UNITED STATES REPORTS

VOLUME 332

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1946

AND

OCTOBER TERM, 1947

OPINIONS OF JUNE 23, 1947 (END OF 1946 TERM)
DECISIONS FROM BEGINNING OF 1947 TERM THROUGH
JANUARY 19, 1948

WALTER WYATT
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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

FRED M. VINSON, Chief Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
FRANK MURPHY, Associate Justice.
ROBERT H. JACKSON, Associate Justice.
WILEY RUTLEDGE, Associate Justice.
HAROLD H. BURTON, Associate Justice.

RETIRED

CHARLES EVANS HUGHES, Chief Justice.

TOM C. CLARK, Attorney General.
PHILIP B. PERLMAN, Solicitor General.[1]
CHARLES ELMORE CROPLEY, Clerk.
THOMAS ENNALLS WAGGAMAN, Marshal.

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[1] Mr. Philip B. Perlman, of Maryland, was nominated to be Solicitor General by President Truman on January 31, 1947; the nomination was confirmed by the Senate on July 26, 1947; he was commissioned on July 30, 1947; and he took the oath and entered on duty on July 31, 1947. During the vacancy which had existed since the resignation of Solicitor General McGrath on October 7, 1946 (329 U. S. III, n. 3), the duties of the office were performed by Assistant Solicitor General George T. Washington, who signed government briefs and appeared as "Acting Solicitor General."

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, agreeably to the Acts of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, FELIX FRANKFURTER, Associate Justice.

For the Second Circuit, ROBERT H. JACKSON, Associate Justice.

For the Third Circuit, HAROLD H. BURTON, Associate Justice.

For the Fourth Circuit, FRED M. VINSON, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, STANLEY REED, Associate Justice.

For the Seventh Circuit, FRANK MURPHY, Associate Justice.

For the Eighth Circuit, WILEY RUTLEDGE, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, WILEY RUTLEDGE, Associate Justice.

For the District of Columbia, FRED M. VINSON, Chief Justice.

October 14, 1946.

(For next previous allotment, see 328 U. S. p. IV.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1946.

UNITED STATES *v.* PETRILLO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 954. Argued May 5–6, 1947.—Decided June 23, 1947.

1. Section 506 (a) (1) of the Communications Act, making it a crime, by the use or threat of use of force, violence, intimidation, or duress, to coerce, compel or constrain or attempt to coerce, compel or constrain a radio-broadcasting licensee to employ or agree to employ, in connection with the conduct of the licensee's broadcasting business, any person or persons "in excess of the number of employees needed by such licensee to perform actual services," is not so vague, indefinite or uncertain as to violate the Due Process Clause of the Fifth Amendment. Pp. 5–8.

(a) This question was properly presented to this Court for a decision on an appeal by the Government under the Criminal Appeals Act from a decision of a District Court dismissing, on the sole ground that the section was unconstitutional, an information charging a violation in substantially the statutory language. Pp. 5–6.

(b) The contention that persons of ordinary intelligence would be unable to know when their compulsive actions would force a person against his will to hire employees he did not need, cannot be sustained. Pp. 6–7.

(c) When measured by common understanding and practices, the language of the statute provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress; and the Constitution requires no more. Pp. 7–8.

2. It does not contravene the Due Process Clause of the Fifth Amendment by denying equal protection of the laws to radio-broadcasting employees as a class—even though it provides no punishment for employers for violating the policy and leaves other classes of employees free to engage in the practices forbidden to radio workers. Pp. 8–9.

   (a) This question was properly presented to this Court for a decision on an appeal by the Government under the Criminal Appeals Act from a decision of the District Court dismissing an information on the sole ground that the statute is unconstitutional as written. P. 8.

   (b) It is not within the province of this Court to say that, because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power. Pp. 8–9.

3. On its face, the statute does not contravene the First Amendment by abridging freedom of speech; but, since the statute does not mention picketing and it is uncertain on the record in this case whether it would have been applied so as to prohibit peaceful picketing, the question whether such an application would violate the First Amendment is not before this Court in a form appropriate for decision. Pp. 9–12.

4. On its face, the statute does not violate the provisions of the Thirteenth Amendment prohibiting slavery and involuntary servitude; but no decision is made on the question whether some possible application of it to particular persons in particular sets of circumstances would violate the Thirteenth Amendment, since questions of that kind are not presented by the record in this case in a form appropriate for decision by this Court. Pp. 12–13.

5. The Criminal Appeals Act does not require this Court to pass on constitutional questions prematurely decided by a district court's dismissal of an information which had not been tested by a motion to strike or for a bill of particulars. P. 10.

68 F. Supp. 845, reversed and remanded.

The District Court dismissed a criminal information charging respondent with violation of § 506 (a) (1) of the Communications Act, on the ground that the section was unconstitutional. 68 F. Supp. 845. On direct appeal by the Government under the Criminal Appeals Act, 18 U. S. C. (Supp. V, 1946) § 682, *reversed and remanded,* p. 13.

Assistant to the Attorney General McGregor and *Robert L. Stern* argued the cause for the United States. With them on the brief was *Acting Solicitor General Washington.*

Joseph A. Padway and *Henry Kaiser* argued the cause for appellee. With them on the brief was *Herbert S. Thatcher.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The District Court dismissed a criminal information filed against the respondent, James C. Petrillo, on the ground that the statute on which the information was founded was unconstitutional. 68 F. Supp. 845. The case is here on direct appeal by the Government as authorized by the Criminal Appeals Act. 18 U. S. C. (Supp. V, 1946) § 682. The information charged a violation of the Communications Act of 1934, 48 Stat. 1064, 1102, as amended by an Act of April 16, 1946. 60 Stat. 89. The specific provisions of the Amendment charged to have been violated read:

> "SEC. 506. (a) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation, or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel, or constrain a licensee—
>
> "(1) to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services; or
>
> . . . . . .
>
> "(d) Whoever willfully violates any provision of subsection (a) or (b) of this section shall, upon con-

viction thereof, be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or both." 60 Stat. 89.

The information alleged that a radio broadcasting company, holding a federal license, had, for several years immediately preceding, employed "certain persons who were sufficient and adequate in number to perform all of the actual services needed . . . in connection with the conduct of its broadcasting business." The information further charged that the respondent, Petrillo, "wilfully, by the use of force, intimidation, duress and by the use of other means, did attempt to coerce, compel and constrain said licensee to employ and agree to employ, in connection with the conduct of its radio broadcasting business, three additional persons not needed by said licensee to perform actual services . . . ."

The coercion was allegedly accomplished in the following manner:

"(1) By directing and causing three musicians, members of the Chicago Federation of Musicians, theretofore employed by the said licensee in connection with the conduct of its broadcasting business, to discontinue their employment with said licensee;

"(2) By directing and causing said three employees and other persons, members of the Chicago Federation of Musicians, not to accept employment by said licensee; and,

"(3) By placing and causing to be placed a person as a picket in front of the place of business of said licensee."

The only challenge to the information was a motion to dismiss on the ground that the Act on which the information was based (a) abridges freedom of speech in contravention of the First Amendment; (b) is repugnant to the Fifth Amendment because it defines a crime in

terms that are excessively vague, and denies equal protection of the law and liberty of contract; (c) imposes involuntary servitude in violation of the Thirteenth Amendment.[1] The District Court dismissed the information, holding that the 1946 Amendment on which it was based violates the First, Fifth, and Thirteenth Amendments.

Two general principles which concern our disposition of appeals involving constitutional questions have special application to this case: We have consistently refrained from passing on the constitutionality of a statute until a case involving it has reached a stage where the decision of a precise constitutional issue is a necessity. The reasons underlying this principle and illustrations of the strictness with which it has been applied appear in the opinion of the Court in *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 568, and cases there collected. And in reviewing a direct appeal from a District Court under the Criminal Appeals Act, *supra,* our review is limited to the validity or construction of the contested statute. For "The Government's appeal does not open the whole case." *United States* v. *Borden Co.,* 308 U. S. 188, 193.

First. One holding of the District Court was that, as contended here, the statute is repugnant to the due process clause of the Fifth Amendment because its words, "number of employees needed by such licensee," are so vague, indefinite and uncertain that "persons of ordinary intelligence cannot in advance tell whether a certain action or course of conduct would be within its prohibition . . . ." The information here, up to the place where it specifically charges the particular means used to coerce the licensee, substantially employs this statutory language. And the motion to dismiss on the ground of vagueness and indefi-

[1] Another ground, not argued here, was that the Act represents an exercise of power by Congress not delegated to the United States.

niteness squarely raises the question of whether the section invoked in the indictment is void *in toto,* barring all further actions under it, in this, and every other case. *Cf. United States* v. *Thompson,* 251 U. S. 407, 412. Many questions of a statute's constitutionality as applied can best await the refinement of the issues by pleading, construction of the challenged statute and pleadings, and, sometimes, proof. *Rescue Army* v. *Municipal Court, supra; Watson* v. *Buck,* 313 U. S. 387, 402. *Borden's Company* v. *Baldwin,* 293 U. S. 194, 204, 210, and concurring opinion at p. 213. But no refinement or clarification of issues which we can reasonably anticipate would bring into better focus the question of whether the contested section is written so vaguely and indefinitely that one whose conduct it affected could only guess what it meant. Consequently, since this phase of the appeal raises a question of validity of a statute within our jurisdiction under the Criminal Appeals Act, *supra,* and is ripe for our decision, we turn to the merits of the contention.

We could not sustain this provision of the Act if we agreed with the contention that persons of ordinary intelligence would be unable to know when their compulsive actions would force a person against his will to hire employees he did not need. *Connally* v. *General Construction Co.,* 269 U. S. 385, 391; *Lanzetta* v. *New Jersey,* 306 U. S. 451. But we do not agree. Of course, as respondent points out, there are many factors that might be considered in determining how many employees are needed on a job. But the same thing may be said about most questions which must be submitted to a fact-finding tribunal in order to enforce statutes. Certainly, an employer's statements as to the number of employees "needed" is not conclusive as to that question. It, like the alleged wilfullness of a defendant, must be decided in the light of all the evidence.

Clearer and more precise language might have been framed by Congress to express what it meant by "number of employees needed." But none occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose. The argument really seems to be that it is impossible for a jury or court ever to determine how many employees a business needs, and that, therefore, no statutory language could meet the problem Congress had in mind. If this argument should be accepted, the result would be that no legislature could make it an offense for a person to compel another to hire employees, no matter how unnecessary they were, and however desirable a legislature might consider suppression of the practice to be.

The Constitution presents no such insuperable obstacle to legislation. We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. *Robinson* v. *United States,* 324 U. S. 282, 285–286. It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees. See *Screws* v. *United States,* 325 U. S. 91; *United States* v. *Ragen,* 314 U. S. 513, 522, 524, 525. The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible stand-

ards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more.

Second. It is contended that the statute denies equal protection of the laws to radio-broadcasting employees as a class, and, for this reason, violates the due process clause of the Fifth Amendment. This contention, raised by the motion to dismiss, and sustained by the District Court as a ground for holding the statute unconstitutional as written, is properly before us, and we reach this equal protection ground, for the same reason that we decided the question of whether the section was unconstitutionally vague and indefinite.

In support of this contention it is first argued that if Congress concluded that employment by broadcasting companies of unneeded workers was detrimental to interstate commerce, in order to be consistent, it should have provided for the punishment of employers, as well as employees, who violate that policy.[2] Secondly, it is argued, the Act violates due process because it singles out broadcasting employees for regulation while leaving other classes of employees free to engage in the very practices forbidden to radio workers. But it is not within our province to say that, because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power. Consequently, if Congress believes that there are employee practices in the radio industry which injuriously affect interstate commerce, and directs its prohibitions against those practices, we could not set aside its legislation even if we were persuaded that employer practices also required regulation. See *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46.

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[2] The Act does not prohibit radio broadcasters from voluntarily hiring more employees than they need.

Nor could we strike down such legislation, even if we believed that as a matter of policy it would have been wiser not to enact the legislation or to extend the prohibitions over a wider or narrower area. Here Congress aimed its law directly against one practice—compelling a broadcasting company to hire unneeded workers. There is nothing novel about laws to prohibit some persons from compelling other persons to act contrary to their desires. Whatever may be the limits of the power of Congress that do not apply equally to all classes, groups, and persons, see *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 584, we are satisfied that Congress has not transgressed those limits in the provisions of this statute which are here attacked.

Third. Respondent contends here, and the District Court has held, that the statute abridges freedom of speech by making peaceful picketing a crime. It is important to note that the statute does not mention picketing, peaceful or violent. The proposed application of the statute to picketing, therefore, does not derive from any specific prohibition written into the statute against peaceful picketing. Rather it comes from the information's charge that respondent attempted to compel the licensee to hire unneeded employees by placing "a picket in front of the place of business of [the] . . . licensee." Yet the respondent's motion to dismiss was made only on the ground that the statute, as written, contravenes the First Amendment. In ruling on this motion, the District Court assumed that because "there [was] in this case no charge of violence . . . the placing of a picket must be regarded . . . as peaceful picketing." From this assumption, it concluded that "the application [of the statute] here sought to be made violates the First Amendment by its restriction upon freedom of speech by peaceful picketing." Thus, rather than holding the statute as written to be an unconstitutional violation of the First

Amendment, the District Court ruled on the statute as it was proposed to be applied by the information as it then read.

We consider it inappropriate to reach the merits of this constitutional question now. As we have pointed out, we have consistently said that we would refrain from passing on the constitutionality of statutes in advance of the necessity to do so. And the provisions for direct appeal from District Courts of certain criminal cases do not require us to pass on constitutional questions prematurely decided by a district court's dismissal of an information.

The information here, up to the place where it alleges the use of particular coercive means, charges in substantially the language of the statute that respondent coerced the licensee. The information's charges up to this point constitute a sufficient basis for a challenge to the statute on the ground that it contravenes the Constitution. Whether this part of the information, or the information as a whole, was adequate definitely to inform the respondent of the nature of the charge against him is another question. See *United States* v. *Lepowitch,* 318 U. S. 702, 704; *Potter* v. *United States,* 155 U. S. 438; *cf. United States* v. *Hess,* 124 U. S. 483. Had the District Court postponed ruling on the First Amendment question raised by the motion to dismiss, or had it denied the motion, respondent could have sought a bill of particulars, apart from attacking the constitutionality of the Act. See *Husty* v. *United States,* 282 U. S. 694, 702; *Bartell* v. *United States,* 227 U. S. 427, 433–434; *Dunbar* v. *United States,* 156 U. S. 185, 192. So also, if the additional allegations describing the means used to accomplish the proscribed purpose were not definite enough for the court to determine whether they were sufficient in law to charge an offense, and if such allegations were not mere surplusage, see *United States* v. *Socony-Vacuum Oil Company,* 310 U. S. 150, 222, a challenge could have been

made to the information, see *United States* v. *Hess, supra,* at 487–488, as distinguished from a challenge to the statute on which it rested. In that event, and upon a holding of insufficiency of the information, appeal by the United States would have properly gone, under the Criminal Appeals Act, *supra,* to the Circuit Court of Appeals, and if inappropriately brought here, that Act, as amended, 56 Stat. 271, would have required us to transfer the cause to the Circuit Court of Appeals. But no such challenge was made to the information.

We therefore have a situation in which we are urged to strike down a statute as violative of the constitutional guarantees of free speech when the statute has not been, and might never be, applied in such manner as to raise the question respondent asks us to decide. For the gist of the offense here charged in the statute and in the information is that respondent "wilfully, by the use of force, intimidation, duress *and* by the use of other means, did attempt to coerce, compel and constrain" [3] the licensee to hire unneeded employees. If the allegations that this prohibited result was attempted to be accomplished by picketing are so broad as to include action which either is not coercive, compelling or constraining, within the statute's meaning, or could not be constitutionally held to be, the trial court would be free, on motion of the respondent, to strike the particular allegations if they are surplusage. Rules of Criminal Procedure, § 7 (d). Or the Government might amend the information "at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." *Ibid.* § 7 (e).

The foregoing analysis shows that we are asked to rule on constitutional questions that are not yet precisely in issue. The question as it was decided by the District

[3] Italics supplied.

Court was not the question raised by the motion to dismiss—whether the statute is invalid on its face—but whether it is invalid as it is proposed to be applied. And even if our decision could be evoked upon a showing that the statute certainly, but for our intervention, would have punished respondent for peaceful picketing, there is no such certainty here. No final issue had been drawn. The information was still subject to amendment to fit, within the permissible area of amendments, the type of coercive means developed by further pleading or proof. See *Borden's Co.* v. *Baldwin, supra,* at 213. Further pleadings and proof might well draw the issues into sharper focus making it unnecessary for us to decide questions not relevant to determination of the constitutionality of the statute as actually applied. Thus this case had not reached a stage where the decision of a precise constitutional issue was a necessity. Consequently, we refrain from considering any constitutional questions except those concerning the Act as written. We do not decide whether the allegations of the information, whatever shape they might eventually take, would constitute an application of the statute in such manner as to contravene the First Amendment. We only pass on the statute on its face; it is not in conflict with the First Amendment.

Fourth. The District Court held, and it is argued here, that the statute, as sought to be applied in the information, violates the Thirteenth Amendment which prohibits slavery and involuntary servitude. This contention is also rooted in that part of the information which particularizes the means by which respondent attempted to compel action by the licensee, *i. e.,* by causing three musicians to discontinue, and three musicians not to accept, employment. The argument is that employees have a constitutional right to leave employment singly, see *Pollock* v. *Williams,* 322 U. S. 4, 17, 18, or in concert, and con-

sequently that respondent cannot be guilty of a crime for directing or causing them to do so. For the reasons given with reference to the picketing specification, therefore, we consider the Thirteenth Amendment question only with reference to the statute on its face. Thus considered, it plainly does not violate the Thirteenth Amendment. Whether some possible attempted application of it to particular persons in particular sets of circumstances would violate the Thirteenth Amendment is a question we shall not pass upon until it is appropriately presented.

Reversed and remanded.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, concurring.

I agree with the Court's judgment and opinion because it holds that the Lea Act is not beyond the power of Congress to regulate commerce. I desire, however, to add a few words.

The constitutional basis for the legislation is the same as that upon which the validity of the Sherman Law rests. It is too late in the day to require argument or citation of cases in support of the right of Congress to free interstate commerce from obstruction that the exertion of monopolistic power may entail or from interference that may reasonably be deemed to promote monopoly. Equally clear is it that Congress may direct its legislation specifically towards a disclosed evil, without generalizing its prohibition, when in its judgment like evils have not disclosed themselves elsewhere. It would be a usurpation of the legislative authority for us to find that there was no basis in reason for the judgment of Congress that the public interest called for legislation to deal with what is colloquially called "feather-

bedding" in connection with the broadcasting business. Beyond that, it is not our province to go.

The District Court took a different view, and on defendant's motion dismissed this information on the ground that the statute is unconstitutional. 68 F. Supp. 845. Since the Court now holds that the statute is constitutional, the case goes back to the District Court.

The Court conjures up difficulties which I do not share. The case is here under the Criminal Appeals Act of 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C. (Supp. V, 1946) § 682, whereby a direct review can be had of a district court judgment setting aside an indictment or information, if the decision of the district court is based "upon the invalidity or construction of the statute upon which the indictment or information is founded." Our decisions have construed this to mean that review can be had here only if a district court's decision was based exclusively upon the invalidity or construction of a statute. A criminal case cannot be reviewed here if questions of criminal pleading—defects not arising from the statute under consideration—enter into a decision sought to be reviewed. See *United States* v. *Hastings,* 296 U. S. 188, 192, 194; *United States* v. *Borden Co.,* 308 U. S. 188, 193; *United States* v. *Swift & Co.,* 318 U. S. 442. If both the sufficiency of criminal pleading and the validity or construction of the underlying statute were in issue before the District Court, and views as to both were interwoven in the court's decision, this Court has no jurisdiction to entertain the appeal. Under the Act of May 9, 1942, it must remand the cause to the appropriate circuit court of appeals. On the other hand, if the question of constitutional construction was the isolated ground of decision by a district court dismissing a federal prosecution, that is the only question to be considered here and it must be considered within the scope given it by

the district court. Other questions may be imbedded in the case which may eventually come to the surface. But they are not brought to the surface here under the limited, specific review given by the Criminal Appeals Act. It is to such implicit questions of pleading, and to statutory or constitutional questions not passed upon by a district court, that Mr. Chief Justice Hughes had reference when he said, "The Government's appeal does not open the whole case." *United States* v. *Borden Co., supra,* at 193.

There is no complication in the record before us to an exercise of our jurisdiction under the Criminal Appeals Act. The District Judge's decision is wholly free from any ruling involving criminal pleading. He stated precisely what he deemed to be the sole issue before him and which alone he decided: "The only question before the court is the constitutional aspect of this statute as it was written by Congress. On this question the court is of the opinion that this statute is unconstitutional for the reasons above stated." 68 F. Supp. at 850.

We, therefore, have no acknowledgment or intimation by the District Judge that he had any difficulty with the information as a matter of pleading, or that it carried any ambiguities which he resolved one way rather than another. If that were so, we would have no jurisdiction to review his decision. The District Court found constitutional defects in the statute "as it was written by Congress." We find the contrary. Therefore, the information should go back to the District Court for disposition. Just as we cannot go behind a district court's determination regarding the sufficiency of the indictment as a matter of pleading as a preliminary to passing on statutory validity, so, when a naked question of validity is presented to us, it is not for us to scrutinize the charge and hypothesize possibilities whereby new questions may arise of a statutory or constitutional nature.

MR. JUSTICE REED, dissenting.

I dissent from the opinion and judgment of the Court. My reason for disagreement is that § 506 (a) (1) of the Communications Act is too indefinite in its description of the prohibited acts to support an information or indictment for violation of its provisions. My objection is not to the words in the first paragraph of § 506 that make unlawful in labor matters the use of threats, force, violence, intimidation or duress against an employer. There is a background of experience and common understanding that ordinarily gives such words, when used in criminal statutes, sufficient definiteness to acquaint the public with the limits of the proscribed acts. When such words are used, they place upon those affected the risk of estimating incorrectly the sort of action that may ultimately be held to violate the statutes. *Nash* v. *United States,* 229 U. S. 373.

My objection is to the indefiniteness of the statutory description of the thing for which force must not be used—that is, "to compel" a licensee under the Communications Act "to employ . . . any person or persons in excess of the number of employees needed by such licensee to perform actual services."

This criminal statute is the product of legislation directed at the control of acts deemed evil by Congress. It is one of the many regulatory acts that legislative bodies have passed in recent years to make unlawful certain practices in the field of economics that seemed contrary to the public interest.[1] These statutes made new crimes. Deeds theretofore not subject to punishment fall within the general scope of their prohibition. Common expe-

[1] Emergency Price Control Act, 56 Stat. 33, § 205 (b), 50 U. S. C. App. (Supp. V, 1946) § 925 (b); Fair Labor Standards Act, 52 Stat. 1069, § 16 (a), 29 U. S. C. § 216 (a); National Labor Relations Act, 49 Stat. 456, § 12, 29 U. S. C. § 162; Federal Corrupt Practices Act, as amended, 57 Stat. 167, § 9, 50 U. S. C. App. (Supp. V, 1946) § 1509.

rience has not created a general understanding of their criminality. Consequently, in order to adequately inform the public of the limitations on conduct, a more precise definition of the crime is necessary to meet constitutional requirements.[2]

Anglo-American law does not punish citizens for violations of vague and uncertain statutes. There is no place in our criminal law for acts defined as detrimental to the interests of the state. A statute is invalid when "so vague that men of common intelligence must necessarily guess at its meaning." 269 U. S. at 391. It seems to me that this vice exists in this section of the challenged act. How can a man or a jury possibly know how many men are "needed" "to perform actual services" in broadcasting? What must the quality of the program be? How skillful are the employees in the performance of their task? Does one weigh the capacity of the employee or the managerial ability of the employer? Is the desirability of short hours to spread the work to be evaluated? Or is the standard the advantage in take-home pay for overtime work?

The Government seeks to avoid the difficulty by interpreting the section. Their brief says, after considering the legislative history, "the bill was not intended to apply to mere differences of opinion as to whether men were overworked; it only fits deliberate demands for payment to additional employees made in complete disregard for the employer's need and without any justification from the viewpoint of actually getting the employer's business done. . . . If Paragraph (1) is read in its context, along with the succeeding paragraphs, it is clear what Congress was driving at when it characterized the Act

[2] *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Connally* v. *General Construction Co.*, 269 U. S. 385. See *Gorin* v. *United States*, 312 U. S. 19, 26.

as one to prevent extortion, as distinct from *bona fide* demands relating to conditions of employment." This interpretation seems to me to fly in the face of § 506 (1). There is another subsection to which the language might apply.[3] This clearly defines the prohibited acts. If the Congress wishes to fix the maximum number of employees that a licensee may employ in stations of various sizes, it may, of course, be done. Or, if it is impractical for Congress to act because of the varying situations, the number may be left to regulations of the Federal Communications Commission or other regulatory body.

This is a criminal statute. The principle that such statutes must be so written that intelligent men may know what acts of theirs will jeopardize their life, liberty or property is of importance to all. That principle requires, I think, a determination that this section of the Communications Act is invalid.

MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join in this dissent.

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[3] 60 Stat. 89, § 506 (a) (4):

"to pay or give or agree to pay or give any money or other thing of value for services, in connection with the conduct of the broadcasting business of such licensee, which are not to be performed; . . . ."

UNITED STATES *v.* CALIFORNIA.

NO. 12, ORIGINAL.

Argued March 13–14, 1947.—Decided June 23, 1947.*

1. The complaint filed in this Court by the United States against the State of California to determine which government owns, or has paramount rights in and power over, the submerged land off the coast of California between the low-water mark and the three-mile limit and has a superior right to take or authorize the taking of the vast quantities of oil and gas underneath that land (much of which has already been, and more of which is about to be, taken by or under authority of the State) presents a case or controversy under Article III, § 2, of the Constitution. Pp. 24–25.
2. The fact that the coastal line is indefinite and that its exact location will involve many complexities and difficulties presents no insuperable obstacle to the exercise of the highly important jurisdiction conferred on this Court by Article III, § 2, of the Constitution. Pp. 25–26.
3. Congress has neither explicitly nor by implication stripped the Attorney General of the power to invoke the jurisdiction of this Court in this federal-state controversy, pursuant to his broad authority under 5 U. S. C. §§ 291, 309, to protect the Government's interests through the courts. Pp. 26–29.
4. California is not the owner of the three-mile marginal belt along its coast; and the Federal Government rather than the State has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil. Pp. 29–39.

   (a) There is no substantial support in history for the view that the thirteen original colonies separately acquired ownership of the three-mile belt beyond the low-water mark or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it. *Pollard's Lessee* v. *Hagan*, 3 How. 212, distinguished. Pp. 29–33.

   (b) Acquisition of the three-mile belt has been accomplished by the National Government, and protection and control of it has been and is a function of national external sovereignty. Pp. 33–35.

*For order and decree entered October 27, 1947, see *post*, p. 804.

(c) The assertion by the political agencies of this Nation of broad dominion and control over the three-mile marginal belt is binding upon this Court. Pp. 33–34.

(d) The fact that the State has been authorized to exercise local police power functions in the part of the marginal belt within its declared boundaries does not detract from the Federal Government's paramount rights in and power over this area. P. 36.

(e) *Manchester* v. *Massachusetts,* 139 U. S. 240; *Louisiana* v. *Mississippi,* 202 U. S. 1; *The Abby Dodge,* 223 U. S. 166, distinguished. Pp. 36–38.

5. The Federal Government's paramount rights in the three-mile belt have not been lost by reason of the conduct of its agents, nor by this conduct is the Government barred from enforcing its rights by reason of principles similar to laches, estoppel or adverse possession. Pp. 39–40.

(a) The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property. P. 40.

(b) Officers of the Government who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act. P. 40.

6. The great national question whether the State or the Nation has paramount rights in and power over the three-mile belt is not dependent upon what expenses may have been incurred by public or private agencies upon mistaken assumptions. P. 40.

7. It is not to be assumed that Congress, which has constitutional control over Government property, will so execute its powers as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission. P. 40.

8. The United States is entitled to a decree declaring its rights in the area in question as against California and enjoining California and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States. Pp. 22–23, 41.

The case is stated in the first paragraph of the opinion, and the conclusion that the United States is entitled to the relief prayed for is reported at page 41.

Attorney General Clark and *J. Howard McGrath,* then Solicitor General, were for the United States on the motion

for leave to file the complaint, and on the complaint and other pleadings, including a motion for judgment on the pleadings.

Robert W. Kenny, then Attorney General of California, was for the defendant on its answer and other pleadings.

Attorney General Clark and *Arnold Raum* argued the cause for the United States. With them on the brief were *Acting Solicitor General Washington, Assistant Attorney General Bazelon, Stanley M. Silverberg, J. Edward Williams, Robt. E. Mulroney, Robert M. Vaughan, Abraham J. Harris* and *Thomas L. McKevitt.*

Fred N. Howser, Attorney General of California, and *William W. Clary,* Assistant Attorney General, argued the cause for the defendant. With them on the brief were *C. Roy Smith,* Assistant Attorney General, *Homer Cummings, Max O'Rell Truitt, Louis W. Myers* and *Jackson W. Chance.*

By special leave of Court, *Price Daniel,* Attorney General of Texas, argued the cause for the National Association of Attorneys General, as *amicus curiae,* urging dismissal of the complaint. With him on the brief were *Walter R. Johnson,* Attorney General of Nebraska; *Clarence A. Barnes,* Attorney General of Massachusetts, *Nathan B. Bidwell* and *George P. Drury,* Assistant Attorneys General; *Hugh S. Jenkins,* Attorney General of Ohio; *Fred S. LeBlanc,* Attorney General of Louisiana, and *John L. Madden,* Special Assistant Attorney General; *Edward F. Arn,* Attorney General of Kansas; *A. B. Mitchell; Elton M. Hyder, Jr.,* Assistant Attorney General of Texas; *Grover Sellers* and *Orrin G. Judd.*

By special leave of Court, *Leander I. Shelley* argued the cause for the American Association of Port Authorities, as

amicus curiae, urging dismissal of the complaint. With him on the brief were *Eldon S. Lazarus* and *Reuben Satterthwaite.*

James E. Watson and *Orin deM. Walker* filed a brief for Robert E. Lee Jordan, as *amicus curiae,* in support of the United States.

Briefs of *amici curiae* in support of the defendant were filed by *Nathaniel L. Goldstein,* Attorney General, and *Wendell P. Brown,* Solicitor General, for the State of New York; *T. McKeen Chidsey,* Attorney General, *M. Vashti Burr,* Deputy Attorney General, and *Harry F. Stambaugh* for the Commonwealth of Pennsylvania; *Herman C. Wilson, Horace H. Edward, Walter J. Mattison, Ray L. Chesebro* and *Charles S. Rhyne* for the National Institute of Municipal Law Officers; *Ray L. Chesebro, W. Reginald Jones, Irving M. Smith* and *Hugh H. MacDonald,* for the California Association of Port Authorities; *Archibald N. Jordan* for the Lawrence Wards Island Realty Co.; and *A. L. Weil* and *Thomas A. J. Dockweiler.*

Mr. Justice Black delivered the opinion of the Court.

The United States by its Attorney General and Solicitor General brought this suit against the State of California invoking our original jurisdiction under Article III, § 2, of the Constitution which provides that "In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction." The complaint alleges that the United States "is the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters of the State, extending seaward three nautical miles and bounded on the north and south, respectively, by the

northern and southern boundaries of the State of California." It is further alleged that California, acting pursuant to state statutes, but without authority from the United States, has negotiated and executed numerous leases with persons and corporations purporting to authorize them to enter upon the described ocean area to take petroleum, gas, and other mineral deposits, and that the lessees have done so, paying to California large sums of money in rents and royalties for the petroleum products taken. The prayer is for a decree declaring the rights of the United States in the area as against California and enjoining California and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States.

California has filed an answer to the complaint. It admits that persons holding leases from California, or those claiming under it, have been extracting petroleum products from the land under the three-mile ocean belt immediately adjacent to California. The basis of California's asserted ownership is that a belt extending three English miles from low water mark lies within the original boundaries of the state, Cal. Const. Art. XII (1849); [1] that the original thirteen states acquired from the Crown of England title to all lands within their boundaries under navigable waters, including a three-mile belt in adjacent seas; and that since California was admitted as a state on an "equal footing" with the original states, California at that time became vested with title to all such lands. The answer further sets up several "affirmative" defenses. Among these are that California should be adjudged to

[1] The Government complaint claims an area extending three nautical miles from shore; the California boundary purports to extend three English miles. One nautical mile equals 1.15 English miles, so that there is a difference of .45 of an English mile between the boundary of the area claimed by the Government, and the boundary of California. See Cal. Const. Art. XXI, § 1 (1879).

have title under a doctrine of prescription; because of an alleged long-existing Congressional policy of acquiescence in California's asserted ownership; because of estoppel or laches; and, finally, by application of the rule of *res judicata*.[2]

After California's answer was filed, the United States moved for judgment as prayed for in the complaint on the ground that the purported defenses were not sufficient in law. The legal issues thus raised have been exhaustively presented by counsel for the parties, both by brief and oral argument. Neither has suggested any necessity for the introduction of evidence, and we perceive no such necessity at this stage of the case. It is now ripe for determination of the basic legal issues presented by the motion. But before reaching the merits of these issues, we must first consider questions raised in California's brief and oral argument concerning the Government's right to an adjudication of its claim in this proceeding.

First. It is contended that the pleadings present no case or controversy under Article III, § 2, of the Constitution. The contention rests in the first place on an argument that there is no case or controversy in a legal sense, but only a difference of opinion between federal and state officials. It is true that there is a difference of opinion between federal and state officers. But there is far more than that. The point of difference is as to who owns, or has paramount rights in and power over several thousand square miles of

[2] The claim of *res judicata* rests on the following contention. The United States sued in ejectment for certain lands situated in San Francisco Bay. The defendant held the lands under a grant from California. This Court decided that the state grant was valid because the land under the Bay had passed to the state upon its admission to the Union. *United States* v. *Mission Rock Co.*, 189 U. S. 391. There may be other reasons why the judgment in that case does not bar this litigation; but it is a sufficient reason that this case involves land under the open sea, and not land under the inland waters of San Francisco Bay.

land under the ocean off the coast of California. The difference involves the conflicting claims of federal and state officials as to which government, state or federal, has a superior right to take or authorize the taking of the vast quantities of oil and gas underneath that land, much of which has already been, and more of which is about to be, taken by or under authority of the state. Such concrete conflicts as these constitute a controversy in the classic legal sense, and are the very kind of differences which can only be settled by agreement, arbitration, force, or judicial action. The case principally relied upon by California, *United States* v. *West Virginia,* 295 U. S. 463, does not support its contention. For here there is a claim by the United States, admitted by California, that California has invaded the title or paramount right asserted by the United States to a large area of land and that California has converted to its own use oil which was extracted from that land. *Cf. United States* v. *West Virginia, supra,* 471. This alone would sufficiently establish the kind of concrete, actual conflict of which we have jurisdiction under Article III. The justiciability of this controversy rests therefore on conflicting claims of alleged invasions of interests in property and on conflicting claims of governmental powers to authorize its use. *United States* v. *Texas,* 143 U. S. 621, 646, 648; *United States* v. *Minnesota,* 270 U. S. 181, 194; *Nebraska* v. *Wyoming,* 325 U. S. 589, 608.

Nor can we sustain that phase of the state's contention as to the absence of a case or controversy resting on the argument that it is impossible to identify the subject matter of the suit so as to render a proper decree. The land claimed by the Government, it is said, has not been sufficiently described in the complaint since the only shoreward boundary of some segments of the marginal belt is the line between that belt and the State's inland waters. And the Government includes in the term "in-

land waters" ports, harbors, bays, rivers, and lakes. Pointing out the numerous difficulties in fixing the point where these inland waters end and the marginal sea begins, the state argues that the pleadings are therefore wholly devoid of a basis for a definite decree, the kind of decree essential to disposition of a case like this. Therefore, California concludes, all that is prayed for is an abstract declaration of rights concerning an unidentified three-mile belt, which could only be used as a basis for subsequent actions in which specific relief could be granted as to particular localities.

We may assume that location of the exact coastal line will involve many complexities and difficulties. But that does not make this any the less a justiciable controversy. Certainly demarcation of the boundary is not an impossibility. Despite difficulties this Court has previously adjudicated controversies concerning submerged land boundaries. See *New Jersey* v. *Delaware,* 291 U. S. 361, 295 U. S. 694; *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 21–27; *Oklahoma* v. *Texas,* 256 U. S. 70, 602. And there is no reason why, after determining in general who owns the three-mile belt here involved, the Court might not later, if necessary, have more detailed hearings in order to determine with greater definiteness particular segments of the boundary. *Oklahoma* v. *Texas,* 258 U. S. 574, 582. Such practice is commonplace in actions similar to this which are in the nature of equitable proceedings. See *e. g. Oklahoma* v. *Texas,* 256 U. S. 602, 608–609; 260 U. S. 606, 625, 261 U. S. 340. California's contention concerning the indefiniteness of the claim presents no insuperable obstacle to the exercise of the highly important jurisdiction conferred on us by Article III of the Constitution.

Second. It is contended that we should dismiss this action on the ground that the Attorney General has not been granted power either to file or to maintain it. It is

not denied that Congress has given a very broad authority to the Attorney General to institute and conduct litigation in order to establish and safeguard government rights and properties.[3] The argument is that Congress has for a long period of years acted in such a way as to manifest a clear policy to the effect that the states, not the Federal Government, have legal title to the land under the three-mile belt. Although Congress has not expressly declared such a policy, we are asked to imply it from certain conduct of Congress and other governmental agencies charged with responsibilities concerning the national domain. And, in effect, we are urged to infer that Congress has by implication amended its long-existing statutes which grant the Attorney General broad powers to institute and maintain court proceedings in order to safeguard national interests.

An Act passed by Congress and signed by the President could, of course, limit the power previously granted the Attorney General to prosecute claims for the Government. For Article IV, § 3, Cl. 2 of the Constitution vests in Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." We have said that the constitutional power of Congress in this respect is without limitation. *United States* v. *San Francisco,* 310 U. S. 16, 29–30. Thus neither the courts nor the executive agencies could proceed contrary to an Act of Congress in this congressional area of national power.

But no Act of Congress has amended the statutes which impose on the Attorney General the authority and the duty to protect the Government's interests through the

[3] 5 U. S. C. §§ 291, 309; *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273, 279, 284; *Kern River Co.* v. *United States,* 257 U. S. 147, 154–55; *Sanitary District* v. *United States,* 266 U. S. 405, 425–426; see also *In re Debs,* 158 U. S. 564, 584; *United States* v. *Oregon,* 295 U. S. 1, 24; *United States* v. *Wyoming,* 323 U. S. 669, 329 U. S. 670.

courts. See *In re Cooper,* 143 U. S. 472, 502–503. That Congress twice failed to grant the Attorney General specific authority to file suit against California,[4] is not a sufficient basis upon which to rest a restriction of the Attorney General's statutory authority. And no more can we reach such a conclusion because both Houses of Congress passed a joint resolution quitclaiming to the adjacent states a three-mile belt of all land situated under the ocean beyond the low water mark, except those which the Government had previously acquired by purchase, condemnation, or donation.[5] This joint resolution was vetoed by the President.[6] His veto was sustained.[7] Plainly, the resolution does not represent an exercise of the constitutional power of Congress to dispose of public property under Article IV, § 3, Cl. 2.

Neither the matters to which we have specifically referred, nor any others relied on by California, afford support for a holding that Congress has either explicitly or by implication stripped the Attorney General of his statu-

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[4] S. J. Res. 208, 75th Cong., 1st Sess. (1937); S. J. Res. 83 and 92, 76th Cong., 1st Sess. (1939). S. J. Res. 208 passed the Senate, 81 Cong. Rec. 9326 (1937), was favorably reported by the House Judiciary Committee, H. R. Rep. 2378, 75th Cong., 3d Sess (1938), but was never acted on in the House. Hearings were held on S. J. Res. 83 and 92 before the Senate Committee on Public Lands and Surveys, but no further action was taken. *Hearings before the Senate Committee on Public Lands and Surveys on S. J. Res. 83 and 92,* 76th Cong., 1st Sess. (1939). In both hearings objections to the resolutions were repeatedly made on the ground that passage of the resolutions was unnecessary since the Attorney General already had statutory authority to institute the proceedings. See *Hearing before the House Committee on the Judiciary on S. J. Res. 208,* 75th Cong., 3d Sess., 42–45, 59–61 (1938); *Hearings on S. J. Res. 83 and 92, supra,* 27–30.

[5] H. J. Res. 225, 79th Cong., 2d Sess. (1946); 92 Cong. Rec. 9642, 10316 (1946).

[6] 92 Cong. Rec. 10660 (1946).

[7] 92 Cong. Rec. 10745 (1946).

torily granted power to invoke our jurisdiction in this federal-state controversy. This brings us to the merits of the case.

Third. The crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea. The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean. The Government also appears in its capacity as a member of the family of nations. In that capacity it is responsible for conducting United States relations with other nations. It asserts that proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and the land under it. See *McCulloch* v. *Maryland,* 4 Wheat. 316, 403–408; *United States* v. *Minnesota,* 270 U. S. 181, 194. In the light of the foregoing, our question is whether the state or the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited.

California claims that it owns the resources of the soil under the three-mile marginal belt as an incident to those elements of sovereignty which it exercises in that water area. The state points out that its original Constitution, adopted in 1849 before that state was admitted to the Union, included within the state's boundary the water area extending three English miles from the shore, Cal. Const. (1849) Art. XII; that the Enabling Act which

admitted California to the Union ratified the territorial boundary thus defined; and that California was admitted "on an equal footing with the original States in all respects whatever," 9 Stat. 452. With these premises admitted, California contends that its ownership follows from the rule originally announced in *Pollard's Lessee* v. *Hagan*, 3 How. 212; see also *Martin* v. *Waddell*, 16 Pet. 367, 410. In the *Pollard* case it was held, in effect, that the original states owned in trust for their people the navigable tidewaters between high and low water mark within each state's boundaries, and the soil under them, as an inseparable attribute of state sovereignty. Consequently, it was decided that Alabama, because admitted into the Union on "an equal footing" with the other states, had thereby become the owner of the tidelands within its boundaries. Thus the title of Alabama's tidelands grantee was sustained as valid against that of a claimant holding under a United States grant made subsequent to Alabama's admission as a state.

The Government does not deny that under the *Pollard* rule, as explained in later cases,[8] California has a qualified ownership[9] of lands under inland navigable waters such as rivers, harbors, and even tidelands down to the low water mark. It does question the validity of the rationale in the *Pollard* case that ownership of such water areas, any

[8] See *e. g.*, *Manchester* v. *Massachusetts*, 139 U. S. 240; *Louisiana* v. *Mississippi*, 202 U. S. 1; *The Abby Dodge*, 223 U. S. 166. See also *United States* v. *Mission Rock Co.*, 189 U. S. 391; *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10.

Although the *Pollard* case has thus been generally approved many times, the case of *Shively* v. *Bowlby*, 152 U. S. 1, 47–48, 58, held, contrary to implications of the *Pollard* opinion, that the United States could lawfully dispose of tidelands while holding a future state's land "in trust" as a territory.

[9] See *United States* v. *Commodore Park*, 324 U. S. 386, 390, 391; *Scranton* v. *Wheeler*, 179 U. S. 141, 159, 160, 163; *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9, 20; see also *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53.

more than ownership of uplands, is a necessary incident of the state sovereignty contemplated by the "equal footing" clause. *Cf. United States* v. *Oregon*, 295 U. S. 1, 14. For this reason, among others, it argues that the *Pollard* rule should not be extended so as to apply to lands under the ocean. It stresses that the thirteen original colonies did not own the marginal belt; that the Federal Government did not seriously assert its increasingly greater rights in this area until after the formation of the Union; that it has not bestowed any of these rights upon the states, but has retained them as appurtenances of national sovereignty. And the Government insists that no previous case in this Court has involved or decided conflicting claims of a state and the Federal Government to the three-mile belt in a way which requires our extension of the *Pollard* inland water rule to the ocean area.

It would unduly prolong our opinion to discuss in detail the multitude of references to which the able briefs of the parties have cited us with reference to the evolution of powers over marginal seas exercised by adjacent countries. From all the wealth of material supplied, however, we cannot say that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it,[10] even if they did acquire elements of the sovereignty of the English Crown by their revolution against it. *Cf. United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 316.

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[10] A representative collection of official documents and scholarship on the subject is Crocker, The Extent of the Marginal Sea (1919). See also I Azuni, Maritime Law of Europe (published 1806) c. II; Fulton, Sovereignty of the Sea (1911); Masterson, Jurisdiction in Marginal Seas (1929); Jessup, The Law of Territorial Waters and Maritime Jurisdiction (1927); Fraser, *The Extent and Delimitation of Territorial Waters*, 11 Corn. L. Q. 455 (1926); Ireland, *Marginal Seas Around the States*, 2 La. L. Rev. 252, 436 (1940); Comment, *Conflicting State and Federal Claims of Title in Submerged Lands of the Continental Shelf*, 56 Yale L. J. 356 (1947).

At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders. Some countries, notably England, Spain, and Portugal, had, from time to time, made sweeping claims to a right of dominion over wide expanses of ocean. And controversies had arisen among nations about rights to fish in prescribed areas.[11] But when this nation was formed, the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion.[12] Neither the English charters granted to this nation's settlers,[13] nor the treaty of peace with England,[14] nor any other document to which we have been referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership.[15] Those who settled this country were interested in lands upon which to live, and waters upon which to fish and sail. There is no substantial support in history for the idea that they wanted or claimed a right to block off

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[11] See, *e. g.*, Fulton, *op. cit. supra*, 3–19, 144–145; Jessup, *op. cit. supra*, 4.

[12] Fulton, *op. cit. supra*, 21, says in fact that "mainly through the action and practice of the United States of America and Great Britain since the end of the eighteenth century, the distance of three miles from shore was more or less formally adopted by most maritime states as . . . more definitely fixing the limits of their jurisdiction and rights for various purposes, and, in particular, for exclusive fishery."

[13] Collected in Thorpe, Federal and State Constitutions (1909).

[14] Treaty of 1783, 8 Stat. 80.

[15] The Continental Congress did for example authorize capture of neutral and even American ships carrying British goods, "if found within three leagues [about nine miles] of the coasts." Journ. of Cong. 185, 186, 187 (1781). *Cf.* Declaration of Panama of 1939, 1 Dept. of State Bull. 321 (1939), claiming the right of the American Republics to be free from a hostile act in a zone 300 miles from the American coasts.

the ocean's bottom for private ownership and use in the extraction of its wealth.

It did happen that shortly after we became a nation our statesmen became interested in establishing national dominion over a definite marginal zone to protect our neutrality.[16] Largely as a result of their efforts, the idea of a definite three-mile belt in which an adjacent nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world,[17] although as late as 1876 there was still considerable doubt in England about its scope and even its existence. See *The Queen* v. *Keyn,* 2 Ex. D. 63. That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. *Cunard Steamship Co.* v. *Mellon,* 262 U. S. 100, 122–124.[18]

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[16] Secretary of State Jefferson in a note to the British minister in 1793 pointed to the nebulous character of a nation's assertions of territorial rights in the marginal belt, and put forward the first official American claim for a three-mile zone which has since won general international acceptance. Reprinted in H. Ex. Doc. No. 324, 42d Cong., 2d Sess. (1872) 553–554. See also Secretary Jefferson's note to the French Minister, Genet, reprinted American State Papers, I Foreign Relations (1833), 183, 184; Act of June 5, 1794, 1 Stat. 381; 1 Kent, Commentaries, 14th Ed., 33–40.

[17] See Jessup, *op. cit. supra,* 66; *Research in International Law,* 23 A. J. I. L. 249, 250 (Spec. Supp. 1929).

[18] See also *Church* v. *Hubbart,* 2 Cranch 187, 234. Congressional assertion of a territorial zone in the sea appears in statutes regulating seals, fishing, pollution of waters, etc. 36 Stat. 326, 328; 43 Stat. 604, 605; 37 Stat. 499, 501. Under the National Prohibition Act, territory including "a marginal belt of the sea extending from low-water mark outward a marine league, or 3 geographical miles" constituting the "territorial waters of the United States" was regulated. See U. S. Treas. Reg. 2, § 2201 (1927), reprinted in *Research in International Law, supra,* 250; 41 Stat. 305. Anti-smuggling treaties in which foreign nations agreed to permit the United States to pursue smugglers beyond the three-mile limit contained express stipulations

And this assertion of national dominion over the three-mile belt is binding upon this Court. See *Jones* v. *United States,* 137 U. S. 202, 212–214; *In re Cooper,* 143 U. S. 472, 502–503.

Not only has acquisition, as it were, of the three-mile belt been accomplished by the National Government, but protection and control of it has been and is a function of national external sovereignty. See *Jones* v. *United States,* 137 U. S. 202; *In re Cooper,* 143 U. S. 472, 502. The belief that local interests are so predominant as constitutionally to require state dominion over lands under its land-locked navigable waters finds some argument for its support. But such can hardly be said in favor of state control over any part of the ocean or the ocean's bottom. This country, throughout its existence has stood for freedom of the seas, a principle whose breach has precipitated wars among nations. The country's adoption of the three-mile belt is by no means incompatible with its traditional insistence upon freedom of the sea, at least so long as the national Government's power to exercise control consistently with whatever international undertakings or commitments it may see fit to assume in the national interest

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that generally the three-mile limit constitutes "the proper limits of territorial waters." See *e. g.,* 43 Stat. 1761 (Pt. 2).

There are innumerable executive declarations to the world of our national claims to the three-mile belt, and more recently to the whole continental shelf. For references to diplomatic correspondence making these assertions, see 1 Moore, International Law Digest (1906) 705, 706, 707; 1 Wharton, Digest of International Law (1886) 100. See also Hughes, *Recent Questions and Negotiations,* 18 A. J. I. L. 229 (1924).

The latest and broadest claim is President Truman's recent proclamation that the United States "regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. . . ." Exec. Proc. 2667, Sept. 28, 1945, 10 F. R. 12303.

is unencumbered. See *Hines* v. *Davidowitz,* 312 U. S. 52, 62–64; *McCulloch* v. *Maryland, supra.* The three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its coasts. And insofar as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use. But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it,[19] is a question for consideration among nations as such, and not their separate governmental units. What this Government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations. See *United States* v. *Belmont,* 301 U. S. 324, 331–332. The very oil about which the state and nation here contend might well become the subject of international dispute and settlement.

The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation. See *Chy Lung* v. *Freeman,* 92 U. S. 275, 279. The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with

[19] See *Lord* v. *Steamship Co.,* 102 U. S. 541, 544.

the dominion which it seeks. Conceding that the state has been authorized to exercise local police power functions in the part of the marginal belt within its declared boundaries,[20] these do not detract from the Federal Government's paramount rights in and power over this area. Consequently, we are not persuaded to transplant the *Pollard* rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean, so much more a matter of national concern. If this rationale of the *Pollard* case is a valid basis for a conclusion that paramount rights run to the states in inland waters to the shoreward of the low water mark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt. *Cf. United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 316; *United States* v. *Causby*, 328 U. S. 256.

As previously stated, this Court has followed and reasserted the basic doctrine of the *Pollard* case many times. And in doing so it has used language strong enough to indicate that the Court then believed that states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not. All of these statements were, however, merely paraphrases or offshoots of the *Pollard* inland-water rule, and were used, not as enunciation of a new ocean rule, but in explanation of the old inland-water principle. Notwithstanding the fact that none of these cases either involved or decided the state-federal conflict presented here, we are urged to say that the language used and repeated in those cases fore-

[20] See *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 404; *cf. The Abby Dodge*, 223 U. S. 166, with *Skiriotes* v. *Florida*, 313 U. S. 69, 74–75.

closes the Government from the right to have this Court decide that question now that it is squarely presented for the first time.

There are three such cases whose language probably lends more weight to California's argument than any others. The first is *Manchester* v. *Massachusetts,* 139 U. S. 240. That case involved only the power of Massachusetts to regulate fishing. Moreover, the illegal fishing charged was in Buzzards Bay, found to be within Massachusetts territory, and no question whatever was raised or decided as to title or paramount rights in the open sea. And the Court specifically laid to one side any question as to the rights of the Federal Government to regulate fishing there. The second case, *Louisiana* v. *Mississippi,* 202 U. S. 1, 52, uses language about "the sway of the riparian States" over "maritime belts." That was a case involving the boundary between Louisiana and Mississippi. It did not involve any dispute between the federal and state governments. And the Court there specifically laid aside questions concerning "the breadth of the maritime belt or the extent of the sway of the riparian States . . . ." *Id.* at 52. The third case is *The Abby Dodge,* 223 U. S. 166. That was an action against a ship landing sponges at a Florida port in violation of an Act of Congress, 34 Stat. 313, which made it unlawful to "land" sponges taken under certain conditions from the waters of the Gulf of Mexico. This Court construed the statute's prohibition as applying only to sponges outside the state's "territorial limits" in the Gulf. It thus narrowed the scope of the statute because of a belief that the United States was without power to regulate the Florida traffic in sponges obtained from within Florida's territorial limits, presumably the three-mile belt. But the opinion in that case was concerned with the state's power to regulate and conserve within its territorial waters, not with its exercise of the right to use and deplete

resources which might be of national and international importance. And there was no argument there, nor did this Court decide, whether the Federal Government owned or had paramount rights in the soil under the Gulf waters. That this question remained undecided is evidenced by *Skiriotes* v. *Florida,* 313 U. S. 69, 75, where we had occasion to speak of Florida's power over sponge-fishing in its territorial waters. Through Mr. Chief Justice Hughes we said: "It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the [state] statute *so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the State.*" (Emphasis supplied.)

None of the foregoing cases, nor others which we have decided, are sufficient to require us to extend the *Pollard* inland-water rule so as to declare that California owns or has paramount rights in or power over the three-mile belt under the ocean. The question of who owned the bed of the sea only became of great potential importance at the beginning of this century when oil was discovered there.[21] As a consequence of this discovery, California passed an Act in 1921 authorizing the granting of permits to California residents to prospect for oil and gas on blocks of land off its coast under the ocean. Cal. Stats. 1921, c. 303. This state statute, and others which followed it, together with the leasing practices under them, have precipitated this extremely important controversy, and pointedly raised this state-federal conflict for the first time. Now that the question is here, we decide for the reasons we have stated that California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to

[21] Bull. No. 321, Dept. of Interior, Geological Survey.

which is full dominion over the resources of the soil under that water area, including oil.

Fourth. Nor can we agree with California that the Federal Government's paramount rights have been lost by reason of the conduct of its agents. The state sets up such a defense, arguing that by this conduct the Government is barred from enforcing its rights by reason of principles similar to laches, estoppel or adverse possession. It would serve no useful purpose to recite the incidents in detail upon which the state relies for these defenses. Some of them are undoubtedly consistent with a belief on the part of some Government agents at the time that California owned all, or at least a part of the three-mile belt. This belief was indicated in the substantial number of instances in which the Government acquired title from the states to lands located in the belt; some decisions of the Department of Interior have denied applications for federal oil and gas leases in the California coastal belt on the ground that California owned the lands. Outside of court decisions following the *Pollard* rule, the foregoing are the types of conduct most nearly indicative of waiver upon which the state relies to show that the Government has lost its paramount rights in the belt. Assuming that Government agents could by conduct, short of a congressional surrender of title or interest, preclude the Government from asserting its legal rights, we cannot say it has done so here. As a matter of fact, the record plainly demonstrates that until the California oil issue began to be pressed in the thirties, neither the states nor the Government had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three-mile belt. And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean

area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.[22]

We have not overlooked California's argument, buttressed by earnest briefs on behalf of other states, that improvements have been made along and near the shores at great expense to public and private agencies. And we note the Government's suggestion that the aggregate value of all these improvements are small in comparison with the tremendous value of the entire three-mile belt here in controversy. But however this may be, we are faced with the issue as to whether state or nation has paramount rights in and power over this ocean belt, and that great national question is not dependent upon what expenses may have been incurred upon mistaken assumptions. Furthermore, we cannot know how many of these improvements are within and how many without the boundary of the marginal sea which can later be accurately defined. But beyond all this we cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission. See *United States* v. *Texas,* 162 U. S. 1, 89, 90; *Lee Wilson & Co.* v. *United States,* 245 U. S. 24, 32.

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[22] *United States* v. *San Francisco,* 310 U. S. 16, 31–32; *Utah* v. *United States,* 284 U. S. 534, 545, 546; *Lee Wilson & Co.* v. *United States,* 245 U. S. 24, 32; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409. See also *Sec'y of State for India* v. *Chelikani Rama Rao,* L. R. 43 Indian App. 192, 204 (1916).

We hold that the United States is entitled to the relief prayed for. The parties, or either of them, may, before September 15, 1947, submit the form of decree to carry this opinion into effect, failing which the Court will prepare and enter an appropriate decree at the next term of Court.

It is so ordered.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

MR. JUSTICE REED, dissenting.

In my view the controversy brought before this Court by the complaint of the United States against California seeks a judgment between State and Nation as to the ownership of the land underlying the Pacific Ocean, seaward of the ordinary low water mark, on the coast of California and within the three-mile limit. The ownership of that land carries with it, it seems to me, the ownership of any minerals or other valuables in the soil, as well as the right to extract them.

The determination as to the ownership of the land in controversy turns for me on the fact as to ownership in the original thirteen states of similar lands prior to the formation of the Union. If the original states owned the bed of the sea, adjacent to their coasts, to the three-mile limit, then I think California has the same title or ownership to the lands adjacent to her coast. The original states were sovereignties in their own right, possessed of so much of the land underneath the adjacent seas as was generally recognized to be under their jurisdiction. The scope of their jurisdiction and the boundaries of their lands were coterminous. Any part of that territory which had not passed from their ownership by existing valid grants were and remained public lands of the respective states. California, as is customary, was admitted into

the Union "on an equal footing with the original States in all respects whatever." 9 Stat. 452. By § 3 of the Act of Admission, the public lands within its borders were reserved for disposition by the United States. "Public lands" was there used in its usual sense of lands subject to sale under general laws. As was the rule, title to lands under navigable waters vested in California as it had done in all other states. *Pollard* v. *Hagan,* 3 How. 212; *Barney* v. *Keokuk,* 94 U. S. 324, 338; *Shively* v. *Bowlby,* 152 U. S. 1, 49; *Mann* v. *Tacoma Land Co.,* 153 U. S. 273, 284; *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U. S. 10, 17.

The authorities cited in the Court's opinion lead me to the conclusion that the original states owned the lands under the seas to the three-mile limit. There were, of course, as is shown by the citations, variations in the claims of sovereignty, jurisdiction or ownership among the nations of the world. As early as 1793, Jefferson as Secretary of State, in a communication to the British Minister, said that the territorial protection of the United States would be extended "three geographical miles" and added:

> "This distance can admit of no opposition, as it is recognized by treaties between some of the powers with whom we are connected in commerce and navigation, and is as little, or less, than is claimed by any of them on their own coasts." H. Ex. Doc. No. 324, 42d Cong., 2d Sess., pp. 553–54.

If the original states did claim, as I think they did, sovereignty and ownership to the three-mile limit, California has the same rights in the lands bordering its littoral.

This ownership in California would not interfere in any way with the needs or rights of the United States in war or peace. The power of the United States is plenary over these undersea lands precisely as it is over every

river, farm, mine, and factory of the nation. While no square ruling of this Court has determined the ownership of those marginal lands, to me the tone of the decisions dealing with similar problems indicates that, without discussion, state ownership has been assumed. *Pollard* v. *Hagan, supra; Louisiana* v. *Mississippi,* 202 U. S. 1, 52; *The Abby Dodge,* 223 U. S. 166; *New Jersey* v. *Delaware,* 291 U. S. 361; 295 U. S. 694.

MR. JUSTICE FRANKFURTER, dissenting.

By this original bill the United States prayed for a decree enjoining all persons, including those asserting a claim derived from the State of California, from trespassing upon the disputed area. An injunction against trespassers normally presupposes property rights. The Court, however, grants the prayer but does not do so by finding that the United States has proprietary interests in the area. To be sure, it denies such proprietary rights in California. But even if we assume an absence of ownership or possessory interest on the part of California, that does not establish a proprietary interest in the United States. It is significant that the Court does not adopt the Government's elaborate argument, based on dubious and tenuous writings of publicists, see Schwarzenberger, Inductive Approach to International Law, 60 Harv. L. Rev. 539, 559, that this part of the open sea belongs, in a proprietary sense, to the United States. See *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 351. Instead, the Court finds trespass against the United States on the basis of what it calls the "national dominion" by the United States over this area.

To speak of "dominion" carries precisely those overtones in the law which relate to property and not to political authority. Dominion, from the Roman concept *dominium,* was concerned with property and ownership,

as against *imperium,* which related to political sovereignty. One may choose to say, for example, that the United States has "national dominion" over navigable streams. But the power to regulate commerce over these streams, and its continued exercise, do not change the *imperium* of the United States into *dominium* over the land below the waters. Of course the United States has "paramount rights" in the sea belt of California—the rights that are implied by the power to regulate interstate and foreign commerce, the power of condemnation, the treaty-making power, the war power. We have not now before us the validity of the exercise of any of these paramount rights. Rights of ownership are here asserted—and rights of ownership are something else. Ownership implies acquisition in the various ways in which land is acquired—by conquest, by discovery and claim, by cession, by prescription, by purchase, by condemnation. When and how did the United States acquire this land?

The fact that these oil deposits in the open sea may be vital to the national security, and important elements in the conduct of our foreign affairs, is no more relevant than is the existence of uranium deposits, wherever they may be, in determining questions of trespass to the land of which they form a part. This is not a situation where an exercise of national power is actively and presently interfered with. In such a case, the inherent power of a federal court of equity may be invoked to prevent or remove the obstruction. *In re Debs,* 158 U. S. 564; *Sanitary District* v. *United States,* 266 U. S. 405. Neither the bill, nor the opinion sustaining it, suggests that there is interference by California or the alleged trespassers with any authority which the Government presently seeks to exercise. It is beside the point to say that "if wars come, they must be fought by the nation." Nor is it relevant that "The very oil about which the state and nation here

contend might well become the subject of international dispute and settlement." It is common knowledge that uranium has become "the subject of international dispute" with a view to settlement. Compare *Missouri* v. *Holland,* 252 U. S. 416.

To declare that the Government has "national dominion" is merely a way of saying that *vis-à-vis* all other nations the Government is the sovereign. If that is what the Court's decree means, it needs no pronouncement by this Court to confer or declare such sovereignty. If it means more than that, it implies that the Government has some proprietary interest. That has not been remotely established except by sliding from absence of ownership by California to ownership by the United States.

Let us assume, for the present, that ownership by California cannot be proven. On a fair analysis of all the evidence bearing on ownership, then, this area is, I believe, to be deemed unclaimed land, and the determination to claim it on the part of the United States is a political decision not for this Court. The Constitution places vast authority for the conduct of foreign relations in the independent hands of the President. See *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304. It is noteworthy that the Court does not treat the President's proclamation in regard to the disputed area as an assertion of ownership. See Exec. Proc. 2667 (Sept. 28, 1945) 10 F. R. 12303. If California is found to have no title, and this area is regarded as unclaimed land, I have no doubt that the President and the Congress between them could make it part of the national domain and thereby bring it under Article IV, Section 3, of the Constitution. The disposition of the area, the rights to be created in it, the rights heretofore claimed in it through usage that might be respected though it fall short of prescription, all raise appropriate questions of policy, questions of ac-

commodation, for the determination of which Congress and not this Court is the appropriate agency.

Today this Court has decided that a new application even in the old field of torts should not be made by adjudication, where Congress has refrained from acting. *United States* v. *Standard Oil Co.*, 332 U. S. 301. Considerations of judicial self-restraint would seem to me far more compelling where there are obviously at stake claims that involve so many far-reaching, complicated, historic interests, the proper adjustments of which are not readily resolved by the materials and methods to which this Court is confined.

This is a summary statement of views which it would serve no purpose to elaborate. I think that the bill should be dismissed without prejudice.

ADAMSON *v.* CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 102. Argued January 15–16, 1947.—Decided June 23, 1947.

1. The guaranty of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" is not made effective against state action by the Fourteenth Amendment. *Twining* v. *New Jersey*, 211 U. S. 78, and *Palko* v. *Connecticut*, 302 U. S. 319, reaffirmed. Pp. 50–53.
2. The privilege against self-incrimination is not inherent in the right to a fair trial, and is therefore not on that basis protected by the due process clause of the Fourteenth Amendment. Pp. 53–54.
3. The constitution and statutes of California provide that, in any criminal case, whether the defendant testifies or not, his "failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon" by the court and by counsel, and may be considered by the court or the jury. If the defendant pleads not guilty, but admits a charge that he has suffered a previous conviction, the charge of the previous conviction must not be read to the jury. However, if the defendant testifies, the previous conviction may on cross-examination be

revealed to the jury to impeach his testimony. In a prosecution for murder, in which the defendant admitted previous convictions but did not testify, the trial court instructed the jury, and the state's attorney argued the case, in accordance with the state law. *Held:* The provisions of the California law, as applied in the circumstances of this case, do not violate the due process clause of the Fourteenth Amendment. Pp. 53–58.

4. There is no basis in the California law for the defendant's objection on due process or other grounds that the statutory authorization to comment on the failure to explain or deny adverse testimony shifts the burden of proof or the duty to go forward with the evidence. P. 58.
5. This Court does not interfere with a conclusion of the State Supreme Court that it was improbable that the jury was misled by the prosecutor's argument to believe that the jury could infer guilt solely from the defendant's silence. P. 58.
6. The defendant in this case was not denied due process of law by the admission in evidence of tops of women's stockings that were found in his room, even though they did not match a stocking part which was found under the victim's body. Pp. 58–59.

27 Cal. 2d 478, 165 P. 2d 3, affirmed.

Appellant was convicted in a state court of murder in the first degree. The conviction was affirmed by the state supreme court, 27 Cal. 2d 478, 165 P. 2d 3, which sustained the validity of provisions of the state law challenged as violative of the Federal Constitution. *Affirmed,* p. 59.

Morris Lavine argued the cause and filed a brief for appellant.

Walter L. Bowers, Assistant Attorney General of California, argued the cause for appellee. With him on the brief was *Fred N. Howser,* Attorney General.

Mr. Justice Reed delivered the opinion of the Court.

The appellant, Adamson, a citizen of the United States, was convicted, without recommendation for mercy, by a jury in a Superior Court of the State of California of

murder in the first degree.[1] After considering the same objections to the conviction that are pressed here, the sentence of death was affirmed by the Supreme Court of the state. 27 Cal. 2d 478, 165 P. 2d 3. Review of that judgment by this Court was sought and allowed under Judicial Code § 237; 28 U. S. C. § 344.[2] The provisions of California law which were challenged in the state proceedings as invalid under the Fourteenth Amendment to the Federal Constitution are those of the state constitution and penal code in the margin. They permit the failure of a defendant to explain or to deny evidence against him to be commented upon by court and by counsel and to be considered by court and jury.[3] The defendant did not testify. As the trial court gave its instructions and the District Attorney argued the case in accordance with the constitutional and statutory provisions just referred to, we have

[1] There was also a conviction for first degree burglary. This requires no discussion.

[2] This section authorizes appeal to this Court from the final judgment of a state when the validity of a state statute is questioned on the ground of its being repugnant to the Constitution of the United States. The section has been applied so as to cover a state constitutional provision. *Railway Express Agency, Inc.* v. *Virginia,* 282 U. S. 440; *King Mfg. Co.* v. *Augusta,* 277 U. S. 100.

[3] Constitution of California, Art. I, § 13:

". . . No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. . . ."

Penal Code of California, § 1323: "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel."

for decision the question of their constitutionality in these circumstances under the limitations of § 1 of the Fourteenth Amendment.[4]

The appellant was charged in the information with former convictions for burglary, larceny and robbery and pursuant to § 1025, California Penal Code, answered that he had suffered the previous convictions. This answer barred allusion to these charges of convictions on the trial.[5] Under California's interpretation of § 1025 of the Penal Code and § 2051 of the Code of Civil Procedure, however, if the defendant, after answering affirmatively charges alleging prior convictions, takes the witness stand to deny or explain away other evidence that has been introduced "the commission of these crimes could have been revealed to the jury on cross-examination to impeach his testimony." *People* v. *Adamson,* 27 Cal. 2d 478, 494, 165 P. 2d 3, 11; *People* v. *Braun,* 14 Cal. 2d 1, 6, 92 P. 2d 402, 405. This forces an accused who is a repeated offender to choose between the risk of having his prior offenses disclosed to the jury or of having it draw harmful inferences from uncontradicted evidence that can only be denied or explained by the defendant.

In the first place, appellant urges that the provision of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" is a fundamental national privilege or immunity protected

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[4] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[5] Penal Code of California, § 1025: ". . . In case the defendant pleads not guilty, and answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial."

against state abridgment by the Fourteenth Amendment or a privilege or immunity secured, through the Fourteenth Amendment, against deprivation by state action because it is a personal right, enumerated in the federal Bill of Rights.

Secondly, appellant relies upon the due process of law clause of the Fourteenth Amendment to invalidate the provisions of the California law, set out in note 3 *supra,* and as applied (a) because comment on failure to testify is permitted, (b) because appellant was forced to forego testimony in person because of danger of disclosure of his past convictions through cross-examination, and (c) because the presumption of innocence was infringed by the shifting of the burden of proof to appellant in permitting comment on his failure to testify.

We shall assume, but without any intention thereby of ruling upon the issue,[6] that permission by law to the court, counsel and jury to comment upon and consider the failure of defendant "to explain or to deny by his testimony any evidence or facts in the case against him" would infringe defendant's privilege against self-incrimination under the Fifth Amendment if this were a trial in a court of the United States under a similar law. Such an assumption does not determine appellant's rights under the Fourteenth Amendment. It is settled law that the clause

[6] The California law protects a defendant against compulsion to testify, though allowing comment upon his failure to meet evidence against him. The Fifth Amendment forbids compulsion on a defendant to testify. *Boyd* v. *United States,* 116 U. S. 616, 631, 632; cf. *Davis* v. *United States,* 328 U. S. 582, 587, 593. A federal statute that grew out of the extension of permissible witnesses to include those charged with offenses negatives a presumption against an accused for failure to avail himself of the right to testify in his own defense. 28 U. S. C. § 632; *Bruno* v. *United States,* 308 U. S. 287. It was this statute which is interpreted to protect the defendant against comment for his claim of privilege. *Wilson* v. *United States,* 149 U. S. 60, 66; *Johnson* v. *United States,* 318 U. S. 189, 199.

of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights.

The reasoning that leads to those conclusions starts with the unquestioned premise that the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states. *Barron* v. *Baltimore,* 7 Pet. 243; *Feldman* v. *United States,* 322 U. S. 487, 490. With the adoption of the Fourteenth Amendment, it was suggested that the dual citizenship recognized by its first sentence [7] secured for citizens federal protection for their elemental privileges and immunities of state citizenship. The *Slaughter-House Cases* [8] decided, contrary to the suggestion, that these

[7] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

[8] 16 Wall. 36. The brief of Mr. Fellows for the plaintiff in error set out the legislative history in an effort to show that the purpose of the first section of the Fourteenth Amendment was to put the "Rights of Citizens" under the protection of the United States. It was pointed out, p. 12, that the Fourteenth Amendment was needed to accomplish that result. After quoting from the debates, the brief summarized the argument, as follows, p. 21:

"As the result of this examination, the only conclusion to be arrived at, as to the intention of Congress in proposing the amendments, and especially the first section of the Fourteenth Amendment, and the interpretation universally put upon it by every member of Congress, whether friend or foe, the interpretation in which all were agreed, was, in the words of Mr. Hale, 'that it was intended to apply to every State which has failed to apply equal protection to life, liberty and property;' or in the words of Mr. Bingham, 'that the

rights, as privileges and immunities of state citizenship, remained under the sole protection of the state governments. This Court, without the expression of a contrary view upon that phase of the issues before the Court, has approved this determination. *Maxwell* v. *Bugbee,* 250 U. S. 525, 537; *Hamilton* v. *Regents,* 293 U. S. 245, 261. The power to free defendants in state trials from self-incrimination was specifically determined to be beyond the scope of the privileges and immunities clause of the Fourteenth Amendment in *Twining* v. *New Jersey,* 211 U. S. 78, 91–98. "The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state." [9] The *Twining* case likewise disposed of the contention that freedom from testimonial compulsion, being specifically granted by the Bill of Rights, is a federal privilege or immunity that is protected by the Fourteenth Amendment against state invasion. This Court held that the inclusion in the Bill of Rights of this protection against the power of the national government did not make the privilege a federal privilege or immunity secured to citizens by the Constitution against state action. *Twining* v. *New Jersey, supra,* at 98–99; *Palko* v. *Connecticut, supra,* at 328. After declaring that state and national citizenship coexist in the same person, the Fourteenth Amendment forbids a state from abridging the privileges and immunities of citizens of the United States. As a matter of words, this leaves a state free to abridge, within the limits of the due process clause, the privileges and immunities flowing from state citizenship. This reading of the

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protection given by the laws of the States shall be equal in respect to life, liberty and property to all persons;' or in the language of Mr. Sumner, that it abolished 'oligarchy, aristocracy, caste, *or monopoly with peculiar privileges and powers.*' "

[9] *Snyder* v. *Massachusetts,* 291 U. S. 97, 105; *Palko* v. *Connecticut,* 302 U. S. 319, 324; *Twining* v. *New Jersey, supra,* 114.

Federal Constitution has heretofore found favor with the majority of this Court as a natural and logical interpretation. It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship.[10] It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment. This construction has become embedded in our federal system as a functioning element in preserving the balance between national and state power. We reaffirm the conclusion of the *Twining* and *Palko* cases that protection against self-incrimination is not a privilege or immunity of national citizenship.

Appellant secondly contends that if the privilege against self-incrimination is not a right protected by the privileges and immunities clause of the Fourteenth Amendment against state action, this privilege, to its full scope under the Fifth Amendment, inheres in the right to a fair trial. A right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment.[11] Therefore, appellant argues, the due process clause of the Fourteenth Amendment protects his privilege against self-incrimination. The due process clause of the Fourteenth Amendment, however, does not draw all the rights of the federal Bill of Rights under its protection. That contention was made and rejected in *Palko* v. *Connecticut*, 302 U. S. 319, 323. It was rejected with citation of the cases excluding several of the rights, protected by the Bill of Rights, against infringement by the National Gov-

[10] See *Madden* v. *Kentucky*, 309 U. S. 83, 90, and cases cited; and see the concurring opinions in *Edwards* v. *California*, 314 U. S. 160, and the opinion of Stone, J., in *Hague* v. *C. I. O.*, 307 U. S. 496, 519.

[11] *Moore* v. *Dempsey*, 261 U. S. 86, 91; *Chambers* v. *Florida*, 309 U. S. 227, 238; *Buchalter* v. *New York*, 319 U. S. 427.

ernment. Nothing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution. *Palko* held that such provisions of the Bill of Rights as were "implicit in the concept of ordered liberty," p. 325, became secure from state interference by the clause. But it held nothing more.

Specifically, the due process clause does not protect, by virtue of its mere existence, the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment. *Twining* v. *New Jersey,* 211 U. S. 78, 99–114; *Palko* v. *Connecticut, supra,* p. 323. For a state to require testimony from an accused is not necessarily a breach of a state's obligation to give a fair trial. Therefore, we must examine the effect of the California law applied in this trial to see whether the comment on failure to testify violates the protection against state action that the due process clause does grant to an accused. The due process clause forbids compulsion to testify by fear of hurt, torture or exhaustion.[12] It forbids any other type of coercion that falls within the scope of due process.[13] California follows Anglo-American legal tradition in excusing defendants in criminal prosecutions from compulsory testimony. Cf. VIII Wigmore on Evidence (3d ed.) § 2252. That is a matter of legal policy and

[12] *White* v. *Texas,* 310 U. S. 530; *Brown* v. *Mississippi,* 297 U. S. 278; *Ashcraft* v. *Tennessee,* 322 U. S. 143, 154; *Ashcraft* v. *Tennessee,* 327 U. S. 274.

[13] See *Malinski* v. *New York,* 324 U. S. 401, concurring op. at 414, dissent at 438; *Buchalter* v. *New York, supra,* at 429; *Palko* v. *Connecticut, supra,* at 325; *Carter* v. *Illinois,* 329 U. S. 173.

State action must "be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'" *Hebert* v. *Louisiana,* 272 U. S. 312, 316.

not because of the requirements of due process under the Fourteenth Amendment.[14] So our inquiry is directed, not at the broad question of the constitutionality of compulsory testimony from the accused under the due process clause, but to the constitutionality of the provision of the California law that permits comment upon his failure to testify. It is, of course, logically possible that while an accused might be required, under appropriate penalties, to submit himself as a witness without a violation of due process, comment by judge or jury on inferences to be drawn from his failure to testify, in jurisdictions where an accused's privilege against self-incrimination is protected, might deny due process. For example, a statute might declare that a permitted refusal to testify would compel an acceptance of the truth of the prosecution's evidence.

Generally, comment on the failure of an accused to testify is forbidden in American jurisdictions.[15] This arises from state constitutional or statutory provisions similar in character to the federal provisions. Fifth Amendment and 28 U. S. C. § 632. California, however, is one of a few states that permit limited comment upon a defendant's failure to testify.[16] That permission is narrow. The California law is set out in note 3 and authorizes comment by court and counsel upon the "failure of the defendant to explain or to deny by his testimony any evi-

[14] *Twining* v. *New Jersey, supra,* pp. 110–12.

[15] VIII Wigmore, *supra,* p. 412.

[16] The cases and statutory references are collected in VIII Wigmore, *supra,* at pp. 413 *et seq.* New Jersey, Ohio and Vermont permit comment. The question of permitting comment upon the failure of an accused to testify has been a matter for consideration in recent years. See Reports of American Bar Association (1931) 137; Proceedings, American Law Institute, 1930–31, 202; Reeder, *Comment Upon Failure of Accused to Testify,* 31 Mich. L. Rev. 40; Bruce, *The Right to Comment on the Failure of the Defendant to Testify, Id.,* 226.

dence or facts in the case against him." This does not involve any presumption, rebuttable or irrebuttable, either of guilt or of the truth of any fact, that is offered in evidence. Compare *Tot* v. *United States,* 319 U. S. 463, 470. It allows inferences to be drawn from proven facts. Because of this clause, the court can direct the jury's attention to whatever evidence there may be that a defendant could deny and the prosecution can argue as to inferences that may be drawn from the accused's failure to testify. Compare *Caminetti* v. *United States,* 242 U. S. 470, 492–95; *Raffel* v. *United States,* 271 U. S. 494, 497. There is here no lack of power in the trial court to adjudge and no denial of a hearing. California has prescribed a method for advising the jury in the search for truth. However sound may be the legislative conclusion that an accused should not be compelled in any criminal case to be a witness against himself, we see no reason why comment should not be made upon his silence. It seems quite natural that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution should bring out the strength of the evidence by commenting upon defendant's failure to explain or deny it. The prosecution evidence may be of facts that may be beyond the knowledge of the accused. If so, his failure to testify would have little if any weight. But the facts may be such as are necessarily in the knowledge of the accused. In that case a failure to explain would point to an inability to explain.

Appellant sets out the circumstances of this case, however, to show coercion and unfairness in permitting comment. The guilty person was not seen at the place and time of the crime. There was evidence, however, that entrance to the place or room where the crime was committed might have been obtained through a small door. It was freshly broken. Evidence showed that six finger-

prints on the door were petitioner's. Certain diamond rings were missing from the deceased's possession. There was evidence that appellant, sometime after the crime, asked an unidentified person whether the latter would be interested in purchasing a diamond ring. As has been stated, the information charged other crimes to appellant and he admitted them. His argument here is that he could not take the stand to deny the evidence against him because he would be subjected to a cross-examination as to former crimes to impeach his veracity and the evidence so produced might well bring about his conviction. Such cross-examination is allowable in California. *People* v. *Adamson,* 27 Cal. 2d 478, 494, 165 P. 2d 3, 11. Therefore, appellant contends the California statute permitting comment denies him due process.

It is true that if comment were forbidden, an accused in this situation could remain silent and avoid evidence of former crimes and comment upon his failure to testify. We are of the view, however, that a state may control such a situation in accordance with its own ideas of the most efficient administration of criminal justice. The purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction. When evidence is before a jury that threatens conviction, it does not seem unfair to require him to choose between leaving the adverse evidence unexplained and subjecting himself to impeachment through disclosure of former crimes. Indeed, this is a dilemma with which any defendant may be faced. If facts, adverse to the defendant, are proven by the prosecution, there may be no way to explain them favorably to the accused except by a witness who may be vulnerable to impeachment on cross-examination. The defendant must then decide whether or not to use such a witness. The fact that the witness may also be the de-

fendant makes the choice more difficult but a denial of due process does not emerge from the circumstances.[17]

There is no basis in the California law for appellant's objection on due process or other grounds that the statutory authorization to comment on the failure to explain or deny adverse testimony shifts the burden of proof or the duty to go forward with the evidence. Failure of the accused to testify is not an admission of the truth of the adverse evidence. Instructions told the jury that the burden of proof remained upon the state and the presumption of innocence with the accused. Comment on failure to deny proven facts does not in California tend to supply any missing element of proof of guilt. *People* v. *Adamson,* 27 Cal. 2d 478, 489–95, 165 P. 2d 3, 9–12. It only directs attention to the strength of the evidence for the prosecution or to the weakness of that for the defense. The Supreme Court of California called attention to the fact that the prosecutor's argument approached the borderline in a statement that might have been construed as asserting "that the jury should infer guilt solely from defendant's silence." That court felt that it was improbable the jury was misled into such an understanding of their power. We shall not interfere with such a conclusion. *People* v. *Adamson,* 27 Cal. 2d 478, 494–95, 165 P. 2d 3, 12.

Finally, appellant contends that due process of law was denied him by the introduction as evidence of tops of women's stockings that were found in his room. The claim is made that such evidence inflamed the jury. The lower part of a woman's stocking was found under the victim's body. The top was not found. The corpse was barelegged. The tops from defendant's room did not

[17] Comment here did not follow a grant of privilege that carried immunity from comment. The choice between giving evidence and remaining silent was an open choice. There was no such possible misleading of the defendant as we condemned in *Johnson* v. *United States,* 318 U. S. 189, 195–99.

match the lower part found under the dead body. The California court held that the tops were admissible as evidence because this "interest in women's stocking tops is a circumstance that tends to identify defendant" as the perpetrator of the crime. We do not think the introduction of this evidence violated any federal constitutional right.

We find no other error that gives ground for our intervention in California's administration of criminal justice.

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

Less than ten years ago, Mr. Justice Cardozo announced as settled constitutional law that while the Fifth Amendment, "which is not directed to the states, but solely to the federal government," provides that no person shall be compelled in any criminal case to be a witness against himself, the process of law assured by the Fourteenth Amendment does not require such immunity from self-crimination: "in prosecutions by a state, the exemption will fail if the state elects to end it." *Palko* v. *Connecticut*, 302 U. S. 319, 322, 324. Mr. Justice Cardozo spoke for the Court, consisting of Mr. Chief Justice Hughes, and McReynolds, Brandeis, Sutherland, Stone, Roberts, Black, JJ. (Mr. Justice Butler dissented.) The matter no longer called for discussion; a reference to *Twining* v. *New Jersey*, 211 U. S. 78, decided thirty years before the *Palko* case, sufficed.

Decisions of this Court do not have equal intrinsic authority. The *Twining* case shows the judicial process at its best—comprehensive briefs and powerful arguments on both sides, followed by long deliberation, resulting in an opinion by Mr. Justice Moody which at once gained and has ever since retained recognition as one of the outstanding opinions in the history of the Court. After

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enjoying unquestioned prestige for forty years, the *Twining* case should not now be diluted, even unwittingly, either in its judicial philosophy or in its particulars. As the surest way of keeping the *Twining* case intact, I would affirm this case on its authority.

The circumstances of this case present a minor variant from what was before the Court in *Twining* v. *New Jersey, supra.* The attempt to inflate the difference into constitutional significance was adequately dealt with by Mr. Justice Traynor in the court below. *People* v. *Adamson,* 27 Cal. 2d 478, 165 P. 2d 3. The matter lies within a very narrow compass. The point is made that a defendant who has a vulnerable record would, by taking the stand, subject himself to having his credibility impeached thereby. See *Raffel* v. *United States,* 271 U. S. 494, 496–97. Accordingly, under California law, he is confronted with the dilemma, whether to testify and perchance have his bad record prejudice him in the minds of the jury, or to subject himself to the unfavorable inference which the jury might draw from his silence. And so, it is argued, if he chooses the latter alternative, the jury ought not to be allowed to attribute his silence to a consciousness of guilt when it might be due merely to a desire to escape damaging cross-examination.

This does not create an issue different from that settled in the *Twining* case. Only a technical rule of law would exclude from consideration that which is relevant, as a matter of fair reasoning, to the solution of a problem. Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and right-minded men do every day violates the "immutable principles of justice" as conceived by a civilized society is to trivialize the importance of "due process." Nor does it

make any difference in drawing significance from silence under such circumstances that an accused may deem it more advantageous to remain silent than to speak, on the nice calculation that by taking the witness stand he may expose himself to having his credibility impugned by reason of his criminal record. Silence under such circumstances is still significant. A person in that situation may express to the jury, through appropriate requests to charge, why he prefers to keep silent. A man who has done one wrong may prove his innocence on a totally different charge. To deny that the jury can be trusted to make such discrimination is to show little confidence in the jury system. The prosecution is frequently compelled to rely on the testimony of shady characters whose credibility is bound to be the chief target of the defense. It is a common practice in criminal trials to draw out of a vulnerable witness' mouth his vulnerability, and then convince the jury that nevertheless he is telling the truth in this particular case. This is also a common experience for defendants.

For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions. It is so, of course, by explicit act of Congress. 20 Stat. 30; see *Bruno* v. *United States,* 308 U. S. 287. But to suggest that such a limitation can be drawn out of "due process" in its protection of ultimate decency in a civilized society is to suggest that the Due Process Clause fastened fetters of unreason upon the States. (This opinion is concerned solely with a discussion of the Due Process Clause of the Fourteenth Amendment. I put to one side the Privileges or Immunities Clause of that Amendment. For the mischievous uses to which that clause would lend itself if its scope were not confined to that given it by all but

one of the decisions beginning with the *Slaughter-House Cases,* 16 Wall. 36, see the deviation in *Colgate* v. *Harvey,* 296 U. S. 404, overruled by *Madden* v. *Kentucky,* 309 U.S. 83.)

Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court—a period of seventy years—the scope of that Amendment was passed upon by forty-three judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States. Among these judges were not only those who would have to be included among the greatest in the history of the Court, but—it is especially relevant to note—they included those whose services in the cause of human rights and the spirit of freedom are the most conspicuous in our history. It is not invidious to single out Miller, Davis, Bradley, Waite, Matthews, Gray, Fuller, Holmes, Brandeis, Stone and Cardozo (to speak only of the dead) as judges who were alert in safeguarding and promoting the interests of liberty and human dignity through law. But they were also judges mindful of the relation of our federal system to a progressively democratic society and therefore duly regardful of the scope of authority that was left to the States even after the Civil War. And so they did not find that the Fourteenth Amendment, concerned as it was with matters fundamental to the pursuit of justice, fastened upon the States procedural arrangements which, in the language of Mr. Justice Cardozo, only those who are "narrow or provincial" would deem essential to "a fair and enlightened system of justice." *Palko* v. *Connecticut,* 302 U. S. 319, 325. To suggest that it is inconsistent with a truly free

society to begin prosecutions without an indictment, to try petty civil cases without the paraphernalia of a common law jury, to take into consideration that one who has full opportunity to make a defense remains silent is, in de Tocqueville's phrase, to confound the familiar with the necessary.

The short answer to the suggestion that the provision of the Fourteenth Amendment, which ordains "nor shall any State deprive any person of life, liberty, or property, without due process of law," was a way of saying that every State must thereafter initiate prosecutions through indictment by a grand jury, must have a trial by a jury of twelve in criminal cases, and must have trial by such a jury in common law suits where the amount in controversy exceeds twenty dollars, is that it is a strange way of saying it. It would be extraordinarily strange for a Constitution to convey such specific commands in such a roundabout and inexplicit way. After all, an amendment to the Constitution should be read in a " 'sense most obvious to the common understanding at the time of its adoption.' . . . For it was for public adoption that it was proposed." See Mr. Justice Holmes in *Eisner* v. *Macomber,* 252 U. S. 189, 220. Those reading the English language with the meaning which it ordinarily conveys, those conversant with the political and legal history of the concept of due process, those sensitive to the relations of the States to the central government as well as the relation of some of the provisions of the Bill of Rights to the process of justice, would hardly recognize the Fourteenth Amendment as a cover for the various explicit provisions of the first eight Amendments. Some of these are enduring reflections of experience with human nature, while some express the restricted views of Eighteenth-Century England regarding the best methods for the ascertainment of facts. The notion that the Fourteenth Amendment was a covert way of imposing upon the

States all the rules which it seemed important to Eighteenth Century statesmen to write into the Federal Amendments, was rejected by judges who were themselves witnesses of the process by which the Fourteenth Amendment became part of the Constitution. Arguments that may now be adduced to prove that the first eight Amendments were concealed within the historic phrasing* of the Fourteenth Amendment were not unknown at the time of its adoption. A surer estimate of their bearing was possible for judges at the time than distorting distance is likely to vouchsafe. Any evidence of design or purpose not contemporaneously known could hardly have influenced those who ratified the Amendment. Remarks of a particular proponent of the Amendment, no matter how influential, are not to be deemed part of the Amendment. What was submitted for ratification was his proposal, not his speech. Thus, at the time of the ratification of the Fourteenth Amendment the constitutions of nearly half of the ratifying States did not have the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury. It could hardly have occurred to these States that by ratifying the Amendment they uprooted their established methods for prosecuting crime and fastened upon themselves a new prosecutorial system.

Indeed, the suggestion that the Fourteenth Amendment incorporates the first eight Amendments as such is not unambiguously urged. Even the boldest innovator would shrink from suggesting to more than half the States that

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*"The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the fourteenth amendment, in the year 1866." *Davidson* v. *New Orleans,* 96 U. S. 97, 101.

they may no longer initiate prosecutions without indictment by grand jury, or that thereafter all the States of the Union must furnish a jury of twelve for every case involving a claim above twenty dollars. There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out. Nor are we given the calculus for determining which go in and which stay out. If the basis of selection is merely that those provisions of the first eight Amendments are incorporated which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test. The protection against unreasonable search and seizure might have primacy for one judge, while trial by a jury of twelve for every claim above twenty dollars might appear to another as an ultimate need in a free society. In the history of thought "natural law" has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth. If all that is meant is that due process contains within itself certain minimal standards which are "of the very essence of a scheme of ordered liberty," *Palko* v. *Connecticut,* 302 U. S. 319, 325, putting upon this Court the duty of applying these standards from time to time, then we have merely arrived at the insight which our predecessors long ago expressed. We are called upon to apply to the difficult issues of our own day the wisdom afforded by the great opinions in this field, such as those in *Davidson* v. *New Orleans,* 96 U. S. 97; *Missouri* v. *Lewis,* 101 U. S. 22; *Hurtado* v. *California,* 110 U. S. 516; *Holden* v. *Hardy,* 169 U. S. 366; *Twining* v. *New Jersey,* 211 U. S. 78, and *Palko* v. *Connecticut,* 302 U. S. 319. This guidance bids us to be duly mindful of the heritage of the past, with its great lessons of how liberties are won and

how they are lost. As judges charged with the delicate task of subjecting the government of a continent to the Rule of Law we must be particularly mindful that it is "a *constitution* we are expounding," so that it should not be imprisoned in what are merely legal forms even though they have the sanction of the Eighteenth Century.

It may not be amiss to restate the pervasive function of the Fourteenth Amendment in exacting from the States observance of basic liberties. See *Malinski* v. *New York*, 324 U. S. 401, 412 *et seq.*; *Louisiana* v. *Resweber*, 329 U. S. 459, 466 *et seq.* The Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them. The Due Process Clause of the Fourteenth Amendment has an independent potency, precisely as does the Due Process Clause of the Fifth Amendment in relation to the Federal Government. It ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth. The Fifth Amendment specifically prohibits prosecution of an "infamous crime" except upon indictment; it forbids double jeopardy; it bars compelling a person to be a witness against himself in any criminal case; it precludes deprivation of "life, liberty, or property, without due process of law . . . ." Are Madison and his contemporaries in the framing of the Bill of Rights to be charged with writing into it a meaningless clause? To consider "due process of law" as merely a shorthand statement of other specific clauses in the same amendment is to attribute to the authors and proponents of this Amendment ignorance of, or indifference to, a historic conception which was one of the great instruments in the arsenal of constitutional freedom which the Bill of Rights was to protect and strengthen.

A construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights would, as has been noted, tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom. It would assume that no other abuses would reveal themselves in the course of time than those which had become manifest in 1791. Such a view not only disregards the historic meaning of "due process." It leads inevitably to a warped construction of specific provisions of the Bill of Rights to bring within their scope conduct clearly condemned by due process but not easily fitting into the pigeon-holes of the specific provisions. It seems pretty late in the day to suggest that a phrase so laden with historic meaning should be given an improvised content consisting of some but not all of the provisions of the first eight Amendments, selected on an undefined basis, with improvisation of content for the provisions so selected.

And so, when, as in a case like the present, a conviction in a State court is here for review under a claim that a right protected by the Due Process Clause of the Fourteenth Amendment has been denied, the issue is not whether an infraction of one of the specific provisions of the first eight Amendments is disclosed by the record. The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward

those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the State court under review.

MR. JUSTICE BLACK, dissenting.

The appellant was tried for murder in a California state court. He did not take the stand as a witness in his own behalf. The prosecuting attorney, under purported authority of a California statute, Cal. Penal Code, § 1323 (Hillyer-Lake, 1945), argued to the jury that an inference of guilt could be drawn because of appellant's failure to deny evidence offered against him. The appellant's contention in the state court and here has been that the statute denies him a right guaranteed by the Federal Constitution. The argument is that (1) permitting comment upon his failure to testify has the effect of compelling him to testify so as to violate that provision of the Bill of Rights contained in the Fifth Amendment that "No person . . . shall be compelled in any criminal case to be a witness against himself"; and (2) although this provision of the Fifth Amendment originally applied only as a restraint upon federal courts, *Barron* v. *Baltimore*, 7 Pet. 243, the Fourteenth Amendment was intended to, and did, make the prohibition against compelled testimony applicable to trials in state courts.

The Court refuses to meet and decide the appellant's first contention. But while the Court's opinion, as I read it, strongly implies that the Fifth Amendment does not, of itself, bar comment upon failure to testify in federal courts, the Court nevertheless assumes that it does in order to reach the second constitutional question involved in appellant's case. I must consider the case on the same assumption that the Court does. For the discussion of the second contention turns out to be a decision which reaches far beyond the relatively narrow issues on which this case might have turned.

This decision reasserts a constitutional theory spelled out in *Twining* v. *New Jersey*, 211 U. S. 78, that this Court is endowed by the Constitution with boundless power under "natural law" periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes "civilized decency" and "fundamental liberty and justice."[1] Invoking this *Twining* rule, the Court concludes that although comment upon testimony in a federal court would violate the Fifth Amendment, identical comment in a state court does not violate today's fashion in civilized decency and fundamentals and is therefore not prohibited by the Federal Constitution as amended.

The *Twining* case was the first, as it is the only, decision of this Court which has squarely held that states were free, notwithstanding the Fifth and Fourteenth Amendments, to extort evidence from one accused of crime.[2] I

[1] The cases on which the Court relies seem to adopt these standards. *Malinski* v. *New York*, 324 U. S. 401, concurring opinion, 412–417; *Buchalter* v. *New York*, 319 U. S. 427, 429; *Hebert* v. *Louisiana*, 272 U. S. 312, 316.

[2] "The question in the case at bar has been twice before us, and been left undecided, as the cases were disposed of on other grounds." *Twining* v. *New Jersey*, *supra*, 92. In *Palko* v. *Connecticut*, 302 U. S. 319, relied on by the Court, the issue was double jeopardy and not enforced self-incrimination.

agree that if *Twining* be reaffirmed, the result reached might appropriately follow. But I would not reaffirm the *Twining* decision. I think that decision and the "natural law" theory of the Constitution upon which it relies degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise. Furthermore, the *Twining* decision rested on previous cases and broad hypotheses which have been undercut by intervening decisions of this Court. See Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 1, 191, 202. My reasons for believing that the *Twining* decision should not be revitalized can best be understood by reference to the constitutional, judicial, and general history that preceded and followed the case. That reference must be abbreviated far more than is justified but for the necessary limitations of opinion-writing.

The first ten amendments were proposed and adopted largely because of fear that Government might unduly interfere with prized individual liberties. The people wanted and demanded a Bill of Rights written into their Constitution. The amendments embodying the Bill of Rights were intended to curb all branches of the Federal Government in the fields touched by the amendments—Legislative, Executive, and Judicial. The Fifth, Sixth, and Eighth Amendments were pointedly aimed at confining exercise of power by courts and judges within precise boundaries, particularly in the procedure used for the trial of criminal cases.[3] Past history provided strong reasons

[3] The Fifth Amendment requires indictment by a Grand Jury in many criminal trials, prohibits double jeopardy, self incrimination, deprivation of life, liberty or property without due process of law or the taking of property for public use without just compensation.

The Sixth Amendment guarantees to one accused of crime a speedy, public trial before an impartial jury of the district where the crime

for the apprehensions which brought these procedural amendments into being and attest the wisdom of their adoption. For the fears of arbitrary court action sprang largely from the past use of courts in the imposition of criminal punishments to suppress speech, press, and religion. Hence the constitutional limitations of courts' powers were, in the view of the Founders, essential supplements to the First Amendment, which was itself designed to protect the widest scope for all people to believe and to express the most divergent political, religious, and other views.

But these limitations were not expressly imposed upon state court action. In 1833, *Barron* v. *Baltimore, supra,* was decided by this Court. It specifically held inapplicable to the states that provision of the Fifth Amendment which declares: "nor shall private property be taken for public use, without just compensation." In deciding the particular point raised, the Court there said that it could not hold that the first eight amendments applied to the states. This was the controlling constitutional rule when the Fourteenth Amendment was proposed in 1866.[4]

My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the

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was allegedly committed; it requires that the accused be informed of the nature of the charge against him, confronted with the witnesses against him, have compulsory process to obtain witnesses in his favor, and assistance of counsel.

The Eighth Amendment prohibits excessive bail, fines and cruel and unusual punishments.

[4] See Appendix, *infra,* pp. 97–98.

states.[5] With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment.

In construing other constitutional provisions, this Court has almost uniformly followed the precept of *Ex parte Bain,* 121 U. S. 1, 12, that "It is never to be forgotten that, in the construction of the language of the Constitution . . . , as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument." See also *Everson* v. *Board of Education,* 330 U. S. 1, 8, 28, 33; *Thornhill* v. *Alabama,* 310 U. S. 88, 95, 102; *Knowlton* v. *Moore,* 178 U. S. 41, 89, 106; *Reynolds* v. *United States,* 98 U. S. 145, 162; *Barron* v. *Baltimore, supra* at 250–251; *Cohens* v. *Virginia,* 6 Wheat. 264, 416–420.

Investigation of the cases relied upon in *Twining* v. *New Jersey* to support the conclusion there reached that neither the Fifth Amendment's prohibition of compelled testimony, nor any of the Bill of Rights, applies to the States, reveals an unexplained departure from this salutary

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[5] Another prime purpose was to make colored people citizens entitled to full equal rights as citizens despite what this Court decided in the Dred Scott case. *Scott* v. *Sandford,* 19 How. 393.

A comprehensive analysis of the historical origins of the Fourteenth Amendment, Flack, The Adoption of the Fourteenth Amendment (1908) 94, concludes that "Congress, the House and the Senate, had the following objects and motives in view for submitting the first section of the Fourteenth Amendment to the States for ratification:

"1. To make the Bill of Rights (the first eight Amendments) binding upon, or applicable to, the States.

"2. To give validity to the Civil Rights Bill.

"3. To declare who were citizens of the United States."

practice. Neither the briefs nor opinions in any of these cases, except *Maxwell* v. *Dow,* 176 U. S. 581, make reference to the legislative and contemporary history for the purpose of demonstrating that those who conceived, shaped, and brought about the adoption of the Fourteenth Amendment intended it to nullify this Court's decision in *Barron* v. *Baltimore, supra,* and thereby to make the Bill of Rights applicable to the States. In *Maxwell* v. *Dow, supra,* the issue turned on whether the Bill of Rights guarantee of a jury trial was, by the Fourteenth Amendment, extended to trials in state courts. In that case counsel for appellant did cite from the speech of Senator Howard, Appendix, *infra,* p. 104, which so emphatically stated the understanding of the framers of the Amendment—the Committee on Reconstruction for which he spoke—that the Bill of Rights was to be made applicable to the states by the Amendment's first section. The Court's opinion in *Maxwell* v. *Dow, supra,* 601, acknowledged that counsel had "cited from the speech of one of the Senators," but indicated that it was not advised what other speeches were made in the Senate or in the House. The Court considered, moreover, that "What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it." *Id.* at 601–602.

In the *Twining* case itself, the Court was cited to a then recent book, Guthrie, Fourteenth Amendment to the Constitution (1898). A few pages of that work recited some of the legislative background of the Amendment, emphasizing the speech of Senator Howard. But Guthrie did not emphasize the speeches of Congressman Bingham, nor the part he played in the framing and adoption of the first section of the Fourteenth Amendment. Yet Congress-

man Bingham may, without extravagance, be called the Madison of the first section of the Fourteenth Amendment. In the *Twining* opinion, the Court explicitly declined to give weight to the historical demonstration that the first section of the Amendment was intended to apply to the states the several protections of the Bill of Rights. It held that that question was "no longer open" because of previous decisions of this Court which, however, had not appraised the historical evidence on that subject. *Id.* at 98. The Court admitted that its action had resulted in giving "much less effect to the Fourteenth Amendment than some of the public men active in framing it" had intended it to have. *Id.* at 96. With particular reference to the guarantee against compelled testimony, the Court stated that "Much might be said in favor of the view that the privilege was guaranteed against state impairment as a privilege and immunity of National citizenship, but, as has been shown, the decisions of this court have foreclosed that view." *Id.* at 113. Thus the Court declined, and again today declines, to appraise the relevant historical evidence of the intended scope of the first section of the Amendment. Instead it relied upon previous cases, none of which had analyzed the evidence showing that one purpose of those who framed, advocated, and adopted the Amendment had been to make the Bill of Rights applicable to the States. None of the cases relied upon by the Court today made such an analysis.

For this reason, I am attaching to this dissent an appendix which contains a résumé, by no means complete, of the Amendment's history. In my judgment that history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state

could deprive its citizens of the privileges and protections of the Bill of Rights. Whether this Court ever will, or whether it now should, in the light of past decisions, give full effect to what the Amendment was intended to accomplish is not necessarily essential to a decision here. However that may be, our prior decisions, including *Twining*, do not prevent our carrying out that purpose, at least to the extent of making applicable to the states, not a mere part, as the Court has, but the full protection of the Fifth Amendment's provision against compelling evidence from an accused to convict him of crime. And I further contend that the "natural law" formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power. And my belief seems to be in accord with the views expressed by this Court, at least for the first two decades after the Fourteenth Amendment was adopted.

In 1872, four years after the Amendment was adopted, the *Slaughter-House* cases came to this Court. 16 Wall 36. The Court was not presented in that case with the evidence which showed that the special sponsors of the Amendment in the House and Senate had expressly explained one of its principal purposes to be to change the Constitution as construed in *Barron* v. *Baltimore, supra,* and make the Bill of Rights applicable to the states.[6] Nor

[6] It is noteworthy that before the *Twining* decision Justices Bradley, Field, Swayne, Harlan, and apparently Brewer, although they had not been presented with and did not rely upon a documented history of the Fourteenth Amendment such as is set out in the Appendix, *infra,* nevertheless dissented from the view that the Fourteenth Amendment did not make provisions of the Bill of Rights

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was there reason to do so. For the state law under consideration in the *Slaughter-House* cases was only challenged as one which authorized a monopoly, and the brief for the challenger properly conceded that there was "no direct constitutional provision against a monopoly." [7]

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applicable to the states. In the attached Appendix (at pp. 120–123) I have referred to some cases evidencing their views, and set out some expressions of it.

A contemporary comment illustrates that the *Slaughter-House* interpretation of the Fourteenth Amendment was made without full regard for the congressional purpose or popular understanding.

"It must be admitted that the construction put upon the language of the first section of this amendment by the majority of the court is not its primary and most obvious signification. Ninety-nine out of every hundred educated men, upon reading this section over, would at first say that it forbade a state to make or enforce a law which abridged any privilege or immunity whatever of one who was a citizen of the United States; and it is only by an effort of ingenuity that any other sense can be discovered that it can be forced to bear. It is a little remarkable that, so far as the reports disclose, no one of the distinguished counsel who argued this great case (the Slaughter-House Cases), nor any one of the judges who sat in it, appears to have thought it worth while to consult the proceedings of the Congress which proposed this amendment, to ascertain what it was that they were seeking to accomplish. Nothing is more common than this. There is hardly a question raised as to the true meaning of a provision of the old, original Constitution that resort is not had to Elliott's Debates, to ascertain what the framers of the instrument declared at the time that they intended to accomplish. . . ." Royall, *The Fourteenth Amendment: The Slaughter-House Cases*, 4 So. L. Rev. (N. S.) 558, 563 (1879).

For a collection of other comments on the *Slaughter-House* cases, see 2 Warren, The Supreme Court in United States History (1937) c. 32.

[7] The case was not decided until over two years after it was submitted. In a short brief filed some two years after the first briefs, one of the counsel attacking the constitutionality of the state statute referred to and cited part of the history of the Fourteenth Amendment. The historical references made were directed only to an effort to show that a purpose of the Fourteenth Amendment was to protect freedom of contract against monopoly since monopolies interfered with the freedom of contract and the right to engage

The argument did not invoke any specific provision of the Bill of Rights, but urged that the state monopoly statute violated "the natural right of a person" to do business and engage in his trade or vocation. On this basis, it was contended that "bulwarks that have been erected around the investments of capital are impregnable against State legislation." These natural law arguments, so suggestive of the premises on which the present due process formula rests, were flatly rejected by a majority of the Court in the *Slaughter-House* cases. What the Court did hold was that the privileges and immunities clause of the Fourteenth Amendment only protected from state invasion such rights as a person has because he is a citizen of the United States. The Court enumerated some, but refused to enumerate all of these national rights. The majority of the Court emphatically declined the invitation of counsel to hold that the Fourteenth Amendment subjected all state regulatory legislation to continuous censorship by this Court in order for it to determine whether it collided with this Court's opinion of "natural" right and justice. In effect, the *Slaughter-House* cases rejected the very

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in business. Nonetheless some of these references would have supported the theory, had it been in question there, that a purpose of the Fourteenth Amendment was to make the Bill of Rights applicable to the states. For counsel quoted a statement by Congressman Bingham that ". . . it is . . . clear by every construction of the Constitution, its continued construction, legislative, executive and judicial, that these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States. The House knows, the country knows . . . , that the legislative, executive and judicial officers of eleven States within this Union, within the last five years, have utterly disregarded the behest." But since there was no contention that the Bill of Rights Amendment prohibited monopoly, this statement, in the context in which it was quoted, is hardly an indication that the Court was presented with documented argument on the question of whether the Fourteenth Amendment made the Bill of Rights applicable to the States.

natural justice formula the Court today embraces. The Court did not meet the question of whether the safeguards of the Bill of Rights were protected against state invasion by the Fourteenth Amendment. And it specifically did not say as the Court now does, that particular provisions of the Bill of Rights could be breached by states in part, but not breached in other respects, according to this Court's notions of "civilized standards," "canons of decency," and "fundamental justice."

Later, but prior to the *Twining* case, this Court decided that the following were not "privileges or immunities" of national citizenship, so as to make them immune against state invasion: the Eighth Amendment's prohibition against cruel and unusual punishment, *In re Kemmler,* 136 U. S. 436; the Seventh Amendment's guarantee of a jury trial in civil cases, *Walker* v. *Sauvinet,* 92 U. S. 90; the Second Amendment's "right of the people to keep and bear Arms . . . ," *Presser* v. *Illinois,* 116 U. S. 252; the Fifth and Sixth Amendments' requirements for indictment in capital or other infamous crimes, and for trial by jury in criminal prosecutions, *Maxwell* v. *Dow,* 176 U. S. 581. While it can be argued that these cases implied that no one of the provisions of the Bill of Rights was made applicable to the states as attributes of national citizenship, no one of them expressly so decided. In fact, the Court in *Maxwell* v. *Dow, supra* at 597–598, concluded no more than that "the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government." *Cf. Palko* v. *Connecticut,* 302 U. S. 319, 329.

After the *Slaughter-House* decision, the Court also said that states could, despite the "due process" clause of the Fourteenth Amendment, take private property without just compensation, *Davidson* v. *New Orleans,* 96 U. S.

97, 105; *Pumpelly* v. *Green Bay Co.*, 13 Wall., 166, 176–177; abridge the freedom of assembly guaranteed by the First Amendment, *United States* v. *Cruikshank*, 92 U. S. 542; see also *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 543; *Patterson* v. *Colorado*, 205 U. S. 454; *cf. Gitlow* v. *New York*, 268 U. S. 652, 666 (freedom of speech); prosecute for crime by information rather than indictment, *Hurtado* v. *People of California*, 110 U. S. 516; regulate the price for storage of grain in warehouses and elevators, *Munn* v. *Illinois*, 94 U. S. 113. But this Court also held in a number of cases that colored people must, because of the Fourteenth Amendment, be accorded equal protection of the laws. See, *e. g.*, *Strauder* v. *West Virginia*, 100 U. S. 303; *cf. Virginia* v. *Rives*, 100 U. S. 313; see also *Yick Wo* v. *Hopkins*, 118 U. S. 356.

Thus, up to and for some years after 1873, when *Munn* v. *Illinois*, *supra*, was decided, this Court steadfastly declined to invalidate states' legislative regulation of property rights or business practices under the Fourteenth Amendment unless there were racial discrimination involved in the state law challenged. The first significant breach in this policy came in 1889, in *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418.[8] A state's railroad rate regulatory statute was there stricken as violative of the due process clause of the Fourteenth Amendment. This was accomplished by reference to a due process formula which did not necessarily operate so as to protect the Bill of Rights' personal liberty safeguards, but which gave a new and hitherto undiscovered scope for the Court's use of the due process clause to protect property rights under natural law concepts. And in 1896, in *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226,

[8] See *San Mateo County* v. *Southern P. R. Co.*, 116 U. S. 138; *Santa Clara County* v. *Southern P. R. Co.*, 118 U. S. 394, 396; Graham, The "Conspiracy Theory" of the Fourteenth Amendment, 47 Yale L. J. 371, 48 Yale L. J. 171.

this Court, in effect, overruled *Davidson* v. *New Orleans, supra,* by holding, under the new due process-natural law formula, that the Fourteenth Amendment forbade a state from taking private property for public use without payment of just compensation.[9]

Following the pattern of the new doctrine formalized in the foregoing decisions, the Court in 1896 applied the due process clause to strike down a state statute which had forbidden certain types of contracts. *Allgeyer* v. *Louisiana,* 165 U. S. 578. *Cf. Hoopeston Canning Co.* v. *Cullen,* 318 U. S. 313, 316, 318–319. In doing so, it substantially adopted the rejected argument of counsel in the *Slaughter-House* cases, that the Fourteenth Amendment guarantees the liberty of all persons under "natural law" to engage in their chosen business or vocation. In the *Allgeyer* opinion, *id.* at 589, the Court quoted with approval the concurring opinion of Mr. Justice Bradley in a second *Slaughter-House* case, *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746, 762, 764, 765, which closely fol-

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[9] This case was decided after *Hurtado* but before *Twining.* It apparently was the first decision of this Court which brought in a Bill of Rights provision under the due process clause. In *Davidson* v. *New Orleans,* 96 U. S. 97, 105 the Court had refused to make such a holding, saying that "it must be remembered that, when the Fourteenth Amendment was adopted, the provision on that subject [just compensation], in immediate juxtaposition in the fifth amendment with the one we are now construing [due process], was left out, and this [due process] was taken." Not only was the just compensation clause left out, but it was deliberately left out. A Committee on Reconstruction framed the Fourteenth Amendment, and its Journal shows that on April 21, 1866, the Committee by a 7 to 5 vote rejected a proposal to incorporate the just compensation clause in the Fourteenth Amendment. Journal of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. (1866), reprinted as Sen. Doc. No. 711, 63d Cong., 3d Sess. (1915) 29. As shown by the history of the Amendment's passage, however, the Framers thought that in the language they had included this protection along with all the other protections of the Bill of Rights. See Appendix, *infra.*

lowed one phase of the argument of his dissent in the original *Slaughter-House* cases—not that phase which argued that the Bill of Rights was applicable to the States. And in 1905, three years before the *Twining* case, *Lochner* v. *New York*, 198 U. S. 45, followed the argument used in *Allgeyer* to hold that the due process clause was violated by a state statute which limited the employment of bakery workers to sixty hours per week and ten hours per day.

The foregoing constitutional doctrine, judicially created and adopted by expanding the previously accepted meaning of "due process," marked a complete departure from the *Slaughter-House* philosophy of judicial tolerance of state regulation of business activities. Conversely, the new formula contracted the effectiveness of the Fourteenth Amendment as a protection from state infringement of individual liberties enumerated in the Bill of Rights. Thus the Court's second-thought interpretation of the Amendment was an about-face from the *Slaughter-House* interpretation and represented a failure to carry out the avowed purpose of the Amendment's sponsors.[10] This reversal is dramatized by the fact that the *Hurtado* case, which had rejected the due process clause as an instru-

[10] One writer observed, "That the Supreme Court has, on the one hand, refused to give this Amendment its evident meaning and purpose—thus completely defeating the intention of the Congress that framed it and of the people that adopted it. But, on the other hand, the Court has put into it a meaning which had never been intended either by its framers or adopters—thus in effect adopting a new Amendment and augmenting its own power by constituting itself that 'perpetual censor upon all legislation of the state,' which Mr. Justice Miller was afraid the Court would become if the Fourteenth Amendment were interpreted according to its true meaning and given the full effect intended by the people when they adopted it." 2 Boudin, Government by Judiciary (1932) 117. See also Haines, The Revival of Natural Law Concepts (1930) 143–165; Fairman, Mr. Justice Miller and the Supreme Court (1939) c. VIII.

ment for preserving Bill of Rights liberties and privileges, was cited as authority for expanding the scope of that clause so as to permit this Court to invalidate all state regulatory legislation it believed to be contrary to "fundamental" principles.

The *Twining* decision, rejecting the compelled testimony clause of the Fifth Amendment, and indeed rejecting all the Bill of Rights, is the end product of one phase of this philosophy. At the same time, that decision consolidated the power of the Court assumed in past cases by laying broader foundations for the Court to invalidate state and even federal regulatory legislation. For the *Twining* decision, giving separate consideration to "due process" and "privileges or immunities," went all the way to say that the "privileges or immunities" clause of the Fourteenth Amendment "did not forbid the States to abridge the personal rights enumerated in the first eight Amendments . . . ." *Twining* v. *New Jersey, supra,* 99. And in order to be certain, so far as possible, to leave this Court wholly free to reject all the Bill of Rights as specific restraints upon state action, the decision declared that even if this Court should decide that the due process clause forbids the states to infringe personal liberties guaranteed by the Bill of Rights, it would do so, not "because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law." *Ibid.*

At the same time that the *Twining* decision held that the states need not conform to the specific provisions of the Bill of Rights, it consolidated the power that the Court had assumed under the due process clause by laying even broader foundations for the Court to invalidate state and even federal regulatory legislation. For under the *Twining* formula, which includes non-regard for the first eight amendments, what are "fundamental rights" and in accord with "canons of decency," as the Court

said in *Twining*, and today reaffirms, is to be independently "ascertained from time to time by judicial action . . . ." *Id.* at 101; "what is due process of law depends on circumstances." *Moyer* v. *Peabody*, 212 U. S. 78, 84. Thus the power of legislatures became what this Court would declare it to be at a particular time independently of the specific guarantees of the Bill of Rights such as the right to freedom of speech, religion and assembly, the right to just compensation for property taken for a public purpose, the right to jury trial or the right to be secure against unreasonable searches and seizures. Neither the contraction of the Bill of Rights safeguards [11] nor the invalidation of regulatory laws [12] by this Court's appraisal of "circumstances" would readily be classified as the most satisfactory contribution of this Court to the nation. In 1912, four years after the *Twining* case was decided, a book written by Mr. Charles Wallace Collins gave the history of this Court's interpretation and application of the Fourteenth Amendment up to that time. It is not necessary for one fully to agree with all he said in

[11] See cases collected pp. 78–79 *supra*. Other constitutional rights left unprotected from state violation are, for example, right to counsel, *Betts* v. *Brady*, 316 U. S. 455; privilege against self-incrimination, *Feldman* v. *United States*, 322 U. S. 487, 490.

[12] Examples of regulatory legislation invalidated are: state ten-hour law for bakery employees, *Lochner* v. *New York*, 198 U. S. 45; *cf. Muller* v. *Oregon*, 208 U. S. 412; District of Columbia minimum wage for women, *Adkins* v. *Children's Hospital*, 261 U. S. 525; *Morehead* v. *New York*, 298 U. S. 587; but *cf. West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379; state law making it illegal to discharge employee for membership in a union, *Coppage* v. *Kansas*, 236 U. S. 1; *cf. Adair* v. *United States*, 208 U. S. 161; state law fixing price of gasoline, *Williams* v. *Standard Oil Co.*, 278 U. S. 235; state taxation of bonds, *Baldwin* v. *Missouri*, 281 U. S. 586; state law limiting amusement ticket brokerage, *Ribnik* v. *McBride*, 277 U. S. 350; law fixing size of loaves of bread to prevent fraud on public, *Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 504; *cf. Schmidinger* v. *Chicago*, 226 U. S. 578.

order to appreciate the sentiment of the following comment concerning the disappointments caused by this Court's interpretation of the Amendment.

> ". . . It was aimed at restraining and checking the powers of wealth and privilege. It was to be a charter of liberty for human rights against property rights. The transformation has been rapid and complete. It operates to-day to protect the rights of property to the detriment of the rights of man. It has become the Magna Charta of accumulated and organized capital." Collins, The Fourteenth Amendment and the States, (1912) 137–8.

That this feeling was shared, at least in part, by members of this Court is revealed by the vigorous dissents that have been written in almost every case where the *Twining* and *Hurtado* doctrines have been applied to invalidate state regulatory laws.[13]

Later decisions of this Court have completely undermined that phase of the *Twining* doctrine which broadly precluded reliance on the Bill of Rights to determine what is and what is not a "fundamental" right. Later cases have also made the *Hurtado* case an inadequate support for this phase of the *Twining* formula. For despite *Hurtado* and *Twining,* this Court has now held that the Fourteenth Amendment protects from state invasion the following "fundamental" rights safeguarded by the Bill of Rights: right to counsel in criminal cases, *Powell* v. *Alabama,* 287 U. S. 45, 67, limiting the *Hurtado* case; see also *Betts* v. *Brady,* 316 U. S. 455, and *De Meerleer* v. *Michigan,* 329 U. S. 663; freedom of assembly, *De Jonge* v. *Oregon,* 299 U. S. 353, 364; at the very least, certain types of cruel and unusual punishment and former jeopardy, *State of Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459; the right of an accused in a criminal case to be in-

[13] See particularly dissents in cases cited notes 11 and 12, *supra.*

formed of the charge against him, see *Snyder* v. *Massachusetts,* 291 U. S. 97, 105; the right to receive just compensation on account of taking private property for public use, *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226. And the Court has now through the Fourteenth Amendment literally and emphatically applied the First Amendment to the States in its very terms. *Everson* v. *Board of Education,* 330 U. S. 1; *Board of Education* v. *Barnette,* 319 U. S. 624, 639; *Bridges* v. *California,* 314 U. S. 252, 268.

In *Palko* v. *Connecticut, supra,* a case which involved former jeopardy only, this Court re-examined the path it had traveled in interpreting the Fourteenth Amendment since the *Twining* opinion was written. In *Twining* the Court had declared that none of the rights enumerated in the first eight amendments were protected against state invasion because they were incorporated in the Bill of Rights. But the Court in *Palko, supra,* at 323, answered a contention that all eight applied with the more guarded statement, similar to that the Court had used in *Maxwell* v. *Dow, supra* at 597, that "there is no such general rule." Implicit in this statement, and in the cases decided in the interim between *Twining* and *Palko* and since, is the understanding that some of the eight amendments do apply by their very terms. Thus the Court said in the *Palko* case that the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the "freedom of speech which the First Amendment safeguards against encroachment by the Congress . . . or the like freedom of the press . . . or the free exercise of religion . . . , or the right of peaceable assembly . . . or the right of one accused of crime to the benefit of counsel . . . . In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered

liberty, and thus, through the Fourteenth Amendment, become valid as against the states." *Id.* at 324–325. The Court went on to describe the Amendments made applicable to the States as "the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption." *Id.* at 326. In the *Twining* case fundamental liberties were things apart from the Bill of Rights. Now it appears that at least some of the provisions of the Bill of Rights in their very terms satisfy the Court as sound and meaningful expressions of fundamental liberty. If the Fifth Amendment's protection against self-incrimination be such an expression of fundamental liberty, I ask, and have not found a satisfactory answer, why the Court today should consider that it should be "absorbed" in part but not in full? *Cf.* Warren, The New "Liberty" under the Fourteenth Amendment, 39 Harv. L. Rev. 431, 458–461 (1926). Nothing in the *Palko* opinion requires that when the Court decides that a Bill of Rights' provision is to be applied to the States, it is to be applied piecemeal. Nothing in the *Palko* opinion recommends that the Court apply part of an amendment's established meaning and discard that part which does not suit the current style of fundamentals.

The Court's opinion in *Twining,* and the dissent in that case, made it clear that the Court intended to leave the states wholly free to compel confessions, so far as the Federal Constitution is concerned. *Twining* v. *New Jersey, supra,* see particularly pp. 111–114, 125–126. Yet in a series of cases since *Twining* this Court has held that the Fourteenth Amendment does bar all American courts, state or federal, from convicting people of crime on coerced confessions. *Chambers* v. *Florida,* 309 U. S. 227; *Ashcraft* v. *Tennessee,* 322 U. S. 143, 154–155, and cases cited. Federal courts cannot do so because of the Fifth Amend-

ment. *Bram* v. *United States,* 168 U. S. 532, 542, 562–563. And state courts cannot do so because the principles of the Fifth Amendment are made applicable to the States through the Fourteenth by one formula or another. And taking note of these cases, the Court is careful to point out in its decision today that coerced confessions violate the Federal Constitution if secured "by fear of hurt, torture or exhaustion." Nor can a state, according to today's decision, constitutionally compel an accused to testify against himself by "any other type of coercion that falls within the scope of due process." Thus the Court itself destroys or at least drastically curtails the very *Twining* decision it purports to reaffirm. It repudiates the foundation of that opinion, which presented much argument to show that compelling a man to testify against himself does not "violate" a "fundamental" right or privilege.

It seems rather plain to me why the Court today does not attempt to justify all of the broad *Twining* discussion. That opinion carries its own refutation on what may be called the factual issue the Court resolved. The opinion itself shows, without resort to the powerful argument in the dissent of Mr. Justice Harlan, that outside of Star Chamber practices and influences, the "English-speaking" peoples have for centuries abhorred and feared the practice of compelling people to convict themselves of crime. I shall not attempt to narrate the reasons. They are well known and those interested can read them in both the majority and dissenting opinions in the *Twining* case, in *Boyd* v. *United States,* 116 U. S. 616, and in the cases cited in notes 8, 9, 10, and 11 of *Ashcraft* v. *Tennessee, supra.* Nor does the history of the practice of compelling testimony in this country, relied on in the *Twining* opinion, support the degraded rank which that opinion gave the Fifth Amendment's privilege against compulsory self-incrimination. I think the history there recited by the Court belies its conclusion.

The Court in *Twining* evidently was forced to resort for its degradation of the privilege to the fact that Governor Winthrop in trying Mrs. Anne Hutchinson in 1627 was evidently "not aware of any privilege against self-incrimination or conscious of any duty to respect it." *Id.* at 103–104. Of course not.[14] Mrs. Hutchinson was tried, if trial it can be called, for holding unorthodox religious views.[15] People with a consuming belief that their religious convictions must be forced on others rarely ever believe that the unorthodox have any rights which should or can be rightfully respected. As a result of her trial and compelled admissions, Mrs. Hutchinson was found guilty of unorthodoxy and banished from Massachusetts. The lamentable experience of Mrs. Hutchinson and others, contributed to the overwhelming sentiment that demanded adoption

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[14] Actually it appears that the practice of the Court of Star Chamber of compelling an accused to testify under oath in Lilburn's trial, 3 Howell's State Trials 1315; 4 *id.*, 1269, 1280, 1292, 1342, had helped bring to a head the popular opposition which brought about the demise of that engine of tyranny. 16 Car. I, cc. 10, 11. See 8 Wigmore, Evidence (1940) pp. 292, 298; Pittman, The Colonial and Constitutional History of the Privilege Against Self-incrimination, 21 Va. L. Rev. 763, 774 (1935). Moreover, it has been pointed out that seven American state constitutions guaranteed a privilege against self-incrimination prior to 1789. Pittman, *supra*, 765; Md. Const. (1776), 1 Poore Constitutions (1878) 818; Mass. Const. (1780), *id.* at 958; N. C. Const. (1776), 2 *id.* at 1409; N. H. Const. (1784), *id.* at 1282; Pa. Const. (1776), *id.* at 1542; Vt. Const. (1777), *id.* at 1860; Va. Bill of Rights (1776), *id.* at 1909.

By contrast it has been pointed out that freedom of speech was not protected by colonial or state constitutions prior to 1789 except for the right to speak freely in sessions of the legislatures. See Warren, The New "Liberty" under the Fourteenth Amendment, 39 Harv. L. Rev. 431, 461 (1926).

[15] For accounts of the proceedings against Mrs. Hutchinson, see 1 Hart, American History Told by Contemporaries, 382 ff. (1897); Beard, The Rise of American Civilization (1930) 57; 1 Andrews, The Colonial Period of American History, 485 (1934).

of a Constitutional Bill of Rights. The founders of this Government wanted no more such "trials" and punishments as Mrs. Hutchinson had to undergo. They wanted to erect barriers that would bar legislators from passing laws that encroached on the domain of belief, and that would, among other things, strip courts and all public officers of a power to compel people to testify against themselves. See Pittman, *supra* at 789.

I cannot consider the Bill of Rights to be an outworn 18th Century "strait jacket" as the *Twining* opinion did. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. If the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process. But rather than accept either of these choices, I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.

Conceding the possibility that this Court is now wise enough to improve on the Bill of Rights by substituting natural law concepts for the Bill of Rights, I think the possibility is entirely too speculative to agree to take that course. I would therefore hold in this case that the full protection of the Fifth Amendment's proscription against compelled testimony must be afforded by California. This I would do because of reliance upon the original purpose of the Fourteenth Amendment.

It is an illusory apprehension that literal application of some or all of the provisions of the Bill of Rights to the States would unwisely increase the sum total of the powers of this Court to invalidate state legislation. The Federal Government has not been harmfully burdened by the requirement that enforcement of federal laws affecting civil liberty conform literally to the Bill of Rights. Who would advocate its repeal? It must be conceded, of course, that the natural-law-due-process formula, which the Court today reaffirms, has been interpreted to limit substantially this Court's power to prevent state violations of the individual civil liberties guaranteed by the Bill of Rights.[16] But this formula also has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government.

Since *Marbury* v. *Madison*, 1 Cranch 137, was decided, the practice has been firmly established, for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a consti-

[16] See, *e. g.*, *Betts* v. *Brady*, 316 U. S. 455; *Feldman* v. *United States*, 322 U. S. 487.

tutional provision, thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; [17] to invalidate statutes because of application of "natural law" deemed to be above and undefined by the Constitution is another.[18] "In the one instance, courts proceeding within

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[17] See *Chambers* v. *Florida*, 309 U. S. 227; *Polk Co.* v. *Glover*, 305 U. S. 5, 12–19; *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419, 423, 428; *Milk Wagon Drivers* v. *Meadowmoor Dairies*, 312 U. S. 287, 299, 301; *Betts* v. *Brady*, 316 U. S. 455, 474; *International Shoe Co.* v. *Washington*, 326 U. S. 310, 322, 324–326; *Feldman* v. *United States*, 322 U. S. 487, 494, 495; *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 619, 620; *United Gas Co.* v. *Texas*, 303 U. S. 123, 146, 153; *Gibbs* v. *Buck*, 307 U. S. 66, 79.

[18] An early and prescient exposé of the inconsistency of the natural law formula with our constitutional form of government appears in the concurring opinion of Mr. Justice Iredell in *Calder* v. *Bull*, 3 Dall. 386, 398, 399: "If any act of Congress, or of the Legislature of a state, violates . . . constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice."

See also Haines, The Law of Nature in State and Federal Decisions, 25 Yale L. J. 617 (1916); Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures, 2 Tex. L. Rev. 257 (1924), 3 Tex. L. Rev. 1 (1924); The Revival of Natural Law Concepts (1930); The American Doctrine of Judicial Supremacy (1932); The Role of the Supreme Court in American Government and Politics (1944).

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clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other, they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people." *Federal Power Commission* v. *Pipeline Co.*, 315 U. S. 575, 599, 601, n. 4.

MR. JUSTICE DOUGLAS joins in this opinion.

[For dissenting opinion of MURPHY, J., see *post*, p. 123.]

APPENDIX.

I.

The legislative origin of the first section of the Fourteenth Amendment seems to have been in the Joint Committee on Reconstruction. That Committee had been appointed by a concurrent resolution of the House and Senate with authority to report "by bill or otherwise" whether the former Confederate States "are entitled to be represented in either House of Congress." Cong. Globe, 39th Cong., 1st Sess. (1865) 6, 30. The broad mission of that Committee was revealed by its very first action of sending a delegation to President Johnson requesting him to "defer all further executive action in regard to reconstruction until this committee shall have taken action on that subject." Journal of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. (1866), reprinted as Sen. Doc. No. 711, 63d Cong., 3d Sess. (1915) 6. It immediately set about the business of drafting constitutional amendments which would outline the plan of reconstruction which it would recommend to Congress. Some of those proposed amendments related to suffrage and representation in the South. Journal, 7. On January 12, 1866, a subcommittee, consisting of Senators Fessenden (Chairman of the Reconstruction Com-

mittee) and Howard, and Congressmen Stevens, Bingham and Conkling, was appointed to consider those suffrage proposals. Journal, 9. There was at the same time referred to this Committee a "proposed amendment to the Constitution" submitted by Mr. Bingham that:

"The Congress shall have power to make all laws necessary and proper to secure to all persons in every State within this Union equal protection in their rights of life, liberty, and property." Journal, 9. Another proposed amendment that "All laws, State or national, shall operate impartially and equally on all persons without regard to race or color,"[1] was also referred to the Committee. Journal, 9. On January 24, 1866, the subcommittee reported back a combination of these two proposals which was not accepted by the full Committee. Journal, 13, 14. Thereupon the proposals were referred to a "select committee of three," Bingham, Boutwell and Rogers. Journal, 14. On January 27, 1866, Mr. Bingham on behalf of the select committee, presented this recommended amendment to the full committee:

"Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every State full protection in the enjoyment of life, liberty, and property; and to all citizens of the United States, in any State, the same immunities and also equal political rights and privileges." Journal, 14. This was not accepted. But on February 3, 1866, Mr. Bingham submitted an amended version: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, sec. 2); and to all persons in the several States equal protection

[1] Mr. Bingham and Mr. Stevens had introduced these same proposed amendments in the House prior to the establishment of the Reconstruction Committee. Cong. Globe, 39th Cong., 1st Sess. (1865) 10, 14.

in the rights of life, liberty, and property (5th amendment)." This won committee approval, Journal, 17, and was presented by Mr. Bingham to the House on behalf of the Committee on February 13, 1866. Cong. Globe, *supra,* 813.

II.

When, on February 26, the proposed amendment came up for debate, Mr. Bingham stated that "by order . . . of the committee . . . I propose the adoption of this amendment." In support of it he said:

". . . the amendment proposed stands in the very words of the Constitution of the United States as it came to us from the hands of its illustrious framers. Every word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States. The residue of the resolution, as the House will see by a reference to the Constitution, is the language of the second section of the fourth article, and of a portion of the fifth amendment adopted by the First Congress in 1789, and made part of the Constitution of the country. . . .

"Sir, it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution. Nothing can be plainer to thoughtful men than that if the grant of power had been originally conferred upon the Congress of the nation, and legislation had been upon your statute-books to enforce these requirements of the Constitution in every State, that rebellion, which has scarred and blasted the land, would have been an impossibility. . . .

. . . . . .

"And, sir, it is equally clear by every construction of the Constitution, its contemporaneous construction, its con-

tinued construction, legislative, executive, and judicial, that these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States. . . ." Cong. Globe, *supra,* 1033–1034.

Opposition speakers emphasized that the Amendment would destroy state's rights and empower Congress to legislate on matters of purely local concern. Cong. Globe, *supra,* 1054, 1057, 1063–1065, 1083, 1085–1087. See also *id.* at 1082. Some took the position that the Amendment was unnecessary because the Bill of Rights were already secured against state violation. *Id.* at 1059, 1066, 1088. Mr. Bingham joined issue on this contention:

"The gentleman seemed to think that all persons could have remedies for all violations of their rights of 'life, liberty, and property' in the Federal courts.

"I ventured to ask him yesterday when any action of that sort was ever maintained in any of the Federal courts of the United States to redress the great wrong which has been practiced, and which is being practiced now in more States than one of the Union under the authority of State laws, denying to citizens therein equal protection or any protection in the rights of life, liberty, and property.

. . . . . .

". . . A gentleman on the other side interrupted me and wanted to know if I could cite a decision showing that the power of the Federal Government to enforce in the United States courts the bill of rights under the articles of amendment to the Constitution had been denied. I answered that I was prepared to introduce such decisions; and that is exactly what makes plain the necessity of adopting this amendment.

"Mr. Speaker, on this subject I refer the House and the country to a decision of the Supreme Court, to be found in 7 Peters, 247, in the case of Barron *vs.* The Mayor and City

Council of Baltimore, involving the question whether the provisions of the fifth article of the amendments to the Constitution are binding upon the State of Maryland and to be enforced in the Federal courts. The Chief Justice says:

> " 'The people of the United States framed such a Government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this Government were to be exercised by itself; and the limitations of power, if expressed in general terms, are naturally, and we think necessarily, applicable to the Government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments, framed by different persons and for different purposes.
>
> " 'If these propositions be correct, the fifth amendment must be understood as restraining the power of the General Government, not as applicable to the States.'

"I read one further decision on this subject—the case of the Lessee of Livingston *vs.* Moore and others, 7 Peters, page 551. The court, in delivering its opinion, says:

> " 'As to the amendments of the Constitution of the United States, they must be put out of the case, since it is now settled that those amendments do not extend to the States; and this observation disposes of the next exception, which relies on the seventh article of those amendments.'
>
> . . . . .

"The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution? . . . Is the bill of rights to stand in

our Constitution hereafter, as in the past five years within eleven States, a mere dead letter? It is absolutely essential to the safety of the people that it should be enforced.

"Mr. Speaker, it appears to me that this very provision of the bill of rights brought in question this day, upon this trial before the House, more than any other provision of the Constitution, makes that unity of government which constitutes us one people, by which and through which American nationality came to be, and only by the enforcement of which can American nationality continue to be.

. . . . . .

"What more could have been added to that instrument to secure the enforcement of these provisions of the bill of rights in every State, other than the additional grant of power which we ask this day? . . .

"As slaves were not protected by the Constitution, there might be some color of excuse for the slave States in their disregard for the requirement of the bill of rights as to slaves and refusing them protection in life or property . . . .

"But, sir, there never was even colorable excuse, much less apology, for any man North or South claiming that any State Legislature or State court, or State Executive, has any right to deny protection to any free citizen of the United States within their limits in the rights of life, liberty, and property. Gentlemen who oppose this amendment oppose the grant of power to enforce the bill of rights. Gentlemen who oppose this amendment simply declare to these rebel States, go on with your confiscation statutes, your statutes of banishment, your statutes of unjust imprisonment, your statutes of murder and death against men because of their loyalty to the Constitution and Government of the United States." *Id.* at 1089–1091.

". . . Where is the power in Congress, unless this or some similar amendment be adopted, to prevent the reën-

actment of those infernal statutes . . .? Let some man answer. Why, sir, the gentleman from New York [Mr. HALE] . . . yesterday gave up the argument on this point. He said that the citizens must rely upon the State for their protection. I admit that such is the rule under the Constitution as it now stands." *Id.* at 1093.

As one important writer on the adoption of the Fourteenth Amendment has observed, "Bingham's speech in defense and advocacy of his amendment comprehends practically everything that was said in the press or on the floor of the House in favor of the resolution . . . ." Kendrick, Journal of the Joint Committee on Reconstruction (1914) 217. A reading of the debates indicates that no member except Mr. Hale had contradicted Mr. Bingham's argument that without this Amendment the states had power to deprive persons of the rights guaranteed by the first eight amendments. Mr. Hale had conceded that he did not "know of a case where it has ever been decided that the United States Constitution is sufficient for the protection of the liberties of the citizen." Cong. Globe, *supra,* at 1064. But he was apparently unaware of the decision of this Court in *Barron* v. *Baltimore, supra.* For he thought that the protections of the Bill of Rights had already been "thrown over us in some way, whether with or without the sanction of a judicial decision . . . ." And in any event, he insisted, ". . . the American people have not yet found that their State governments are insufficient to protect the rights and liberties of the citizen." He further objected, as had most of the other opponents to the proposal, that the Amendment authorized the Congress to "arrogate" to itself vast powers over all kinds of affairs which should properly be left to the States. Cong. Globe, *supra,* 1064–1065.

When Mr. Hotchkiss suggested that the amendment should be couched in terms of a prohibition against the States in addition to authorizing Congress to legislate

against state deprivations of privileges and immunities, debate on the amendment was postponed until the second Tuesday of April, 1866. Cong. Globe, *supra,* 1095.

III.

Important events which apparently affected the evolution of the Fourteenth Amendment transpired during the period during which discussion of it was postponed. The Freedman's Bureau Bill which made deprivation of certain civil rights of negroes an offense punishable by military tribunals had been passed. It applied, not to the entire country, but only to the South. On February 19, 1866, President Johnson had vetoed the bill principally on the ground that it was unconstitutional. Cong. Globe, *supra,* 915. Forthwith, a companion proposal known as the Civil Rights Bill empowering federal courts to punish those who deprived any person anywhere in the country of certain defined civil rights was pressed to passage. Senator Trumbull, Chairman of the Senate Judiciary Committee, who offered the bill in the Senate on behalf of that Committee, had stated that "the late slaveholding States" had enacted laws ". . . depriving persons of African descent of privileges which are essential to freemen . . . [S]tatutes of Mississippi . . . provide that . . . If any person of African descent residing in that State travels from one county to another without having a pass or a certificate of his freedom, he is liable to be committed to jail and to be dealt with as a person who is in the State without authority. Other provisions of the statute prohibit any negro or mulatto from having fire-arms; and one provision of the statute declares that for 'exercising the functions of a minister of the Gospel free negroes . . . on conviction, may be punished by . . . lashes . . . .' Other provisions . . . prohibit a free negro . . . from keeping a house of entertainment, and subject him to trial before two justices of the peace and five slaveholders for

violating . . . this law. The statutes of South Carolina make it a highly penal offense for any person, white or colored, to teach slaves; and similar provisions are to be found running through all the statutes of the late slave-holding States. . . . The purpose of the bill . . . is to destroy all these discriminations . . . ." Cong. Globe, *supra,* 474.

In the House, after Mr. Bingham's original proposal for a constitutional amendment had been rejected, the suggestion was also advanced that the bill secured for all "the right of speech, . . . transit, . . . domicil, . . . the right to sue, the writ of *habeas corpus,* and the right of petition." Cong. Globe, *supra,* 1263. And an opponent of the measure, Mr. Raymond, conceded that it would guarantee to the negro "the right of free passage . . . He has a defined *status* . . . a right to defend himself . . . to bear arms . . . to testify in the Federal courts . . . ." Cong. Globe, *supra,* 1266–1267. But opponents took the position that without a constitutional amendment such as that proposed by Mr. Bingham, the Civil Rights Bill would be unconstitutional. Cong. Globe, *supra,* 1154–1155, 1263.

Mr. Bingham himself vigorously opposed and voted against the Bill. His objection was twofold: First, insofar as it extended the protections of the Bill of Rights as against state invasion, he believed the measure to be unconstitutional because of the Supreme Court's holding in *Barron* v. *Baltimore, supra.* While favoring the extension of the Bill of Rights guarantees as against state invasion, he thought this could be done only by passage of his amendment. His second objection to the Bill was that, in his view, it would go beyond his objective of making the states observe the Bill of Rights and would actually strip the states of power to govern, centralizing all power in the Federal Government. To this he was opposed. His views are in part reflected by his own remarks and the answers to him by Mr. Wilson. Mr. Bingham said, in part:

". . . I do not oppose any legislation which is authorized by the Constitution of my country to enforce in its letter and its spirit the bill of rights as embodied in that Constitution. I know that the enforcement of the bill of rights is the want of the Republic. I know if it had been enforced in good faith in every State of the Union the calamities and conflicts and crimes and sacrifices of the past five years would have been impossible.

"But I feel that I am justified in saying, in view of the text of the Constitution of my country, in view of all its past interpretations, in view of the manifest and declared intent of the men who framed it, the enforcement of the bill of rights, touching the life, liberty, and property of every citizen of the Republic within every organized State of the Union, is of the reserve powers of the States, to be enforced by State tribunals . . . .

". . . I am with him in an earnest desire to have the bill of rights in your Constitution enforced everywhere. But I ask that it be enforced in accordance with the Constitution of my country.

. . . . . .

". . . I submit that the term civil rights includes every right that pertains to the citizen under the Constitution, laws, and Government of this country. . . .

. . . . . .

". . . The law in every State should be just; it should be no respecter of persons. It is otherwise now, and it has been otherwise for many years in many of the States of the Union. I should remedy that not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future. . . ."

. . . . . .

"If the bill of rights, as has been solemnly ruled by the Supreme Court of the United States, does not limit the powers of States and prohibit such gross injustice by

States, it does limit the power of Congress and prohibit any such legislation by Congress.

. . . . . .

". . . [T]he care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution. . . ." Cong. Globe, *supra,* 1291–1292.

Mr. Wilson, House sponsor of the Civil Rights Bill, answered Mr. Bingham's objections to it with these remarks:

"The gentleman from Ohio tells the House that civil rights involve all the rights that citizens have under the Government; that in the term are embraced those rights which belong to the citizen of the United States as such, and those which belong to a citizen of a State as such; and that this bill is not intended merely to enforce equality of rights, so far as they relate to citizens of the United States, but invades the States to enforce equality of rights in respect to those things which properly and rightfully depend on State regulations and laws. . . .

". . . I find in the bill of rights which the gentleman desires to have enforced by an amendment to the Constitution that 'no person shall be deprived of life, liberty, or property without due process of law.' I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named, and these are the rights to

which this bill relates, having nothing to do with subjects submitted to the control of the several States." Cong. Globe, *supra* at 1294.

In vetoing the Civil Rights Bill, President Johnson said among other things that the bill was unconstitutional for many of the same reasons advanced by Mr. Bingham:

"Hitherto every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the States. . . . As respects the Territories, they come within the power of Congress, for as to them, the law-making power is the Federal power; but as to the States no similar provisions exist, vesting in Congress the power 'to make rules and regulations' for them." Cong. Globe, *supra,* 1679, 1680.

The bill, however, was passed over President Johnson's veto and in spite of the constitutional objections of Bingham and others. Cong. Globe, *supra,* 1809, 1861.

IV.

Thereafter the scene changed back to the Committee on Reconstruction. There Mr. Stevens had proposed an amendment, § 1 of which provided "No discrimination shall be made by any State, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude." Journal, 28. Mr. Bingham proposed an additional section providing that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Journal, 30. After the committee had twice declined to recommend Mr. Bingham's proposal, on April 28 it was accepted by the Committee, substantially in the form he had proposed it, as § 1 of the recommended Amendment. Journal, 44.

V.

In introducing the proposed Amendment to the House on May 8, 1866, Mr. Stevens speaking for the Committee said:

"The first section [of the proposed amendment] prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the 'equal' protection of the laws.

"I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." Cong. Globe, 2459.[2]

On May 23, 1866, Senator Howard introduced the proposed amendment to the Senate in the absence of Senator Fessenden who was sick. Senator Howard prefaced his remarks by stating:

"I . . . present to the Senate . . . the views and the motives [of the Reconstruction Committee] . . . . One result of their investigations has been the joint resolution for the amendment of the Constitution of the United States now under consideration. . . .

"The first section of the amendment . . . submitted for the consideration of the two Houses relates to the privileges and immunities of citizens of the several States,

[2] It has been said of Stevens' statement: "He evidently had reference to the Bill of Rights, for it is in it that most of the privileges are enumerated, and besides it was not applicable to the States." Flack, The Adoption of the Fourteenth Amendment (1908) 75.

and to the rights and privileges of all persons, whether citizens or others, under the laws of the United States. . . .

"It will be observed that this is a general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States. That is its first clause, and I regard it as very important. It also prohibits each one of the States from depriving any person of life, liberty, or property without due process of law, or denying to any person within the jurisdiction of the State the equal protection of its laws.

. . . . . .

"It would be a curious question to solve what are the privileges and immunities of citizens of each of the States in the several States. . . . I am not aware that the Supreme Court have ever undertaken to define either the nature or extent of the privileges and immunities thus guarantied. . . . But we may gather some intimation of what probably will be the opinion of the judiciary by referring to . . . Corfield *vs.* Coryell . . . 4 Washington's Circuit Court Reports, page 380. [Here Senator Howard quoted at length from that opinion.]

"Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner;

the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

"Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it, are secured to the citizens solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.

"Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions,

which may be altered from year to year. The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." Cong. Globe, *supra,* 2765.

Mr. Bingham had closed the debate in the House on the proposal prior to its consideration by the Senate. He said in part:

". . . [M]any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.

. . . . . .

"It was an approbrium to the Republic that for fidelity to the United States they could not by national law be protected against the degrading punishment inflicted on slaves and felons by State law. That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment." Cong. Globe, *supra,* 2542–2543.

Both proponents and opponents of § 1 of the amendment spoke of its relation to the Civil Rights Bill which had been previously passed over the President's veto. Some considered that the amendment settled any doubts there might be as to the constitutionality of the Civil Rights Bill. Cong. Globe, 2511, 2896. Others maintained that the Civil Rights Bill would be unconstitutional

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unless and until the amendment was adopted. Cong. Globe, 2461, 2502, 2506, 2513, 2961. Some thought that amendment was nothing but the Civil Rights "in another shape." Cong. Globe, 2459, 2462, 2465, 2467, 2498, 2502. One attitude of the opponents was epitomized by a statement by Mr. Shanklin that the amendment strikes "down the reserved rights of the States, . . . declared by the framers of the Constitution to belong to the States exclusively and necessary for the protection of the property and liberty of the people. The first section of this proposed amendment . . . is to strike down those State rights and invest all power in the General Government." Cong. Globe, *supra,* 2500. See also Cong. Globe, *supra,* 2530, 2538.

Except for the addition of the first sentence of § 1 which defined citizenship, Cong. Globe, *supra,* 2869, the amendment weathered the Senate debate without substantial change. It is significant that several references were made in the Senate debate to Mr. Bingham's great responsibility for § 1 of the amendment as passed by the House. See *e. g.* Cong. Globe, *supra,* 2896.

VI.

Also just prior to the final votes in both Houses passing the resolution of adoption, the Report of the Joint Committee on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess. (1866); Sen. Rep. No. 112, 39th Cong., 1st Sess. (1866), was submitted. Cong. Globe, *supra,* 3038, 3051. This report was apparently not distributed in time to influence the debates in Congress. But a student of the period reports that 150,000 copies of the Report and the testimony which it contained were printed in order that senators and representatives might distribute them among their constituents. Apparently the Report was widely reprinted in the press and used as a campaign document

in the election of 1866. Kendrick, Journal of the Joint Committee on Reconstruction (1914) 265. According to Kendrick the Report was "eagerly . . . perused" for information concerning "conditions in the South." Kendrick, *supra,* 265.

The Report of the Committee had said with reference to the necessity of amending the Constitution:

". . . [T]he so-called Confederate States are not, at present, entitled to representation in the Congress of the United States; that, before allowing such representation, adequate security for future peace and safety should be required; that this can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic . . . ." Report, *supra,* XXI.

Among the examples recited by the testimony were discrimination against negro churches and preachers by local officials and criminal punishment of those who attended objectionable church services. Report, Part II, 52. Testimony also cited recently enacted Louisiana laws which made it "a highly penal offence for anyone to do anything that might be construed into encouraging the blacks to leave the persons with whom they had made contracts for labor . . . ." Report, Part III, p. 25.[3]

Flack, *supra* at 142, who canvassed newspaper coverage and speeches concerning the popular discussion of the adoption of the Fourteenth Amendment, indicates that

[3] In a widely publicized report to the President which was also submitted to the Congress, Carl Schurz had reviewed similar incidents and emphasized the fact that negroes had been denied the right to bear arms, own property, engage in business, to testify in Court, and that local authorities had arrested them without cause and tried them without juries. Sen. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865) 23, 24, 26, 36. See also Report of Commissioner of Freedman's Bureau, H. Exec. Doc. No. 70, 39th Cong., 1st Sess. (1866) 41, 47, 48, 233, 236, 265, 376.

Senator Howard's speech stating that one of the purposes of the first section was to give Congress power to enforce the Bill of Rights, as well as extracts and digests of other speeches were published widely in the press. Flack summarizes his observation that

"The declarations and statements of newspapers, writers and speakers, . . . show very clearly, . . . the general opinion held in the North. That opinion, briefly stated, was that the Amendment embodied the Civil Rights Bill and gave Congress the power to define and secure the privileges of citizens of the United States. There does not seem to have been any statement at all as to whether the first eight Amendments were to be made applicable to the States or not, whether the privileges guaranteed by those Amendments were to be considered as privileges secured by the Amendment, but it may be inferred that this was recognized to be the logical result by those who thought that the freedom of speech and of the press as well as due process of law, including a jury trial, were secured by it." Flack, *supra,* 153–154.

VII.

Formal statements subsequent to adoption of the Amendment by the congressional leaders who participated in the drafting and enactment of it are significant. In 1871, a bill was before the House which contemplated enforcement of the Fourteenth Amendment. Mr. Garfield, who had participated in the debates on the Fourteenth Amendment in 1866, said:

"I now come to consider . . . for it is the basis of the pending bill, the fourteenth amendment. I ask the attention of the House to the first section of that amendment, as to its scope and meaning. I hope gentlemen will bear in mind that this debate, in which so many have taken part, will become historical, as the earliest legislative construc-

tion given to this clause of the amendment. Not only the words which we put into the law, but what shall be said here in the way of defining and interpreting the meaning of the clause, may go far to settle its interpretation and its value to the country hereafter." Cong. Globe, 42d Cong., 1st Sess. (1871) App. 150.

"The next clause of the section under debate declares: 'Nor shall any State deprive any person of life, liberty, or property, without due process of law.'

"This is copied from the fifth article of amendments, with this difference: as it stood in the fifth article it operated only as a restraint upon Congress, while here it is a direct restraint upon the governments of the States. The addition is very valuable. It realizes the full force and effect of the clause in Magna Charta, from which it was borrowed; and there is now no power in either the State or the national Government to deprive any person of those great fundamental rights on which all true freedom rests, the rights of life, liberty, and property, except by due process of law; that is, by an impartial trial according to the laws of the land. . . ." Cong. Globe, *supra,* at 152–3.

A few days earlier, in a debate on this same bill to enforce the Fourteenth Amendment, Mr. Bingham, still a member of Congress, had stated at length his understanding of the purpose of the Fourteenth Amendment as he had originally conceived it:

"Mr. Speaker, the honorable gentleman from Illinois [Mr. FARNSWORTH] did me unwittingly, great service, when he ventured to ask me why I changed the form of the first section of the fourteenth article of amendment from the form in which I reported it to the House in February, 1866, from the Committee on Reconstruction. I will answer the gentleman, sir, and answer him truthfully. I had the honor to frame the amendment as reported in February, 1866, and the first section, as it now

stands, letter for letter and syllable for syllable, in the fourteenth article of the amendments to the Constitution of the United States, save the introductory clause defining citizens. The clause defining citizens never came from the joint Committee on Reconstruction, but the residue of the first section of the fourteenth amendment did come from the committee precisely as I wrote it and offered it in the Committee on Reconstruction, and precisely as it now stands in the Constitution . . . .

"That is the grant of power. It is full and complete. The gentleman says that amendment differs from the amendment reported by me in February; differs from the provision introduced and written by me, now in the fourteenth article of amendments. It differs in this: that it is, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition.

. . . . .

"The gentleman ventured upon saying that this amendment does not embrace all of the amendment prepared and reported by me with the consent of the committee in February, 1866. The amendment reported in February, and to which the gentleman refers, is as follows: 'The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.'

"That is the amendment, and the whole of it, as reported in February, 1866. That amendment never was rejected by the House or Senate. A motion was made to lay it on the table, which was a test vote on the merits of it, and the motion failed . . . . I consented to and voted for the motion to postpone it . . . . Afterward, in the joint

Committee on Reconstruction, I introduced this amendment, in the precise form, as I have stated, in which it was reported, and as it now stands in the Constitution of my country. . . .

. . . . . .

"I answer the gentleman, how I came to change the form of February to the words now in the first section of the fourteenth article of amendment, as they stand, and I trust will forever stand, in the Constitution of my country. I had read—and that is what induced me to attempt to impose by constitutional amendments new limitations upon the power of the States—the great decision of Marshall in Barron *vs.* the Mayor and City Council of Baltimore, wherein the Chief Justice said, in obedience to his official oath and the Constitution as it then was: 'The amendments [to the Constitution] contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.'—7 *Peters* p. 250.

"In this case the city had taken private property for public use, without compensation as alleged, and there was no redress for the wrong in the Supreme Court of the United States; and only for this reason, the first eight amendments were not limitations on the power of the States.

"And so afterward, in the case of the Lessee of Livingstone *vs.* Moore . . . the court ruled, 'it is now settled that the amendments [to the Constitution] do not extend to the States.' They were but limitations upon Congress. Jefferson well said of the first eight articles of amendments to the Constitution of the United States, they constitute the American Bill of Rights. Those amendments secured the citizens against any deprivation of any essential rights of person by any act of Congress, and among other things thereby they were secured

in their persons, houses, papers, and effects against unreasonable searches and seizures, in the inviolability of their homes in times of peace, by declaring that no soldier shall in time of peace be quartered in any house without the consent of the owner. They secured trial by jury; they secured the right to be informed of the nature and cause of accusations which might in any case be made against them; they secured compulsory process for witnesses, and to be heard in defense by counsel. They secured, in short, all the rights dear to the American citizen. And yet it was decided, and rightfully, that these amendments, defining and protecting the rights of men and citizens, were only limitations on the power of Congress, not on the power of the States.

"In reëxamining that case of Barron, Mr. Speaker, after my struggle in the House in February, 1866, to which the gentleman has alluded, I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: 'Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention.' Barron *vs.* The Mayor, &c., 7 Peters, 250.

"Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said 'no State shall emit bills of credit, pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts;' imitating their example and imitating it to the letter, I prepared the provision of the first section of the fourteenth amendment as it stands in the Constitution, as follows: 'No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law,

nor deny to any person within its jurisdiction the equal protection of the laws.'

"I hope the gentleman now knows why I changed the form of the amendment of February, 1866.

"Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States. Those eight amendments are as follows: [Here Mr. Bingham recited verbatim the first eight articles.]

"These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment. The words of that amendment, 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' are an express prohibition upon every State of the Union, which may be enforced under existing laws of Congress, and such other laws for their better enforcement as Congress may make.

"Mr. Speaker, that decision in the fourth of Washington's Circuit Court Reports, to which my learned colleague . . . has referred is only a construction of the second section, fourth article of the original Constitution, to wit, 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' In that case the court only held that in civil rights the State could not refuse to extend to citizens of other States the same general rights secured to its own.

"In the case of The United States *vs.* Primrose, Mr. Webster said that—'For the purposes of trade, it is evidently not in the power of any State to impose any hinderance or embarrassment, &c., upon citizens of other States, or to place them, on coming there, upon a different

footing from her own citizens.'—6 *Webster's Works,* 112.

"The learned Justice Story declared that—'The intention of the clause ("the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,") was to confer on the citizens of each State a general citizenship, and communicated all the privileges and immunities which a citizen of the same State would be entitled to under the same circumstances.'—*Story on the Constitution,* vol. 2, page 605.

"Is it not clear that other and different privileges and immunities than those to which a citizen of a State was entitled are secured by the provision of the fourteenth article, that no State shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment, and which were not limitations on the power of the States before the fourteenth amendment made them limitations?

"Sir, before the ratification of the fourteenth amendment, the State could deny to any citizen the right of trial by jury, and it was done. Before that the State could abridge the freedom of the press, and it was so done in half of the States of the Union. Before that a State, as in the case of the State of Illinois, could make it a crime punishable by fine and imprisonment for any citizen within her limits, in obedience to the injunction of our divine Master, to help a slave who was ready to perish; to give him shelter, or break with him his crust of bread. The validity of that State restriction upon the rights of conscience and the duty of life was affirmed, to the shame and disgrace of America, in the Supreme Court of the United States; but nevertheless affirmed in obedience to the requirements of the Constitution. . . .

"Under the Constitution as it is, not as it was, and by force of the fourteenth amendment, no State hereafter

can imitate the bad example of Illinois, to which I have referred, nor can any State ever repeat the example of Georgia and send men to the penitentiary, as did that State, for teaching the Indian to read the lessons of the New Testament, to know that new evangel, 'The pure in heart shall see God.'

. . . . .

". . . You say it is centralized power to restrain by law unlawful combinations in States against the Constitution and citizens of the United States, to enforce the Constitution and the rights of United States citizen [*sic.*] by national law, and to disperse by force, if need be, combinations too powerful to be overcome by judicial process, engaged in trampling underfoot the life and liberty, or destroying the property of the citizen.

. . . . .

"The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have already said, the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They denied trial by jury, and he had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials

of right as these in States and by States, or combinations of persons?

. . . . . .

"Mr. Speaker, I respectfully submit to the House and country that, by virtue of these amendments, it is competent for Congress to-day to provide by law that no man shall be held to answer in the tribunals of any State in this Union for any act made criminal by the laws of that State without a fair and impartial trial by jury. Congress never before has had the power to do it. It is also competent for Congress to provide that no citizen in any State shall be deprived of his property by State law or the judgment of a State court without just compensation therefor. Congress never before had the power so to declare. It is competent for the Congress of the United States to-day to declare that no State shall make or enforce any law which shall abridge the freedom of speech, the freedom of the press, or the right of the people peaceably to assemble together and petition for redress of grievances for these are of the rights of citizens of the United States defined in the Constitution and guarantied by the fourteenth amendment, and to enforce which Congress is thereby expressly empowered. . . ." Cong. Globe, 42d Cong., 1st Sess. (1871) App. 81, 83–85.

And the day after Mr. Garfield's address, Mr. Dawes, also a member of the 39th Congress, stated his understanding of the meaning of the Fourteenth Amendment:

"Sir, in the progress of constitutional liberty, when, in addition to those privileges and immunities [secured by the original Constitution] . . . , there were added from time to time, by amendments, others, and these were augmented, amplified, and secured and fortified in the buttresses of the Constitution itself, he hardly comprehended the full scope and measure of the phrase which appears in this bill. Let me read, one by one, these

amendments, and ask the House to tell me when and where and by what chosen phrase has man been able to bring before the Congress of the country a broader sweep of legislation than my friend has in the bill here. In addition to the original rights secured to him in the first article of amendments he had secured the free exercise of his religious belief, and freedom of speech and of the press. Then again he had secured to him the right to keep and bear arms in his defense. Then, after that, his home was secured in time of peace from the presence of a soldier; and, still further, sir, his house, his papers, and his effects were protected against unreasonable seizure. . . .

"Then, again, as if that were not enough, by another amendment he was secured against trial for any alleged offense except it be on the presentation of a grand jury, *and he was protected against ever giving testimony against himself.* [Italics supplied.] Then, sir, he was guarantied a speedy trial, and the right to confront every witness against him. Then in every controversy which should arise he had the right to have it decided by a jury of his peers. Then, sir, by another amendment, he was never to be required to give excessive bail, or be punished by cruel and unusual punishment. And still later, sir, after the bloody sacrifice of our four years' war, we gave the most grand of all these rights, privileges, and immunities, by one single amendment to the Constitution, to four millions of American citizens who sprang into being, as it were, by the wave of a magic wand. Still further, every person born on the soil was made a citizen and clothed with them all.

"It is all these, Mr. Speaker, which are comprehended in the words 'American citizen,' and it is to protect and to secure him in these rights, privileges, and immunities this bill is before the House. And the question to be settled is, whether by the Constitution, in which these provisions are

inserted, there is also power to guard, protect, and enforce these rights of the citizens; whether they are more, indeed, than a mere declaration of rights, carrying with it no power of enforcement . . . ." Cong. Globe, 42d Cong., 1st Sess. Part I (1871) 475, 476.

VIII.

Hereafter appear statements in opinions of this Court rendered after adoption of the Fourteenth Amendment and prior to the *Twining* case which indicate a belief that the Fourteenth Amendment, and particularly its privileges and immunities clause, was a plain application of the Bill of Rights to the states. See p. 75, note 6, *supra.*

In the *Slaughter-House* cases, 16 Wall. 36, 83, the dissenting opinion of Mr. Justice Field emphasized that the Fourteenth Amendment made a "citizen of a State . . . a citizen of the United States residing in that State." *Id.* at 95. But he enunciated a relatively limited number of privileges and immunities which he considered protected by national power from state interference by the Fourteenth Amendment. Apparently dissatisfied with the limited interpretation of Mr. Justice Field, Mr. Justice Bradley, although agreeing with all that Mr. Justice Field had said, wrote an additional dissent. *Id.* at 111. In it he said:

> "But we are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself. The Constitution, it is true, as it stood prior to the recent amendments, specifies, in terms, only a few of the personal privileges and immunities of citizens, but they are very comprehensive in their character. The States were merely prohibited from passing bills of

attainder, *ex post facto* laws, laws impairing the obligation of contracts, and perhaps one or two more. But others of the greatest consequence were enumerated, although they were only secured, in express terms, from invasion by the Federal government; such as the right of *habeas corpus,* the right of trial by jury, of free exercise of religious worship, the right of free speech and a free press, the right peaceably to assemble for the discussion of public measures, the right to be secure against unreasonable searches and seizures, and above all, and including almost all the rest, the right of *not being deprived of life, liberty, or property, without due process of law.* These, and still others are specified in the original Constitution, or in the early amendments of it, as among the privileges and immunities of citizens of the United States, or, what is still stronger for the force of the argument, the rights of all persons, whether citizens or not." *Id.* at 118–119; see also *id.* at 120–122.

Mr. Justice Swayne joined in this opinion but added his own not inconsistent views. *Id.* at 124.

But in *Walker* v. *Sauvinet,* 92 U. S. 90, 92, when a majority of the Court held that "A trial by jury in suits at common law pending in the State courts is not . . . a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge," Mr. Justice Field and Mr. Justice Clifford dissented from "the opinion and judgment of the court." *Id.* at 93.

In *Spies* v. *Illinois,* 123 U. S. 131, counsel for the petitioners, Mr. J. Randolph Tucker, after enumerating the protections of the Bill of Rights, took this position:

". . . Though originally the first ten Amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental

rights—common law rights—of the man, they make them privileges and immunities of the man as citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment. In other words, while the ten Amendments, as limitations on power, only apply to the Federal government, and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs, as citizens of the United States, and the Fourteenth Amendment as to such rights limits state power, as the ten Amendments had limited Federal power.

. . . . . .

". . . the rights declared in the first ten Amendments are to be regarded as privileges and immunities of citizens of the United States, which, as I insist, are protected as such by the Fourteenth Amendment." *Id.* at 151, 152.

The constitutional issues raised by this argument were not reached by the Court which disposed of the case on jurisdictional grounds.

However, Mr. Justice Field, in his dissenting opinion in *O'Neil* v. *Vermont,* 144 U. S. 323, 337, 361, stated that "after much reflection" he had become persuaded that the definition of privileges and immunities given by Mr. Tucker in *Spies* v. *Illinois, supra,* "is correct." And Mr. Justice Field went on to say that

"While, therefore, the ten Amendments, as limitations on power, and, so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the Federal government and not to the States, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as

to all such rights, places a limit upon state power by ordaining that no State shall make or enforce any law which shall abridge them. If I am right in this view, then every citizen of the United States is protected from punishments which are cruel and unusual. It is an immunity which belongs to him, against both state and Federal action. The State cannot apply to him, any more than the United States, the torture, the rack or thumbscrew, or any cruel and unusual punishment, or any more than it can deny to him security in his house, papers and effects against unreasonable searches and seizures, or compel him to be a witness against himself in a criminal prosecution. These rights, as those of citizens of the United States, find their recognition and guaranty against Federal action in the Constitution of the United States, and against state action in the Fourteenth Amendment. The inhibition by that Amendment is not the less valuable and effective because of the prior and existing inhibition against such action in the constitutions of the several States. . . . " *O'Neil* v. *Vermont, supra,* at 363.

Mr. Justice Harlan, and apparently Mr. Justice Brewer, concurred in this phase of Mr. Justice Field's dissent. *Id.* at 366, 370, 371.

For further exposition of these views see also the vigorous dissenting opinions of Mr. Justice Harlan in *Hurtado* v. *California,* 110 U. S. 516, 538, and *Maxwell* v. *Dow,* 176 U. S. 581, 605, as well as his dissenting opinion in *Twining* v. *New Jersey,* 211 U. S. 78, 114.

MR. JUSTICE MURPHY, with whom MR. JUSTICE RUTLEDGE concurs, dissenting.

While in substantial agreement with the views of MR. JUSTICE BLACK, I have one reservation and one addition to make.

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I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.

That point, however, need not be pursued here inasmuch as the Fifth Amendment is explicit in its provision that no person shall be compelled in any criminal case to be a witness against himself. That provision, as MR. JUSTICE BLACK demonstrates, is a constituent part of the Fourteenth Amendment.

Moreover, it is my belief that this guarantee against self-incrimination has been violated in this case. Under California law, the judge or prosecutor may comment on the failure of the defendant in a criminal trial to explain or deny any evidence or facts introduced against him. As interpreted and applied in this case, such a provision compels a defendant to be a witness against himself in one of two ways:

1. If he does not take the stand, his silence is used as the basis for drawing unfavorable inferences against him as to matters which he might reasonably be expected to explain. Thus he is compelled, through his silence, to testify against himself. And silence can be as effective in this situation as oral statements.

2. If he does take the stand, thereby opening himself to cross-examination, so as to overcome the effects of the provision in question, he is necessarily compelled to testify against himself. In that case, his testimony on cross-examination is the result of the coercive pressure of the provision rather than his own volition.

Much can be said pro and con as to the desirability of allowing comment on the failure of the accused to testify. But policy arguments are to no avail in the face of a clear constitutional command. This guarantee of freedom from self-incrimination is grounded on a deep respect for those who might prefer to remain silent before their accusers. To borrow language from *Wilson* v. *United States,* 149 U. S. 60, 66: "It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand."

We are obliged to give effect to the principle of freedom from self-incrimination. That principle is as applicable where the compelled testimony is in the form of silence as where it is composed of oral statements. Accordingly, I would reverse the judgment below.

BARTELS ET AL., DOING BUSINESS AS CRYSTAL BALLROOM, *v.* BIRMINGHAM, COLLECTOR OF INTERNAL REVENUE, ET AL.

NO. 731. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

Argued April 3, 1947.—Decided June 23, 1947.

1. Under the circumstances detailed in the opinion, the members of "name bands" which play short-term engagements at public dance halls are, for purposes of the taxes imposed by the Social Security Act, employees of the band leaders and not of the dance hall operators—notwithstanding contractual provisions designating the dance hall operators as their employers. Pp. 127–132.
2. An interpretive ruling on Treasury Regulations by the Commissioner of Internal Revenue, whereby the burden of the social security tax could be shifted by contractual arrangements from the band leaders to the dance hall operators, was in excess of the statutory power of the Commissioner and invalid. Pp. 130–132.

157 F. 2d 295, reversed.

Petitioners brought suits against the Collector of Internal Revenue for refunds of social security taxes. In one of the suits several band leaders were permitted to intervene as defendants. Judgments for the petitioners in the District Court were reversed by the Circuit Court of Appeals. 157 F. 2d 295. This Court granted certiorari. 329 U. S. 711. *Reversed,* p. 132.

Clyde B. Charlton and *Thomas B. Roberts* argued the cause for petitioners. With them on the brief were *George E. Brammer* and *Joseph I. Brody.*

Robert L. Stern argued the cause for Birmingham, Collector of Internal Revenue, respondent. With him on the

*Together with No. 732, *Geer et al., doing business as Larry Geer Ballrooms,* v. *Birmingham, Collector of Internal Revenue,* also on certiorari to the same Court.

brief were *Acting Solicitor General Washington, Sewall Key* and *Lyle M. Turner.*

Robert A. Wilson argued the cause for Williams et al., respondents in No. 731. With him on the brief were *Joseph A. Padway* and *Chauncey A. Weaver.*

MR. JUSTICE REED delivered the opinion of the Court.

Petitioners, operators of public dance halls, brought these actions, which were consolidated for trial, against the respondent Collector of Internal Revenue to recover taxes paid under the Social Security Act, Titles VIII and IX, and I. R. C., c. 9, subchap. A and C. Recovery depends on whether petitioners' arrangements for bands to play at the dance halls made the band leaders and other members of the bands employees of the petitioners or whether, despite the arrangements, the leaders were independent contractors and therefore themselves the employers of the other members. Several band leaders were allowed to intervene in the *Bartels* case as defendants to protect their own interests. After a recovery in the District Court, 59 F. Supp. 84, was reversed by the Circuit Court of Appeals, *Birmingham* v. *Bartels,* 157 F. 2d 295, petitioners sought certiorari which we granted because of the importance of the issue to the administration of the Act. 329 U. S. 711. See *United States* v. *Silk* and *Harrison* v. *Greyvan Lines,* 331 U. S. 704.

These cases are not concerned with musicians hired by petitioners to play regularly for their dance halls but with "name bands" hired to play for limited engagements at their establishments. These bands are built around a leader whose name, and distinctive style in the presentation and rendition of dance music, is intended to give each band a marked individuality. The leader contracts with different ballroom operators to play at their establishments for a contract price. Almost all of the engagements here involved were one-night stands, some few being

for several successive nights. The trial court found, and there is no real dispute, that the leader exercises complete control over the orchestra. He fixes the salaries of the musicians, pays them, and tells them what and how to play. He provides the sheet music and arrangements, the public address system, and the uniforms. He employs and discharges the musicians, and he pays agents' commissions, transportation and other expenses out of the sum received from the dance hall operators. Any excess is his profit and any deficit his personal loss. The operators of the dance halls furnish the piano but not the other instruments.

The American Federation of Musicians, of which the leaders and the musicians are members, adopted a standard contract known as "Form B." The terms of this contract create the difficulties in the determination of this case. As compensation to the bands, some contracts call for a guaranteed sum, with the privilege to the bands to take a percentage of the gross. Other contracts are for a fixed sum, only, and others for a percentage of gross, not to exceed a fixed sum. The contract states that the ballroom operator is the employer of the musicians and their leader, and "shall at all times have complete control of the services which the employees will render under the specifications of this contract." The form paragraph, so far as pertinent, is set out in the margin.[1] The District

[1] "Witnesseth, That the employer employs the personal services of the employees, as musicians severally, and the employees severally, through their representative, agree to render collectively to the employer services as musicians in the orchestra under the leadership of Griff Williams, according to the following terms and conditions:

. . . . . .

"The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including him-

Court found that the contract was adopted by the Union in order to shift the incidence of the social security taxes from the leader to the ballroom operator, and that it had no practical effect on the relations between the musicians, leader, and operator. The District Court held that the question of employment under the Act was one of fact, and that the contract was only one factor to be considered. Since the District Court believed that the contract was not entered into "by fair negotiation" and that its purpose was to protect the leaders from taxes as employers, it concluded that the contract was of no effect and that the leader was an independent contractor employing the musicians.

The Circuit Court of Appeals thought otherwise. It concluded that the test of employment was the common law test of control, *i. e.,* that one was an employer if he had the "right" to direct what should be done and how it should be done. It concluded that the contract between the parties gave the ballroom operators the "right" to control the musicians and the leader, whether or not the control was actually exercised. While the majority thought that such a contract was not binding on the Government, they thought it was binding on the parties and would control liability for employment taxes if the Bureau of Internal Revenue chose to accept the arrangement as valid. *Birmingham* v. *Bartels, supra,* at 300.

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self, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract. . . ."

The Government here relies entirely on the contract, conceding that otherwise the bandleaders are independent contractors employing the musicians. On the other hand, the bandleaders involved contend also that though the contract be thought inconclusive, the leaders and musicians are employees of the operators. They rely upon the dependence of the orchestra members upon the ballroom operators judged in the light of the purposes of the Act.

In *United States* v. *Silk, supra,* we held that the relationship of employer-employee, which determines the liability for employment taxes under the Social Security Act, was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker or workers. Obviously control is characteristically associated with the employer-employee relationship, but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service. In *Silk,* we pointed out that permanency of the relation, the skill required, the investment in the facilities for work, and opportunities for profit or loss from the activities were also factors that should enter into judicial determination as to the coverage of the Social Security Act. It is the total situation that controls. These standards are as important in the entertainment field as we have just said, in *Silk,* that they were in that of distribution and transportation.

Consideration of the regulations of the Treasury and the Federal Security Agency, quoted in *Silk,* 331 U. S. 704, at note 8, is necessary here. I. R. C., chap. 9, §§ 1429, 1609. Under those regulations, the Government successfully resisted the effort of a leader of a "name" band, like those here involved, to recover social security taxes paid on the wages of the members of his organization. *Wil-*

liams v. *United States,* 126 F. 2d 129. The contract in that case was not "Form B" and did not contain any corresponding control clause. Two years later, the Commissioner of Internal Revenue issued mimeographs 5638, 1944–5–11651, and 5767, 1944–22–11889, 1944 Cum. Bull. 547–48. They were directed at the status of musicians and variety entertainers appearing in theatres, night clubs, restaurants and similar establishments. Collectors and others were therein advised that a "Form B" or similar contract with the entertainers made operators of amusement places liable as employers under the Social Security Act. In the absence of such a contract, that is, in reality, the absence of the control clause of "Form B," the entertainers, with "short-term engagements for a number of different operators" of amusement places, would be considered "independent contractors." The argument of respondents to support the administrative interpretation of the regulations is that the Government may accept the voluntary contractual arrangements of the amusement operators and entertainers to shift the tax burden from the band leaders to the operators.[2] Cases are cited to support this position.[3] All of these cases, however, involve the problem of corporate or association entity. They are not pertinent upon the question of contracts to shift tax liability from one taxpayer to another wholly distinct and disconnected corporation

[2] There is a contention that the contracts were coerced because the operators could not secure these musicians under other arrangements. We do not find it necessary to rely or pass upon that contention.

[3] *Edwards* v. *Chile Copper Co.,* 270 U. S. 452, 456; *Burnet* v. *Commonwealth Improvement Co.,* 287 U. S. 415; *New Colonial Ice Co.* v. *Helvering,* 292 U. S. 435; *Helvering* v. *Coleman-Gilbert Associates,* 296 U. S. 369, 374; *Higgins* v. *Smith,* 308 U. S. 473, 477; *Gray* v. *Powell,* 314 U. S. 402; *Moline Properties, Inc.* v. *Commissioner,* 319 U. S. 436, 439; *Interstate Transit Lines* v. *Commissioner,* 319 U. S. 590; *Schenley Corp.* v. *United States,* 326 U. S. 432, 437.

or individual. We do not think that such a contractual shift authorizes the Commissioner to collect taxes from one not covered by the taxing statute. The interpretive rulings on the Regulations, referred to in this paragraph, do not have the force and effect of Treasury Decisions.[4] We are of the opinion that such administrative action goes beyond routine and exceeds the statutory power of the Commissioner. *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369–70.

This brings us then to a determination of whether the members of a "name band" under the circumstances heretofore detailed are employees of the operator of the dance hall or of the leader. If the operator is the employer, the leader is also his employee.

We are of the opinion that the elements of employment mark the band leader as the employer in these cases. The leader organizes and trains the band. He selects the members. It is his musical skill and showmanship that determines the success or failure of the organization. The relations between him and the other members are permanent; those between the band and the operator are transient. Maintenance costs are a charge against the price received for the performance. He bears the loss or gains the profit after payment of the members' wages and the other band expenses.

The judgments of the Circuit Court of Appeals are reversed and those of the District Court are affirmed.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE MURPHY concur, dissenting.

As the opinion of the Court points out, the Form B contract involved in the present case was adopted, with the approval of the Commissioner of Internal Revenue,

[4] See 1944 Cum. Bull., notice, p. I.

after it had been held under an earlier form of contract that members of the orchestra were employees of the band leader. On the face of the present contract the dance hall proprietor is the employer even under traditional concepts of master and servant. For he has all of the conventional earmarks of the entrepreneur—ownership, profit, loss, and control—if the provisions of the contract alone are considered. Then the requirements of the Social Security Act are satisfied. And to hold the dance hall proprietor liable for the tax is not to contract the coverage contemplated by the statutory scheme.

I think the tax collector should be entitled to take such private arrangements at their face. In other situations a taxpayer may not escape the tax consequences of the business arrangements which he makes on the grounds that they are fictional. The Government may "sustain or disregard the effect of the fiction as best serves the purposes of the tax statute." *Higgins* v. *Smith,* 308 U. S. 473, 477. That rule is not restricted in its application to the use by taxpayers of corporate or related devices to obtain tax advantages. It was applied in *Gray* v. *Powell,* 314 U. S. 402, where a railroad sought exemption from the Bituminous Coal Act by contending that the operations of one who appeared to be an independent contractor were in fact its operations. The Court in rejecting the contention said that "The choice of disregarding a deliberately chosen arrangement for conducting business affairs does not lie with the creator of the plan." *Id.,* 414. I see no reason for creating an exception to that rule here. If the Government chooses to accept the contract on its face, the parties should be barred from showing that it conceals the real arrangement. Tax administration should not be so easily embarrassed.

FOSTER ET AL. *v.* ILLINOIS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 540. Argued May 8, 1947.—Decided June 23, 1947.

1. In reviewing on writ of error a conviction for burglary and larceny in which it was claimed that the right to counsel had been denied contrary to the Fourteenth Amendment, a state supreme court was confined by local practice to the common law record. That record contained no specific recital of an offer of counsel; but it showed that the defendant was a mature man and that, before accepting his plea of guilty, the trial court advised him of his "rights of trial" and of the consequences of a plea of guilty; and it contained nothing to contradict this account of the proceedings. In the state supreme court, there was neither proof nor uncontradicted allegation of any actual miscarriage of justice in accepting the plea of guilty; and that court affirmed the conviction. *Held:* On this record, to which review in this Court is confined, there is no showing of a denial of due process under the Fourteenth Amendment. Pp. 138–139.
2. The provision of the Sixth Amendment which guarantees to an accused in a criminal prosecution in a federal court the absolute right "to have the Assistance of Counsel for his defence," is not made applicable by the Fourteenth Amendment to prosecutions in state courts. Pp. 136–137.

394 Ill. 194, 68 N. E. 2d 252, affirmed.

In an original proceeding in the Supreme Court of Illinois, petitioners challenged the validity, under the Federal Constitution, of sentences of imprisonment imposed on them upon pleas of guilty in criminal prosecutions in a state court. The State Supreme Court affirmed the judgments. 394 Ill. 194, 68 N. E. 2d 252. This Court granted certiorari. 329 U. S. 712. *Affirmed,* p. 139.

Charles R. Kaufman argued the cause and filed a brief for petitioners.

William C. Wines, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *George F. Barrett,* Attorney General, and *James C. Murray,* Assistant Attorney General.

Briefs of *amici curiae* urging affirmance were filed by *Eugene F. Black,* Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for the State of Michigan; and *Sterry R. Waterman* for the State of Vermont.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is an original proceeding in the Supreme Court of Illinois by way of writ of error to test the validity of sentences of imprisonment following pleas of guilty. The Supreme Court of Illinois having affirmed the judgment, 394 Ill. 194, 68 N. E. 2d 252, we brought the case here, 329 U. S. 712, because of the importance of reviewing convictions where solid doubt is raised whether the requirements of due process have been observed.

On February 22, 1935, the petitioners were sentenced to confinement in the Illinois State Penitentiary, under the Illinois State indeterminate sentence law, after pleading guilty to an indictment charging them with burglary and larceny. Cahill's Ill. Rev. Stats. (1933) c. 38, §§ 65, 796. Since the controversy turns on the legal significance of the circumstances under which the pleas of guilty were accepted, it is important to state them according to the record which, for purposes of this proceeding, is binding upon the Illinois Supreme Court and therefore upon this Court. According to the "Minutes from the Judges Docket," the defendants Foster and Payne (petitioners here)

"having been furnished with a copy of the Indictment and a list of the Jurors and Peoples Witnesses and are advised of their rights of Trial and of the consequences of an entry of a plea of guilty and being arraigned in open Court for plea to the Indictment says, each for himself That he is guilty of burglary and larceny as charged in the indictment and thereupon the Court advises and admonishes each of said defendants of the consequences of entering such pleas of guilty, and Thereafter each of said defendants still persist in such pleas of guilty . . . Whereupon said pleas of guilty are received and entered of record."

"The Court finds the ages of said defendants to be as follows, respectively, Nelson Foster 34 years old, George Payne, alias Elijah Jefferson 48 years . . . ."

Eleven years later, on February 7, 1946, the petitioners asked the Supreme Court of Illinois for their discharge. Various state grounds were urged and rejected. Our sole concern is with the claim "that the record in this case fails to show" a compliance with the Fourteenth Amendment insofar as the Due Process Clause of that Amendment requires an accused to have the benefit of counsel.

The considerations that guide the disposition of this case have been canvassed here in a series of recent opinions. The "due process of law" which the Fourteenth Amendment exacts from the States is a conception of fundamental justice. See *Hebert* v. *Louisiana,* 272 U. S. 312, 316; *Palko* v. *Connecticut,* 302 U. S. 319, 325. It is not satisfied by merely formal procedural correctness, nor is it confined by any absolute rule such as that which the Sixth Amendment contains in securing to an accused "the Assistance of Counsel for his defence." By virtue of that provision, counsel must be furnished to an indigent de-

fendant prosecuted in a federal court in every case, whatever the circumstances. See *Palko* v. *Connecticut, supra,* at 327; *Johnson* v. *Zerbst,* 304 U. S. 458; *Betts* v. *Brady,* 316 U. S. 455, 464–65. Prosecutions in State courts are not subject to this fixed requirement. So we have held upon fullest consideration. *Betts* v. *Brady, supra.* But process of law in order to be "due" does require that a State give a defendant ample opportunity to meet an accusation. And so, in the circumstances of a "particular situation," assignment of counsel may be "essential to the substance of a hearing" as part of the due process which the Fourteenth Amendment exacts from a State which imposes sentence. *Palko* v. *Connecticut, supra,* at 327. Such need may exist whether an accused contests a charge against him or pleads guilty.

The rationale of this application of due process was first expounded in *Powell* v. *Alabama,* 287 U. S. 45. In following that case our recent decisions have spoken of "the rule of *Powell* v. *Alabama,*" or "the requirements of *Powell* v. *Alabama,*" thereby indicating the essential scope of the doctrine. See *Williams* v. *Kaiser,* 323 U. S. 471, 476–77; *Tomkins* v. *Missouri,* 323 U. S. 485, 488. And so, in every case in which this doctrine was invoked and due process was found wanting, the prisoner sustained the burden of proving, or was prepared to prove but was denied opportunity, that for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement. See *Powell* v. *Alabama, supra,* at 51, 53, 56, 57–58; *Smith* v. *O'Grady,* 312 U. S. 329, 334; *Williams* v. *Kaiser, supra,* at 472, 473–74, and 476–77; *Tomkins* v. *Missouri, supra,* at 486–487; *House* v. *Mayo,* 324 U. S. 42, 45–46; *White* v. *Ragen,* 324 U. S. 760, 762–63; *Rice* v. *Olson,* 324 U. S. 786, 788–89. Only the other day, in a case concerning a charge of first-degree murder against a seventeen-year-old defendant, in which

we found a deprivation "of rights essential to a fair hearing," we took pains to point out that "The court did not explain the consequences of the plea of guilty, and the record indicates considerable confusion in petitioner's mind at the time of the arraignment as to the effect of such a plea." *De Meerleer* v. *Michigan,* 329 U. S. 663, 664.

In this case there is neither proof nor uncontradicted allegation of any such miscarriage of justice in accepting pleas of guilty. The record of the proceeding plainly imports an observance of due process. In the contemporaneous language of the trial court, the defendants "are advised of their rights of Trial and of the consequences of an entry of a plea of guilty," the court "advises and admonishes each of said defendants of the consequences of entering such pleas of guilty," and the defendants thereafter still persisting, their pleas "are received and entered of record." There was nothing in the common-law record, on the basis of which the Supreme Court of Illinois rendered its decision, to contradict this account of the proceedings in 1935. We thus have in effect the bald claim that, merely because the record does not disclose an offer of counsel to a defendant upon a plea of guilty, although the court before accepting the plea duly advised him of his "rights of Trial" and of the consequences of such a plea, he is "deprived of rights essential to a fair hearing under the Federal Constitution." *De Meerleer* v. *Michigan, supra,* at 665.

We reject such a claim. Most incarcerations are upon pleas of guilty, and probably most such pleas have been made without the felt need of counsel. It is not for us to suggest that it might be desirable to offer to every accused who desires to plead guilty the opportunities for counsel and to enter with formality upon the record the deliberate disclaimer of his need for counsel because

of a full appreciation of the meaning of a plea of guilty as expounded by responsible judges. Our duty does not go beyond safeguarding "rights essential to a fair hearing" by the States. After all, due process, "itself a historical product," *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 31, is not to be turned into a destructive dogma in the administration of systems of criminal justice under which the States have lived not only before the Fourteenth Amendment but for the eighty years since its adoption. It does not militate against respect for the deeply rooted systems of criminal justice in the States that such an abrupt innovation as recognition of the constitutional claim here made implies, would furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land.

Insofar as the sentences in this case are attacked on claims which were not open for consideration on the common-law record which alone was before the Illinois court, see 394 Ill. 194, 68 N. E. 2d 252, they are not open here. *Carter* v. *Illinois,* 329 U. S. 173. They must be raised by whatever procedure Illinois may provide, or, in default of relief by appropriate Illinois proceedings, by a new claim of denial of due process for want of such relief. See *Mooney* v. *Holohan,* 294 U. S. 103.

Affirmed.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join, dissenting.

In *Adamson* v. *California,* this day decided, *ante* p. 46, the Court waters down the Fourteenth Amendment's application to the states of the Bill of Rights guarantee against self-incrimination so as to make it compatible with the Court's standards of decency and a fair trial. In this case the Court similarly waters down the Bill of

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Rights guarantee of counsel in criminal cases. In both cases, the Court refuses to strike down convictions obtained in disregard of Bill of Rights guarantees, assuming all the while that identical convictions obtained in federal courts would violate the Bill of Rights. For the Court, in the instant case, concedes that, by virtue of the Sixth Amendment, "counsel must be furnished an indigent defendant prosecuted in a federal court in every case, whatever the circumstances." This, of course, relates to convictions following both pleas of not guilty and pleas of guilty. *Williams* v. *Kaiser,* 323 U. S. 471; *Tomkins* v. *Missouri,* 323 U. S. 485.

In the *Adamson* case, I have voiced my objections to dilution of constitutional protections against self-incrimination in state courts. This decision is another example of the consequences which can be produced by substitution of this Court's day-to-day opinion of what kind of trial is fair and decent for the kind of trial which the Bill of Rights guarantees. This time it is the right of counsel. We cannot know what Bill of Rights provision will next be attenuated by the Court. We can at least be sure that there will be more, so long as the Court adheres to the doctrine of this and the *Adamson* case.

The Court's decision relies heavily on *Betts* v. *Brady,* 316 U. S. 455. In that case, a man on relief, too poor to hire a lawyer, and whose request for the appointment of a lawyer was denied, was compelled to act as his own lawyer on a charge of robbery. Conviction followed. That case is precedent for this one. But it is the kind of precedent that I had hoped this Court would not perpetuate.

One thing more. The Court seems to fear that protecting these defendants' right to counsel to the full extent defined in the Bill of Rights would furnish "opportunities hitherto uncontemplated for opening wide the prison doors of the land," because, presumably, there are many

people like Betts, Foster and Payne behind those doors after trials without having had the benefit of counsel. I do not believe that such a reason is even relevant to a determination that we should decline to enforce the Bill of Rights.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY concur, dissenting.

I think the Sixth Amendment's guaranty of the right to counsel in criminal causes is applicable to such proceedings as this in state courts.

Apart from that view and upon the Court's basis that the Fourteenth Amendment by its own force independently prescribes a partial similar guaranty, cf. *Palko* v. *Connecticut,* 302 U. S. 319, 327; *Betts* v. *Brady,* 316 U. S. 455; *Powell* v. *Alabama,* 287 U. S. 45, I am unable to accept its conclusion in this case. Of course if the so-called presumption of regularity is to be effective to sustain the denial of counsel in circumstances as bald as those presented in *Gayes* v. *New York,* 332 U. S. 145, decided today, that presumption must work the same denial in the somewhat less startling facts of this case.

But when a record discloses as much as the record here shows, I do not think any presumption of regularity should be permitted to overcome the substance of the violated constitutional right. Such a presumption indeed, if valid by mere force of the fact that a judgment has been rendered, may always be indulged. Cf. *Williams* v. *Kaiser,* 323 U. S. 471; *Tomkins* v. *Missouri,* 323 U. S. 485; *De Meerleer* v. *Michigan,* 329 U. S. 663. And the consequences of such a course of action here, for the observance and preservation of constitutional rights, more especially of the indigent and ignorant who are unable to employ counsel from their own resources and do

not know their rights, must be, not merely a denial of the basic right of counsel, but also a denial of the equal protection of the laws in sweeping application. Poverty or wealth will make all the difference in securing the substance or only the shadow of constitutional protections.

Here petitioners were charged with the serious crimes of burglary and larceny, handed a copy of the indictment, and arraigned. Every lawyer knows the difficulties of pleading to such charges, including the technicalities of the applicable statutes and especially of the practice relating to included or lesser offenses. The crimes charged involved penalties of imprisonment for from one year to life, the penalty actually imposed upon these petitioners.

On the very day the indictment was handed down, petitioners were arraigned, their pleas of guilty were accepted, and they were sentenced. At no time were they offered counsel or advised of their right to counsel, nor did they receive any assistance from counsel. The record, it is true, recites that they were "advised of their rights of Trial and of the consequences of an entry of a plea of guilty," notwithstanding which each said that he was guilty, whereupon the court "advises and admonishes each of said defendants of the consequences of entering such pleas of guilty," despite which each persisted in his plea.

However this vague and formal recital might be taken in other circumstances, it cannot be regarded in this case as meaning that petitioners were either offered counsel or informed of any right to counsel. Indeed the recital must be taken as having deliberately avoided including statements in either respect. And, upon the record as a whole, we are required not only to read it in this light but to conclude that the recital and the intentional omission of statements concerning the right to counsel were effective to establish that the petitioners were in fact denied that right.

The Court does not point out, but it is the very heart of this case, that under Illinois law these petitioners were, in effect, denied the right to have counsel tendered or appointed by the court. It was under no duty imposed by state law to tender counsel, to inquire into the need for counsel, or to inform the defendants of any right to counsel. Indeed, under the law of the state, it seems, the court would have exceeded its powers by taking action in any of these respects.

We are not only entitled, we are required, to read the record of the state's proceedings in the light of the state's law applicable to them. In Illinois by statute it is only in capital cases that the court is under an affirmative duty, when it appears that a defendant is indigent, to tender appointment of counsel.[1] In noncapital cases the following statute applies:

> ". . . Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense." Ill. Rev. Stat. (1945) c. 38, § 730.

The Illinois Supreme Court consistently has construed this statute as requiring appointment of counsel only when a defendant requests counsel and states on oath that he cannot procure counsel. It is expressly held that the provision "does not place upon the court the duty to proffer the services of counsel . . .," *People* v. *Lavendowski,* 326 Ill. 173, 176, nor does it require advising defendants of their right to counsel. *People* v. *Corrie,* 387 Ill. 587, 589–590. See also *People* v. *Corbett,* 387 Ill.

[1] "Whenever it shall appear to the court that a defendant or defendants indicted in a capital case, is or are indigent and unable to pay counsel for his or her defense, it shall be the duty of the court to appoint one or more competent counsel for said defendant or defendants, who shall receive a reasonable sum for services . . . ." Ill. Rev. Stat. (1945) c. 38, § 730.

41; *People* v. *Childers,* 386 Ill. 312; *People* v. *Fuhs,* 390 Ill. 67. And the failure of the defendant to state his need and inability to procure counsel under oath is taken apparently as a waiver of the right. Cf. *People* v. *Stubblefield,* 391 Ill. 609, 610.[2]

Finally, the opinion of the Illinois court in this case shows that petitioners were denied relief on the basis of these rules.[3]

In the light of the Illinois statutes and decisions, therefore, the present record can be taken to sustain no presumption that the trial court offered counsel to petitioners, inquired concerning their need for counsel or ability to secure such aid, or advised them in any way of their right to have that assistance. The only tenable presumption is that the court refrained deliberately, in accordance with the state law, from taking action in any of these respects.

Moreover, when men appear in court for trial or plea, obviously without counsel or so far as appears the means of securing such aid, under serious charges such as were made here involving penalties of the character imposed, it is altogether inconsistent with their federal constitutional right for the court to shut its eyes to their apparently helpless condition without so much as an inquiry concerning its cause. A system so callous of the rights of men, not only in their personal freedom but in their rights to trial comporting with any conception of fairness, as to tolerate such action, is in my opinion wholly contrary

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[2] And see note 3.

[3] "It is first contended by plaintiffs in error that they did not have counsel appointed to represent and protect their rights. It is not shown by the record that the defendants informed the court or in any way indicated that they desired counsel. We have repeatedly held that the right to be represented by counsel is a personal right which a defendant may waive or claim as he himself may determine. (*People* v. *Fuhs,* 390 Ill. 67.) This contention is without merit." 394 Ill. 194, 195.

to the scheme of things the nation's charter establishes. Courts and judges, under that plan, owe something more than the negative duty to sit silent and blind while men go on their way to prison, for all that appears, for want of any hint of their rights.

Adding to this blindness a "presumption of regularity" to sustain what has thus been done makes a mockery of judicial proceedings in any sense of the administration of justice and a snare and a delusion of constitutional rights for all unable to pay the cost of securing their observance.

GAYES v. NEW YORK.

CERTIORARI TO THE COUNTY COURT OF MONROE COUNTY, NEW YORK.

No. 405. Argued May 2, 1947.—Decided June 23, 1947.

Upon a plea of guilty in a criminal prosecution in a state court, petitioner was sentenced as a second offender, the length of the sentence being based partly on a previous conviction. Upon sentence as a second offender, petitioner had full opportunity, so far as appears, to contest any infirmity in the previous sentence. While serving the second sentence, petitioner applied to the court which had imposed the earlier sentence to vacate the judgment there rendered against him, on the ground of denial of his right to counsel under the Federal Constitution. The state court denied the motion, and its judgment is here affirmed. Pp. 147–149.

Affirmed.

Petitioner's application to a state court to vacate a judgment there rendered against him was denied without opinion. Under the state law, no review could be had of this determination. This Court granted certiorari. 329 U. S. 710. *Affirmed*, p. 149.

Herbert Wechsler argued the cause and filed a brief for petitioner.

Harry L. Rosenthal argued the cause and filed a brief for respondent.

MR. JUSTICE FRANKFURTER announced the judgment of the Court in an opinion in which THE CHIEF JUSTICE, MR. JUSTICE REED and MR. JUSTICE JACKSON join.

This is another case in which release is sought from confinement under a sentence by a State court following a plea of guilty, on a claim of a denial of due process of law through want of benefit of counsel.

The circumstances are these. On July 15, 1938, Gayes, then a lad of sixteen, was arraigned in the County Court of Monroe County, New York, upon an indictment charging burglary in the third degree and petty larceny. According to the record of conviction, he was asked, in accordance with the requirement of § 308 of the New York Code of Criminal Procedure, whether "he desired the aid of counsel," and he answered "No." [1] Imposition of sentence was postponed to July 28. When on that day

[1] Subsequent to the proceedings before the County Court of Monroe now under review, the minutes of the original proceedings against Gayes came to light. By stipulation of counsel these minutes are here. According to them, the precise question put to Gayes by the Assistant District Attorney in the presence of the Judge was, "Do you need a lawyer before you enter a plea of guilty or not guilty to this indictment?" To which Gayes replied, "No, sir." It may be inconclusively debated whether if Gayes was asked "if he desired the aid of counsel," as stated in the entry in the record of conviction, he was better informed of his rights, than if he was asked, "Do you need a lawyer?" In view of our disposition, the difference in significance becomes immaterial, and it is also immaterial whether, if there were a difference, we could consider, even in a case involving belated release from State detention, a matter not before the court whose judgment is here for review. But the differences that may exist between formal entry in the minutes of an acceptance of a plea and what was actually said contemporaneously lends force to the caution frequently expressed that every intendment must be made in support of the due observance of law in the rendering of judgments which are collaterally attacked, often after a considerable passage of time.

Gayes appeared for judgment, he was asked, again according to the requirements of New York law, whether "he had any legal cause to show why judgment should not be pronounced against him." New York Code of Criminal Procedure § 480. And "no sufficient cause appearing," the record continues, Gayes was committed to a New York State Vocational School to be dealt with there according to law. It appears from the facts before us that Gayes did not stay at this correctional institution as long as New York law would have authorized his detention. See New York Penal Law §§ 2184–a and 2189, in connection with § 407. For, on October 14, 1941, he pleaded guilty, in the County Court of Schenectady, New York, to a new charge of burglary in the third degree. The record of this latter proceeding does not indicate whether this time he was or was not represented by counsel. But no claim is made that this plea of guilty, or the sentence under it, has any infirmity for lack of legal assistance. Gayes' claim is that he was sentenced as a second offender by the inclusion of the improper sentence to the vocational school in 1938.

In accordance with New York procedure, Gayes, *pro se,* filed in the County Court of Monroe County, New York, an application to vacate the judgment rendered against him in that court on July 28, 1938. He claimed that in the proceedings which led to that judgment he had not been informed of his "Constitutional Rights of Assistance of Counsel," that he "could not have understood his rights to Counsel" and that "youths of the age of 16 years cannot Intelligently and Competently waive their rights." Since, according to this claim, the first sentence was void, he challenged the validity of the sentence in 1941 because the length of the second sentence was partly based upon the 1938 conviction.

Upon this record, the county court denied the motion without opinion. As New York law then stood, no re-

view could there be had of this determination. See *People* v. *Gersewitz,* 294 N. Y. 163, 61 N. E. 2d 427. This made the county court the highest court of the State of New York for purposes of our review. *Canizio* v. *New York,* 327 U. S. 82, 85. But see Chapter 706 of the New York Laws of 1947. We brought the case here, 329 U. S. 710, as one of a series, for further consideration of the circumstances under which the requirements of due process imply a duty to supply counsel to defendants in State prosecutions.

The guiding principles bearing on the general problem have been set forth in the opinion in *Foster* v. *Illinois,* just decided, *ante,* p. 134. Insofar as the facts of this case present a particular variant, they are controlled by our decision in *Canizio* v. *New York, supra.* We there held that whatever doubts may arise from the circumstances of a plea of guilty, if, before sentence is imposed, the opportunities required by the Constitution for meeting the legal implications of the plea are satisfied, the sentence must stand. And so, the questions that may be raised regarding the circumstances attending the imposition of Gayes' commitment to the vocational institution in 1938 are not now open. Gayes is complaining of his sentence following his plea of guilty in 1941.[2] What he wants is to be relieved of his imprisonment under that sentence. That sentence, to be sure, partly took into account his earlier sentence in 1938. But upon his subsequent sentence, as a second offender, in 1941, he had

[2] Gayes is detained under the 1941 sentence imposed by the County Court of Schenectady. A motion attacking that sentence would, under New York law, have to be made in that court. What he is asking is the invalidation of the prior sentence, underlying as it were the Schenectady sentence, presumably as a first step in getting relief from detention under the latter sentence. We are treating this proceeding, for our purposes, as one seeking, in effect, relief from the 1941 sentence without regard to formal distinctions which might otherwise be relevant.

full opportunity, so far as appears, to contest whatever infirmity he may have claimed in the earlier sentence when the fact of that sentence was included in the sentence which he is now serving.[3] Since the process leading up to the second sentence is not challenged he cannot now, so far as the United States Constitution is concerned, by a flank attack, challenge the sentence of 1938.

Judgment affirmed.

MR. JUSTICE BURTON concurs in the result.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY concur, dissenting.

A sixteen-year-old boy, indigent and alone, without relatives, friends, money or counsel to aid him and, according to the undenied allegations of the petition, with-

[3] According to the State, Gayes could have raised the claim he now makes against the 1938 conviction at the time he was sentenced in 1941, and from a denial of relief could have appealed to the higher courts. This was not contradicted by the petitioner and is not brought into question in any opinion of the higher courts of New York. It has been ruled in courts of very limited authority that a second offender cannot apply for resentence on a claim that there was a defect in the first sentence imposed by another court. See *People* v. *Keller*, 37 N. Y. S. 2d 61 (Gen. Sess. N. Y. County), and *People* v. *Paterno*, 182 Misc. 491, 50 N. Y. S. 2d 713 (Chatauqua County Court). Neither case, however, presented the claim that a violation of the United States Constitution vitiated the first sentence, and neither case raised the power of the court at the time of sentencing to consider such a claim. It is certainly within the power of a duly advised defendant, before pleading guilty as a second offender, to raise the constitutional invalidity of the first sentence so as to secure opportunity appropriately to challenge such invalidity. Nothing that is herein decided precludes petitioner from raising a denial of his constitutional right upon a record that discloses circumstances other than those before us. An order on such a motion is now reviewable by the New York Supreme Court and in certain instances by the New York Court of Appeals.

out knowledge of his constitutional rights,[1] pleaded guilty in 1938, under an indictment specifying two highly technical and distinct charges,[2] to the crime of burglary in the third degree.[3] The property he was charged with intending to steal[4] consisted of cigarettes of the value of seventy-five cents, two flashlights worth one dollar, and three dollars in currency. The sentence imposed on that plea has been served.[5] He is now confined as a second offender under sentence for another offense of similar character imposed in 1941,[6] when he was nineteen

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[1] No answer was filed to the petition and the trial court determined the issues on the pleadings without hearing or appearance of petitioner in court, in person or by counsel. The allegation of petitioner that when asked whether he "desired counsel," he answered "no" in the belief that he would have to pay the lawyer's fee, and was not informed to the contrary is, of course, to be taken as true in the absence of denial and of contrary evidence which might have been tendered on a hearing.

[2] The first count charged that petitioner "broke and entered the building and garage of Francis Marlow . . . with intent to commit therein the crime of larceny"; the second count charged petit larceny of the property described in the text above.

[3] The sentence was to confinement in the New York State Vocational Institute, which when imposed for an unspecified term under New York Penal Law § 2184–a carried a maximum of ten years, which is the maximum for burglary in the third degree as a first offense. N. Y. Penal Law § 407 (3).

[4] Under the second count, for petit larceny or theft, being also presumably the property with respect to which it was charged in the first count that petitioner broke and entered with intent to commit larceny.

[5] Petitioner was held under the first sentence, see note 3, until December 14, 1943, when the New York Board of Parole directed that service of the sentence as second offender begin. The date of termination of the latter sentence, see note 6, was correspondingly postponed.

[6] The sentence of ten to twenty years as second offender is mandatory. N. Y. Penal Law § 1941. Had petitioner been sentenced in

and also without relatives, friends or counsel so far as appears.[7]

One part of the opinion announced in this case, as I understand, takes the view that because Gayes did not attack the 1938 sentence in 1941, when he was sentenced as a second offender, he is forever foreclosed from doing so on the facts and issues presented on this record, although as a second offender he is now suffering the consequences of the 1938 sentence.[8] For this conclusion reliance is placed upon no New York authorities; indeed, as I read the state cases, the Court's decision is made in the face of their rulings that the procedure petitioner has followed is the appropriate one for raising the issues he presents.[9]

I am unwilling to subscribe to such a doctrine of forfeitures concerning constitutional rights, which in the extreme circumstances of this case seems to me shocking.

1941 as a first rather than a second offender, the maximum sentence allowed would have been five to ten years, N. Y. Penal Law §§ 2189, 407, and he might have been sent to a reformatory rather than prison. N. Y. Penal Law § 2185.

[7] The "Record of Conviction" in the trial for the second offense, contained in the record here, discloses that petitioner, having been charged and arraigned, first pleaded not guilty, then withdrew that plea and entered one of guilty. It is then recited that petitioner appeared for judgment and, "having been asked by the clerk whether he had any legal cause to show why judgment should not be pronounced against him, and no legal cause having been shown" or appearing to the court, judgment and sentence were thereupon pronounced. There is no recital that petitioner was represented by counsel, was informed of his rights in any manner, or was admonished of the consequences of his plea.

[8] See notes 3, 5, 6 *supra*. See also note 12 *infra* and text.

[9] See note 11 *infra*.

Under all of the New York decisions which have passed upon the question,[10] the proper and apparently the necessary procedure, see *People* v. *Keller*, 37 N. Y. S. 2d 61, 62, for attacking a sentence as second offender, upon the ground that the former conviction was invalid, is first by motion in the court imposing the initial sentence to vacate it, after which if the motion is successful the sentence for the second offense may be attacked and vacated.[11] In other words, the second offender, situated as is petitioner, must first overturn his first conviction in the court where it was obtained, before he can attack the second sentence founded in part upon that conviction.

This procedure in my opinion is a reasonable one within the power of a state to require, at least where both offenses have taken place within its jurisdiction. And I know of no reason why this Court should disregard or override it. Much less is it within our province to invert the state procedure, if that is the effect of the dubious suggestion that petitioner's rights perhaps may be saved upon some other record "that discloses circumstances other than those

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[10] In the absence of determination by a state's highest tribunal the rule announced and applied by other state courts is to be taken by us as determining questions of state law. Cf. *West* v. *A. T. & T. Co.*, 311 U. S. 223.

[11] If the 1938 conviction is held void, under state law petitioner then may move to vacate the 1941 sentence in the court which imposed it, and for resentencing according to state law. See *People ex rel. Sloane* v. *Lawes*, 255 N. Y. 112; *People ex rel. Carollo* v. *Brophy*, 294 N. Y. 540; *People* v. *Keller*, 37 N. Y. S. 2d 61. And the proper forum for attacking the 1938 conviction, as a preliminary to attack on that of 1941, is the one where the former was obtained, by the motion to vacate which petitioner has employed. *People* v. *Bernoff*, 61 N. Y. S. 2d 46; *People* v. *Foster*, 182 Misc. 73; *People* v. *Paterno*, 187 Misc. 56, with which compare *People* v. *Paterno*, 182 Misc. 491; cf. *People* v. *Gersewitz*, 294 N. Y. 163, 167; *People* v. *Keller*, *supra*, at 63.

before us," presumably if at all by motion before the court which imposed the 1941 sentence to vacate it.[12]

No state decisions are cited or, it would seem in view of the contrary authorities cited above,[13] can be cited to support such a view. Nor is it required by anything said or done in *Canizio* v. *New York*, 327 U. S. 82, if indeed such a matter could ever be within our function. The *Canizio* decision has no relevance to this case, either for prescribing the state procedure or for the constitutional issue. It held only that where a defendant had counsel at the time of his sentence and could then have moved to withdraw his prior plea of guilty, he was not prejudiced by the convicting court's previous failure to inform him of his right to counsel.

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[12] The opinion announced in conjunction with the Court's judgment seems to suggest that the decisions establishing the state procedure followed in this case are not controlling for our disposition, on what basis I am unable to understand, see note 10 *supra*, unless upon the untenable one that state rulings upon criminal procedures and the proper forum for utilizing them are not binding for federal determinations to the same extent as are such rulings in civil matters.

Only upon some such basis is the dubious suggestion justified that petitioner should have raised the question of the validity of his first sentence at the time of his sentencing as a second offender and in that forum. Not only is this contrary to the established state procedure, see note 11, but it is expressly qualified by the further suggestion that petitioner's rights may possibly be saved "upon a record that discloses circumstances other than those before us," and it seems to be contradicted by the further statement that "the questions that may be raised regarding the circumstances attending the imposition of Gayes' commitment . . . in 1938 are not now open." It is pertinent to inquired whether Gayes is to have another chance, through a local procedure prescribed by this Court alone, or whether the constitutional questions now presented are foreclosed by his failure to follow a procedure not prescribed or, so far as appears, permitted by the state.

[13] See note 11.

That case had nothing to do with the state procedure open to one convicted as a second offender for challenging his sentence on the ground that the first conviction was invalid for federal constitutional reasons. And the facts, on the merits, were very different from those presented here. Whereas, among other things, in that case the petitioner did have counsel before his sentence was imposed, here not only was Gayes denied counsel altogether in the first trial, but so far as the record discloses he had none in the trial for the second offense. I do not think the *Canizio* decision can be held to cover such a wholly different situation as this. It did not rule that, if a convicted person has never had counsel, the fact that in a later proceeding he conceivably might have had such aid if he had applied for it cures the denial, more particularly when so far as appears he was treated no better during his trial for the second offense than during the first, and when moreover his present attack is made as a preliminary one required by state law for showing the second sentence invalid.

In my judgment it is for the state, not this Court, to say whether the attack upon the first sentence as increasing the second shall be made on the flank or frontally, or perchance in either way. Indeed, under the law of New York, which is controlling on us, the so-called "flank" attack is apparently the only one now open to petitioner. In the face of so clear a violation of constitutional right as this case presents, we should neither foreclose that avenue nor substitute for it another dubiously available one of our own manufacture.

The judgment should be reversed.

Syllabus.

CALDAROLA *v.* ECKERT ET AL., DOING BUSINESS AS THOR ECKERT & CO.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 625. Argued March 31, April 1, 1947.—Decided June 23, 1947.

A stevedore, while aboard and engaged in unloading a vessel owned by the United States and managed by General Agents under a general agency contract, was injured by a defective boom. He sued the Agents for damages in a state court. *Held:*

1. The injury was a maritime tort and the state court had jurisdiction by virtue of § 9 of the Judiciary Act of 1789, which saves "to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." P. 157.

2. The determination of the state court that a business invitee, such as the stevedore, is without a remedy in the courts of the state against one who has no control and possession of the premises is decisive. P. 158.

3. To the extent that the determination of tort liability in the state court involves the construction of the contract between the Agents and the United States, the interpretation of the contract presents a federal question upon which the determination of the state court is not conclusive. P. 158.

4. If, on a fair reading of the contract, the control which the Agents had over the vessel is the kind of control which the state requires as a basis of liability to third persons, the state courts can not so read the contract as to deny the right which the state recognizes. P. 158.

5. Under the contract with the United States, the Agents are not to be deemed owners *pro hac vice* in possession and control of the vessel. Pp. 158–159.

6. *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, and *Brady* v. *Roosevelt S. S. Co.,* 317 U. S. 575, differentiated. Pp. 159–160.

295 N. Y. 463, 68 N. E. 2d 444, affirmed.

Petitioner sued respondents in a state court of New York to recover damages for injuries sustained aboard a vessel which respondents were managing as General Agents under a contract with the United States. A ver-

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dict for the petitioner was set aside by the Appellate Division. 270 App. Div. 563, 61 N. Y. S. 2d 164. The Court of Appeals affirmed. 295 N. Y. 463, 68 N. E. 2d 444. This Court granted certiorari. 329 U. S. 704. *Affirmed,* p. 160.

Abraham M. Fisch argued the cause for petitioner. With him on the brief was *Isidor Enselman.*

Raymond Parmer argued the cause for respondents. With him on the brief were *Cletus Keating* and *Vernon Sims Jones.*

Acting Solicitor General Washington, Assistant Attorney General Sonnett, J. Frank Staley, James C. Wilson, Paul A. Sweeney and *Leavenworth Colby* filed a brief for the United States, as *amicus curiae.*

Jacquin Frank and *Arthur Leonard Ross* filed a brief for the International Longshoremen's & Warehousemen's Union, as *amicus curiae,* urging reversal.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The S. S. Everagra is owned by the United States and managed in its behalf by the respondents as General Agents. (For the relevant portions of the contract and for full consideration of it in relation to issues other than those here involved, reference is made to *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707.) On January 27, 1944, the Everagra, docked in the North River, New York City, was being unloaded by a stevedoring concern, the Jarka Company. Jarka did the unloading under a contract with the United States, negotiated through the War Shipping Administration. One of its provisions was that "the Administrator shall furnish and maintain in good working order all" necessary equipment. Caldarola, the

petitioner, was an employee of Jarka. In the course of his work on the vessel he was injured. He brought this action in the New York courts against the respondents, claiming that his injury was caused by a defective boom and that they were liable for failing in their duty as Agents to maintain it in sound condition.

The New York Court of Appeals, affirming the Appellate Division in setting aside a verdict for the petitioner, 270 App. Div. 563, 61 N. Y. S. 2d 164, held that under New York law the relation which the Agents bore to the vessel did not make them responsible to a third person for its condition. 295 N. Y. 463, 68 N. E. 2d 444. Because of claimed conflict in the decisions, particularly between this ruling and *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, we granted certiorari. 329 U. S. 704.

No doubt petitioner could have sued the United States in Admiralty. Section 2 of the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. § 742. He chose not to do so. Presumably to obtain the benefit of trial by jury, he asked for relief from New York. There is no question that the injury of which Caldarola complains is a maritime tort. As such it is suable in the State courts by virtue of § 9 of the Judiciary Act of 1789 which saves "to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . ." 1 Stat. 76–77. Whether Congress thereby recognized that there were common law rights in the States as to matters also cognizable in admiralty, or whether it was concerned only with "saving" to the States the power to use their courts to vindicate rights deriving from the maritime law to the extent that their common law remedies may be available, is a question on which the authorities do not speak with clarity. Compare *Waring* v. *Clarke,* 5 How. 441, 460–61; *Taylor* v. *Carryl,* 20 How. 583, 598–99; 3 Story on the Constitution (1st ed.) 533, n. 3, with *Schoonmaker* v. *Gilmore,* 102 U. S. 118; *The Hamilton,* 207 U. S. 398;

Chelentis v. *Luckenbach S. S. Co.*, 247 U. S. 372; *C. J. Hendry Co.* v. *Moore*, 318 U. S. 133; *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 88–89. In any event, whether New York is the source of the right or merely affords the means for enforcing it, her determination is decisive that there is no remedy in its courts for such a business invitee against one who has no control and possession of premises. Compare *Douglas* v. *New York, New Haven & Hartford R. Co.*, 279 U. S. 377, and *Testa* v. *Katt*, 330 U. S. 386.

The New York Court of Appeals authoritatively determines who is liable, in New York, for such an occurrence as that of which Caldarola complains. Insofar as the issues in this case exclusively concern New York law, that court had the final say in holding that one in the relation of the respondents to the petitioner is not liable for the tort of which the latter complains. But to the extent that the determination of tort liability in New York is entangled with the construction of the contract between the Agents and the United States, the interpretation of that contract is a matter of federal concern and is not concluded by the meaning which the State court may find in it.

We agree that if, on a fair reading of the contract, the control which the Agents had over the vessel is the kind of control which New York requires as a basis of liability to third persons, the New York courts cannot so read the contract as to deny the right which New York recognizes. It is not claimed that an injured party has rights under the agency contract or that it created duties to third persons. *Robins Drydock & Repair Co.* v. *Flint*, 275 U. S. 303. And so the narrow question is whether the Agents were in possession and control of the Everagra. This is the crucial issue, because liability in tort by the Agents for Caldarola's injury would only arise in New York when there is such possession and control of premises on

which injury occurs, due to negligence in their maintenance. *Cullings* v. *Goetz,* 256 N. Y. 287, 176 N. E. 397. The United States, as *amicus curiae,* submitted what we deem to be conclusive considerations against reading the contract so as to find the Agents to be owners *pro hac vice* in possession and control of the vessel. The consequences, to both the national and international interests of the United States, of such a construction would be too far-reaching to warrant such a forced reading merely in order to have a basis on which to build liability under the law of New York. Serious issues affecting the immunity of Government vessels in foreign ports as well as immunity from regulation and taxation by local governments would needlessly be raised. After all, the question is not whether petitioner may be compensated for his injury. Congress has made provision for that. Petitioner insists, in order to enable him to sue in the courts of New York, that the Agents are to be deemed, as a matter of federal law, owners of the vessel *pro hac vice* and, therefore, as a matter of State law, subject to the duties of such ownership under New York law toward business invitees. We reject this construction.

Our previous decisions do not require it. *Hust* v. *Moore-McCormack Lines, supra,* arose under the Jones Act. (Act of March 4, 1915, 38 Stat. 1185, as amended, June 5, 1920, 41 Stat. 1007). We there held that under the Agency contract the Agent was the "employer" of an injured seaman as that term is used in the Jones Act, and a seaman could therefore bring the statutory action against such an "employer." The Court did not hold that the Agency contract made the Agent for all practical purposes the owner of the vessel. It did not hold that it imposed upon him, as a matter of federal law, duties of care to third persons, more particularly to a stevedore under employment of a concern unloading the vessel pursuant to a contract with the United States. *Brady* v. *Roosevelt*

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Steamship Co., 317 U. S. 575, is likewise remote from the issues decisive of this case. It merely held that the Suits in Admiralty Act, by furnishing an *in personam* remedy against the United States, did not free the Agent from liability for his own torts. The *Brady* case did not reach the "different question" whether "a cause of action" against the Agent had been established. 317 U. S. at 585. That is the precise question here, and more particularly, whether the contract created a relationship from which, under New York law, liability as to business invitees followed.

Judgment affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE MURPHY concur, dissenting.

For the reasons stated in my separate opinion in *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, 734, I think that respondents were owners *pro hac vice* of the vessel, since the business of managing and operating it was their business. They were, therefore, principals and liable to petitioner, a longshoreman who was injured while working on the deck of the vessel by reason of the breaking of a cargo boom, part of the ship's gear.

The Circuit Court of Appeals for the Second Circuit has reached the same result in a case decided since *Hust* v. *Moore-McCormack Lines*. In *Militano* v. *United States*, 156 F. 2d 599, that court held that the agent under the same form of operating agreement as we have here was owner *pro hac vice*. Swan, J., speaking for the court, said in reference to the *Hust* case, p. 602, "If the agent remains the employer sufficiently to be liable to members of the crew under the Jones Act, we think it cannot escape the duties of an owner pro hac vice in other respects. Thus it has the duty to furnish stevedores with a safe place to work, a duty which is analogous to that owed by a landowner to a business visitor."

The Court does not essay to answer that argument; nor does it address itself to the facts which I reviewed in the *Hust* case and which establish that the business of managing and operating the vessel was the business of the agent. It avoids analysis of the actual arrangement by viewing with alarm the consequences to the Government of such a holding as applied in other situations. But we are here concerned with private rights which press for recognition. It is no answer to the legal argument on which those private rights rest that the Government might be inconvenienced if they were recognized. It is plain under this operating agreement that the United States is merely the underwriter of the financial risks of the venture while the private operator performs the managerial functions in the usual way. To call that government operation is to ignore the realities of the relationship. Whatever the consequences in other situations, it is shocking to find private operators getting immunity in this manner from their traditional liability for tort claims.

MR. JUSTICE RUTLEDGE, dissenting.

I agree with respondents' counsel and the Court that *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, does not rule this case. Nevertheless I cannot agree with the Court's view that either New York law or the so-called "agency contract," identical with that involved in the *Hust* case, immunizes respondents from the consequences of their negligence causing petitioner's injury.

The *Hust* case involved the rights of seamen, not of longshoremen.[1] Also it arose under the Jones Act, 46 U. S. C. § 688, whereas here liability is grounded upon maritime tort. And the *Hust* decision rested in part

[1] Congress and the President, in the legislative and executive action taken in connection with the Merchant Marine and pertinent in the *Hust* case, were concerned with the rights of seamen, not primarily or perhaps even incidentally with those of longshoremen.

upon the effects of the so-called Clarification Act of 1943, 50 U. S. C. App. (Supp. V, 1946) § 1291, which has no bearing in this case, since seamen are not involved.

The *Hust* decision flatly rejected the view that the events there in question [2] had been effective to strip the seaman of his various preexisting remedies, replacing them with the single remedy of suit provided by the Suits in Admiralty Act.[3] 46 U. S. C. § 742. The necessary result was to preserve not merely the seaman's rights under the Jones Act but also his other preexisting ones.[4] For if the conjunction of events put forward in the *Hust* case as having made the Suits in Admiralty Act remedy the only one available to the seaman was thus effective, the Jones Act remedy as well as others was thereby excluded. And if it was not excluded, neither were those

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[2] In the *Hust* case, after noting the disruptive consequences for seamen's long-settled rights flowing from the view that they had been reduced for assertion to the single remedy provided by the Suits in Admiralty Act, we said: "We may assume that Congress could authorize so vast a disturbance to settled rights by clear and unequivocal command. It is not permissible to find one by implication. *Brady* v. *Roosevelt Co., supra* [317 U. S. 575], at 580. Here the disruption, if it has occurred, has done so only as an implied result of the conjunction of the Suits in Admiralty Act's provisions with the Government's emergency action in taking over the shipping industry for war purposes." 328 U. S. at 722. No such intent, we said, could be found in any action of Congress, or of that body and the President, in exercising their powers to bring the industry under governmental control; or in the Suits in Admiralty Act or the Jones Act as applied to the relation created by the "agency" contract.

[3] See note 2.

[4] Confirmation of the conclusions summarized in note 2, *supra,* was found in the legislative history of the Clarification Act of 1943, 50 U. S. C. App. (Supp. V, 1946) § 1291, and particularly in the provision for election of remedies given by § 1, as to injuries accruing on or after October 1, 1941, and before March 24, 1943, the Act's effective date. Opinion was expressly reserved as to the effect of that Act concerning injuries occurring after its effective date. 328 U. S. at 727.

others long possessed by seamen.[5] The *Hust* decision was therefore not merely a construction of the Jones Act. That Act was simply a specific fulcrum for turning the broader issue presented.

But seamen's rights are not longshoremen's rights and the events combining to present the question concerning seamen's rights in the *Hust* case were not conclusive upon longshoremen's rights. This is true although in some instances longshoremen, through legislation or by virtue of their succession to seamen occasioned by the industry's evolution in some phases of ship and shore duty, have been held entitled to similar protections. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52. The question in this case therefore is not one necessarily governed by the same considerations as applied in the cases of seamen covered by the *Hust* decision.

But, as the Court recognizes, it is one of maritime tort, although longshoremen rather than seamen are involved; and is moreover "suable in the State courts by virtue of § 9 of the Judiciary Act of 1789 which saves 'to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.'" Notwithstanding the characterization as maritime tort, the Court skirts the question whether the source of the right is New York law or, on the contrary, is federal law for which New York, pursuant to § 9, merely supplies a means for enforcement. For in either event, it says, New York's "determination is decisive that there is no remedy in its courts for such a business invitee against one who has no control and possession of premises."

[5] In the *Hust* case we said of the argument that the Suits in Admiralty Act remedy had become exclusively available for asserting seamen's rights that, with specified exceptions, "the various rights of seamen, enforceable by various proceedings in admiralty and at law, in state and federal courts, are swept into one hopper, the suit against the Government . . . ." 328 U. S. at 720.

From this conclusion I disagree. For, if the liability here is founded in federal law, as creating the maritime tort, then New York law has nothing to do with creating or nullifying the substantive right. Its sole function is to supply the remedy commanded by § 9 of the Judiciary Act. *Testa* v. *Katt,* 330 U. S. 386. And in my judgment the liability here, since it arises from a maritime tort, is a creature of federal law in its entirety, not of state law.[6] I therefore do not agree that any substantive issues in the case "exclusively concern New York law" or that in any respect that state's Court of Appeals "had the final say in holding that one in the relation of the respondents to the petitioner is not liable for the tort of which the latter complains." I do not understand how the Court can leave open the question whether New York law has a hand in creating the right sued on or one only in supplying a forum and remedy, and at the same time can rely on New York law as having any part in creating the right or nullifying it, as it seems to do. The result does not simply entangle state law with federal law in the

[6] 28 U. S. C. § 371, derived from § 9 of the Judiciary Act of 1789, is a recognition by Congress that the states may exercise whatever jurisdiction the common law had concurrently with admiralty. See *Waring* v. *Clarke,* 5 How. 441, 460–461. However, since "It is not a remedy in the common-law courts which is saved, but a common-law remedy," *The Moses Taylor,* 4 Wall. 411, 431, it has been held that where suit is brought under the saving clause the right to be enforced is that "recognized by the law of the sea." *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, 384. "The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common-law court." *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255, 259. The commentators recognize this to be the rule now, 1 Benedict on Admiralty (6th ed.) 53–55; Stumberg, Maritime Cases in Common-law Courts (1925) 3 Tex. L. Rev. 246; Mole and Wilson, A Study of Comparative Negligence (1932) 17 Corn. L. Q. 333, 353–355, though the matter seems not to have been decided prior to the *Chelentis* case. Cf. *The Hamilton,* 207 U. S. 398, 404.

substantive phase of the case. It entangles hypothetically applicable state law in one phase with federal law in another.

Regarding the case, as I do, as being controlled in its substantive aspect altogether by federal law, I do not think that law requires or should permit the result the Court reaches. Regardless of whether the so-called "agency" contract makes the operating company an "agent," an "owner pro hac vice," or technically something else in relation to the United States, the federal maritime law in my opinion well might hold responsible to an injured longshoreman one who has knowledge that such persons will come aboard and who undertakes to keep the vessel and its equipment in safe condition for their use.[7] More especially should such a rule apply when the person so undertaking is the only one constantly on board to observe the creation of hazardous risks in the vessel's daily routines and, in addition, has such a degree of control over their creation as the "agent" did here.

But, in any event, the same result should be reached on the basis of construction of the contract. Whether this is put upon the ground stated in the opinion of MR. JUSTICE DOUGLAS, that the "agent" became owner *pro hac vice,* or in the view of the contract taken in the *Hust* case,

[7] "One who does an act or carries on an activity upon land on behalf of the possessor thereof, is subject to the same liability, and enjoys the same immunity from liability, for bodily harm caused thereby to others within and outside the land as though he were the possessor of the land." Restatement, Torts, § 383.

"An agent who has the custody of land or chattels and who should realize that there is an undue risk that their condition will cause harm to the person, land, or chattels of others is subject to liability for such harm caused, during the continuance of his custody, by his failure to use care to take such reasonable precautions as he is authorized to take." Restatement, Agency, § 355.

with reference to application of the Jones Act, is largely immaterial, perhaps only a matter of words.[8]

That view, incorporating the rule of the *Hearst* case,[9] we have only recently extended to apply in cases of coverage of the Social Security Act and the Fair Labor Standards Act. *United States* v. *Silk,* 331 U. S. 704; *Harrison* v. *Greyvan Lines, id.; Rutherford Food Corp.* v. *McComb,* 331 U. S. 722. While the liability here is not legislative in origin, nevertheless as in the *Hust* case, application of the common-law "control" test to defeat the longshoreman's remedy under the state procedure, as provided by § 9 of the Judiciary Act of 1789, cannot "be justified in this temporary situation unless by inversion of that wisdom which teaches that 'the letter killeth, but the spirit giveth life.' " 328 U. S. at 725.

Finally, in my opinion, the terms of the agreement in its provisions for indemnity confirm the conclusion that liability of the "agent" in such a case as this was contemplated. Not only is there broad indemnity "for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder," with specified exceptions not covering such liabilities as are now in question. The indemnity also expressly provided:

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[8] In that case, assuming that the agreement made Hust, the injured seaman, an employee of the United States for purposes of ultimate control, in spite of the meticulous character of the differences between it and the Maritime Commission's standard contract, we said: "But it does not follow from the fact that Hust was technically the Government's employee that he lost all remedies against the operating 'agent' for such injuries as he incurred. This case, like *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, involves something more than mere application to the facts of the common-law test for ascertaining the vicarious responsibilities of a private employer for tortious conduct of an employee." 328 U. S. at 724.

[9] *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111.

> "To the extent not recovered from insurance, the United States shall also reimburse the General Agent for all crew expenditures (accruing during the term hereof) in connection with the vessels hereunder, including, without limitation, all disbursements for or on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss or personal effects, maintenance, cure, vacation allowances, *damages or compensation for death or personal injury or illness,* and insurance premiums, required to be paid by law, custom, or by the terms of the ship's articles or labor agreements . . ." (Emphasis added.)

as well as for payments made to pension funds and for social security taxes. This clause specifically contemplated that the "agent" should be responsible for paying claims not only for maintenance and cure but also for "damages or compensation for death or personal injury or illness," and should be indemnified for such payment. A narrow construction, of course, would limit the provisions for payment and indemnity to payments made without resort to suit. On the other hand, even a literal interpretation would cover payments made by the "agent" upon judgments recovered against it on claims of the character specified. I know of no good reason why the narrow view should be accepted or why the Government by its contract should desire to uproot seamen and others, including longshoremen insofar as they have acquired seamen's rights aboard ship, from their normally applicable remedies, in the absence of either explicit statutory command or express contractual provision to that effect. Moreover, in view of the scope of the indemnity provided, I see no possible harm that could be inflicted on the "agent" from interpreting the contract so as to allow the normally applicable remedies to apply.

Accordingly, I would reverse the judgment of the Court of Appeals.

ATLANTIC COAST LINE RAILROAD CO. *v.* PHILLIPS, STATE REVENUE COMMISSIONER.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 385. Argued April 9, 1947.—Decided June 23, 1947.

1. A charter granted by the State of Georgia to a railroad company in 1833 provided that "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said rail roads or any one of them: and after that, shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments." In 1937 the State imposed a tax of 5½ per cent on the net income of all domestic and foreign corporations and in 1941 assessed deficiencies for such taxes against a lessee of the railroad. *Held,* following a decision of the highest court of the State, that the 1833 exemption did not apply to taxes on "income," imposed by a statute in 1937, and, therefore, the tax did not impair the obligation of the railroad's charter contrary to Art. I, § 10, of the Federal Constitution. Pp. 169–174.
2. Earlier decisions of this Court construing the same tax exemption provision, in cases involving property taxes and not a conventional income tax, are not controlling here. Pp. 173–174.

200 Ga. 856, 38 S. E. 2d 774, affirmed.

The railroad company appealed to the state courts from a tax assessment under a state statute challenged as violative of the contract clause of the Federal Constitution. The trial court gave judgment for the railroad. The State Supreme Court reversed. 200 Ga. 856, 38 S. E. 2d 774. On appeal to this Court, *affirmed,* p. 174.

Carl H. Davis and *T. M. Cunningham* argued the cause for appellant. With them on the brief was *Philip H. Alston.*

Victor Davidson and *Claud Shaw,* Assistant Attorneys General of Georgia, argued the cause for appellee. With them on the brief were *Eugene Cook,* Attorney General, and *C. E. Gregory, Jr.,* Assistant Attorney General.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This was a proceeding in the courts of Georgia to declare invalid an assessment by the State Revenue Commissioner against the Atlantic Coast Line Railroad Company on the ground that the tax as applied to the appellant impairs the obligation of contracts. United States Constitution, Art. I, Sec. 10.

To encourage railroad development, the State of Georgia in 1833 chartered the Georgia Railroad Company (which later became the Georgia Railroad and Banking Company), and gave the railroad certain immunity from taxation. Georgia's increasing need of tapping new sources of revenue has not unnaturally brought to the courts the scope of this immunity. Its construction in relation to the claim of Georgia, that despite the charter of 1833 the appellant is subject to its corporate income tax, is the sole issue before us.

The case is this. Georgia, in 1937, imposed a tax of 5½ per cent. on the net income of all domestic and foreign corporations. Acts 1931, Extra. Sess. pp. 24, 26, amended, Acts 1937, pp. 109, 117; Ga. Ann. Code § 92–3102. No claim under this corporate income tax was made against the Atlantic Coast Line, one of the lessees of the Georgia Railroad, until 1941. For the calendar years 1941, 1942, 1943, the State Revenue Commissioner assessed against the appellant deficiency taxes on the basis of its net income from the road, computed at the 5½ per cent. rate paid by all corporations. It is this assessment that is contested. The appellant resisted on the ground that the attempt of Georgia to impose this tax is in disregard of the obligation assumed by Georgia through § 15 of the Charter of 1833. The Supreme Court of Georgia sustained the assessment, holding that the tax exemption of the charter related merely to the limits to which a tax on the railroad property could be levied, such a property

tax to be measured so as not to exceed one-half per cent. of the net earning power of the properties. 200 Ga. 856, 38 S. E. 2d 774. The exemption, so the State Supreme Court found, was not concerned with what we now know as a corporate net income tax and therefore did not bargain away the power of the legislature to impose such a tax.

A claim that a State statute impairs the obligation of contract is an appeal to the United States Constitution, and cannot be foreclosed by a State court's determination whether there was a contract or what were its obligations. But while it is true that we are not bound by the construction of local statutes by the local courts in deciding the Constitutional question, "yet when we are dealing with a matter of local policy, like a system of taxation, we should be slow to depart from their judgment, if there was no real oppression or manifest wrong in the result." *Clyde* v. *Gilchrist,* 262 U. S. 94, 97.

The Georgia Supreme Court had to construe the following Georgia language:

> "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said rail roads or any one of them: and after that, shall be subject to a tax not exceeding one half per cent. per annum on the net proceeds of their investments." § 15, Act of December 21, 1833, Acts 1833, pp. 256, 263–64.

It is not for us to read such a local law with independent but innocent eyes, heedless of a construction placed upon it by the local court. Such a tax provision is not a collocation of abstract words. In seeking the meaning conveyed by a local enactment it must be viewed as part of the whole texture of local laws and of the economy to which they apply. The language draws to itself presuppositions not always articulated, and even what is expressed

in words may carry meaning to insiders which is not within the sure discernment of those viewing the law from a distance. And so we are not prepared to say that the Supreme Court of Georgia was "manifestly wrong," *Hale* v. *State Board,* 302 U. S. 95, 101, in construing the exemption as limiting merely the right to impose property taxes. Our search is for something other than the meaning which the tax specialists may today find in the words. "It is for the meaning that at a particular time and place and in the setting of a particular statute might reasonably have acceptance by men of common understanding." *Hale* v. *State Board, supra.* We should reject the construction which the Georgia Supreme Court has placed upon what the Georgia Legislature of 1833 wrote only if we can be confident that the Georgia Legislature of 1833, by the words it used, could not have expressed the meaning thus attributed to it. A fair regard for the place of income taxes, as now commonly conceived, in the thought and practice concerning fiscal matters prevalent in 1833 precludes the rejection of the interpretation by the Georgia Court of the exemption of 1833.

There were, to be sure, so-called "faculty taxes" in Colonial times which had some of the characteristics of our present income taxes in that ability to pay was an ingredient. But even these taxes, hardly income taxes as we now know them, had by 1833 generally ceased to be, and perhaps even to be remembered. See, *e. g.,* Seligman, The Income Tax (2d ed.) Part II, c. I, pp. 367 *et seq.;* compare *Hylton* v. *United States,* 3 Dall. 171. In Georgia, the only imposition even remotely classifiable as an income tax because presumably based on ability to pay is that illustrated by a levy of "The sum of four dollars on all professors of law and physic, and the sum of fifty dollars on all billiard tables . . . ." Law No. 590, 1797, Watkins Digest of the Laws of Georgia, 1755–1799, pp. 646, 648. Not until the Civil War did Georgia, like the Federal Gov-

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ernment, resort to what was indisputably an income tax. On the other hand, to read as the Georgia Supreme Court read the exemption provision of the Charter of 1833, as dealing with a tax on property, fairly reflects a practice, not unknown in the earlier days, of assessing property for tax purposes not by its exchange value but by its earning power. See, *e. g.,* Seligman, The Income Tax (2d ed.) pp. 382–83; Report of Special Commission on Taxation, Connecticut 1887, p. 9, with comments thereon in Kennan, Income Taxation, p. 207.

In this setting, it would savor of dogmatism to infuse into the 1833 exemption the income tax atmosphere of our own day. It does not seem inadmissible for the Supreme Court of Georgia to have found that what the Georgia Legislature of 1833 sought was to measure the commonplace property tax of the time not by a flat sum, or on the basis of a value abstractly ascertained, but in accordance with the fruits of the property, modestly limited.

To sanction such a restricted reading of the exemption is to respect a rule deeply rooted in history and policy, according to which contracts of tax exemption are to be read "narrowly and strictly." *Hale* v. *State Board, supra,* at 109. To recognize that more than a hundred years ago the Georgia Legislature did not forever bargain away the wholly untapped domain of income taxation is to recognize the governing consideration that "The power of taxation is never to be regarded as surrendered or bargained away if there is room for rational doubt as to the purpose." This was said when an earlier controversy affecting this charter was here. *Wright* v. *Georgia Railroad and Banking Co.,* 216 U. S. 420, 438. As to the astuteness of taxpayers in ordering their affairs so as to minimize taxes, we have said that "the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it." *Superior*

Oil Co. v. *Mississippi,* 280 U. S. 390, 395–96. This is so because "nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions." Learned Hand, C. J., dissenting in *Commissioner* v. *Newman,* 159 F. 2d 848, 851. Conversely, the State, insofar as it may limit its basic power to tax to enable government to go on, can sail as closely as astuteness permits to the line of an immunity from such exaction. This is an old canon of judicial construction. The policy on which it rests antedates the charter before us, and it forms the setting in which the exemption is to be read. See, *e. g., Charles River Bridge* v. *Warren Bridge,* 7 Pick. (Mass. 1829) 344, affirmed, 11 Pet. 420 (1837). This requirement in the construction of legislative grants, especially tax exemptions, is merely an aspect of respecting legislative purpose. A legislature is not to be presumed to have relinquished its power of taxation beyond the narrowest rational reading of an exemption. The potential need of all governmental powers, and fairness in the distribution of burdens or in the enjoyment of privileges, preclude such an assumption.

We have carefully considered the earlier cases in which the scope of this exemption came before this Court. *Central Railroad and Banking Co.* v. *Georgia,* 92 U. S. 665; *Wright* v. *Georgia Railroad and Banking Co., supra; Wright* v. *Central of Georgia R. Co.,* 236 U. S. 674; *Wright* v. *Louisville and Nashville R. Co.,* 236 U. S. 687; *Central of Georgia R. Co.* v. *Wright,* 248 U. S. 525; *Central of Georgia R. Co.* v. *Wright,* 250 U. S. 519. It is needless to rehearse the issues they involved. Suffice it to say that the prior taxes found to have been barred by the exemption were all taxes on the railroad property. Now for the first time we are called upon to examine a candid, conventional income tax. Passing reference to "income" when the Court's mind was not focused upon the validity of an income tax as such must not be torn

from the context of discussion of property taxes. In any event, these phrases leave untouched our duty to respect the judgment of a State court as to the fair intendment of an exemption.

Judgment affirmed.

MR. JUSTICE RUTLEDGE, agreeing with the Court's conclusions concerning the meaning of the Georgia statute, concurs in the result.

SUNAL *v.* LARGE, SUPERINTENDENT, FEDERAL PRISON CAMP.

NO. 535. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.*

Argued April 1, 1947.—Decided June 23, 1947.

1. In a criminal prosecution under the Selective Training and Service Act of 1940 for failure to submit to induction into the Army, a federal district court improperly denied to a defendant who had fully exhausted his administrative remedy the right to defend on the ground of the invalidity of his classification by the local Board as available for military service rather than as an exempt minister of religion. He was convicted and sentenced to imprisonment but took no appeal. *Held:* He could not later obtain a review of his conviction by a habeas corpus proceeding. Pp. 175–184.
2. In the circumstances of this case, the failure of the defendant to take an appeal from the judgment of conviction can not be justified on the ground that an appeal was deemed futile because of the state of the law at that time—*i. e.,* after the decision of this Court in *Falbo* v. *United States,* 320 U. S. 549, and before the decision in *Estep* v. *United States,* 327 U. S. 114. P. 181.
3. The trial court's error in the ruling on the question of law did not deprive the defendant of any right under the Federal Constitution. P. 182.

157 F. 2d 165, affirmed.
157 F. 2d 811, reversed.

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*Together with No. 840, *Alexander, Warden,* v. *United States ex rel. Kulick,* on certiorari to the Circuit Court of Appeals for the Second Circuit.

No. 535. In a habeas corpus proceeding, the District Court discharged the writ and remanded petitioner to the custody of the respondent. The Circuit Court of Appeals affirmed. 157 F. 2d 165. This Court granted certiorari. 329 U. S. 712. *Affirmed,* p. 184.

No. 840. In a habeas corpus proceeding, the District Court discharged the writ and remanded the relator here to custody. 66 F. Supp. 183. The Circuit Court of Appeals reversed, and ordered the discharge of the relator from custody. 157 F. 2d 811. This Court granted certiorari. 329 U. S. 712. *Reversed,* p. 184.

Irving S. Shapiro argued the cause for petitioner in No. 840 and respondent in No. 535. With him on the briefs were *Acting Solicitor General Washington* and *Robert S. Erdahl. Frederick Bernays Wiener* was also on the brief in No. 840.

Hayden C. Covington argued the cause and filed briefs for respondent in No. 840 and petitioner in No. 535.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Sunal and Kulick registered under the Selective Training and Service Act of 1940, 54 Stat. 885, 57 Stat. 597, 50 U. S. C. App. § 301, *et seq.* Each is a Jehovah's Witness and each claimed the exemption granted by Congress to regular or duly ordained ministers of religion.[1] § 5 (d). The local boards, after proceedings unnecessary to relate here, denied the claimed exemptions and classified these registrants as I–A. They exhausted their administrative remedies but were unable to effect a change in their classi-

[1] Sunal in 1942 was classified as a conscientious objector and ordered to report for work of national importance. On his failure to do so he was convicted under the Act and a fine and term of imprisonment were imposed. The events with which we are now concerned relate to his classification after his discharge from prison.

fications. Thereafter they were ordered to report for induction—Sunal on October 25, 1944, Kulick on November 9, 1944. Each reported but refused to submit to induction. Each was thereupon indicted, tried and convicted under § 11 of the Act for refusing to submit to induction. Sunal was sentenced on March 22, 1945, Kulick on May 7, 1945, each to imprisonment for a term of years. Neither appealed.

At the trial each offered evidence to show that his selective service classification was invalid. The trial courts held, however, that such evidence was inadmissible, that the classification was final and not open to attack in the criminal trial. On February 4, 1946, we decided *Estep* v. *United States* and *Smith* v. *United States,* 327 U. S. 114. These cases [2] held on comparable facts that a registrant, who had exhausted his administrative remedies and thus obviated the rule of *Falbo* v. *United States,* 320 U. S. 549, was entitled, when tried under § 11, to defend on the ground that his local board exceeded its jurisdiction in making the classification—for example, that it had no basis in fact. 327 U. S. pp. 122–123.

It is plain, therefore, that the trial courts erred in denying Sunal and Kulick the defense which they tendered. Shortly after the *Estep* and *Smith* cases were decided, petitions for writs of *habeas corpus* were filed on behalf of Sunal and Kulick. In each case it was held that *habeas corpus* was an available remedy. In Sunal's case the Circuit Court of Appeals for the Fourth Circuit held that there was a basis in fact for the classification and affirmed a judgment discharging the writ. 157 F. 2d 165.

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[2] The *Smith* case was decided by the Circuit Court of Appeals on April 4, 1945, 148 F. 2d 288; the petition for certiorari was filed April 25, 1945, and granted May 28, 1945. 325 U. S. 846. The *Estep* case was decided by the Circuit Court of Appeals on July 6, 1945, 150 F. 2d 768; the petition for certiorari was filed August 3, 1945, and granted October 8, 1945. 326 U. S. 703.

In Kulick's case the Circuit Court of Appeals for the Second Circuit reversed a District Court holding that there was evidence to support the classification, 66 F. Supp. 183, and ruled, without examining the evidence, that since Kulick had been deprived of the defense he should be discharged from custody without prejudice to further prosecution. 157 F. 2d 811. The cases are here on petitions for writs of certiorari, which we granted because of the importance of the questions presented.

The normal and customary method of correcting errors of the trial is by appeal. Appeals could have been taken in these cases,[3] but they were not. It cannot be said that absence of counsel made the appeals unavailable as a practical matter. See *Johnson* v. *Zerbst,* 304 U. S. 458, 467. Defendants had counsel. Nor was there any other barrier to the perfection of their appeals. Cf. *Cochran* v. *Kansas,* 316 U. S. 255. Moreover, this is not a situation where the facts relied on were dehors the record and therefore not open to consideration and review on appeal. See *Waley* v. *Johnston,* 316 U. S. 101, 104; *United States ex rel. McCann* v. *Adams,* 320 U. S. 220, 221. And see *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 274–275. The error was of record in each case. It is said, however, that the failure to appeal was excusable, since under the decisions as they then stood—March 22, 1945, and May 7, 1945—the lower courts had consistently ruled that the selective service classification could not be attacked in a prosecution under § 11. See *Estep* v. *United States, supra,* p. 123, n. 15. It is also pointed out that on April 30, 1945, we had denied certiorari in a case which sought to raise the same

[3] We therefore lay to one side cases such as *Bridges* v. *Wixon,* 326 U. S. 135, *Duncan* v. *Kahanamoku,* 327 U. S. 304, and *Eagles* v. *United States ex rel. Samuels,* 329 U. S. 304, where the order of the agency under which petitioner was detained was not subject to judicial review.

point,[4] and that *Estep* v. *United States, supra,* and *Smith* v. *United States, supra,* were brought here [5] and decided after Sunal's and Kulick's time for appeal had passed. The argument is that since the state of the law made the appeals seem futile, it would be unfair to those registrants to conclude them by their failure to appeal.

We put to one side comparable problems respecting the use of *habeas corpus* in the federal courts to challenge convictions obtained in the state courts. See *New York* v. *Eno,* 155 U. S. 89; *Tinsley* v. *Anderson,* 171 U. S. 101, 104–105; *United States ex rel. Kennedy* v. *Tyler,* 269 U. S. 13; *Ex parte Hawk,* 321 U. S. 114, 116–117. So far as convictions obtained in the federal courts are concerned, the general rule is that the writ of *habeas corpus* will not be allowed to do service for an appeal. *Adams* v. *United States ex rel. McCann, supra,* p. 274. There have been, however, some exceptions. That is to say, the writ has at times been entertained either without consideration of the adequacy of relief by the appellate route or where an appeal would have afforded an adequate remedy. Illustrative are those instances where the conviction was under a federal statute alleged to be unconstitutional,[6] where there was a conviction by a federal court whose jurisdiction over the person or the offense was challenged,[7] where the trial or sentence by a federal court vio-

[4] *Rinko* v. *United States,* 325 U. S. 851. We also denied certiorari in *Flakowicz* v. *United States,* 325 U. S. 851; but it, like *Falbo* v. *United States, supra,* was one where the administrative remedies had not been exhausted, there being an additional examination which the registrant had not taken. See *Gibson* v. *United States,* 329 U. S. 338.

[5] See note 2, *supra.*

[6] *Ex parte Siebold,* 100 U. S. 371; *Ex parte Curtis,* 106 U. S. 371; *Ex parte Yarbrough,* 110 U. S. 651; *In re Coy,* 127 U. S. 731; *Matter of Heff,* 197 U. S. 488; *Matter of Gregory,* 219 U. S. 210; *Baender* v. *Barnett,* 255 U. S. 224.

[7] *Ex parte Watkins,* 3 Pet. 193; *Ex parte Parks,* 93 U. S. 18; *Bowen* v. *Johnston,* 306 U. S. 19.

lated specific constitutional guaranties.[8] It is plain, however, that the writ is not designed for collateral review of errors of law committed by the trial court—the existence of any evidence to support the conviction,[9] irregularities in the grand jury procedure,[10] departure from a statutory grant of time in which to prepare for trial,[11] and other errors in trial procedure which do not cross the jurisdictional line. Cf. *Craig* v. *Hecht*, 263 U. S. 255.

Yet the latter rule is not an absolute one; and the situations in which *habeas corpus* has done service for an appeal are the exceptions. Thus where the jurisdiction of the federal court which tried the case is challenged or where the constitutionality of the federal statute under which conviction was had is attacked, *habeas corpus* is increasingly denied in case an appellate procedure was available for correction of the error.[12] Yet, on the other hand, where the error was flagrant and there was no other remedy available for its correction, relief by *habeas corpus* has sometimes been granted.[13] As stated by Chief Jus-

[8] *Ex parte Lange*, 18 Wall. 163 (double jeopardy); *In re Snow*, 120 U. S. 274 (same); *In re Nielsen*, 131 U. S. 176 (same); *Counselman* v. *Hitchcock*, 142 U. S. 547 (self-incrimination); *Ex parte Wilson*, 114 U. S. 417 (requirement of indictment); *Ex parte Bain*, 121 U. S. 1 (same); *Callan* v. *Wilson*, 127 U. S. 540 (jury trial); *Johnson* v. *Zerbst*, *supra* (right to counsel); *Walker* v. *Johnston*, 312 U. S. 275 (same); *Waley* v. *Johnston*, *supra* (coerced plea of guilty).

[9] *Harlan* v. *McGourin*, 218 U. S. 442.

[10] *Ex parte Harding*, 120 U. S. 782; *Kaizo* v. *Henry*, 211 U. S. 146.

[11] *McMicking* v. *Schields*, 238 U. S. 99. The rule is even more strict where *habeas corpus* is sought before trial. See *Johnson* v. *Hoy*, 227 U. S. 245.

[12] *In re Lincoln*, 202 U. S. 178; *Toy Toy* v. *Hopkins*, 212 U. S. 542; *Glasgow* v. *Moyer*, 225 U. S. 420.

[13] *Tinsley* v. *Treat*, 205 U. S. 20 (removal case). In removal cases *habeas corpus* is available not to weigh the evidence to support the accusation but to determine whether there is an entire lack of evidence to support it. *Hyde* v. *Shine*, 199 U. S. 62, 84. It is also available to determine whether removal to the district in question violates a constitutional right of the accused, *Haas* v. *Henkel*, 216 U. S. 462, or

tice Hughes in *Bowen* v. *Johnston,* 306 U. S. 19, 27, the rule which requires resort to appellate procedure for the correction of errors "is not one defining power but one which relates to the appropriate exercise of power." That rule is, therefore, "not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Id.* p. 27. That case was deemed to involve "exceptional circumstances" by reason of the fact that it indicated "a conflict between state and federal authorities on a question of law involving concerns of large importance affecting their respective jurisdictions." *Id.* p. 27. The Court accordingly entertained the writ to examine into the jurisdiction of the court to render the judgment of conviction.

The same course was followed in *Ex parte Hudgings,* 249 U. S. 378, where petitioner was adjudged guilty of contempt for committing perjury. The Court did not require the petitioner to pursue any appellate route but issued an original writ and discharged him, holding that perjury without more was not punishable as a contempt. That situation was deemed exceptional in view of "the nature of the case, of the relation which the question which it involves bears generally to the power and duty of courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected . . . ." *Id.* p. 384. Cf. *Craig* v. *Hecht, supra.*

The Circuit Courts of Appeals thought that the facts of the present cases likewise presented exceptional cir-

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whether the court before which it is proposed to take and try the accused has jurisdiction over the offense. *Salinger* v. *Loisel,* 265 U. S. 224. But *habeas corpus* will not be entertained to pass on the question of jurisdiction where it involves consideration of many facts and seriously controverted questions of law. *Rodman* v. *Pothier,* 264 U. S. 399; *Henry* v. *Henkel,* 235 U. S. 219.

cumstances which justified resort to *habeas corpus* though no appeals were taken. In their view the failure to appeal was excusable, since relief by that route seemed quite futile.

But denial of certiorari by this Court in the earlier case imported no expression of opinion on the merits. *House* v. *Mayo,* 324 U. S. 42, 48, and cases cited. The same chief counsel represented the defendants in the present cases and those in the *Estep* and *Smith* cases. At the time these defendants were convicted the *Estep* and *Smith* cases were pending before the appellate courts. The petition in the *Smith* case was, indeed, filed here about two weeks before Kulick's conviction and about a month after Sunal's conviction. The same road was open to Sunal and Kulick as the one Smith and Estep took. Why the legal strategy counseled taking appeals in the *Smith* and *Estep* cases and not in these we do not know. Perhaps it was based on the facts of these two cases. For the question of law had not been decided by the Court; and counsel was pressing for a decision here. The case, therefore, is not one where the law was changed after the time for appeal had expired. Cf. *Warring* v. *Colpoys,* 122 F. 2d 642. It is rather a situation where at the time of the convictions the definitive ruling on the question of law had not crystallized. Of course, if Sunal and Kulick had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile.

We are dealing here with a problem which has radiations far beyond the present cases. The courts which tried the defendants had jurisdiction over their persons and over the offense. They committed an error of law in excluding the defense which was tendered. That error did not go to the jurisdiction of the trial court. Congress,

moreover, has provided a regular, orderly method for correction of all such errors by granting an appeal to the Circuit Court of Appeals and by vesting us with certiorari jurisdiction. It is not uncommon after a trial is ended and the time for appeal has passed to discover that a shift in the law or the impact of a new decision has given increased relevance to a point made at the trial but not pursued on appeal. Cf. *Warring* v. *Colpoys, supra.* If in such circumstances, *habeas corpus* could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications. Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by *habeas corpus,* litigation in these criminal cases will be interminable. Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court.

An endeavor is made to magnify the error in these trials to constitutional proportions by asserting that the refusal of the proffered evidence robbed the trial of vitality by depriving defendants of their only real defense. But as much might be said of many rulings during a criminal trial. Defendants received throughout an opportunity to be heard and enjoyed all procedural guaranties granted by the Constitution. Error in ruling on the question of law did not infect the trial with lack of procedural due process. As stated by Mr. Justice Cardozo in *Escoe* v. *Zerbst,* 295 U. S. 490, 494, "When a hearing is allowed but there is error in conducting it or in limiting its scope, the remedy is by appeal.

When an opportunity to be heard is denied altogether, the ensuing mandate of the court is void, and the prisoner confined thereunder may have recourse to *habeas corpus* to put an end to the restraint."

It is said that the contrary position was indicated by the following statement in *Estep* v. *United States, supra,* pp. 124–125,

> "But if we now hold that a registrant could not defend at his trial on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board after conviction by *habeas corpus.* The court would then be sending men to jail today when it was apparent that they would have to be released tomorrow."

We were there examining the alternative pressed on us—that the classification could not be attacked at the trial. If we denied the defense, we concluded that *habeas corpus* would lie the moment after conviction. For one convicted of violating an illegal order of a selective service board, like one convicted of violating an unconstitutional statute, should be afforded an opportunity at some stage to establish the fact. And where no other opportunity existed, *habeas corpus* would be the appropriate remedy.[14] But that was an additional reason for allowing the defense in the criminal trial, not a statement that defendants prosecuted under § 11 had an alternative of defending at the trial on the basis of an illegal classification or resorting to *habeas corpus* after conviction. These registrants had available a method of obtaining the right to defend their prosecutions under § 11 on that ground. They did not use

[14] The remedy of *habeas corpus* extends to a case where a person "is in custody in violation of the Constitution or of a law . . . of the United States . . . ." R. S. § 753, 28 U. S. C. § 453.

it. And since we find no exceptional circumstances which excuse their failure, *habeas corpus* may not now be used as a substitute.

Accordingly *Sunal* v. *Large* will be affirmed and *Alexander* v. *Kulick* will be reversed.

So ordered.

MR. JUSTICE BURTON concurs in the result.

MR. JUSTICE FRANKFURTER, dissenting.

That *habeas corpus* cannot be made to do service for an appeal is a well-worn formula. But this generalization should not dispose of these two cases, if their actualities are viewed in the light of our decisions.

The First Judiciary Act empowered the courts of the United States to issue writs of *habeas corpus*. Section 14 of the Act of September 24, 1789, 1 Stat. 73, 81. Since the scope of the writ was not defined by Congress, it carried its common law implications. The writ was greatly enlarged after the Civil War by the Act of February 5, 1867. 14 Stat. 385. (For legislation dealing with *habeas corpus* see note in 18 F. 68.) It was no longer limited to searching the face of a judgment of a court of competent jurisdiction. It was available to cut through forms and go "to the very tissue of the structure," Mr. Justice Holmes in *Frank* v. *Mangum,* 237 U. S. 309, 345, 346, though it was certainly not to be invoked merely as a substitute for an available appeal. But what is "form" and what is the "tissue of the structure," and when is a writ sought in fact as a substitute for an appeal in a practical view of the administration of justice, are questions to which our decisions give dubious and confused answers. I think it is fair to say that the scope of *habeas corpus* in the federal courts is an untidy area of our law that calls for much more systematic consideration than it has thus far received.

The extent to which this Court has left itself unhampered, by not drawing sharp jurisdictional lines, is indicated by the following very tentative classification of categories in which *habeas corpus* has not been deemed beyond the power of federal courts to entertain:

(1) Conviction by a federal court which had no jurisdiction either over the person or of the offense. See *Ex parte Watkins,* 3 Pet. 193, 203; *Ex parte Parks,* 93 U. S. 18, 23. But the writ is discretionary and may not issue even though if an opportunity were allowed such want of jurisdiction might be established. See *Toy Toy* v. *Hopkins,* 212 U. S. 542, and *Rodman* v. *Pothier,* 264 U. S. 399. And compare *In re Mayfield,* 141 U. S. 107, with *In re Blackbird,* 66 F. 541.

(2) Conviction under unconstitutional statute. *Ex parte Virginia,* 100 U. S. 339, 343; *Ex parte Siebold,* 100 U. S. 371; *Ex parte Curtis,* 106 U. S. 371; *Ex parte Yarbrough,* 110 U. S. 651. The writ was denied in each case, but the Court passed on the constitutionality of the statute. Here too the availability of the writ will depend on the circumstances of the case, particularly the stage in the criminal proceedings at which the writ is sought. *Johnson* v. *Hoy,* 227 U. S. 245; *Henry* v. *Henkel,* 235 U. S. 219. Compare *Glasgow* v. *Moyer,* 225 U. S. 420, with *Matter of Gregory,* 219 U. S. 210. See also *In re Lincoln,* 202 U. S. 178.

(3) Violation by federal courts of specific constitutional rights: (a) double jeopardy. Compare *Ex parte Bigelow,* 113 U. S. 328, with *In re Snow,* 120 U. S. 274, and *Nielsen, Petitioner,* 131 U. S. 176; (b) self-crimination. Writ granted as to a witness held in contempt, though apparently not as to a defendant restrained on charge of crime. Compare *Counselman* v. *Hitchcock,* 142 U. S. 547, and *Ex parte Irvine,* 74 F. 954 (Taft, Circuit Judge), with *Matter of Moran,* 203 U. S. 96; (c) no indictment by

grand jury. *Ex parte Wilson,* 114 U. S. 417. Also *Ex parte Bain,* 121 U. S. 1. As to denial of constitutional rights in State courts, *Moore* v. *Dempsey,* 261 U. S. 86.

(4) Due regard for harmonious Nation-State relations, need to avoid friction and maintain balance. See *Ex parte Rowland,* 104 U. S. 604; *In re Ayers,* 123 U. S. 443; *In re Sawyer,* 124 U. S. 200; *Bowen* v. *Johnston,* 306 U. S. 19. Compare *In re Tyler,* 149 U. S. 164; *In re Swan,* 150 U. S. 637; *Ex parte Young,* 209 U. S. 123. Availability of other remedies is here an important factor. Similarly as to State interference with federal officers, prompt relief may be deemed necessary. *Ohio* v. *Thomas,* 173 U. S. 276. See also *In re Neagle,* 135 U. S. 1; *Hunter* v. *Wood,* 209 U. S. 205.

(5) Insufficiency of indictments is not open on *habeas corpus;* it may be in removal cases, in view of the hardship to the individual and the inadequacy of other remedies. Compare *Tinsley* v. *Treat,* 205 U. S. 20; also *Hyde* v. *Shine,* 199 U. S. 62. Compare also the extradition cases. *Benson* v. *McMahon,* 127 U. S. 457; *Ornelas* v. *Ruiz,* 161 U. S. 502; *Bryant* v. *United States,* 167 U. S. 104.

(6) Defects in jury panel, in trial procedure, exclusion or insufficiency of evidence, are rarely held ground for relief on *habeas corpus.* But when no other remedy was available and the error appeared flagrant, there have been instances of relief. See *Tinsley* v. *Treat,* 205 U. S. 20. Compare *Ex parte Bain,* 121 U. S. 1.

(7) Legality of sentence or conditions of confinement. *Ex parte Lange,* 18 Wall. 163; *In re Bonner,* 151 U. S. 242.

(8) Contempt cases. *Ex parte Hudgings,* 249 U. S. 378, 384. Compare, *Savin, Petitioner,* 131 U. S. 267, and *Cuddy, Petitioner,* 131 U. S. 280. But when appeal is sufficient remedy, see *Craig* v. *Hecht,* 263 U. S. 255, and

Judge Learned Hand's dissenting opinion in the *Craig* case, 282 F. 138, 155.

Perhaps it is well that a writ the historic purpose of which is to furnish "a swift and imperative remedy in all cases of illegal restraint," see Lord Birkenhead, L. C., *Secretary of State for Home Affairs* v. *O'Brien,* [1923] A. C. 603, 609, should be left fluid and free from the definiteness appropriate to ordinary jurisdictional doctrines. But if we are to leave the law pertaining to *habeas corpus* in the unsystematized condition in which we find it, then I believe it is true of both cases what Judge Learned Hand said of the *Kulick* case, that the writ is necessary "to prevent a complete miscarriage of justice." 157 F. 2d 811, 813. If the justification need be no more definite than the existence of "exceptional circumstances," *Bowen* v. *Johnston,* 306 U. S. 19, 27, the reasons for allowing the writs in these cases are more compelling than were those in *Bowen* v. *Johnston,* where there merely appeared "to be uncertainty and confusion . . . whether offenses within the . . . National Park are triable in the state or federal courts." For the reasons set forth in Judge Hand's opinion, it "would pass all fair demands upon Kulick's diligence to conclude him because of his failure to appeal." 157 F. 2d at 813.

I agree with both Circuit Courts of Appeals that *habeas corpus* was available as a remedy in the circumstances of these cases, but since the Court does not consider the merits, I shall abstain from doing so.

MR. JUSTICE RUTLEDGE, dissenting.

I am in agreement with MR. JUSTICE FRANKFURTER in the result and substantially in the views he expresses. I would modify them by making definite and certain his tentatively expressed conclusion that the great writ of *habeas corpus* should not be confined by rigidities charac-

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terizing ordinary jurisdictional doctrines. And I agree with Judge Learned Hand, in the view stated for the Circuit Court of Appeals in Kulick's case, that upon the sum of our decisions,[1] regardless of the variety of statement in the opinions, no more definite rule is to be drawn out than that "the writ is available, not only to determine points of jurisdiction, stricti juris, and constitutional questions; but whenever else resort to it is necessary to prevent a complete miscarriage of justice." 157 F. 2d 811, 813.

In my opinion not only is this the law, measured by the sum of the decisions and the applicable statute,[2] but the aggregate of the results demonstrates it should be the law.

Confusion in the opinions there is, in quantity. But it arises in part from the effort to pin down what by its nature cannot be confined in special, all-inclusive categories, unless the office of the writ is to be diluted or destroyed where that should not happen. And so limitation in assertion gives way to the necessity for achieving the writ's historic purpose when the two collide. Admirable as may be the effort toward system,

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[1] Including those cited in the Court's opinion and that of MR. JUSTICE FRANKFURTER. See also dissenting opinion, *Ex parte Craig*, 282 F. 138, 155–159, affirmed in *Craig* v. *Hecht*, 263 U. S. 255; The Writ of Habeas Corpus in the Federal Courts (1935) 35 Col. L. Rev. 404.

[2] Rev. Stat. § 761, 28 U. S. C. § 461, which commands the court, after hearing to "dispose of the party as law and justice require." Cf. *Frank* v. *Mangum*, 237 U. S. 309, 330, 331, and dissenting opinion of Mr. Justice Holmes, at 345 ff., concurred in by Mr. Justice Hughes, who afterward as Chief Justice wrote the Court's opinion in *Bowen* v. *Johnston*, 306 U. S. 19. See note 4. Pertinently the statute applies to prisoners "in custody in violation of the Constitution or of a law or treaty of the United States . . . ." Rev. Stat. § 753, 28 U. S. C. § 453.

this last resort for human liberty cannot yield when the choice is between tolerating its wrongful deprivation and maintaining the systematist's art.

The writ should be available whenever there clearly has been a fundamental miscarriage of justice for which no other adequate remedy is presently available. Beside executing its great object, which is the preservation of personal liberty and assurance against its wrongful deprivation, considerations of economy of judicial time and procedures, important as they undoubtedly are, become comparatively insignificant.[3] This applies to situations involving the past existence of a remedy presently foreclosed, as well as to others where no such remedy has ever been afforded.

In the prevailing state of our criminal law, federal and state, there are few errors, either fundamental or of lesser gravity, which cannot be corrected by appeal timely taken, unless the facts disclosing or constituting them arise after the time has expired. If the existence of a remedy by appeal at some stage of the criminal proceedings is to be taken for the criterion, then in very few instances, far less than the number comprehended by our decisions, will the writ be available. Taken literally, the formula so often repeated, that the writ is not a substitute for appeal, is thus in conflict with every case where the ground upon which the writ has been allowed either was or might have been asserted on appeal.[4]

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[3] It is for this reason that the doctrine of *res judicata* does not apply to *habeas corpus* determinations, *Waley* v. *Johnston*, 316 U. S. 101, 105, although a prior refusal to discharge the prisoner on a like application may be given weight, *Salinger* v. *Loisel*, 265 U. S. 224, 231, for obvious reasons of judicial administration.

[4] In the following cases the Court either passed upon the substance of the contentions presented in the petition for writ of *habeas corpus*

The formula has obvious validity in the sense that the writ is not readily to be used for overturning determinations made on appeal or for securing review where no specification has been made or no appeal has been taken of matters not going to make the conviction a gross miscarriage of justice.

But any effort to shut off the writ's functioning merely because appeal has not been taken in a situation where, but for that fact alone, the writ would issue, seems to me to prescribe a system of forfeitures in the last area where such a system should prevail. Certainly a basic miscarriage of justice is no less great or harmful, either to the individual or to the general cause of personal liberty, merely because appeal has not been taken, than where appeal is taken but relief is wrongfully denied.

These considerations apply with special force, though not exclusively, where good reason existed, as I think did here, for failure to note the appeal in the brief time

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or held that the petitioner was entitled to a hearing, although, so far as appears, at the time the petition was filed the time to appeal had expired, *e. g., Bowen* v. *Johnston,* 306 U. S. 19; *Walker* v. *Johnston,* 312 U. S. 275; *Johnson* v. *Zerbst,* 304 U. S. 458, see The Writ of Habeas Corpus in the Federal Courts (1935) 35 Col. L. Rev. 404, 414, n. 66; an appeal had already been taken, *Moore* v. *Dempsey,* 261 U. S. 86; or the time to appeal had not expired, *Hunter* v. *Wood,* 209 U. S. 205; *In re Sawyer,* 124 U. S. 200; *Wo Lee* v. *Hopkins,* 118 U. S. 356, discussed in The Writ of Habeas Corpus in the Federal Courts, *supra,* at 414, n. 60. See also *Appleyard* v. *Massachusetts,* 203 U. S. 222, 225–226; *Ex parte Bridges,* 2 Woods 428, 430, approved in *Ex parte Royall,* 117 U. S. 241.

In his dissenting opinion in *Ex parte Craig, supra* note 1, Judge Learned Hand, reviewing the authorities, said: "The appellant's attempt rigidly to classify these exceptions appears to me more definite than the books warrant. A safer rule is to say somewhat vaguely that they must be occasions of pressing necessity." 282 F. at 156.

allowed.[5] Whether or not the inferior federal courts were justified in taking the *Falbo* decision [6] for more than its specific ruling, the fact remains that their broadly prevailing view was that that case had cut off all right to make such defenses as Sunal and Kulick tendered.[7]

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[5] The opinion of the Circuit Court of Appeals in the *Kulick* case, after stating the summarized effect of our decisions as quoted in the text above, said concerning this case: "The occasion at bar is such; certainly the reasons for allowing it are more compelling than were those in Bowen v. Johnston [see notes 3, 4, *supra*], where there merely appeared 'to be uncertainty and confusion . . . whether offenses within' a national park 'are triable in the state or federal courts.' It would pass all fair demands upon Kulick's diligence to conclude him because of his failure to appeal. Not only had there not been any glimmer of a positive chance of success, but there had been an unusual consensus of judicial opinion against it in the lower courts. Moreover, although a number of the decisions could be explained upon the ground that those inducted had not wholly exhausted their administrative remedies; in a number of others they had done so; and no distinction had been established between the two. Indeed, in United States v. Flakowicz, supra [146 F. 2d 874], which had been one of these, the Supreme Court denied certiorari only a fortnight before May 12th," the date of Kulick's conviction. 157 F. 2d at 813–814. See note 9 *infra*.

[6] *Falbo* v. *United States*, 320 U. S. 549. The opinion, though containing language emphasizing the failure of Congress to provide expressly for judicial review of selective service boards' classifications, explicitly pointed out that "a board order to report is *no more than a necessary intermediate step* in a united and continuous process designed to raise an army speedily and efficiently" and that, if there were a constitutional requirement for judicial review, "Congress was not required to provide for judicial intervention *before final acceptance* of an individual for national service." Pp. 553, 554. The opinion also stated: "Surely if Congress had intended to authorize interference with that process *by intermediate challenges of orders to report*, it would have said so." P. 554. (Emphasis added.)

[7] See note 5 *supra*, and the cases cited in MR. JUSTICE FRANKFURTER'S opinion in *Estep* v. *United States*, 327 U. S. 114, 139.

In that prevailing climate of opinion in those courts, there was hardly any chance that appeal to the federal circuit courts of appeals would bring relief by their action.[8] The chances for reversal therefore hung almost exclusively upon the doubtful, not to say slender,[9] chance that this Court in the exercise of its discretionary power would grant certiorari.

The deprivation here was of the right to make any substantial defense.[10] I do not think a trial which forecloses the basic right to defend, upon the only valid ground available for that purpose, is any less unfair or conclusive as against the office of *habeas corpus* than one which takes place when the court is without jurisdiction to try the offense, as when the charge is made under an unconstitutional statute or for other reason sets forth no lawfully prescribed offense, or when the court loses jurisdiction by depriving the accused of his

[8] In reference to Kulick's case the chance was practically nil, since the Circuit Court of Appeals for the Second Circuit previously had ruled the question adversely to the validity of the defenses in *United States* v. *Flakowicz*, 146 F. 2d 874, and certiorari had been denied here. 325 U. S. 851. See note 5.

Smith v. *United States*, 148 F. 2d 288, afterwards reversed here, 327 U. S. 114, apparently was the first in which the Circuit Court of Appeals for the Fourth Circuit decided the question. The decision was rendered April 4, 1945. Sunal was convicted on March 22, 1945.

[9] Although denial of certiorari is not to be taken as expression of opinion in any case, it would be idle to claim that it has no actual or reasonable influence upon the practical judgment of lawyers whether appeal should be noted and taken upon the chance that in a case substantially identical this Court's discretion would be exercised, in the absence of conflict, in a contrary manner at the stage of application for certiorari.

[10] Under the rule applied in the district courts and the circuit courts of appeals the only defenses open would have been that the defendants had not refused to take the oaths. No defense relating to the validity of the statute, the regulations, or their application in the particular cases was available.

constitutional right to counsel. That right is no more and no less than an important segment of the right to have any valid defense advanced and considered. It becomes almost meaningless if the larger right to defend is itself cut off.[11]

With MR. JUSTICE FRANKFURTER, since the Court reaches only the question of the availability of *habeas corpus,* I do not consider others.

MR. JUSTICE MURPHY joins in this dissent. He believes that today's decision unduly narrows the point at which due process may be accorded those accused or convicted of violating the Selective Training and Service Act of 1940. Cf. his dissenting opinion in *Falbo* v. *United States,* 320 U. S. 549, 555, and his concurring opinion in *Estep* v. *United States,* 327 U. S. 114, 125.

[11] Cf. *Yakus* v. *United States,* 321 U. S. 414, dissenting opinion, at 460 ff.

SECURITIES & EXCHANGE COMMISSION *v.* CHENERY CORPORATION ET AL.

NO. 81. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.*

Argued December 13, 16, 1946.—Decided June 23, 1947.

1. In approving a plan for the reorganization of a holding company under the Public Utility Holding Company Act of 1935, the Securities and Exchange Commission required that preferred stock purchased by the management without fraud or concealment while plans of reorganization were before the Commission should not be converted into stock of the reorganized company, like other preferred stock, but should be surrendered at cost plus interest. In *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, this Court held that this requirement could not be sustained on the sole ground upon which it was based by the Commission—*i. e.*, principles of equity judicially established. On remand, the Commission re-examined the problem and reached the same result, but based this requirement on the ground that to permit the management to profit from purchases of stock made while reorganization proceedings were pending would be inconsistent with the standards of §§ 7 and 11 of the Act. *Held:* The new order is sustained. Pp. 196–199, 209.
2. This Court's earlier decision held only that the requirement could not be supported on the sole ground stated by the Commission in its first order; and, on the remand for such further proceedings as might be appropriate, the Commission was not precluded in the performance of its administrative function from reaching the same result on proper and relevant grounds. Pp. 200–201.
3. The Commission's action was not precluded by the fact that the Commission had not anticipated this problem and adopted a general rule or regulation governing management trading during reorganization. Pp. 201–202.
4. The choice between proceeding by general rule or by *ad hoc* decisions is one that lies primarily in the informed discretion of the administrative agency. Pp. 202–203.
5. That an *ad hoc* decision of the Commission might have a retroactive effect does not necessarily render it invalid. P. 203.

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*Together with No. 82, *Securities & Exchange Commission* v. *Federal Water & Gas Corp.*, also on certiorari to the same Court.

6. The scope of judicial review of an administrative decision in which a new principle was announced is no different from that in the case of ordinary administrative action. P. 207.
7. The judicial function on review of an order of the Commission is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress. P. 207.
8. In determining whether to approve a plan of reorganization under the Act, the Commission may properly consider that some abuses in the field of corporate reorganization may be dealt with effectively only by prohibitions not concerned with the fairness of a particular transaction. Pp. 207–208.
9. In its interpretation and application of the "fair and equitable" rule of § 11 (e), and of the standard of what is "detrimental to the public interest or the interest of investors or consumers" under §§ 7 (d) (6) and 7 (e), the Commission did not abuse its discretion in this case. P. 208.
10. There was reasonable basis in this case for the conclusion that the benefits and profits accruing to the management from the stock purchases should be prohibited, regardless of the good faith involved. P. 208.
11. The Commission's conclusion in this case is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts; and constitutes an allowable administrative judgment which can not be disturbed on judicial review. P. 209.

154 F. 2d 6, reversed.

Upon remand to the Securities and Exchange Commission of the case decided by this Court in *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, the Commission denied an application for approval of an amendment of the plan of reorganization. Holding Company Act Release No. 5584. The court below reversed. 154 F. 2d 6. This Court granted certiorari. 328 U. S. 829. *Reversed,* p. 209.

Roger S. Foster argued the cause for petitioner. With him on the brief were *Solicitor General McGrath* and *Theodore L. Thau.*

Spencer Gordon argued the cause and filed a brief for respondents in No. 81.

Allen S. Hubbard argued the cause and filed a brief for respondent in No. 82.

MR. JUSTICE MURPHY delivered the opinion of the Court.

This case is here for the second time. In *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, we held that an order of the Securities and Exchange Commission could not be sustained on the grounds upon which that agency acted. We therefore directed that the case be remanded to the Commission for such further proceedings as might be appropriate. On remand, the Commission reexamined the problem, recast its rationale and reached the same result. The issue now is whether the Commission's action is proper in light of the principles established in our prior decision.

When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

We also emphasized in our prior decision an important corollary of the foregoing rule. If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be com-

pelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 511.

Applying this rule and its corollary, the Court was unable to sustain the Commission's original action. The Commission had been dealing with the reorganization of the Federal Water Service Corporation (Federal), a holding company registered under the Public Utility Holding Company Act of 1935, 49 Stat. 803. During the period when successive reorganization plans proposed by the management were before the Commission, the officers, directors and controlling stockholders of Federal purchased a substantial amount of Federal's preferred stock on the over-the-counter market. Under the fourth reorganization plan, this preferred stock was to be converted into common stock of a new corporation; on the basis of the purchases of preferred stock, the management would have received more than 10% of this new common stock. It was frankly admitted that the management's purpose in buying the preferred stock was to protect its interest in the new company. It was also plain that there was no fraud or lack of disclosure in making these purchases.

But the Commission would not approve the fourth plan so long as the preferred stock purchased by the management was to be treated on a parity with the other preferred stock. It felt that the officers and directors of a holding company in process of reorganization under the Act were fiduciaries and were under a duty not to trade in the securities of that company during the reorganization period. 8 S. E. C. 893, 915–921. And so the plan was amended to provide that the preferred stock acquired by the management, unlike that held by others, was not to be con-

verted into the new common stock; instead, it was to be surrendered at cost plus dividends accumulated since the purchase dates. As amended, the plan was approved by the Commission over the management's objections. 10 S. E. C. 200.

The Court interpreted the Commission's order approving this amended plan as grounded solely upon judicial authority. The Commission appeared to have treated the preferred stock acquired by the management in accordance with what it thought were standards theretofore recognized by courts. If it intended to create new standards growing out of its experience in effectuating the legislative policy, it failed to express itself with sufficient clarity and precision to be so understood. Hence the order was judged by the only standards clearly invoked by the Commission. On that basis, the order could not stand. The opinion pointed out that courts do not impose upon officers and directors of a corporation any fiduciary duty to its stockholders which precludes them, merely because they are officers and directors, from buying and selling the corporation's stock. Nor was it felt that the cases upon which the Commission relied established any principles of law or equity which in themselves would be sufficient to justify this order.

The opinion further noted that neither Congress nor the Commission had promulgated any general rule proscribing such action as the purchase of preferred stock by Federal's management. And the only judge-made rule of equity which might have justified the Commission's order related to fraud or mismanagement of the reorganization by the officers and directors, matters which were admittedly absent in this situation.

After the case was remanded to the Commission, Federal Water and Gas Corp. (Federal Water), the surviving corporation under the reorganization plan, made an application for approval of an amendment to the plan to provide

for the issuance of new common stock of the reorganized company. This stock was to be distributed to the members of Federal's management on the basis of the shares of the old preferred stock which they had acquired during the period of reorganization, thereby placing them in the same position as the public holders of the old preferred stock. The intervening members of Federal's management joined in this request. The Commission denied the application in an order issued on February 8, 1945. Holding Company Act Release No. 5584. That order was reversed by the Court of Appeals, 80 U. S. App. D. C. 365, 154 F. 2d 6, which felt that our prior decision precluded such action by the Commission.

The latest order of the Commission definitely avoids the fatal error of relying on judicial precedents which do not sustain it. This time, after a thorough reexamination of the problem in light of the purposes and standards of the Holding Company Act, the Commission has concluded that the proposed transaction is inconsistent with the standards of §§ 7 and 11 of the Act. It has drawn heavily upon its accumulated experience in dealing with utility reorganizations. And it has expressed its reasons with a clarity and thoroughness that admit of no doubt as to the underlying basis of its order.

The argument is pressed upon us, however, that the Commission was foreclosed from taking such a step following our prior decision. It is said that, in the absence of findings of conscious wrongdoing on the part of Federal's management, the Commission could not determine by an order in this particular case that it was inconsistent with the statutory standards to permit Federal's management to realize a profit through the reorganization purchases. All that it could do was to enter an order allowing an amendment to the plan so that the proposed transaction could be consummated. Under this view, the Commission would be free only to promulgate a general rule

outlawing such profits in future utility reorganizations; but such a rule would have to be prospective in nature and have no retroactive effect upon the instant situation.

We reject this contention, for it grows out of a misapprehension of our prior decision and of the Commission's statutory duties. We held no more and no less than that the Commission's first order was unsupportable for the reasons supplied by that agency. But when the case left this Court, the problem whether Federal's management should be treated equally with other preferred stockholders still lacked a final and complete answer. It was clear that the Commission could not give a negative answer by resort to prior judicial declarations. And it was also clear that the Commission was not bound by settled judicial precedents in a situation of this nature. 318 U. S. at 89. Still unsettled, however, was the answer the Commission might give were it to bring to bear on the facts the proper administrative and statutory considerations, a function which belongs exclusively to the Commission in the first instance. The administrative process had taken an erroneous rather than a final turn. Hence we carefully refrained from expressing any views as to the propriety of an order rooted in the proper and relevant considerations. See *Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608, 613–614.

When the case was directed to be remanded to the Commission for such further proceedings as might be appropriate, it was with the thought that the Commission would give full effect to its duties in harmony with the views we had expressed. *Ford Motor Co.* v. *Labor Board,* 305 U. S. 364, 374; *Federal Radio Commission* v. *Nelson Bros. Co.,* 289 U. S. 266, 278. This obviously meant something more than the entry of a perfunctory order giving parity treatment to the management holdings of preferred stock. The fact that the Commission had committed a legal error in its first disposition of the case certainly gave Federal's

management no vested right to receive the benefits of such an order. See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145. After the remand was made, therefore, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress. It was again charged with the duty of measuring the proposed treatment of the management's preferred stock holdings by relevant and proper standards. Only in that way could the legislative policies embodied in the Act be effectuated. Cf. *Labor Board* v. *Donnelly Co.*, 330 U. S. 219, 227–228.

The absence of a general rule or regulation governing management trading during reorganization did not affect the Commission's duties in relation to the particular proposal before it. The Commission was asked to grant or deny effectiveness to a proposed amendment to Federal's reorganization plan whereby the management would be accorded parity treatment on its holdings. It could do that only in the form of an order, entered after a due consideration of the particular facts in light of the relevant and proper standards. That was true regardless of whether those standards previously had been spelled out in a general rule or regulation. Indeed, if the Commission rightly felt that the proposed amendment was inconsistent with those standards, an order giving effect to the amendment merely because there was no general rule or regulation covering the matter would be unjustified.

It is true that our prior decision explicitly recognized the possibility that the Commission might have promulgated a general rule dealing with this problem under its statutory rule-making powers, in which case the issue for our consideration would have been entirely different from that which did confront us. 318 U. S. 92–93. But we did not mean to imply thereby that the failure of the Commission to anticipate this problem and to promulgate a general rule withdrew all power from that agency to per-

form its statutory duty in this case. To hold that the Commission had no alternative in this proceeding but to approve the proposed transaction, while formulating any general rules it might desire for use in future cases of this nature, would be to stultify the administrative process. That we refuse to do.

Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct within the framework of the Holding Company Act. The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. See Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess., p. 29. Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.

In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or

the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency. See *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 421.

Hence we refuse to say that the Commission, which had not previously been confronted with the problem of management trading during reorganization, was forbidden from utilizing this particular proceeding for announcing and applying a new standard of conduct. Cf. *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304. That such action might have a retroactive effect was not necessarily fatal to its validity. Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law. See *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 620.

And so in this case, the fact that the Commission's order might retroactively prevent Federal's management from securing the profits and control which were the objects of the preferred stock purchases may well be outweighed by the dangers inherent in such purchases from the statutory standpoint. If that is true, the argument of retroactivity becomes nothing more than a claim that the Commission lacks power to enforce the standards of

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the Act in this proceeding. Such a claim deserves rejection.

The problem in this case thus resolves itself into a determination of whether the Commission's action in denying effectiveness to the proposed amendment to the Federal reorganization plan can be justified on the basis upon which it clearly rests. As we have noted, the Commission avoided placing its sole reliance on inapplicable judicial precedents. Rather it has derived its conclusions from the particular facts in the case, its general experience in reorganization matters and its informed view of statutory requirements. It is those matters which are the guide for our review.

The Commission concluded that it could not find that the reorganization plan, if amended as proposed, would be "fair and equitable to the persons affected thereby" within the meaning of § 11 (e) of the Act, under which the reorganization was taking place. Its view was that the amended plan would involve the issuance of securities on terms "detrimental to the public interest or the interest of investors" contrary to §§ 7 (d) (6) and 7 (e), and would result in an "unfair or inequitable distribution of voting power" among the Federal security holders within the meaning of § 7 (e). It was led to this result "not by proof that the interveners [Federal's management] committed acts of conscious wrongdoing but by the character of the conflicting interests created by the interveners' program of stock purchases carried out while plans for reorganization were under consideration."

The Commission noted that Federal's management controlled a large multi-state utility system and that its influence permeated down to the lowest tier of operating companies. The financial, operational and accounting policies of the parent and its subsidiaries were therefore under the management's strict control. The broad range of business judgments vested in Federal's management

multiplied opportunities for affecting the market price of Federal's outstanding securities and made the exercise of judgment on any matter a subject of greatest significance to investors. Added to these normal managerial powers, the Commission pointed out that a holding company management obtains special powers in the course of a voluntary reorganization under § 11 (e) of the Holding Company Act. The management represents the stockholders in such a reorganization, initiates the proceeding, draws up and files the plan, and can file amendments thereto at any time. These additional powers may introduce conflicts between the management's normal interests and its responsibilities to the various classes of stockholders which it represents in the reorganization. Moreover, because of its representative status, the management has special opportunities to obtain advance information of the attitude of the Commission.

Drawing upon its experience, the Commission indicated that all these normal and special powers of the holding company management during the course of a § 11 (e) reorganization placed in the management's command "a formidable battery of devices that would enable it, if it should choose to use them selfishly, to affect in material degree the ultimate allocation of new securities among the various existing classes, to influence the market for its own gain, and to manipulate or obstruct the reorganization required by the mandate of the statute." In that setting, the Commission felt that a management program of stock purchase would give rise to the temptation and the opportunity to shape the reorganization proceeding so as to encourage public selling on the market at low prices. No management could engage in such a program without raising serious questions as to whether its personal interests had not opposed its duties "to exercise disinterested judgment in matters pertaining to subsidiaries' accounting, budgetary and dividend policies, to present

publicly an unprejudiced financial picture of the enterprise, and to effectuate a fair and feasible plan expeditiously."

The Commission further felt that its answer should be the same even where proof of intentional wrongdoing on the management's part is lacking. Assuming a conflict of interests, the Commission thought that the absence of actual misconduct is immaterial; injury to the public investors and to the corporation may result just as readily. "Questionable transactions may be explained away, and an abuse of investors and the administrative process may be perpetrated without evil intent, yet the injury will remain." Moreover, the Commission was of the view that the delays and the difficulties involved in probing the mental processes and personal integrity of corporate officials do not warrant any distinction on the basis of evil intent, the plain fact being "that an absence of unfairness or detriment in cases of this sort would be practically impossible to establish by proof."

Turning to the facts in this case, the Commission noted the salient fact that the primary object of Federal's management in buying the preferred stock was admittedly to obtain the voting power that was accruing to that stock through the reorganization and to profit from the investment therein. That stock had been purchased in the market at prices that were depressed in relation to what the management anticipated would be, and what in fact was, the earning and asset value of its reorganization equivalent. The Commission admitted that the good faith and personal integrity of this management were not in question; but as to the management's justification of its motives, the Commission concluded that it was merely trying to "deny that they made selfish use of their powers during the period when their conflict of interest, vis-a-vis public investors, was in existence owing to their purchase program." Federal's management had

thus placed itself in a position where it was "peculiarly susceptible to temptation to conduct the reorganization for personal gain rather than the public good" and where its desire to make advantageous purchases of stock could have an important influence, even though subconsciously, upon many of the decisions to be made in the course of the reorganization. Accordingly, the Commission felt that all of its general considerations of the problem were applicable to this case.

The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. The wisdom of the principle adopted is none of our concern. See *Board of Trade* v. *United States,* 314 U. S. 534, 548. Our duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress. See *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 224.

We are unable to say in this case that the Commission erred in reaching the result it did. The facts being undisputed, we are free to disturb the Commission's conclusion only if it lacks any rational and statutory foundation. In that connection, the Commission has made a thorough examination of the problem, utilizing statutory standards and its own accumulated experience with reorganization matters. In essence, it has made what we indicated in our prior opinion would be an informed, expert judgment on the problem. It has taken into account "those more subtle factors in the marketing of utility company securities that gave rise to the very grave evils which the Public Utility Holding [Company] Act of 1935 was designed to correct" and has relied upon the fact that "Abuse of corporate position, influence, and access to information may raise questions so subtle that the law can deal with them effectively only by prohi-

bitions not concerned with the fairness of a particular transaction." 318 U. S. at 92.

Such factors may properly be considered by the Commission in determining whether to approve a plan of reorganization of a utility holding company, or an amendment to such a plan. The "fair and equitable" rule of § 11 (e) and the standard of what is "detrimental to the public interest or the interest of investors or consumers" under § 7 (d) (6) and § 7 (e) were inserted by the framers of the Act in order that the Commission might have broad powers to protect the various interests at stake. 318 U. S. at 90–91. The application of those criteria, whether in the form of a particular order or a general regulation, necessarily requires the use of informed discretion by the Commission. The very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters. See *United States* v. *Lowden,* 308 U. S. 225; *I. C. C.* v. *Railway Labor Assn.,* 315 U. S. 373. Such an abuse is not present in this case.

The purchase by a holding company management of that company's securities during the course of a reorganization may well be thought to be so fraught with danger as to warrant a denial of the benefits and profits accruing to the management. The possibility that such a stock purchase program will result in detriment to the public investors is not a fanciful one. The influence that program may have upon the important decisions to be made by the management during reorganization is not inconsequential. Since the officers and directors occupy fiduciary positions during this period, their actions are to be held to a higher standard than that imposed upon the general investing public. There is thus a reasonable basis for a judgment that the benefits and profits accruing to the management from the stock purchases should be prohibited, regardless of the good faith involved. And

it is a judgment that can justifiably be reached in terms of fairness and equitableness, to the end that the interests of the public, the investors and the consumers might be protected. But it is a judgment based upon public policy, a judgment which Congress has indicated is of the type for the Commission to make.

The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process. See *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793, 800. Whether we agree or disagree with the result reached, it is an allowable judgment which we cannot disturb.

Reversed.

MR. JUSTICE BURTON concurs in the result.

THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS took no part in the consideration or decision of these cases.

MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON dissent, but there is not now opportunity for a response adequate to the issues raised by the Court's opinion. These concern the rule of law in its application to the administrative process and the function of this Court in reviewing administrative action. Accordingly, the detailed grounds for dissent will be filed in due course.

MR. JUSTICE JACKSON, dissenting.*

The Court by this present decision sustains the identical administrative order which only recently it held invalid.

*Filed October 6, 1947.

S. E. C. v. *Chenery Corp.*, 318 U. S. 80. As the Court correctly notes, the Commission has only "recast its rationale and reached the same result." (Par. 1.)[1] There being no change in the order, no additional evidence in the record and no amendment of relevant legislation, it is clear that there has been a shift in attitude between that of the controlling membership of the Court when the case was first here and that of those who have the power of decision on this second review.

I feel constrained to disagree with the reasoning offered to rationalize this shift. It makes judicial review of administrative orders a hopeless formality for the litigant, even where granted to him by Congress. It reduces the judicial process in such cases to a mere feint. While the opinion does not have the adherence of a majority of the full Court, if its pronouncements should become governing principles they would, in practice, put most administrative orders over and above the law.

I.

The essential facts are few and are not in dispute.[2] This corporation filed with the Securities and Exchange Commission a voluntary plan of reorganization. While the reorganization proceedings were pending sixteen officers and directors bought on the open market about 7½% of the corporation's preferred stock. Both the Commission and the Court admit that these purchases were not forbidden by any law, judicial precedent, regulation or rule of the Commission. Nevertheless, the Commission has

[1] For convenience of reference, I have numbered consecutively the paragraphs of the Court's opinion, and cite quotations accordingly.

[2] The facts and the law of the case generally are fully set forth in the first opinion of Mr. Chief Justice Groner of the Court of Appeals which reversed the Commission's order (75 U. S. App. D. C. 374, 128 F. 2d 303) and in his second opinion (80 U. S. App. D. C. 365, 154 F. 2d 6) again reversing the Commission's order after it had "recast its rationale."

ordered these individuals to surrender their shares to the corporation at cost, plus 4% interest, and the Court now approves that order.

It is helpful, before considering whether this order is authorized by law, to reflect on what it is and what it is not. It is not conceivably a discharge of the Commission's duty to determine whether a proposed plan of reorganization would be "fair and equitable." It has nothing to do with the corporate structure, or the classes and amounts of stock, or voting rights or dividend preferences. It does not remotely affect the impersonal financial or legal factors of the plan. It is a personal deprivation denying particular persons the right to continue to own their stock and to exercise its privileges. Other persons who bought at the same time and price in the open market would be allowed to keep and convert their stock. Thus, the order is in no sense an exercise of the function of control over the terms and relations of the corporate securities.

Neither is the order one merely to regulate the future use of property. It literally takes valuable property away from its lawful owners for the benefit of other private parties without full compensation and the Court expressly approves the taking. It says that the stock owned by these persons is denied conversion along with similar stock owned by others; "instead, it was to be surrendered at cost plus dividends accumulated since the purchase dates." (Par. 5.) It should be noted that this formula was subsequently altered to read "cost plus 4% interest." That this basis was less than its value is recognized, for the Court says "That stock had been purchased in the market at prices that were depressed in relation to what the management anticipated would be, and what in fact was, the earning and asset value of its reorganization equivalent." (Par. 24.) Admittedly, the value above cost, and interest on it, simply is taken from the owners,

without compensation. No such power has ever been confirmed in any administrative body.

It should also be noted that neither the Court nor the Commission purports to adjudge a forfeiture of this property as a consequence of sharp dealing or breach of trust. The Court says, "The Commission admitted that the good faith and personal integrity of this management were not in question; . . . ." (Par. 24.) And again, "It was frankly admitted that the management's purpose in buying the preferred stock was to protect its interest in the new company. It was also plain that there was no fraud or lack of disclosure in making these purchases." (Par. 4.)

II.

The reversal of the position of this Court is due to a fundamental change in prevailing philosophy. The basic assumption of the earlier opinion as therein stated was, *"But before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards . . . ."* *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 92–93. The basic assumption of the present opinion is stated thus: *"The absence of a general rule or regulation governing management trading during reorganization did not affect the Commission's duties in relation to the particular proposal before it."* (Par. 13.) This puts in juxtaposition the two conflicting philosophies which produce opposite results in the same case and on the same facts. The difference between the first and the latest decision of the Court is thus simply the difference between holding that administrative orders must have a basis in law and a holding that absence of a legal basis is no ground on which courts may annul them.

As there admittedly is no law or regulation to support this order, we peruse the Court's opinion diligently to find

on what grounds it is now held that the Court of Appeals, on pain of being reversed for error, was required to stamp this order with its approval. We find but one. That is the principle of judicial deference to administrative experience. That argument is five times stressed in as many different contexts, and I quote just enough to identify the instances: "The Commission," it says, "has drawn heavily upon its accumulated experience in dealing with utility reorganizations." (Par. 9.) "Rather it has derived its conclusions from the particular facts in the case, its general experience in reorganization matters and its informed view of statutory requirements." (Par. 19.) "Drawing upon its experience, the Commission indicated . . . ," etc. (Par. 22.) ". . . the Commission has made a thorough examination of the problem, utilizing statutory standards and its own accumulated experience with reorganization matters." (Par. 26.) And finally, of the order the Court says, "It is the product of administrative experience," etc. (Par. 29.)

What are we to make of this reiterated deference to "administrative experience" when in another context the Court says, "Hence, we refuse to say that the Commission, *which had not previously been confronted with the problem of management trading during reorganization,* was forbidden from utilizing this particular proceeding for announcing and applying *a new standard of conduct.*"? (Par. 17.) (Emphasis supplied.)

The Court's reasoning adds up to this: The Commission must be sustained because of its accumulated experience in solving a problem with which it had never before been confronted!

Of course, thus to uphold the Commission by professing to find that it has enunciated a "new standard of conduct" brings the Court squarely against the invalidity of retroactive law-making. But the Court does not falter. "That such action might have a retroactive effect

was not necessarily fatal to its validity." (Par. 17.) "But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." (Par. 17.) Of course, if what these parties did really was condemned by "statutory design" or "legal and equitable principles," it could be stopped without resort to a new rule and there would be no retroactivity to condone. But if it had been the Court's view that some law already prohibited the purchases, it would hardly have been necessary three sentences earlier to hold that the Commission was not prohibited "from utilizing this particular proceeding for announcing and applying a *new standard of conduct*." (Par. 17.) (Emphasis supplied.)

I give up. Now I realize fully what Mark Twain meant when he said, "The more you explain it, the more I don't understand it."

III.

But one does not need to comprehend the processes by which other minds reach a given result in order to estimate the practical consequences of their pronouncement upon judicial review of administrative orders.

If it is of no consequence that no rule of law be existent to support an administrative order, and the Court of Appeals is obliged to defer to administrative experience and to sustain a Commission's power merely because it has been asserted and exercised, of what use is it to print a record or briefs in the case, or to hear argument? Administrative experience always is present, at least to the degree that it is here, and would always dictate a like deference by this Court to an assertion of administrative power. Must the reviewing court, as this Court does in this opinion, support the order on a presumptive or imputed experience even though the Court is obliged to discredit such experience in the very same opinion? Is

fictitious experience to be conclusive in matters of law and particularly in the interpretation of statutes, as the Court's opinion now intimates, or just in fact finding which has been the function which the Court has heretofore sustained upon the argument of administrative experience?

I suggest that administrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the Commission in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not, within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding. Surely an administrative agency is not a law unto itself, but the Court does not really face up to the fact that this is the justification it is offering for sustaining the Commission action.

Even if the Commission had, as the Court says, utilized this case to announce a new legal standard of conduct, there would be hurdles to be cleared, but we need not dwell on them now. Because to promulgate a general rule of law, either by regulation or by case law, is something the Commission expressly declined to do. It did not previously promulgate, and it does not by this order profess to promulgate, any rule or regulation to prohibit such purchases absolutely or under stated conditions. On the other hand, its position is that no such rule or standard would be fair and equitable in all cases.[3]

[3] The Commission, speaking of such a rule, appends the following note to its opinion:

"Without flexibility the rule might itself operate unfairly. Limitation to cost appears appropriate here, but would be inappropriate in a case where the cost of the security purchased was in excess of its reorganization value, and in some instances cash payment by the company would not be feasible. In addition, special treatment of any sort might be inappropriate for incidental purchases not made

IV.

Whether, as matter of policy, corporate managers during reorganization should be prohibited from buying or selling its stock, is not a question for us to decide. But it is for us to decide whether, so long as no law or regulation prohibits them from buying, their purchases may be forfeited, or not, in the discretion of the Commission. If such a power exists in words of the statute or in their implication, it would be possible to point it out and thus end the case. Instead, the Court admits that there was no law prohibiting these purchases when they were made, or at any time thereafter. And, except for this decision, there is none now.

The truth is that in this decision the Court approves the Commission's assertion of power to govern the matter *without* law, power to force surrender of stock so purchased whenever it will, and power also to overlook such acquisitions if it so chooses. The reasons which will lead it to take one course as against the other remain locked in its own breast, and it has not and apparently does not intend to commit them to any rule or regulation. This administrative authoritarianism, this power to decide without law, is what the Court seems to approve in so many words: "The absence of a general rule or regulation

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as part of a program in contemplation of reorganization benefits. In this connection, we wish to emphasize that our concern here is not primarily with the normal corporate powers which make it possible for officers and directors to influence the market for their own gain, in the absence of reorganization, by a choice of dividend policies, accounting practices, published reports, and the like. The questions of fairness and detriment here presented arise before us in the context of a capital readjustment. At that point our scrutiny is called for, and that our scrutiny is to be vigilant cannot be doubted. See Appendix to Sen. Rep. No. 621 (74th Cong., 1st Sess.) on S. 2796, at p. 58, quoted supra."

governing management trading during reorganization did not affect the Commission's duties . . . ." (Par. 13). This seems to me to undervalue and to belittle the place of law, even in the system of administrative justice. It calls to mind Mr. Justice Cardozo's statement that "Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable." [4]

V.

The Court's averment concerning this order, that "It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process," (Par. 29) is the first instance in which the administrative process is sustained by reliance on that disregard of law which enemies of the process have always alleged to be its principal evil. It is the first encouragement this Court has given to conscious lawlessness as a permissible rule of administrative action. This decision is an ominous one to those who believe that men should be governed by laws that they may ascertain and abide by, and which will guide the action of those in authority as well as of those who are subject to authority.[5]

I have long urged, and still believe, that the administrative process deserves fostering in our system as an expeditious and nontechnical method of *applying law* in special-

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[4] *The Growth of the Law*, p. 3.

[5] On the same day, the Court denied its own authority to recognize and enforce, without Congressional action, an unlegislated liability much less novel than the one imposed here, and that in the field of tort law which traditionally has developed by decisional rather than by legislative process. The result is to confirm in an executive agency a discretion to act outside of established law that goes beyond any judicial discretion as well as beyond any legislative delegation. Compare *United States* v. *Standard Oil Co.*, 332 U. S. 301.

ized fields.[6] I can not agree that it be used, and I think its continued effectiveness is endangered when it is used, as a method of *dispensing with law* in those fields.

MR. JUSTICE FRANKFURTER joins in this opinion.

UNITED STATES *v.* YELLOW CAB CO. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 1035. Argued May 7, 1947.—Decided June 23, 1947.

1. Allegations of a complaint filed in a federal district court pursuant to § 4 of the Sherman Antitrust Act to prevent and restrain the defendants from violating §§ 1 and 2 of the Act, charging a combination and conspiracy to restrain and to monopolize interstate trade and commerce in the sale of motor vehicles for use as taxicabs to the principal cab operating companies in Chicago, Pittsburgh, New York City and Minneapolis, *held* sufficient to state a claim upon which relief might be granted. Pp. 220–228.

(a) A conspiracy to control the purchase of taxicabs by the principal operating companies in Chicago, Pittsburgh, New York City and Minneapolis, whereby they purchase their cabs exclusively from a Michigan manufacturer and are prevented from purchasing from other manufacturers, is in restraint of interstate commerce. Pp. 224–225, 226.

(b) In determining whether the complaint charges a violation of § 1 or § 2 of the Sherman Act, it is enough if some appreciable part of interstate commerce is affected by the restraint or monopoly. P. 225.

(c) Interstate purchases of replacements of some 5,000 licensed taxicabs in four cities is an appreciable amount of commerce. P. 225.

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[6] See statement before House of Delegates, American Bar Association, 1939. (1939 Proceedings, House of Delegates, XXV A. B. A. Journal 95.) Also see Report as Attorney General to President Roosevelt recommending veto of Walter-Logan Bill—made part of veto message, Vol. 86, Part 12, Congressional Record, 76th Congress, 3d Session, p. 13943.

(d) The importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States is irrelevant. P. 226.

(e) The complaint is not defective by reason of its failure to allege that the manufacturer involved has a monopoly with reference to the total number of taxicabs manufactured and sold in the United States. P. 226.

(f) The fact that the corporate defendants, by virtue of affiliation and common ownership, constitute a "vertically integrated enterprise" does not necessarily render inapplicable the prohibitions of the Sherman Act. P. 227.

2. Allegations of a conspiracy whereby two of the defendants will not compete with a third defendant for contracts with railroads or railroad terminal associations to transport passengers and their luggage between railroad stations in Chicago, *held* sufficient to charge a violation of the Sherman Act. Pp. 228–229.

(a) The transportation of passengers and their luggage between railroad stations in Chicago is a part of the stream of interstate commerce. P. 228.

(b) When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. P. 228.

(c) Although exclusive contracts for the transportation service in question are not illegal, it is nevertheless a violation of the Sherman Act to conspire to eliminate competition in obtaining such contracts. P. 229.

(d) The fact that the competition restrained is that between affiliated corporations does not negative the statutory violation where the affiliation itself is one of the means of effectuating the illegal conspiracy not to compete. P. 229.

3. The service rendered by local taxicabs in conveying interstate passengers between their homes and railroad stations, in the normal course of their independent local service, is not an integral part of interstate transportation; and a restraint on or monopoly of that general local service, without more, is not proscribed by the Sherman Act. Pp. 230–234.

69 F. Supp. 170, reversed.

A complaint filed by the United States to prevent and restrain alleged violations of §§ 1 and 2 of the Sherman

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Antitrust Act was dismissed by the district court for failure to state a claim upon which relief might be granted. 69 F. Supp. 170. The United States appealed directly to this Court. *Reversed and remanded,* p. 234.

Charles H. Weston argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Berge* and *Philip Marcus.*

Samuel H. Kaufman argued the cause for appellees. With him on the brief were *A. Leslie Hodson* and *Harold S. Lynton. Howard Ellis* and *Harold A. Smith* were on a motion to dismiss or affirm.

Mr. Justice Murphy delivered the opinion of the Court.

The United States filed a complaint in the federal district court below pursuant to § 4 of the Sherman Anti-Trust Act, 26 Stat. 209, as amended, to prevent and restrain the appellees from violating §§ 1 and 2 of the Act. The complaint alleged that the appellees have been and are engaged in a combination and conspiracy to restrain and to monopolize interstate trade and commerce (1) in the sale of motor vehicles for use as taxicabs to the principal cab operating companies in Chicago, Pittsburgh, New York City and Minneapolis, and (2) in the business of furnishing cab services for hire in Chicago and vicinity. The appellees moved to dismiss the complaint for failure to state a claim upon which relief might be granted. That motion was sustained. 69 F. Supp. 170. The case is now here on direct appeal by the United States.

The alleged facts, as set forth in the complaint, may be summarized briefly. In January, 1929, one Morris Markin and others commenced negotiations to merge the

more important cab operating companies in Chicago, New York and other cities. Markin was then president and general manager, as well as the controlling stockholder, of the Checker Cab Manufacturing Corporation (CCM). That company was engaged in the business of manufacturing taxicabs at its factory in Kalamazoo, Michigan, and shipping them to purchasers in various states.

Parmelee Transportation Company (Parmelee) was organized in April, 1929, with 62% of its stock being owned by CCM. It promptly took over the business of operating special unlicensed cabs to transport passengers and their luggage between railroad stations in Chicago, pursuant to contracts with railroads and railroad terminal associations. It then acquired a controlling interest in the Chicago Yellow Cab Company, Inc. (Chicago Yellow). This latter company holds all the capital stock of Yellow Cab Company (Yellow), the owner and operator of "Yellow" cabs in Chicago and vicinity. Yellow presently holds 53% of the taxicab licenses outstanding in Chicago. In addition, Parmelee acquired or organized subsidiary companies which now hold 100% of the taxicab licenses outstanding in Pittsburgh, 58% of those in Minneapolis, and 15% of those in New York City.[1]

In January, 1930, Cab Sales and Parts Corporation (Cab Sales) was incorporated. At all times, Markin has been the active manager of this company; since 1934, he

[1] Between October, 1929, and June, 1930, Parmelee acquired all the taxicab companies operating in Pittsburgh; it now operates the cabs through two wholly owned subsidiaries. Early in 1931, Parmelee formed a company to operate cabs in Minneapolis; a wholly owned subsidiary now operates 125 of the 214 cabs licensed in that city. Beginning early in 1929, Parmelee acquired certain companies operating cabs in New York City; it later consolidated them in a wholly owned subsidiary now holding 2,000 of the 13,000 licenses outstanding in that city.

has been the sole stockholder. It now owns and operates the "Checker" cabs in Chicago and vicinity, using licenses held in the name of Checker Taxi Company (Checker).[2] Checker presently has no employees and no property other than 1,000 Chicago taxicab licenses, or one-third of the total outstanding, which it leases to Cab Sales; nearly all of its stock is owned by associates of Markin.[3]

Markin also obtained a substantial interest in the DeLuxe Motor Cab Company, which was the third largest cab operating company in Chicago in 1929 with its 400 licenses. He caused all of its stock to be sold to Parmelee. It was then consolidated into a new company; in 1932, Cab Sales bought a controlling interest in this consolidated concern and caused it to suspend operations. Thus, by the end of 1932, Markin had gained control of the three largest taxicab companies operating in Chicago and, through Parmelee, had substantial footholds in the taxicab business in New York City, Pittsburgh and Minneapolis.

Yellow and Checker have consistently held a vast majority of the Chicago taxicab licenses. There were 5,289

[2] Checker originally was a cooperative company, the stockholders of which were the various owners of "Checker" cabs. In February, 1930, as part of a settlement of litigation between it and CCM, Checker agreed that its drivers would purchase all of their taxicabs from Cab Sales for a period of five years at $2,350 per cab. At the same time, CCM appointed Cab Sales as exclusive agent for these sales and agreed to sell its cabs to Cab Sales at $1,906 per cab. During the five-year life of this agreement, Checker drivers bought a large number of cabs from Cab Sales at prices about $400 above those at which Cab Sales bought them from CCM. As these drivers defaulted in their payments from time to time, Cab Sales would foreclose and take over the ownership and operation of the cabs. Since 1941, it has owned and operated all of these cabs.

[3] By 1932, Cab Sales had acquired over 97% of the stock of Checker. Markin caused this stock to be sold to certain of his associates in 1942.

licenses outstanding in January, 1929, of which Yellow held 2,335 (44%) and Checker 1,750 (33%). In September, 1929, the City of Chicago adopted an ordinance to the effect that no more licenses should be issued, except for renewals, unless it should be found that the public convenience and necessity required otherwise. The substance of this provision was repeated in an ordinance adopted in May, 1934. Yellow and Checker subsequently made agreements to reduce the number of cabs in operation and to induce the city to lower the number of licenses outstanding to 3,000, of which Yellow would hold 1,500 and Checker 1,000.

On December 22, 1937, the City of Chicago passed an ordinance providing for a method of voluntary surrender by licensees of a sufficient number of their licenses to reduce the number outstanding to 3,000. It was also provided that if the number of authorized licenses should later be increased above the 3,000 figure, such additional licenses should first be issued to the original licensees in proportion to, and up to, the number which they had surrendered. Yellow and Checker then made an agreement to implement this ordinance; Yellow agreed to surrender 571 licenses (leaving it with 1,595) and Checker agreed to surrender 500 (leaving it with 1,000); both parties promised to attempt to secure for Yellow 60% and for Checker 40% of any licenses in excess of 3,000 which the city might later issue. As a result, 3,000 licenses were left outstanding.

On January 16, 1946, the city authorized the issuance of 250 licenses to war veterans. Yellow was notified that 234 of its licenses, representing that number of cabs which had not been in operation, would be canceled. Checker was given a similar notice as to 87 licenses. Yellow and Checker then brought suit in an Illinois court to enjoin the city from issuing the new licenses and from canceling

any of the ones issued to them; they claimed that economic conditions prevented them from procuring taxicabs to replace those which had become inoperable. The Illinois courts held that the 1937 ordinance created a contract between the city and the licensees and that the city could not issue licenses to the war veterans without first replacing the licenses which Yellow and Checker had surrendered; it was further held that no monopoly existed, since the number of licenses and the rights of the licensees were subject to the control of the city. *Yellow Cab Co.* v. *City of Chicago,* 396 Ill. 388, 71 N. E. 2d 652.

Such is the nature of the facts set forth in the complaint. Those facts allegedly give rise to a combination and conspiracy on the part of the appellees (Yellow, Chicago Yellow, Parmelee, Cab Sales, Checker, CCM and Markin) in violation of the Sherman Act. The problems thereby raised can best be considered in relation to the purported terms of this combination and conspiracy. For present purposes, of course, we must assume, without deciding or implying, that the various facts and allegations in the complaint are true.

I.

It is said that the appellees have agreed to control the operation and purchase of taxicabs by the principal operating companies in Chicago, New York City, Pittsburgh and Minneapolis, insisting that they purchase their cabs exclusively from CCM. This excludes all other manufacturers of taxicabs from 86% of the Chicago market, 15% of the New York City market, 100% of the Pittsburgh market and 58% of the Minneapolis market. At the same time, the trade of the controlled cab companies is restrained since they are prevented from purchasing cabs from manufacturers other than CCM. The result allegedly is that these companies must pay more for cabs

than they would otherwise pay, their other expenditures are increased unnecessarily, and the public is charged high rates for the transportation services rendered.

The commerce which is asserted to be restrained in this manner has a character that is undeniably interstate. The various cab operating companies do business in Illinois, New York, Pennsylvania and Minnesota. By virtue of the conspiracy, they must purchase all of their cabs from CCM. Since CCM's factory is located in Michigan, interstate sales and shipments are inevitable if the conspiracy is to be effectuated. The conspiracy also prevents those operating companies from purchasing cabs from other manufacturers, thus precluding all interstate sales and shipments between each individual cab operating company and manufacturers (other than CCM) located in other states. Interstate trade, in short, is of the very essence of this aspect of the conspiracy.

But the amount of interstate trade thus affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged in the complaint. Section 1 of the Act outlaws unreasonable restraints on interstate commerce, regardless of the amount of the commerce affected. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, note 59, p. 225; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 485. And § 2 of the Act makes it unlawful to conspire to monopolize "any part" of interstate commerce, without specifying how large a part must be affected. Hence it is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint or a conspiracy. The complaint in this case deals with interstate purchases of replacements of some 5,000 licensed taxicabs in four cities.[4] That is an appreciable

[4] 2,595 licenses in Chicago, 2,000 in New York City, 125 in Minneapolis, and an estimated 280 in Pittsburgh.

amount of commerce under any standard. See *Montague & Co.* v. *Lowry,* 193 U. S. 38.

Likewise irrelevant is the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States. The Sherman Act is concerned with more than the large, nation-wide obstacles in the channels of interstate trade. It is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved. As this Court stated in *Indiana Farmer's Guide Co.* v. *Prairie Farmer Co.,* 293 U. S. 268, 279, "The provisions of §§ 1 and 2 have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce." It follows that the complaint in this case is not defective for failure to allege that CCM has a monopoly with reference to the total number of taxicabs manufactured and sold in the United States. Its relative position in the field of cab production has no necessary relation to the ability of the appellees to conspire to monopolize or restrain, in violation of the Act, an appreciable segment of interstate cab sales. An allegation that such a segment has been or may be monopolized or restrained is sufficient.

Nor can it be doubted that combinations and conspiracies of the type alleged in this case fall within the ban of the Sherman Act. By excluding all cab manufacturers other than CCM from that part of the market represented by the cab operating companies under their control, the appellees effectively limit the outlets through which cabs may be sold in interstate commerce. Limitations of that nature have been condemned time and again as violative of the Act. *Associated Press* v. *United States,* 326 U. S. 1, 18–19, and cases cited. In addition, by preventing the cab operating companies under their control from pur-

chasing cabs from manufacturers other than CCM, the appellees deny those companies the opportunity to purchase cabs in a free, competitive market.[5] The Sherman Act has never been thought to sanction such a conspiracy to restrain the free purchase of goods in interstate commerce. See *Montague & Co.* v. *Lowry, supra; Binderup* v. *Pathe Exchange,* 263 U. S. 291.

The fact that these restraints occur in a setting described by the appellees as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form. See *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 360–361, 376–377.

And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act. The complaint charges that the restraint of interstate trade was not only effected by the combination of the appellees but was the primary object of the combination. The theory of the complaint, to borrow language from *United States* v. *Reading Co.,* 253 U. S. 26, 57, is that "dominating power" over the cab operating companies "was not obtained by normal expansion to meet

[5] To the extent that the controlled operating companies are charged higher than the open market prices, they are injured.

the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control." If that theory is borne out in this case by the evidence, coupled with proof of an undue restraint of interstate trade, a plain violation of the Act has occurred. Cf. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189.

II.

It is said that the appellees have agreed that Yellow and Cab Sales will not compete with Parmelee for contracts with railroads or railroad terminal associations to transport passengers and their luggage between railroad stations in Chicago. The complaint points out the well-known fact that Chicago is the terminus of a large number of railroads engaged in interstate passenger traffic and that a great majority of the persons making interstate railroad trips which carry them through Chicago must disembark from a train at one railroad station, travel from that station to another some two blocks to two miles distant, and board another train at the latter station. The railroads often contract with the passengers to supply between-station transportation in Chicago. Parmelee then contracts with the railroads and the railroad terminal associations to provide this transportation by special cabs carrying seven to ten passengers. Parmelee's contracts are exclusive in nature.

The transportation of such passengers and their luggage between stations in Chicago is clearly a part of the stream of interstate commerce. When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. *The Daniel*

Ball, 10 Wall. 557, 565. That portion must be viewed in its relation to the entire journey rather than in isolation. So viewed, it is an integral step in the interstate movement. See *Stafford* v. *Wallace,* 258 U. S. 495.

Any attempt to monopolize or to impose an undue restraint on such a constituent part of interstate commerce brings the Sherman Act into operation. Here there is an alleged conspiracy to bring nearly all the Chicago taxicab companies under common control and to eliminate competition among them relative to contracts for supplying transportation for this transfer in the midst of interstate journeys. Only Parmelee is free to attempt to procure such contracts; Yellow and Cab Sales are forbidden to compete for such contracts, despite the fact that they conceivably might provide the same transportation service at lower cost to the railroads.[6] The complaint accordingly states a violation of the Sherman Act in this respect. See *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211.

It is true, of course, that exclusive contracts for the transportation service in question are not illegal. *Donovan* v. *Pennsylvania Co.,* 199 U. S. 279. But a conspiracy to eliminate competition in obtaining those exclusive contracts is what is alleged in this case and it is a conspiracy of that type that runs afoul of the Sherman Act. Moreover, the fact that the competition restrained is that between affiliated corporations cannot serve to negative the statutory violation where, as here, the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete.

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[6] The District Court thought that Parmelee's equipment and services are so totally different from the taxicab business of Yellow and Cab Sales as to make competition for the contracts impractical and unlikely. But that is a matter for determination at the trial on the merits and does not negative the sufficiency of the complaint.

III.

Finally, it is said that the appellees have conspired to control the principal taxicab operating companies in Chicago and to exclude others from engaging in the transportation of interstate travelers to and from Chicago railroad stations. To that end, they have conspired to induce the City of Chicago to limit the number of licensed taxicabs to 3,000, to hold 2,595 (or 86%) of these licenses themselves, to obtain for Yellow and Checker any licenses above 3,000 which the city might later issue, and to prevent new operators from entering the cab business in Chicago by having Yellow and Checker annually renew licenses for cabs which they do not operate and have no intention of operating.

The interstate commerce toward which this aspect of the conspiracy is directed is claimed to arise out of the following facts. Many persons are said to embark upon interstate journeys from their homes, offices and hotels in Chicago by using taxicabs to transport themselves and their luggage to railroad stations in Chicago. Conversely, in making journeys from other states to homes, offices and hotels in Chicago, many persons are said to complete such trips by using taxicabs to transport themselves and their luggage from railroad stations in Chicago to said homes, offices and hotels. Such transportation of persons and their luggage is intermingled with the admittedly local operations of the Chicago taxicabs. But it is that allegedly interstate part of the business upon which rests the validity of the complaint in this particular.

We hold, however, that such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, admittedly cross no state lines; by ordinance, their service is confined to transportation

"between any two points within the corporate limits of the city." None of them serves only railroad passengers, all of them being required to serve "every person" within the limits of Chicago. They have no contractual or other arrangement with the interstate railroads. Nor are their fares paid or collected as part of the railroad fares. In short, their relationship to interstate transit is only casual and incidental.

In a sense, of course, a traveler starts an interstate journey when he boards a conveyance near his home, office or hotel to travel to the railroad station, from which the journey is continued by train; and such a journey ends when he alights from a conveyance near the home, office or hotel which constitutes his ultimate destination. Indeed, the terminal points of an interstate journey may be traced even further to the moment when the traveler leaves or enters his room or office and descends or ascends the building by elevator.

But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. *Swift & Co.* v. *United States,* 196 U. S. 375, 398; *North American Co.* v. *S. E. C.,* 327 U. S. 686, 705. And interstate journeys are to be measured by "the commonly accepted sense of the transportation concept." *United States* v. *Capital Transit Co.,* 325 U. S. 357, 363. Moreover, what may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey. We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations.

Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination.

What happens prior or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement. The traveler has complete freedom to arrive at or leave the station by taxicab, trolley, bus, subway, elevated train, private automobile, his own two legs, or various other means of conveyance. Taxicab service is thus but one of many that may be used. It is contracted for independently of the railroad journey and may be utilized whenever the traveler so desires. From the standpoints of time and continuity, the taxicab trip may be quite distinct and separate from the interstate journey. To the taxicab driver, it is just another local fare.

Pennsylvania R. Co. v. *Knight,* 192 U. S. 21, demonstrates this common understanding. The Court there held that the Pennsylvania Railroad Company was subject to a state franchise tax by reason of the fact that it maintained a cab service within the boundaries of New York City for the sole benefit of its rail passengers. Its cabs transported the passengers between its ferry station and their residences and hotels. The Court stated that this cab service was an independent local service, preliminary or subsequent to any interstate transportation and not included in the contract of railroad carriage. Hence it was subject to state taxation. It is true that this ruling as to the extent of a state's taxing power is not conclusive as to the boundaries of interstate commerce for federal purposes. *Bacon* v. *Illinois,* 227 U. S. 504, 516; *Binderup* v. *Pathe Exchange, supra,* 311. But it does illustrate the normal and accepted concept of the outer limits of this type of interstate journey. And it is that concept that is determinative here.

We do not mean to establish any absolute rule that local taxicab service to and from railroad stations is completely beyond the reach of federal power or even beyond

the scope of the Sherman Act. In *Stafford* v. *Wallace, supra,* 528, the Court made plain that nothing in the *Knight* case was authority for the proposition that "if such an agency [local cab service] could be and were used in a conspiracy unduly and constantly to monopolize interstate passenger traffic, it might not be brought within federal restraint." Likewise, we are not to be understood in this case as deciding that all conspiracies among local cab drivers are so unrelated to interstate commerce as to fall outside the federal ken. A conspiracy to burden or eliminate transportation of passengers to and from a railroad station where interstate journeys begin and end might have sufficient effect upon interstate commerce to justify the imposition of the Sherman Act or other federal laws resting on the commerce power of Congress.

All that we hold here is that when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation. And a restraint on or monopoly of that general local service, without more, is not proscribed by the Sherman Act.

It follows that the complaint, insofar as it is based on such local taxicab service, fails to state a cause of action under the Sherman Act. It thus becomes unnecessary to discuss the points raised as to the substance of that part of the alleged conspiracy relating to this local service. Our conclusion in this respect, however, does not lead to an affirmance of the District Court's dismissal of the complaint. For the reasons set forth in Parts I and II of this opinion, the complaint does state a cause of action under the Act, entitling the United States to a trial on the merits. Since the portion of the complaint dealt with in Part III of this opinion is defective, appropriate steps should be taken to delete the charges in relation thereto.

With that understanding, we reverse the judgment of the District Court and remand the case for further proceedings consistent with this opinion.

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE agree with Parts I and II of this opinion but dissent from the holding in Part III.

MR. JUSTICE BURTON concurs in Part III of this opinion. However, he believes that the complaint as a whole fails to state a cause of action and that, therefore, the judgment of the District Court dismissing it should be affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

UNITED STATES *v.* MUNSEY TRUST CO., RECEIVER.

CERTIORARI TO THE COURT OF CLAIMS.

No. 847. Argued May 6, 1947.—Decided June 23, 1947.

1. Notwithstanding claims of a surety on a statutory payment bond (given under 40 U. S. C. § 270a) for reimbursement for sums paid to laborers and materialmen, the Government may set off, against unappropriated percentages of progress payments withheld by it and due to the contractor on the construction contract, a debt owed to it by the contractor as a result of a separate and independent transaction. Pp. 236–244.
2. When a receiver is appointed for a contractor with instructions to collect money owing to the contractor by the Government and to hold it for reimbursement of a surety on a payment bond for payments made to laborers and materialmen, a suit in the Court of Claims by the receiver against the Government for money due the contractor is in the right of the contractor; but the receiver may assert the surety's rights also. P. 239.

3. Under Judicial Code § 145, 28 U. S. C. § 250, when a receiver asserts in the Court of Claims a contractor's title to a sum owing to him by the Government, that Court is under statutory duty to recognize an undisputed claim of the Government against the contractor. Pp. 239–240.
4. With reference to withheld and unappropriated percentages of progress payments on a construction contract, performance of which has been completed and accepted, the Government is not a mere general creditor but a secured creditor entitled to withhold what it owes the contractor until it is paid whatever the contractor owes the Government. P. 240.
5. A surety on a payment bond who has paid laborers and materialmen for labor and material furnished under a Government construction contract is not entitled, by subrogation to their rights, to a lien on unappropriated percentages of progress payments retained by the Government for its own protection. Pp. 241–242.
6. The right of the Government to retained percentages of progress payments on a construction contract does not devolve on a surety who has paid laborers and materialmen, so as to prevent the Government from applying the unappropriated sum to the satisfaction of its own claim growing out of a separate and independent transaction. Pp. 242–243.
7. The provisions of 40 U. S. C. § 270a requiring a separate bond for payment of laborers and materialmen were enacted for their benefit and do not give sureties who have paid them rights to the detriment of the Government. Pp. 243–244.
8. When the work to be done under a Government construction contract has been completed at the contract price and accepted by the Government, the law of damages is not pertinent to the rights of a surety on a payment bond given under 40 U. S. C. § 270a who has paid laborers and materialmen. P. 244.

107 Ct. Cl. 131, 67 F. Supp. 976, reversed.

Notwithstanding the existence of a claim by the Government against the contractor growing out of another transaction, the Court of Claims gave judgment against the Government to a receiver for a contractor for withheld and unappropriated percentages of progress payments on a construction contract, to be used by the receiver in reimbursing a surety on a payment bond for payments made

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to laborers and materialmen. 107 Ct. Cl. 131, 67 F. Supp. 976. This Court granted certiorari. 330 U. S. 814. *Reversed,* p. 244.

Philip Elman argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Sonnett, John R. Benney, Paul A. Sweeney* and *Melvin Richter.*

Alexander M. Heron and *W. Braxton Dew* argued the cause for respondent. With them on the brief was *William L. Owen.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

This case presents a problem arising out of contracts for public building construction and repair. The rights *inter sese* of contractor, surety, assignees and government have been productive of much litigation, but we have not heretofore had to decide whether percentages retained pursuant to contract by the United States may be subjected to its set-off claims despite the claims of a surety who has paid laborers and materialmen.

In May and July, 1940, six contracts were made between the United States and the Federal Contracting Corporation, in which the corporate contractor agreed to paint and repair certain federal buildings. Each contract conformed to the requirements of statute, 49 Stat. 793, 40 U. S. C. § 270a, *et seq.*, by providing for two surety bonds, one conditioned on the completion of the work within the contract period, and the other on the payment of those furnishing labor and material to the contractor. The Aetna Casualty and Surety Company signed those bonds, each of which assigned to it the contractor's claims against the government for sums due on the contracts whenever the surety should be compelled

by default of the contractor to fulfill its obligations.[1] The work was completed by the contractor apparently in 1940, and accepted by the government. The surety therefore was not called upon to make good the promise of the performance bonds. But the contractor did not pay $13,065.93 owed to persons who had supplied labor and material for performance of five of the six contracts. This indebtedness the surety paid between April and September, 1941 as the payment bonds obliged it to do.

Under the customary terms of its contracts, the government had retained percentages of the progress payments due to the contractor. This retained money, on acceptance of the work, amounted to $12,445.03, but it was not disbursed. On October 18, 1940, the Federal Contracting Corporation submitted a bid to the United States for another painting job, in St. Louis. That bid was accepted, but the contractor then failed to enter into contract for the work. Another contractor painted the building for a price which left the government considerably more out-of-pocket than it would have been had Federal undertaken performance at its bid price. It is undisputed that $6,731.50 is the amount of damages sustained by the government after it had applied the contractor's deposit of $415.00 in reduction.

Almost inevitably, court process was begun to untangle claims to the money the United States still owed on the six contracts. A stockholder of Federal asked the United States District Court for the District of Columbia to appoint a receiver[2] to collect the money. The Aetna

[1] These assignments were of course invalid against the United States, R. S. § 3477, 31 U. S. C. § 203; *Martin* v. *National Surety Co.*, 300 U. S. 588, but they enable the surety to prevail over the contractor if there is contest between them.

[2] Such proceedings to appoint a receiver in the District of Columbia are for the purpose of taking possession of a fund or property and

Casualty and Surety Company was made a party to that action. Respondent here, the Munsey Trust Company, was appointed receiver with directions to demand and authority to receive from the United States the proceeds of the six contracts. The order of appointment also recited that "the proceeds of all collections made by the Receiver pursuant to this order shall be held for the reimbursement of the defendant The Aetna Casualty and Surety Company for expenditures made by it in the payment of furnishers of labor and material under the several contracts of the Federal Contracting Corporation."

On demand by the receiver for the amounts due, the General Accounting Office deducted the government's claim of $6,731.50 and paid over $5,713.53. Aetna, by letter to the Comptroller General, protested the government's settlement by set-off and asserted its right to an additional $3,568.23.[3] The receiver also protested the set-off and demanded $3,143.23 for reimbursement of the surety. It relied upon *Maryland Casualty Co.* v. *United States,* 100 Ct. Cl. 513, 53 F. Supp. 436. The Acting Comptroller General declined to follow the opinion of the Court of Claims, in the absence of ruling by this Court, and rejected the protests. When the receiver reported its efforts to the district court, it was ordered to turn over to the surety the money collected, less $500. That sum was for prosecution of suit in the Court of Claims for the recovery of whatever other moneys "may be due under the contracts of the Federal Contracting Corporation." This action was begun, and the Court of Claims gave judgment for $3,568.23 to respondent. 107 Ct. Cl. 131, 67 F. Supp.

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to prevent its loss or dissipation. Insolvency is not a necessary allegation, *Houston* v. *Ormes,* 252 U. S. 469, and there is no claim in this case that the contractor is insolvent.

[3] The surety did not and could not claim the whole amount retained by the government. The payments for which it was liable, and which it paid, on two of the contracts exceeded, and on the other four were less than, the amounts retained on each particular contract.

976. We granted the government's petition for certiorari because of the importance and novelty of the question and the cumulative effect of *Maryland Casualty Co.* v. *United States, supra,* and the decision below. 330 U. S. 814.

In these cases, it is usual for the rights relied upon to be largely derivative or subrogated ones. Decision will be attended with unnecessary confusion and difficulty if it is not clear whose rights are being asserted and who claims them. The Court of Claims treated this case as though the surety were plaintiff. But the district court directed the receiver to bring the suit. Its order of appointment made it the representative of Federal Contracting Corporation, although the sums it was to collect were to be held for the reimbursement of Aetna. The second order authorized this action to collect whatever other money might be held to be due under the six contracts which the government would not voluntarily pay. Certainly, the receiver sued at least in the right of Federal, but since its efforts were directed to be for the benefit of Aetna, it might assert the surety's rights also. *Samuel Olson & Co.* v. *Voorhees,* 292 F. 113, 115.

If the right of the United States to make the set-off were opposed only by the claims of the contractor, this case would present no difficulty. The government has the same right "which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." *Gratiot* v. *United States,* 15 Pet. 336, 370; *McKnight* v. *United States,* 98 U. S. 179, 186. More than that, federal statute gives jurisdiction to the Court of Claims to hear and determine "All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court . . . ." Judicial Code § 145, 28 U. S. C. § 250

(2). This power given to the Court of Claims to strike a balance between the debts and credits of the government, by logical implication gives power to the Comptroller General to do the same, subject to review by that court. Insofar as the suitor in the Court of Claims asserted the contractor's title to the sum in dispute, that court was under statutory duty to recognize the undisputed claim for damages of the United States. *Cherry Cotton Mills, Inc.* v. *United States,* 327 U. S. 536.

But the surety urges that it is subrogated also to the rights of laborers and materialmen whom it paid and of the United States. From *Prairie State Bank* v. *United States,* 164 U. S. 227, to *American Surety Co.* v. *Sampsell,* 327 U. S. 269, we have recognized the peculiarly equitable claim of those responsible for the physical completion of building contracts to be paid from available moneys ahead of others whose claims come from the advance of money. But in all those cases, the owner was a mere stakeholder and had no rights of its own to assert. Respondent tells us that here the United States is in the same position and that as a general creditor it has no more right to the money which it holds than does any other general creditor of the contractor.

At the time demand for payment was made by the receiver, the claim of the United States on the St. Louis contract was extant for some time. The disbursing officers, therefore, did not concede that they held the entire amount of the retained percentages for distribution to the contractor or others. And one whose own appropriation and payment of money is necessary to create a fund for general creditors is not a general creditor. He is not compelled to lessen his own chance of recovering what is due him by setting up a fund undiminished by his claim, so that others may share it with him. In fact, he is the best secured of creditors; his security is his own justified refusal to pay what he owes until he is paid what is due him.

But the infirmity in respondent's case goes deeper. If the United States were obligated to pay laborers and materialmen unpaid by a contractor, the surety who discharged that obligation could claim subrogation. But nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation. *Cf. H. Herfurth, Jr., Inc.* v. *United States,* 89 Ct. Cl. 122; see *Schmoll* v. *United States,* 105 Ct. Cl. 415, 455, 63 F. Supp. 753, 757; *Maryland Casualty Co.* v. *United States,* 100 Ct. Cl. 513, 521–522, 53 F. Supp. 436, 440. They cannot acquire a lien on public buildings, *Hill* v. *American Surety Co.,* 200 U. S. 197, 203; *Equitable Surety Co.* v. *McMillan,* 234 U. S. 448, 455, and as a substitute for that more customary protection, the various statutes were passed which require that a surety guarantee their payment. Of these, the last and the one now in force is the Miller Act under which the bonds here were drawn.

The surety says, nevertheless, that the laborers and materialmen may have a lien, or something in the nature of a lien, on the retained percentages. Its argument runs into logical difficulties. For it asserts that the moneys are retained by the government as much for assurance that the contractor will perform his contract by paying the laborers and materialmen as by completing the work on time. It is said to follow that so long as they remain unpaid, the contractor may not demand payment and the government would be justified in refusing to disburse the retained percentages.[4] In that case, how may the laborers and materialmen have a lien upon money which the United States may legally keep? Surely it is not intended that the laborers and ma-

[4] If the money is retained only to assure performance of the work, then the contractor might compel payment when the work is accepted. In that case, the surety's argument falls, since obviously, before paying, the government might set off claims against the contractor.

terialmen may claim payment of that which is not due to the contractor. We are aware that the laborers and materialmen have been paid, so that by no interpretation of the contracts between government and contractor can there be restrictions on paying out the money retained. It is said that it was the surety's payment of those claims which released the asserted contract restrictions. In relying on the rights of the laborers and materialmen, however, the surety must establish that those rights existed before their claims were paid. For it is elementary that one cannot acquire by subrogation what another whose rights he claims did not have. Once the laborers and materialmen have been paid, either by contractor or surety, they have no rights in any fund. If before they are paid, the fund to which they are said to be entitled to look is unavailable for the very reason that they are unpaid, the surety relies on nothing when it relies on those nonexistent "rights." One who rests on subrogation stands in the place of one whose claim he has paid, as if the payment giving rise to the subrogation had not been made. See *Aetna Life Insurance Co.* v. *Middleport,* 124 U. S. 534, 548. He cannot jump back and forth in time and present himself at once as the unpaid claimant and again, under the conditions as they have changed, because payment was made.

We need not decide whether laborers and materialmen would have any claim to the retained percentages if both contractor and surety failed to pay them. Even if they do, certainly those would be rights to which the surety could not be subrogated, for by hypothesis it would have done nothing to earn subrogation.

The surety has yet another party whose rights it would claim, if it cannot prevail by substitution for contractor or laborers and materialmen. This contention too was sustained by the Court of Claims when it said that the rights of the United States devolved upon the surety, because of its payments. We are told that the United

States retained the money to assure performance of all the obligations of the contractor, and that the surety is entitled to apply that security to indemnify itself for performing one of those obligations. This is by analogy to the rule that an obligee, as against a surety, may not apply security in satisfaction of debts other than the one it secures. See 4 Pomeroy, Equity Jurisprudence (5th ed.) 1075. But although we have assumed, for the purposes of another argument, that assurance that laborers and materialmen will be paid is one of the reasons for retaining the money, it seems more likely that completion of the work on time is the only motive. *California Bank* v. *United States Fidelity & Guaranty Co.,* 129 F. 2d 751; see *Schmoll* v. *United States,* 105 Ct. Cl. 415, 455, 63 F. Supp. 753, 757; *Maryland Casualty Co.* v. *United States, supra,* at 439. It is hardly reasonable to withhold money in order to assure payments which perhaps can be made only from the money earned. In any event, we are not prepared to apply law relating to security to unappropriated sums which exist only as a claim.

Finally, the surety by reference to the *Maryland Casualty* case, *supra,* suggests that it has rights of its own in the money which the government retained. It argues that the implication of the several contracts among government, contractor and surety was that the moneys earned under the repair contracts would be available to pay claims arising under each job. However, if statute did not require a surety, there could be no question that the government would have the right of set-off. Respondent's contention then comes to this: that by requiring the contractor to furnish assurances that he will perform his obligations to laborers and materialmen, the government has deliberately decreased the ordinary safeguards it would have had to enforce the contractor's obligations to it. We see nothing in the words of the contract or the statute to lead us to this conclusion. On the contrary, the statutory provisions requiring a separate bond

for payment of laborers and materialmen were enacted for their benefit, not to the detriment of the government. It is the surety who is required to take risk. We have no warrant to increase risks of the government.

Respondent argues that if the work had not been completed, and the surety chose not to complete it, the surety would be liable only for the amount necessary to complete, less the retained money. Moreover, if the surety did complete the job, it would be entitled to the retained moneys in addition to progress payments. The situation here is said to be similar. But when a job is incomplete, the government must expend funds to get the work done, and is entitled to claim damages only in the amount of the excess which it pays for the job over what it would have paid had the contractor not defaulted. Therefore, a surety would rarely undertake to complete a job if it incurred the risk that by completing it might lose more than if it had allowed the government to proceed. When laborers and materialmen, however, are unpaid and the work is complete, the government suffers no damage. The work has been done at the contract price. The government cannot suffer damage because it is under no legal obligation to pay the laborers and materialmen. In the case of the laborers' bond, the surety has promised that they will be paid, not, as in the case of performance bond, that work will be done at a certain price. The law of damages is therefore not pertinent to the payment bond.

We hold that the government properly used its right to set off its independent claim and the judgment below must be

Reversed.

MR. JUSTICE BURTON dissents.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

Syllabus.

FAHEY, FEDERAL HOME LOAN BANK COMMISSIONER, ET AL. *v.* MALLONEE ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 687. Argued April 30, 1947.—Decided June 23, 1947.

1. Section 5 (d) of the Home Owners' Loan Act of 1933, which authorizes the Federal Home Loan Bank Board to prescribe by regulation the terms and conditions upon which a conservator may be appointed for a federal savings and loan association, is not an unconstitutional delegation of legislative functions. Pp. 248–254.

   (a) *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; *Schechter Corp.* v. *United States,* 295 U. S. 495, distinguished. Pp. 249–250.

   (b) Banking being one of the longest regulated and most closely supervised of public callings, a discretion to make regulations to guide supervisory action with respect to the appointment of conservators, receivers and liquidators for banking institutions may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in uncharted fields. P. 250.

   (c) The rules and regulations of the Home Loan Bank Board governing the appointment of conservators are sufficiently explicit, against the background of custom, to be adequate for proper administration and for judicial review. Pp. 250–253.

   (d) In view of the delicate nature of banking institutions and the impossibility of preserving credit during an investigation, it is not unconstitutional to provide for a hearing after, instead of before, a conservator takes possession. Pp. 253–254.

2. When, after the appointment of a conservator for a federal savings and loan association, an administrative hearing is granted and specifications of the charges are furnished, but the making of a record is prevented by an injunction obtained by its shareholders in a derivative suit on behalf of the association without the taking of testimony by the trial court, this Court, in reviewing the judgment for the purpose of determining the case without trial, must assume that the supervisory authorities would be able to sustain the statements of fact and to justify the conclusions in their charges. P. 254.

3. In a derivative suit on behalf of the association, shareholders of a federal savings and loan association organized under § 5 of the Home Owners' Loan Act of 1933 are estopped from challenging the constitutionality of the provisions of § 5 (d), which authorize

the Federal Home Loan Bank Board to prescribe the terms and conditions upon which a conservator may be appointed for the association. Pp. 255–256.

68 F. Supp. 418, reversed.

In a shareholders' derivative suit on behalf of a federal savings and loan association, a three-judge district court held § 5 (d) of the Home Owners' Loan Act of 1933 unconstitutional, ordered removal of a conservator who had been appointed for the association, permanently enjoined the authorities from holding an administrative hearing on the matter, permanently enjoined an apprehended merger, restored the association to its former management, ordered the conservator to account, and enjoined these authorities "from ever asserting any claims, right, title or interest" in or to the association's property. 68 F. Supp. 418. On direct appeal to this Court, *reversed*, p. 258.

Oscar H. Davis argued the cause for appellants. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Robert L. Stern, Paul A. Sweeney, Kenneth G. Heisler, Ray E. Dougherty* and *Mose Silverman.*

Wyckoff Westover argued the cause for Mallonee et al., appellees. With him on the brief was *Daniel W. O'Donohue, Jr.*

Charles K. Chapman argued the cause and filed a brief for the Long Beach Federal Savings & Loan Association, appellee.

By special leave of Court, *Everett W. Mattoon,* Deputy Attorney General, argued the cause for the State of California, as *amicus curiae,* urging affirmance. With him on the brief was *Fred N. Howser,* Attorney General.

Louis W. Myers, Pierce Works and *Richard Fitzpatrick* submitted on brief for the Federal Home Loan Bank of Los Angeles, appellee.

Robert H. Wallis and *Raymond Tremaine* submitted on brief for Wallis, appellee.

Harry O. Wallace submitted on brief for the Title Service Company, appellee.

MR. JUSTICE JACKSON delivered the opinion of the Court.

A specially constituted three-judge District Court has summarily, without trial, entered final judgment ousting a Conservator who, on orders of the Federal Home Loan Bank Commissioner, had taken possession of the Long Beach Federal Savings and Loan Association. It granted this and other relief on the principal ground that § 5 (d) of the Home Owners' Loan Act of 1933, as amended, violates Article I, §§ 1 and 8 of the Constitution.

The Federal Home Loan Bank Administration on May 20, 1946, without notice or hearing, appointed Ammann conservator for the Association and he at once entered into possession. The grounds assigned were that the Association was conducting its affairs in an unlawful, unauthorized and unsafe manner, that its management was unfit and unsafe, that it was pursuing a course injurious to, and jeopardizing the interests of, its members, creditors and the public. Plaintiffs at once commenced this class action in the right of the Association against the Conservator and Fahey, Chairman of the Federal Home Loan Bank Board, the Association as a nominal defendant, and several others not important to the issue here. The complaint alleged that the Conservator and the Chairman had seized the property without due process of law, motivated by malice and ill will, and that the seizure for various reasons was in

violation of the Constitution. It asked return of the Association to its former management, permanent injunction against further interference, and other relief. Other parties in interest intervened. Temporary restraining orders issued and a three-judge court was duly convened.

Personal service was secured upon Ammann, the Conservator, but Fahey, the Federal Home Loan Bank Commissioner, officially an inhabitant of the District of Columbia, could not be served in California. A motion for substituted service, therefore, was granted and process was served upon him in the District of Columbia. It was believed that this was authorized by Judicial Code, § 57, 28 U. S. C. § 118. Ammann moved to dismiss the complaint on the ground that it failed to state a cause of action. Fahey appeared specially to move dismissal or quashing return of service on him upon the ground that he could not, in his official capacity, be sued in California and had not been served properly with process. Neither had answered the complaint, nor had their time to do so expired, when final judgment was granted against them.

The three-judge court set a variety of pending motions for argument and, after argument mainly on the constitutionality of § 5 (d), with only pleadings and motion papers before it, held the section unconstitutional, ordered removal of the Conservator, permanently enjoined the authorities from holding an administrative hearing on the matter, permanently enjoined an apprehended merger, restored the institution to its former management, ordered the Conservator to account and enjoined these authorities "from ever asserting any claims, right, title or interest" in or to the Association's property. 68 F. Supp. 418. The case is here on direct appeal. 50 Stat. 752–53, 28 U. S. C. §§ 349a, 380a.

It is manifest that whatever merit there may be in various subsidiary and collateral questions, this drastic decree can stand only if the section, as applied here, is unconstitutional.

Its defect is said to consist of delegation of legislative functions to the supervising authority without adequate standards of action or guides to policy. Section 5 (d) of the Act gives to the Board "full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation." 48 Stat. 133, 12 U. S. C. § 1464 (d). This, the District Court held, was unconstitutional delegation of the congressional function. It relied on *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, and *Schechter Corp.* v. *United States,* 295 U. S. 495.

Both cited cases dealt with delegation of a power to make federal crimes of acts that never had been such before and to devise novel rules of law in a field in which there had been no settled law or custom. The latter case also involved delegation to private groups as well as to public authorities. Chief Justice Hughes emphasized these features, saying that the Act under examination was not merely to deal with practices "which offend against existing law, and could be the subject of judicial condemnation without further legislation, or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose is clearly disclosed to authorize new and controlling prohibitions through codes of laws which would embrace what the formulators would propose, and what the President would approve, or prescribe, as wise and beneficent measures for the government of trades and industries in order to bring about their rehabilitation, correction and development, according to the general declaration of policy in section one." *Schechter Corp.* v. *United States,* 295 U. S. 495, 535.

The savings and loan associations with which § 5 (d) deals, on the other hand, are created, insured and aided by the Federal Government. It may be that explicit standards in the Home Owners' Loan Act would have been a desirable assurance of responsible administration. But the provisions of the statute under attack are not penal provisions as in the case of *Lanzetta* v. *New Jersey*, 306 U. S. 451, or *United States* v. *Cohen Grocery Co.*, 255 U. S. 81. The provisions are regulatory. They do not deal with unprecedented economic problems of varied industries. They deal with a single type of enterprise and with the problems of insecurity and mismanagement which are as old as banking enterprise. The remedies which are authorized are not new ones unknown to existing law to be invented by the Board in exercise of a lawless range of power. Banking is one of the longest regulated and most closely supervised of public callings. It is one in which accumulated experience of supervisors, acting for many states under various statutes, has established well-defined practices for the appointment of conservators, receivers and liquidators. Corporate management is a field, too, in which courts have experience and many precedents have crystallized into well-known and generally acceptable standards. A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in uncharted fields.

The Board adopted rules and regulations governing appointment of conservators. They provided the grounds upon which a conservator might be named,[1] and they

[1] The Rules and Regulations for the Federal Savings and Loan System provide in part as follows:

PART 206. APPOINTMENT OF CONSERVATOR OR RECEIVER.

§ 206.1. *Receiver or conservator; appointment.* (a) Whenever, in the opinion of the Federal Home Loan Bank Administration, any Federal savings and loan association:

Footnote 1.—Continued.

(1) Is conducting its business in an unlawful, unauthorized, or unsafe manner;

(2) Is in an unsound or unsafe condition, or has a management which is unsafe or unfit to manage a Federal savings and loan association;

(3) Cannot with safety continue in business;

(4) Is impaired in that its assets do not have an aggregate value (in the judgment of the Federal Home Loan Bank Administration) at least equal to the aggregate amount of its liabilities to its creditors, members, and all other persons;

(5) Is in imminent danger of becoming impaired;

(6) Is pursuing a course that is jeopardizing or injurious to the interests of its members, creditors, or the public;

(7) Has suspended payment of its obligations;

(8) Has refused to submit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Federal Home Loan Bank Administration;

(9) Has refused by the refusal of any of its officers, directors, or employees to be examined upon oath by the Federal Home Loan Bank Administration or its representative concerning its affairs; or

(10) Has refused or failed to observe a lawful order of the Federal Home Loan Bank Administration,

the Federal Home Loan Bank Administration may appoint the Federal Savings and Loan Insurance Corporation receiver for such Federal association, which appointment shall be for the purpose of liquidation, or the Federal Home Loan Bank Administration may appoint a conservator for such Federal association to conserve the assets of the association pending further disposition of its affairs. The appointment shall be by order, which order shall state on which of the above causes the appointment is based. Any conservator so appointed shall furnish bond for himself and his employees, in form and amount and with surety acceptable to the Governor of the Federal Home Loan Bank System, or any Deputy or Assistant Governor, but no bond shall be required of the Federal Savings and Loan Insurance Corporation as receiver. The conservator or receiver shall forthwith upon appointment take possession of the association and, at the time such conservator or receiver shall demand possession, such conservator or receiver shall notify the officer or employee of the association, if any, who shall be in the home office of the association and appear to be in charge of such office, of the action of the Federal Home Loan Bank Administration. The Secretary of the Federal

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Footnote 1.—Continued.

Home Loan Bank Administration shall, forthwith upon adoption thereof, mail a certified copy of the order of appointment to the address of the association as it shall appear on the records of the Federal Home Loan Bank Administration and to each director of the association, known by the Secretary to be such, at the last address of each as the same shall appear on the records of the Federal Home Loan Bank Administration. If such certified copy of the order appointing the conservator or receiver is received at the offices of the association after the taking of possession by the conservator or receiver, such conservator or receiver shall hand the same to any officer or director of the association who may make demand therefor.

§ 206.2. *Hearing on appointment.* Within fourteen days (Sundays and holidays included) after the appointment of a conservator or receiver for a Federal association not at the time of such appointment in the hands of a conservator, such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may file an answer and serve a written demand for a hearing, authorized by its board of directors, which demand shall state the address to which notice of hearing shall be sent. Upon receipt of such answer and written demand for a hearing the Federal Home Loan Bank Administration shall issue and serve a notice of hearing upon the institution by mailing a copy of the order of hearing to the address stated in the demand therefor and shall conduct a hearing, at which time and place the Federal association may appear and show cause why the conservator or receiver should not have been appointed and why an order should be entered by the Federal Home Loan Bank Administration discharging the conservator or receiver. Such hearing shall be held either in the district of the Federal Home Loan Bank of which such Federal association is a member or in Washington, D. C., as the Federal Home Loan Bank Administration shall determine, unless the association otherwise consents in writing. Such hearing may be held before the Federal Home Loan Bank Commissioner or before a trial examiner or hearing officer, as the Federal Home Loan Bank Administration shall determine. Such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may, within seven days (Sundays and holidays included) of such appointment, serve a written or telegraphic demand, authorized by its board of directors, upon the Federal Home Loan Bank Administration for a more definite statement of the cause or causes for the action. The time of service upon the

are the usual and conventional grounds found in most state and federal banking statutes.[2] They are sufficiently explicit, against the background of custom, to be adequate for proper administration and for judicial review if there should be a proper occasion for it.

It is complained that these regulations provide for hearing after the conservator takes possession instead of before. This is a drastic procedure. But the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner. It is a heavy responsibility to be exercised

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Federal Home Loan Bank Administration for the purposes of this section shall be the time of receipt by the Secretary of the Federal Home Loan Bank Administration.

§ 206.4. *Discharge of conservator or receiver.* An order of the Federal Home Loan Bank Administration discharging a conservator and returning the association to its management shall restore to such Federal association all its rights, powers and privileges and shall restore the rights, powers and privileges of its officers and directors, all as of the time specified in such order, except as such order may otherwise provide. An order of the Federal Home Loan Bank Administration discharging a receiver and returning the association to its management shall by operation of law and without any conveyance or other instrument, act or deed, restore to such Federal association all its rights, powers and privileges, revest in such Federal association the title to all its property, and restore the rights, powers and privileges of its officers and directors, all as of the time specified in such order, except as such order may otherwise provide. 24 C. F. R. Cum. Supp. § 206.1 *et seq.*, as amended, 24 C. F. R. 1943 Supp. § 206.1.

[2] Bank Conservation Act of March 9, 1933, § 203, 48 Stat. 2–3, 12 U. S. C. § 203; Banking Act of 1933, § 31, 48 Stat. 194, 12 U. S. C. § 71a; National Housing Act, § 406, 48 Stat. 1259–60, 12 U. S. C. § 1729. *E. g.*, New York Banking Law, § 606, 4 McKinney's Consolidated Laws of New York, pp. 708–709, (pocket part, 1946) 125–26; Page's Ohio General Code Ann., § 687; 1 Deering's California General Laws, Act 986, § 13.11; Massachusetts Laws Ann. c. 167, § 22; c. 170B, § 4; Jones Illinois Stat. Ann., § 14.40.

with disinterestedness and restraint, but in the light of the history and customs of banking we cannot say it is unconstitutional.[3]

In this case an administrative hearing was demanded and specifications were asked as to the charges against the management of the Association. The hearing was granted and a statement of complaints against the management was furnished.

The causes for the appointment of a conservator as therein set forth by the Board included withdrawals by the president without proper voucher therefor; payment of salaries and fees not commensurate with services rendered; a director's unlawful removal of a cashier's check in the amount of $50,000 during an examination by Federal Home Loan Bank examiners; leasing properties of the Association for a twenty-year period on terms which would not provide adequate consideration to the Association; use of the Association for personal gain of one or more officers and directors; failure to maintain proper accounts and to make proper reports; and falsification of records. It also charged certain manipulations of the affairs of another institution by the president of this institution.

The plaintiffs nevertheless demanded and obtained an injunction to prevent the administrative hearing and they have therefore cut off the making of a record as to whether these charges are well-founded. Nor did the trial court take evidence on the subject. We must assume that the supervising authorities would be able to sustain the statements of fact and to justify the conclusions in their charges for the purpose of determining the case without trial. We are therefore unable to agree with the court below that the section is invalid and hence that regardless of the charges the management was free to go on undisciplined and unchecked.

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[3] See note 2.

But even if the section were defective, which we think it is not in a constitutional sense, another obstacle stands in the way of ousting this conservator.

The Long Beach Federal Savings and Loan Association was organized in 1934 under § 5 of the Home Owners' Loan Act of 1933, subsection (d) of which is now sought to be declared unconstitutional. The present management obtained a charter which provided that the Association "shall at all times be subject to the provisions of the Home Owners' Loan Act of 1933, providing for Federal savings and loan associations, and to any amendments thereof, and to any valid rules and regulations made thereunder as the same may be amended from time to time," and that it might be "liquidated, merged, consolidated, or reorganized, as is provided in the rules and regulations for Federal savings and loan associations . . . ." In 1937, upon the Association's request, an amended charter was issued which likewise provided that the Association was to exercise its powers subject to the Home Owners' Loan Act and regulations issued thereunder.

This is a stockholder's derivative action in which plaintiffs sue only in the right of the Association. It is an elementary rule of constitutional law that one may not "retain the benefits of the Act while attacking the constitutionality of one of its important conditions." *United States* v. *San Francisco,* 310 U. S. 16, 29. As formulated by Mr. Justice Brandeis, concurring in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 348, "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."

In the name and right of the Association it is now being asked that the Act under which it has its existence be struck down in important particulars, hardly severable from those provisions which grant its right to exist. Plaintiffs challenge the constitutional validity of the only

provision under which proceedings may be taken to liquidate or conserve the Association for the protection of its members and the public. If it can hold the charter that it obtained under this Act and strike down the provision for terminating its powers or conserving its assets, it may perpetually go on, notwithstanding any abuses which its management may perpetrate. It would be intolerable that the Congress should endow an association with the right to conduct a public banking business on certain limitations and that the Court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection. It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions. We hold that plaintiffs are estopped, as the Association would be, from challenging the provisions of the Act which authorize the Board to prescribe the terms and conditions upon which a conservator may be named.

There are other important and difficult questions raised in the case which it becomes unnecessary to decide.

Objection is made to the administrative hearing upon the ground that it is before the same authority which has preferred the charges and that it cannot be expected, therefore, to be fair and impartial and that the Act does not provide for judicial review of the Board's determination on the hearing. We cannot agree that courts should assume in advance that an administrative hearing may not be fairly conducted. We do not now decide whether the determination of the Board in such proceeding is subject to any manner of judicial review. The absence from the statute of a provision for court review has sometimes been held not to foreclose review. *Stark* v. *Wickard,* 321 U. S. 288; *Federal Reserve Board* v. *Agnew,* 329 U. S. 441; Administrative Procedure Act, 5 U. S. C. A. § 1009. Nor do we mean to be understood that if supervising authorities

maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies.

One of the allegations of the complaint is that it was intended that this institution would be merged with other institutions to the injury of its shareholders. The allegation seems to be based on the fact that a different institution with which the management of the Long Beach institution was connected was merged by the authorities in a way that was highly objectionable to some of the shareholders and aroused concern of the public authorities. We find no explicit threat to merge the Long Beach institution and there is no such finding by the court below. The Government has assured us at the bar that there is no plan for such a merger in contemplation. Nevertheless, such a merger was enjoined. In view of the absence of a finding of the threat or of evidence to sustain one, we accept the Government's assurance that merger will not follow and, hence, we do not consider it necessary to discuss the legality of hypothetical mergers.

Since the judgment that has been rendered against the Conservator, who was duly served with process, must be reversed, we find it unnecessary to decide whether Fahey was an indispensable party or was properly brought into the case by substituted service.

It is obvious that there is more to this litigation than meets the eye on the pleadings. The plaintiffs' charges that ill will and malice actuated the supervising authorities, as well as the charges of the defendants that the institution has been mismanaged and that the management is unfit, are alike undetermined by the courts below, and we make no determination or intimation concerning the merits of these issues or as to other remedies or relief than that in the judgment before us.

Our decision is that it was error in the court below to hold the section unconstitutional, to oust the Conservator or to enjoin any of his proceedings or to enjoin the admin-

istrative hearing, and this without prejudice to any other administrative or judicial proceedings which may be warranted by law. The judgment is

Reversed.

MR. JUSTICE DOUGLAS concurs in the result.

MR. JUSTICE RUTLEDGE concurs in the result and in the Court's opinion insofar as it rests upon the ground that the controlling statute, § 5 (d) of the Home Owners' Loan Act of 1933, is not unconstitutional.

EX PARTE FAHEY, FEDERAL HOME LOAN BANK COMMISSIONER, ET AL.

No. 133, Misc. Argued April 30, 1947.—Decided June 23, 1947.

Mandamus, prohibition and injunction against judges are extraordinary remedies which should be reserved for really extraordinary cases; and this Court will not countenance their use as substitutes for an appeal. Pp. 259–260.

Petition invoking the original jurisdiction of this Court and asking leave to file petition for writ of mandamus, prohibition or injunction against a District Judge to vacate his order allowing fees to counsel in *Fahey* v. *Mallonee, ante,* p. 245, to prohibit any further allowance therein and to enjoin any payments heretofore allowed, *denied,* p. 260.

Oscar H. Davis argued the cause for petitioners. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Robert L. Stern, Paul A. Sweeney, Kenneth G. Heisler, Ray E. Dougherty* and *Mose Silverman.*

Charles K. Chapman and *Welburn Maycock* argued the cause for Hall, United States District Judge. With *Mr. Chapman* on the brief were *Peirson M. Hall, Wyckoff Westover* and *Harry O. Wallace.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

This petition by John H. Fahey, individually and as Federal Home Loan Bank Commissioner, and A. V. Ammann, individually and as Conservator for the Long Beach Federal Savings and Loan Association, invokes the original jurisdiction of this Court. They ask leave to file petition for a writ of "mandamus and/or prohibition and/or injunction" against Judge Peirson M. Hall of the United States District Court for the Southern District of California to vacate his order allowing fees to counsel in *Fahey* v. *Mallonee*, decided today, *ante*, p. 245, to prohibit any further allowance therein, and to enjoin any payments heretofore allowed.

While an appeal in the principal case was pending in this Court, application was made by various counsel for the plaintiffs and associated interests therein for allowance of fees aggregating some $125,000. The District Court allowed counsel for plaintiffs $50,000 as a partial payment on account of services, but withheld action on other applications. Certain costs and expenses of the plaintiffs in the amount of $17,295.13 were also ordered reimbursed.

The petition involves serious questions of law and of fact. Whether, because of the pendency of the appeal and the stay order granted therein, the District Court had power to entertain the application, whether before the final outcome of the case could be known an allowance was premature, whether the source of the fund on deposit with the court was so related to the services as to be subject to disbursement for their compensation, and whether one judge can make allowances in a case before a three-judge court, are, with other questions, much contested. We do not decide any question as to the merits.

Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt

power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes.

We find nothing in this case to warrant their use. An allowance of $50,000 will hardly destroy a twenty-six-million-dollar association during the time it would take to prosecute an appeal. The status of one of the applicants in the principal case is now settled so that he has standing to take all authorized appeals. We hold that the applicants' grievance is one to be pursued by appeal at the proper time and to the appropriate court, rather than by resort to our original jurisdiction for extraordinary writs.

The petition is

Denied.

FAY *v.* NEW YORK.

NO. 377. CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.*

Argued April 3, 1947.—Decided June 23, 1947.

1. New York Judiciary Law § 749–aa, 29 McKinney's L. N. Y., pp. 511–515, providing for the administrative selection of a special or "blue ribbon" jury panel from the general jury panel in counties of one million or more inhabitants and the use in certain classes of cases of juries drawn from this special panel, does not on its face deny defendants in criminal cases due process of law or equal protection of the laws contrary to the Fourteenth Amendment. Pp. 270–272.

   (a) This Court cannot find it constitutionally forbidden to set up in a metropolis with congested court calendars administrative procedures in advance of trial to eliminate from the jury panel those who, in a large proportion of cases, would be rejected by the court after its time had been taken in examination to ascertain the disqualifications. P. 271.

   (b) These are local matters with which local authority must and does have considerable latitude to cope, for they affect the administration of justice which is a local responsibility. P. 271.

   (c) There is nothing in the standards prescribed for the selection of the special panel which, on its face, is prohibited by the Constitution. Pp. 267–268, 270–272.

2. Petitioners have not sustained the burden of showing that their trial by a jury drawn from such a special panel denied them equal protection of the laws. Pp. 272–286.

   (a) It is not proven that laborers, operatives, craftsmen, foremen and service employees were systematically, intentionally and deliberately excluded from the special panel. Pp. 273–277.

   (b) Nor is it proven that women were so excluded—especially in view of the fact that three women talesmen were examined and one served on the jury in this case. Pp. 277–278.

   (c) The elimination from the special panel of persons who, in replying to a questionnaire, expressed a preference to serve during certain months is of no constitutional significance and of no prejudice to petitioners. P. 278.

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*Together with No. 452, *Bove* v. *New York*, also on certiorari to the same Court.

(d) Petitioners have not sustained the burden of proving that in 1945, when they were tried, the special panel was so composed as to be more prone to convict than the general panel. Pp. 278–286.

3. The statute providing for the special jury does not violate the Due Process Clause of the Fourteenth Amendment. *Glasser* v. *United States,* 315 U. S. 60; *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217; *Ballard* v. *United States,* 329 U. S. 187, distinguished. Pp. 286–296.

(a) There being no constitutional requirement that juries shall include women, their partial exclusion from the general and special jury panels (by making their service voluntary instead of compulsory) was not a denial of due process. Pp. 289–290.

(b) A lack of proportional representation of an economic class comprising laborers, craftsmen and service employees, which does not result from an intentional and purposeful exclusion of any class but from tests of intelligence, citizenship and understanding of English applied alike to all prospective jurors, does not violate the Due Process Clause. Pp. 290–294.

4. In considering whether the statute is administered so as to produce unconstitutional results, this Court must examine the evidence and reach its own conclusions as to the facts. P. 272.

5. Since Congress has considered the specific application of the Fourteenth Amendment to the state jury systems and has found only discriminations on account of "race, color, or previous condition of servitude" to deserve general legislative condemnation (8 U. S. C. § 44), one who would have the judiciary intervene on other grounds must comply with the exacting requirements of proving clearly that in his own case the procedure has gone so far afield that its results are a denial of equal protection or due process. Pp. 282–284.

6. It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination. P. 284.

7. When discrimination of an unconstitutional kind in the selection of a jury is alleged, the burden of proving it purposeful and intentional is on the defendant. P. 285.

8. In considering whether the method of selecting a jury violates the Equal Protection Clause of the Fourteenth Amendment, the inquiry is whether defendants received less favorable treatment than others. P. 285.

9. This Court may exert a supervisory power over federal proceedings with greater freedom to reflect its notions of good policy than it

may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process. P. 287.

10. The commandments of the Sixth and Seventh Amendments, which require jury trial in criminal and certain civil cases, are not made applicable to the states by the Due Process Clause of the Fourteenth Amendment. P. 288.
11. Due process requires a real hearing by a tribunal unbiased by interest in the event; but an accused is not entitled to a set-up that will give a chance of escape after he is properly proven guilty. He has no constitutional right to friends on the jury. Pp. 288–289.
12. The state's right to apply tests of intelligence, citizenship and understanding of English in selecting jurors is not open to doubt, even though they disqualify a disproportionate number of manual workers. P. 291.
13. This Court is unable to say that mere exclusion of jurors of one's occupation renders a jury unconstitutional, even though the occupation tends to give those who practice it a particular and distinctive viewpoint. P. 292, n. 35.
14. There is some discretion left in the states to say that persons in some occupations are more needed at their work than on jury duty and, perhaps, that some have occupational attitudes that make it appropriate to leave them off the list so long as an unexceptionable list remains on call. P. 292, n. 35.
15. The function of this Court under the Fourteenth Amendment with reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ. P. 294.
16. Beyond requiring conformity to standards of fundamental fairness that have won legal recognition, this Court adheres to a policy of self-restraint in interpreting the Fourteenth Amendment and will not use that Amendment to impose uniform procedures upon the several states, whose legal systems stem from diverse sources of law and reflect different historical influences. Pp. 294–295.
17. No violation of a federal statute being alleged, a successful challenge to this judgment under the Due Process Clause depends on a showing that these defendants have had a trial so unfair as to amount to a taking of their liberty without due process of law; and such a showing has not been made. P. 296.

296 N. Y. 510, 68 N. E. 2d 453, affirmed.

In a state court in New York County, a special or so-called "blue ribbon" jury impaneled pursuant to N. Y. Judiciary Law § 749–aa, 29 McKinney L. N. Y., pp. 511–15, convicted petitioners of extortion and conspiracy to extort. The Appellate Division of the Supreme Court of New York affirmed. 270 App. Div. 261, 59 N. Y. S. 2d 127. The Court of Appeals of New York affirmed. 296 N. Y. 510, 68 N. E. 2d 453. This Court granted certiorari. 329 U. S. 697. *Affirmed,* p. 296.

Harold R. Medina argued the cause for petitioner in No. 377. With him on the brief were *Robert J. Fitzsimmons* and *Richard T. Davis.*

Moses Polakoff and *Samuel Mezansky* submitted on brief for petitioner in No. 452.

Whitman Knapp argued the cause for respondent. With him on the brief were *Frank S. Hogan, Joseph A. Sarafite* and *Eugene A. Leiman.*

Mr. Justice Jackson delivered the opinion of the Court.

These cases present the same issue, a challenge to the constitutionality of the special or so-called "blue ribbon" jury as used by state courts in the State and County of New York.

Such a jury found Fay and Bove guilty of conspiracy to extort and of extortion. Bove was Vice-President of the International Hod Carriers, Building and Common Laborers' Union of America. Fay was Vice-President of the International Union of Operating Engineers. The City of New York awarded contracts for construction of an extensive project known as the Delaware Water Supply system to several large construction concerns. It was not denied that Fay and Bove collected

from these contractors upwards of $300,000. But it was denied that payment was induced by threats to do unlawful injury to person or property. The defense claimed that the payments were voluntary—bribes, perhaps, but not extortion—that these men were paid merely for undertaking to assist the contractors to avoid labor trouble, to prevent jurisdictional or unauthorized strikes, and to "handle the labor situation," and that Fay and Bove rendered service as agreed.

The indictment charged the crimes in seven counts. One was dismissed by the court; the remaining six were submitted to the jury. The jury acquitted the defendants on three of the counts, disagreed on another, and convicted on two counts. The convictions were affirmed on appeal by the Appellate Division of the Supreme Court,[1] which reviews both law and fact,[2] and by the Court of Appeals.[3] No federal question is raised as to the merits of the finding of guilt and we are to assume that the convictions were warranted by the evidence and, except for questions as to the special jury, were regular. While there was challenge to the panel from which this jury was drawn, on ground of denial of federal due process and equal protection, each individual juror was accepted by the defendants without challenge for cause. The challenge to the special jury panel was not discussed by either of the appellate courts of the State but the federal questions were sufficiently and timely raised throughout and were overruled by all state courts. A dual system of juries presents easy possibilities of violation of the Fourteenth Amendment and we took these cases by certiorari to examine the charges of unconstitutionality. 329 U. S. 697.

[1] 270 App. Div. 261, 59 N. Y. S. 2d 127.

[2] Code of Criminal Procedure, §§ 520, 543–a, 66 McKinney's Consolidated Laws of New York, part 2, pp. 328–29, 429.

[3] 296 N. Y. 510, 68 N. E. 2d 453.

The question is whether a warranted conviction by a jury individually accepted as fair and unbiased should be set aside on the ground that the make-up of the panel from which they were drawn unfairly narrows the choice of jurors and denies defendants due process of law or equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution. If answered in the affirmative, it means that no conviction by these special juries is constitutionally valid, and all would be set aside if the question had been properly raised at or before trial.

The defendants raise no question as to the constitutionality of the general statutes of New York which prescribe the qualifications, disqualifications and exemptions for ordinary jury service. Neither is any question raised as to the administration of these general statutes by which the population of New York County, numbering some 1,800,000, is sifted to produce a general jury panel of about 60,000, unless it be that there is discrimination against women.[4] It is from this panel that defendants insist, apart from any objection they may have as to improper exclusion of women even from the general panel, they had a constitutional right to have their trial jury drawn. The statutes advanced as a standard may be roughly summarized:

To qualify as a juror, a person must be an American citizen and a resident of the county; not less than 21 nor more than 70 years old; the owner or spouse of an owner of property of the value of $250; in possession of his or her natural faculties and not infirm or decrepit; not convicted of a felony or a misdemeanor involving moral turpitude; intelligent; of sound mind and good character;

[4] But 7,000 of the 60,000 on the general jury panel, or 11%, are women. It is almost frivolous to assert that there is a bias against their inclusion on juries. *Cf. Akins* v. *Texas,* 325 U. S. 398, 403.

well-informed; able to read and write the English language understandingly.[5] From those qualified the following classes are exempt from service: clergymen, physicians, dentists, pharmacists, embalmers, optometrists, attorneys, members of the Army, Navy or Marine Corps, or of the National Guard or Naval Militia, firemen, policemen, ship's officers, pilots, editors, editorial writers, subeditors, reporters and copy readers.[6]

Women are equally qualified with men,[7] but as they also are granted exemption,[8] a woman drawn may serve or not, as she chooses.

The attack is focused upon the statutes and sifting procedures which shrink the general panel to the special or "blue ribbon" panel of about 3,000.

Special jurors are selected from those accepted for the general panel by the county clerk, but only after each has been subpoenaed for personal appearance and has testified under oath as to his qualification and fitness.[9] The statute prescribes standards for their selection by declaring ineligible and directing elimination of these classes: (1) All who have been disqualified or who claim and are allowed exemption from general service. (2) All who have been convicted of a criminal offense, or found guilty of fraud or misconduct by judgment of any civil court. (3) All who possess such conscientious opinions with regard to the death penalty as would preclude their finding a defendant guilty if the crime charged be

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[5] Judiciary Law, § 596, 29 McKinney's Consolidated Laws of New York (pocket part, 1946), pp. 131–32.

[6] Judiciary Law, § 599, 29 McKinney's Consolidated Laws of New York (pocket part, 1946), pp. 133–34.

[7] Judiciary Law, § 596, *supra.*

[8] Judiciary Law, § 599, *supra.*

[9] Judiciary Law, § 749–aa3, 29 McKinney's Consolidated Laws of New York, pp. 512–13.

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punishable with death. (4) All who doubt their ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence uninfluenced by any such opinion or impression, or whose opinion of circumstantial evidence is such as would prevent their finding a verdict of guilty upon such evidence, or who avow such a prejudice against any law of the State as would preclude finding a defendant guilty of a violation of such law, or who avow such a prejudice against any particular defense to a criminal charge as would prevent giving a fair and impartial trial upon the merits of such defense, or who avow that they cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him.[10]

The special jury panel is not one brought into existence for this particular case nor for any special class of offenses or type of accused. It is part of the regular machinery of trial in counties of one million or more inhabitants. In its sound discretion the court may order trial by special jury on application of either party in a civil action and by either the prosecution or defense in criminal cases. The motion may be granted only on a showing that "by reason of the importance or intricacy of the case, a special jury is required" or "the issue to be tried has been so widely commented upon . . . that an ordinary jury cannot without delay and difficulty be obtained" or that for any other reason "the due, efficient and impartial administration of justice in the particular case would be

[10] Judiciary Law, § 749–aa2, 29 McKinney's Consolidated Laws of New York, p. 512.

advanced by the trial of such an issue by a special jury . . . ." [11]

This special jury statute is not recent nor is the practice under it novel. The progenitor of this statute, like it in all pertinent respects, was enacted in 1896 but was repealed and simultaneously reenacted in substantially its present form in 1901.[12] It was soon attacked as on its face violating the State Constitution. The claim of one convicted by a special jury that it was an unconstitutional body because its restrictive composition denied due process of law, was rejected by the Court of Appeals in a well-considered opinion. *People* v. *Dunn,* 157 N. Y. 528, 52 N. E. 572 (1899). The attack then was made from the opposite direction. One convicted by an ordinary jury claimed that it was an unconstitutional body. This claim that the special panel had withdrawn twenty-five hundred "men of presumably superior intelligence," 162 N. Y. at 362, 56 N. E. at 759, too, was rejected by the Court of Appeals. *People* v. *Meyer,* 162 N. Y. 357, 56 N. E. 758 (1900).

Then, in 1901, an attack on the constitutionality of the statute was rejected by this Court. One Hall had been convicted of murder by a special jury and sentenced to death. He sued out a writ of *habeas corpus* which was denied below. He challenged the special panel and claimed that his conviction by its verdict was a denial of due process of law and of equal protection of the laws in violation of the Fourteenth Amendment because the jury was "taken from a particular body of citizens and not from the general body of the county as was provided in all cases wherein such special jury was not drawn." This Court affirmed, *Hall* v. *Johnson,* 186 U. S. 480, citing

[11] Judiciary Law, § 749–aa4, 29 McKinney's Consolidated Laws of New York, pp. 513–14.

[12] N. Y. Laws 1896, c. 378; N. Y. Laws 1901, c. 602.

among other authorities *Brown* v. *New Jersey*, 175 U. S. 172, which upheld a state statute for a "struck jury." [13]

Since these decisions, the special jury has been in continuous use in New York County in important cases. The District Attorney cites over one hundred murder convictions, on verdict of the special jury, considered by the Court of Appeals which affirmed judgments of death. We are asked, however, to reconsider the question and, in the light of more recent trends of decision and of particular facts about the present operation of the jury system not advanced in support of the argument in the earlier case, to disapprove the special jury system.

We fail to perceive on its face any constitutional offense in the statutory standards prescribed for the special panel. The Act does not exclude, or authorize the clerk to exclude, any person or class because of race, creed, color or occupation. It imposes no qualification of an economic nature beyond that imposed by the concededly valid general panel statute. Each of the grounds of elimination is reasonably and closely related to the juror's suitability for the kind of service the special panel requires or to his fitness to judge the kind of cases for which it is most frequently utilized. Not all of the grounds of elimination would appear relevant to the issues of the present case. But we know of no right of defendants to have a specially constituted panel which would include all persons who might

[13] The other cases cited in the *per curiam* affirmance were *Storti* v. *Massachusetts*, 183 U. S. 138, 141, and *Andrews* v. *Swartz*, 156 U. S. 272, both of which disapprove the use of *habeas corpus* as a substitute for writ of error. It is not clear, therefore, how much the affirmance of the *Hall* case depended on that procedural ground rather than on a disposition of the merits. Moreover, the grounds urged against the special jury in that case related to its selection from a panel which was only a segment of the general panel and did not assert the exclusion of particular groups.

be fitted to hear their particular and unique case. This panel is for service in a wide variety of cases and its eliminations must be judged in that light. We cannot overlook that one of the features which has tended to discredit jury trials is interminable examination and rejection of prospective jurors. In a metropolis with notoriously congested court calendars we cannot find it constitutionally forbidden to set up administrative procedures in advance of trial to eliminate from the panel those who, in a large proportion of cases, would be rejected by the court after its time had been taken in examination to ascertain the disqualifications. Many of the standards of elimination which the clerk is directed to apply in choice of the panel are those the court would have to apply to excuse a juror on challenge for cause.

These are matters with which local authority must and does have considerable latitude to cope, for they affect the administration of justice which is a local responsibility. For example, in this case the time of the trial court and its entire retinue of attendants was taken while eighty-nine prospective jurors were examined. How many more would have been examined if the clerk had not already eliminated those who admit that they would not give defendants benefit of the rule that their neglect or refusal to testify in their own behalf would not create a presumption against them? Neither of these defendants saw fit to take the witness stand. The defendants themselves have complained of the exceptional publicity given to the charges in this case. How many more jurors would have been examined if the clerk had not already eliminated those who felt themselves subject to influence by publicity? These are practical matters in administering justice in which we will take care not to hamstring local authority by artificial or doctrinaire requirements.

It has consistently been held that a jury is not rendered constitutionally invalid by failure of the statute to set forth any standards for selection. *Murray* v. *Louisiana,* 163 U. S. 101, 108; *Franklin* v. *South Carolina,* 218 U. S. 161, 167–68; *Akins* v. *Texas,* 325 U. S. 398, 403; see also *Ex parte Virginia,* 100 U. S. 339, 348. We find nothing in the standards New York has prescribed which, on its face, is prohibited by the Constitution. There remain, however, more serious questions as to whether the special jury Act has been so administered as to deny due process to the defendants and whether the dual system of jury panels as administered denied equal protection of the laws.

As to the actual results of application of the statute, the litigants are in controversy. The New York courts, doubtless influenced by the fact that long ago they had upheld similar statutes, made no findings of fact and wrote no opinion on the subject. It is to be regretted that we must deal with questions of fact without aid of findings by the courts whose experience with the system and proximity to the local conditions with which the special jury customs are so interwoven would entitle their findings to very great weight. We would, in any case, be obliged on a constitutional question to reach our own conclusions, after full allowance of weight to findings of the state courts, and in this case must examine the evidence. *Norris* v. *Alabama,* 294 U. S. 587, 590; *Lisenba* v. *California,* 314 U. S. 219, 237–38; *Ashcraft* v. *Tennessee,* 322 U. S. 143, 148.

The allegations of fact upon which defendants ask us to hold these special panels unconstitutional come to three: (1) That laborers, operatives, craftsmen, foremen and service employees were systematically, intentionally and deliberately excluded from the panel. (2) That

women were in the same way excluded. (3) That the special panel is so composed as to be more prone to convict than the general panel.

(1) The proof that laborers and such were excluded consists of a tabulation of occupations as listed in the questionnaires filed with the clerk. The table received in evidence is set out in the margin.[14] It is said in criticism of this list that it shows the industry in which these

[14] The table was prepared at the request of petitioners' counsel by an attorney who testified that he "found various occupations listed" and "tried to classify them to groups, making them not too numerous."

Total number of special jurors on file in New York County Clerk's Office	2,911
Total number with classifiable occupations	2,743
Auditors and accountants	166
Bankers	170
Manufacturers	106
Real Estate Brokers	117
Retired	62
Architects and engineers	229
Educators, teachers, librarians	27
Executives, managers of industrial enterprises	470
Stock brokers	185
Salesmen, promoters of business enterprises and advertising men	438
Newspaper men, editorial writers and others engaged in the dissemination of information	148
Mechanics	5
Insurance men	166
Travel agency men	10
Civil service employees	21
Office clerks	94
Retail merchants	144
Entertainers	26
Building and construction superintendents	70
Chemists and physicists	66
Attorneys	5
Laborers	None

persons work rather than whether they are laborers or craftsmen; that is, "mechanics" may be and probably are also laborers; "bankers" may be clerks. Certainly the tabulation does not show the relation of these jurors to the industry in which they were classified, as, for example, whether they were owners or financially interested, or merely employees. It does not show absence or exclusion of wage earners or of union members, although none listed themselves as "laborers," for several of these classes are obviously of the employee rather than the entrepreneur character. One of petitioners' tables showed that 38% of the special panel were "clerical, sales, and kindred workers." Three of those examined as jurors in this case were members of labor unions. Two were peremptorily challenged by the People and the one accepted by the prosecution was challenged by the defense.

It is sought to give significance to this exhibit showing the breakdown into occupations of some 2,700 special jurors, however, by reference to a tabulation of occupations of some 920,000 employees and persons seeking employment in Manhattan. The comparison is said to show a great disparity between the percentage of jurors of each occupation represented on the jury list of 1945 and the occupational distribution of the number of employed persons or experienced persons seeking employment in

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Labor union representatives	1
Housewives	20

—There are only about 30 women on the entire special jury list—

Petitioners' attorneys requested the Bureau of Labor Statistics of the United States Department of Labor to conform the classifications of the above table to the Census classifications. In the table thus prepared, twenty-one persons are classed as civil service employees and a note cautions that "Some members of this group undoubtedly belong elsewhere, as under service trades, or laborers." One hundred and sixty-five persons are listed as unclassifiable in the Bureau's table.

Manhattan in 1940. This table was not put in evidence but is reproduced in the margin.[15] Apart from the discrepancy of five years in the dates of the data and the

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OCCUPATIONS OF EMPLOYED PERSONS (EXCEPT ON PUBLIC EMERGENCY WORK) AND OF EXPERIENCED WORKERS SEEKING WORK, RESIDING IN MANHATTAN IN THE WEEK OF MARCH 24 TO 30, 1940, COMPARED WITH OCCUPATIONS OF SPECIAL JURORS ON FILE IN NEW YORK COUNTY CLERK'S OFFICE, JANUARY 31, 1945.

Occupation	Experienced Labor Force [a]						Special Jurors
	Total			Males			
	Total	Employed [c]	Seeking work, experienced	Total	Employed [c]	Seeking work, experienced	
	A	B	C	D	E	F	G
Total [b]	921,183	778,202	142,981	589,431	489,618	99,813	2,664
Professional and semiprofessional	111,600	98,343	13,257	61,191	53,416	7,775	501
Proprietors, managers and officials	85,969	81,234	4,735	73,732	69,509	4,223	1,146
Clerical, sales and kindred workers	196,037	169,066	26,971	112,316	95,853	16,463	1,012
Craftsmen, foremen and kindred workers	70,497	54,217	16,280	67,504	51,618	15,886	5
Operatives and kindred workers	156,581	128,253	28,328	98,493	79,562	18,931	----
Service workers	254,595	216,992	37,603	131,112	110,157	20,955	----
Laborers, except farm	45,375	29,869	15,506	44,578	29,293	15,285	----
Farmers, farm managers, farm laborers	529	228	301	505	210	295	----
	Percent			Percent			
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Professional and semiprofessional	12.1	12.6	9.3	10.4	10.9	7.8	18.8
Proprietors, managers and officials	9.3	10.4	3.3	12.5	14.2	4.2	43.0
Clerical, sales and kindred workers	21.3	21.7	18.9	19.1	19.6	16.5	38.0
Craftsmen, foremen and kindred workers	7.7	7.0	11.4	11.4	10.5	15.9	0.2
Operatives and kindred workers	17.0	16.5	19.8	16.7	16.2	19.0	----
Service workers	27.6	27.9	26.3	22.2	22.5	21.0	----
Laborers, except farm	4.9	3.8	10.8	7.6	6.0	15.3	----
Farmers, farm managers, farm laborers	0.1	[d]	0.2	0.1	[d]	0.3	----

[a] Includes the employed (except those on public emergency work) and experienced workers seeking work. Source: U. S. Bureau of the Census. Sixteenth Census of the United States, 1940, Population, v. III, part 4, New York State Table 10a, pp. 363–365.
[b] Omitting the unclassified, as well as housewives, retired persons, and others not in the labor force.
[c] Except on public emergency work.
[d] Less than one-tenth of one percent.

differences in classification of occupations, the two tables do not afford statistical proof that the jury percentages are the result of discrimination. Such a conclusion would be justified only if we knew whether the application of the proper jury standards would affect all occupations alike, of which there is no evidence and which we regard as improbable. The percentage of persons employed or seeking employment in each occupation does not establish even an approximate ratio for those of each occupation that should appear in a fairly selected jury panel. The former is not limited, as the latter must be, to those over 21 or under 70 years of age. It is common knowledge that many employed and seekers of employment in New York are not, as jurors must be, citizens of the United States. How many could not meet the property qualifications? How many could not read and write the English language understandingly? It is only after effect is given to these admittedly constitutional requirements that we would have any figures which determined or even suggested the effect of the additional disqualifications imposed on special jurors.

An occupational comparison of the special panel with the general panel might afford some ground for an opinion on the effect of the particular practices complained of in the composition of the special panel. But no such comparison is offered. Petitioners' only statement as to the comparative make-up of the general and special panels is as follows: "While the defect of discrimination against women, particularly those who are not members of so-called 'civic conscious' organizations, permeates both the general and special juries, there is no evidence whatever that laborers, operatives, service employees, craftsmen, and foremen, are excluded from the general jury panel." What is more to the point is that petitioners adduced no

evidence whatever that the occupational composition of the general panel is substantially different from that of the special. If they are the same, then petitioners' assertion that Question 23, referred to below, somehow separates the rich from the poor is obviously without merit. It is not unlikely that the requirements of citizenship, property and literacy disqualify a greater proportion of laborers, craftsmen and service employees than of some other classes. Those who are illiterate or, if literate in their own, are unable to speak or write the English language, naturally find employment chiefly in manual work. It is impossible from the defendants' evidence in this case to find that the distribution of the jury panel among occupations is not the result of the application of legitimate standards of disqualification.

On the other hand, the evidence that there has been no discrimination as to occupation in selection of the panel, while from interested witnesses, whose duty it was to administer the law, is clear and positive and is neither contradicted nor improbable. The testimony of those in charge of the selection, offered by the defendants themselves, is that without occupational discrimination they applied the standards of the statute to all whom they examined. We are unable to find that this evidence is untrue.

(2) As to the exclusion of women, it will be remembered that the law of New York gives to women the privilege to serve but does not impose service as a duty. It is said to have been found impractical to compel large numbers of women, who have an absolute exemption, to come to the clerk's office for examination since they so generally assert their exemption. Hence, only those who volunteer or are suggested as willing to serve by other women or by organizations, including the League of Women Voters, are

subpoenaed for examination. Some effort is made by the officials also to induce women to volunteer. But the evidence does not show that women are excluded from the special jury. In this case three women talesmen were examined. One was pronounced "satisfactory" by both sides and served on the jury.

As to both women and men, it is complained that eliminations resulted unfairly from use of a questionnaire, which asked, "What months of the year between October 1 and June 30 would you prefer to serve (Name two or more months)." Those who stated a preference, and they were many, were excluded from the special panel although they continued eligible for the general panel. The reason given for this is that service on the general panel can be adjusted to such preferences while the special panel, because of the nature of the cases tried before it, may require service at any time and for long periods. We think the phrasing of this question is less than candid in view of this purpose. But we find no evidence that it operates more misleadingly on women than on men, or on one occupation or class than on others. While it does not commend itself, it appears to be an administrative ineptitude of no constitutional significance and of no prejudice to these defendants.

(3) A more serious allegation against the special jury panel is that it is more inclined than the general panel to convict. Extensive studies have been made by the New York State Judicial Council which is under the duty of continuous study of the procedures of the courts and of making recommendations for improvement to the Legislature.[16] It is on studies and criticisms by this official body that petitioners base their charge here that the special jury is a convicting jury in an unconstitutional sense.

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[16] Judiciary Law, §§ 40–48, 29 McKinney's Consolidated Laws of New York, pp. 58–62, (pocket part, 1946), p. 17.

In 1937 the Council recommended abolition of struck juries,[17] foreign juries [18] and special juries.[19] It said that, "A well-administered ordinary jury system should produce jurors of as high calibre for every action as the special jury system attempts to provide in exceptional cases." [20] The recommendation was followed by the Legislature except as to special juries. In 1938 the Judicial Council renewed its recommendation as to these. It summarized that its data "indicate that special juries are prone to convict." [21] In a study of certain types of homicide cases, it found that, in 1933 and 1934, special juries convicted in eighty-three percent and eighty-two percent of the cases while ordinary juries those years convicted in forty-three percent and thirty-seven percent respectively. It reported that, "The Judicial Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in all cases. To attain this goal, the ordinary jury, as now provided, may be in need of improvement. It is, however, unjust and should be unnecessary to select sup-

[17] To obtain a struck jury, the commissioner of jurors or the county clerk, in the presence of the parties, selected from the general jury list the names of forty-eight persons whom he deemed most indifferent between the parties and best qualified to try the case. The parties then alternately would each strike off twelve names from the list. The jury was chosen from the remaining twenty-four names.

[18] The foreign jury was chosen from a county adjoining that where the trial was to be held, in cases in which it was thought a more impartial jury would thus be had. It lost its usefulness because of the ease with which a change of venue might be obtained. Code of Criminal Procedure, § 344.2, 66 McKinney's Consolidated Laws of New York, part 1, p. 622.

[19] Third Annual Report of the Judicial Council of the State of New York (1937) 123–28.

[20] *Id.* at 127.

[21] Fourth Annual Report of the Judicial Council of the State of New York (1938) 46.

posedly special juries in specific cases." [22] The Council next year reported that the general panel had not been considered adequate, largely because in its selection the standards of the statute had not been followed, and that a complete reexamination of the general panel was undertaken.[23] From time to time the Council renewed its recommendation. In 1945 it proposed that the special jury "be abolished as unnecessary and undesirable." It said, "It is undisputed that the revised jury system for New York City recommended by the Judicial Council and in operation since 1940 has succeeded in improving the quality of jurors generally by applying to all jurors the high standards which formerly were required only of special jurors. Thus, the necessity for special jurors no longer exists." [24]

While the Judicial Council has pointed out and investigated the different conviction ratios, it has at no time suggested that the special jury has been inclined to convict except where conviction was warranted. New York extends an appeal on law and fact as matter of right.[25] If there were a tendency to convict improperly, the Judicial Council, which includes the Chief Judge of the Court of Appeals and the Presiding Justice of the Appellate Division, which courts review these cases, would know it. Despite the Council's desire to abolish this jury, no such reasons were ever assigned. No statistics are produced to show that special juries have been more often reversed on the facts than ordinary ones. Of course, it would be impossible for us to say, even were we to examine the cases in detail, whether the difference in percentage of

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[22] *Id.* at 47.

[23] Fifth Annual Report of the Judicial Council of the State of New York (1939) 42–43.

[24] Eleventh Annual Report of the Judicial Council of the State of New York (1945) 49–50.

[25] See note 2, *supra.*

convictions indicated a too great readiness to convict on the part of special juries or a too great readiness to acquit on the part of ordinary juries, or whether the disparity reflected a difference between the ordinary case and those selected for special jury trial, rather than a reflection of an attitude on the part of either panel. It may result from the greater attention and better counsel which the prosecution gives to these important cases.

These defendants were convicted March 15, 1945, when the statistics offered here as to relative propensity of the two juries to convict were more than ten years old, and when the conditions which may have produced the discrepancy in ratio of convictions had long since been corrected.

The evidence in support of these objections may well, as the Judicial Council thought, warrant a political or social judgment that this special panel in 1945 was "unnecessary and undesirable" and that the Legislature should abolish it. But it is quite another matter to say that this Federal Court has a mandate from the Constitution to disable the special jury by setting aside its convictions. The great disparity between a legislative policy or a political judgment on the one hand and a constitutional or legal judgment on the other, finds striking illustration in the position taken by the highest judicial personages in New York State who joined in the recommendation to abolish the special jury.

Two members [26] of the Council who joined in proposing legislation to abolish the dual system sat in this case and abstained from putting their legislative recommendation into a court decision—they sustained as constitutional the system they would abolish as matter of policy. Our function concerns only constitutionality and we turn to

[26] Loughran, Ch. J., New York Court of Appeals, and Martin, P. J., App. Div. (1st Dept.).

the bearing of federal constitutional provisions on the legal issues.

It is not easy, and it should not be easy, for defendants to have proceedings set aside and held for naught on constitutional grounds when they have accepted as satisfactory all of the individual jurors who sat in their case, the jury exercised such discriminating and dispassionate judgment as to acquit them on three of the five counts submitted, and their conviction on a full judicial review of the facts and law has been found justified. This Court has long dealt and must continue to deal with these controversies from state courts with self-imposed restraints intended to protect itself and the state against irresponsible exercise of its unappealable power.

While this case does not involve any question as to exclusion of Negroes or any other race, the defendants rely largely upon a series of decisions in which this Court has set aside state court convictions of Negroes because Negroes were purposefully and completely excluded from the jury. However, because of the long history of unhappy relations between the two races, Congress has put these cases in a class by themselves. The Fourteenth Amendment, in addition to due process and equal protection clauses, declares that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article." So empowered, the Congress on March 1, 1875, enacted that "no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude;" and made it a crime for any officer to exclude any citizen on those grounds. 18 Stat. 336–37, 8 U. S. C. § 44. For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is

wanting in every other case of alleged discrimination. This statute was a factor so decisive in establishing the Negro case precedents that the Court even hinted that there might be no judicial power to intervene except in matters authorized by Acts of Congress. Referring to the provision empowering Congress to enforce the Fourteenth Amendment, it said that "All of the amendments derive much of their force from this latter provision. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation." (Italics in original.) *Ex parte Virginia,* 100 U. S. 339, 345.

It is significant that this Court never has interfered with the composition of state court juries except in cases where this guidance of Congress was applicable. In an opinion by Mr. Justice Holmes it unanimously made short work of rejecting a claim that the Fourteenth Amendment prohibits the state from excluding from the jury certain occupational groups such as lawyers, preachers, ministers, doctors, dentists, and engineers and firemen of railroad trains. *Rawlins* v. *Georgia,* 201 U. S. 638. *Cf. Brown* v. *New Jersey,* 175 U. S. 172.

We do not mean that no case of discrimination in jury drawing except those involving race or color can carry such unjust consequences as to amount to a denial of equal protection or due process of law. But we do say that since Congress has considered the specific application of this Amendment to the state jury systems and has found only these discriminations to deserve general legislative condemnation, one who would have the judiciary intervene on grounds not covered by statute must comply

with the exacting requirements of proving clearly that in his own case the procedure has gone so far afield that its results are a denial of equal protection or due process.[27]

These rules to confine our use of power to responsible limits have been formulated and applied even in cases where the federal race and color statute applied. Certainly they should apply with equal, if not greater, rigor in cases that are outside the statute.

It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and in nearly all cases it has been shown to have persisted over many years.[28] *Virginia* v. *Rives,* 100 U. S. 313, 322–23; *Martin* v. *Texas,* 200 U. S. 316, 320–21; *Thomas* v. *Texas,* 212 U. S. 278, 282; *Smith* v. *Texas,* 311

[27] It is unnecessary to decide whether the equal protection clause of the Fourteenth Amendment might of its own force prohibit discrimination on account of race in the selection of jurors, so that such discrimination would violate the due process clause of the same Amendment. Nor need we decide whether the due process clause alone outlaws such discrimination. *Cf. Hill* v. *Texas,* 316 U. S. 400, 406: "But no State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. . . . it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained. Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand."

[28] Official records of the New York county clerk show that in the five-year period, 1940–44, 2,407 new jurors were put on the special panel which is maintained at about 3,000, and 2,692 persons were removed from the list.

U. S. 128; *Hill* v. *Texas,* 316 U. S. 400; *Akins* v. *Texas, supra.* Also, when discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant. *Tarrance* v. *Florida,* 188 U. S. 519; *Martin* v. *Texas,* 200 U. S. 316; *Norris* v. *Alabama,* 294 U. S. 587; *Snowden* v. *Hughes,* 321 U. S. 1, 8–9; *Akins* v. *Texas,* 325 U. S. 398, 400.

Our only source of power or guidance for interfering in this case with the state court jury system is found in the cryptic words of the Fourteenth Amendment, unaided by any word from Congress or any governing precedent in this Court. We consider first the clause which forbids a state to "deny to any person within its jurisdiction the equal protection of the laws." This prohibits prejudicial disparities before the law. Under it a system which might be constitutionally unobjectionable, if applied to all, may be brought within the prohibition if some have more favorable treatment. The inquiry under this clause involves defendants' standing before the law relative to that of others accused.

If it were proved that in 1945 an inequality between the special jury's record of convictions and that of the ordinary jury continued as it was found by the Judicial Council to have prevailed in 1933–34, some foundation would be laid for a claim of unequal treatment. No defendant has a right to escape an existing mechanism of trial merely on the ground that some other could be devised which would give him a better chance of acquittal. But in this case an alternative system actually was provided by the state to other defendants. A state is not required to try all classes of offenses in the same forum. But a discretion, even if vested in the court, to shunt a defendant before a jury so chosen as greatly to lessen his chances while others accused of a like offense are tried by a jury so drawn as to be more favorable to them, would hardly be "equal protection of the laws." Perhaps

it could be shown that the difference in percentages of convictions was not due to a difference in attitude of the jurors but to a difference in the cases that were selected for special jury trial, or to a more intensive preparation and effort by the prosecution in cases singled out for such trial. But a ratio of conviction so disparate, if it continued until 1945, might, in absence of explanation, be taken to indicate that the special jury was, in contrast to its alternate, organized to convict. A defendant could complain of this inequality even if it were shown that a special jury court never had convicted any defendant who did not deserve conviction.

But the defendants have failed to show by any evidence whatever that this disparity in ratio of conviction existed in 1945 when they were tried. They show that it ever existed only by the studies and conclusions of the Judicial Council. The same source shows that it was corrected before these defendants were tried. As we have pointed out, this official body challenged the fairness of this dual system as formerly constituted and as early as 1937 declared that "A well-considered jury system will insure an impartial cross-section of the community on every petit jury," [29] and set out means to achieve it. We know of no reason why we should ignore or discredit their assurance that by administrative improvements in the selection of the ordinary juries they became the substantial equivalent of the special jury before these trials took place.

We hold, therefore, that defendants have not carried the burden of showing that the method of their trial denied them equal protection of the law.

The defendants' other objection is grounded on that clause of the Fourteenth Amendment which provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." It com-

[29] Third Annual Report of the Judicial Council of the State of New York (1937) 123.

prises objections which might be urged against any jury made up as the special jury was, even if it were the only jury in use in the state. It does not depend upon comparison with the jury facilities afforded other defendants.

This Court, however, has never entertained a defendant's objections to exclusions from the jury except when he was a member of the excluded class. *Rawlins* v. *Georgia,* 201 U. S. 638, 640. *Cf. Strauder* v. *West Virginia,* 100 U. S. 303. Relief has been held unavailable to a negro who objected that all white persons were purposely excluded from the grand jury that indicted him. *Haraway* v. *State,* 203 Ark. 912, 159 S. W. 2d 733. Nevertheless, we need not here decide whether lack of identity with an excluded group would alone defeat an otherwise well-established case under the Amendment.

These defendants rely heavily on arguments drawn from our decisions in *Glasser* v. *United States,* 315 U. S. 60; *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217; and *Ballard* v. *United States,* 329 U. S. 187. The facts in the present case are distinguishable in vital and obvious particulars from those in any of these cases. But those decisions were not constrained by any duty of deference to the authority of the State over local administration of justice. They dealt only with juries in federal courts. Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process.

The due process clause is one of comprehensive generality, and in reducing it to apply in concrete cases there are different schools of thought. One is that its content on any subject is to be determined by the content of certain relevant other Amendments in the Bill of Rights which originally imposed restraints on only the Federal

Government but which the Fourteenth Amendment deflected against the states. The other theory is that the clause has an independent content apart from, and in addition to, any and all other Amendments. This meaning is derived from the history, evolution and present nature of our institutions and is to be spelled out from time to time in specific cases by the judiciary.

To treat first of the former doctrine, it steadily has been ruled that the commandments of the Sixth and Seventh Amendments, which require jury trial in criminal and certain civil cases, are not picked up by the due process clause of the Fourteenth so as to become limitations on the states. "This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether." *Palko* v. *Connecticut,* 302 U. S. 319, 324, and cases there cited. Unless we are now so to change our interpretation as to withdraw from the states the power so lately conceded to be theirs, this would end the matter under the view that the force of the due process clause is exhausted when it has applied the principles of other relevant Amendments.

But this Court has construed it to be inherent in the independent concept of due process that condemnation shall be rendered only after a trial, in which the hearing is a real one, not a sham or pretense. *Palko* v. *Connecticut,* 302 U. S. 319, 327; *Mooney* v. *Holohan,* 294 U. S. 103; *Moore* v. *Dempsey,* 261 U. S. 86. Trial must be held before a tribunal not biased by interest in the event. *Tumey* v. *Ohio,* 273 U. S. 510. Undoubtedly a system of exclusions could be so manipulated as to call a jury before which defendants would have so little chance of a decision on the evidence that it would constitute a denial of due process. A verdict on the evidence, however, is all an accused can claim; he is not entitled to a set-up that will give a chance of escape after he is properly proven guilty. Society also has a right to a fair trial. The defendant's

right is a neutral jury. He has no constitutional right to friends on the jury.

To establish the unfairness of this tribunal and the lack of due process afforded to one who is being tried before it, the defendants assert two defects in its composition: first, that it unconstitutionally excluded women, and, second, that it unconstitutionally excluded laborers, craftsmen, service employees, and others of like occupation, amounting in sum to the exclusion of an economic class.

Assuming that defendants, not being women, have standing to complain of exclusion of women from the general and special jury panels, we are unable to sustain their objection. Approximately 7,000 women were on the general panel of 60,000 and 30 were on the special panel. One served on the jury which convicted the petitioners. The proportion of women on the jury panels did not equal their proportion of the population. There may be no logical reason for this, but there is an historical one. Until recently, and for nearly a half-century after the Fourteenth Amendment was adopted, it was universal practice in the United States to allow only men to sit on juries. The first state to permit women jurors was Washington, and it did not do so until 1911.[30] In 1942 only 28 states permitted women to serve on juries and they were still disqualified in the other 20. Moreover, in 15 of the 28 states which permitted women to serve, they might claim exemption because of their sex.[31] It would, in the light of this history,

[30] 1911 Laws of Washington, c. 57. See Carson, Women Jurors (1928).

[31] Report to the Judicial Conference of the Committee on Selection of Jurors (1942) 23. A later bulletin of the Women's Bureau of the United States Department of Labor showed that in 1945, 31 States permitted jury service by women, exemption being allowed in 15 of them. But 17 States still withheld their approval of women on juries. A pamphlet of the Women's Bureau, as yet unpublished, shows that at this time four more states find women acceptable as jurors.

take something more than a judicial interpretation to spell out of the Constitution a command to set aside verdicts rendered by juries unleavened by feminine influence. The contention that women should be on the jury is not based on the Constitution, it is based on a changing view of the rights and responsibilities of women in our public life, which has progressed in all phases of life, including jury duty, but has achieved constitutional compulsion on the states only in the grant of the franchise by the Nineteenth Amendment. We may insist on their inclusion on federal juries where by state law they are eligible [32] but woman jury service has not so become a part of the textual or customary law of the land that one convicted of crime must be set free by this Court if his state has lagged behind what we personally may regard as the most desirable practice in recognizing the rights and obligations of womanhood.

The other objection which petitioners urge under the due process clause is that the special jury panel was invalidated by exclusion of an economic group comprising such specified classifications as laborers, craftsmen and service employees. They argue that the jury panel was chosen "with a purpose to obtain persons of conservative views, persons of the upper economic and social stratum in New York County, persons having a tendency to convict defendants accused of crime, and to exclude those who might understand the point of view of the laboring man." As we have pointed out, there is no proof of exclusion of these.[33]

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[32] See Judicial Code, §§ 275, 276, 28 U. S. C. §§ 411, 412; *Ballard* v. *United States*, 329 U. S. 187.

[33] It is worth comment that the annual reports of the Judicial Council, on which petitioners heavily rely, although they urge strongly and persistently that the special jury be abolished, do not give as one of the reasons the social make-up of the panel. This is odd, if that

At most, the proof shows lack of proportional representation and there is an utter deficiency of proof that this was the result of a purpose to discriminate against this group as such. The uncontradicted evidence is that no person was excluded because of his occupation or economic status. All were subjected to the same tests of intelligence, citizenship and understanding of English. The state's right to apply these tests is not open to doubt even though they disqualify, especially in the conditions that prevail in New York, a disproportionate number of manual workers. A fair application of literacy, intelligence and other tests would hardly act with proportional equality on all levels of life. The most that the evidence does is to raise, rather than answer, the question whether there was an unlawful disproportionate representation of lower income groups on the special jury.

Even in the Negro cases, this Court has never undertaken to say that a want of proportionate representation of groups, which is not proved to be deliberate and intentional, is sufficient to violate the Constitution. *Akins* v. *Texas,* 325 U. S. 398. If the Court has hesitated to require proportional representation where but two groups need be considered and identification of each group is fairly clear, how much more imprudent would it be to require proportional representation of economic classes. The occupations which are said to comprise the economic class allegedly excluded from the special panel are separated by such uncertain lines that the defendants' two exhibits are based on different classifications which are numerous and overlapping.

No significant difference in viewpoint between those allegedly excluded and those permitted to serve has been

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reason were valid, since the Council obviously was interested in urging all good reasons which would support its strong disapproval and its reiterated recommendation.

proved and nothing in our experience permits us to assume it.[34] It would require large assumptions to say that one's present economic status, in a society as fluid as ours, determines his outlook in the trial of cases in general or of this one in particular. There is of course legitimate conflict of interest among economic groups, but they are so many and so overlie each other that not all can be significant. There is entrepreneur and wage-earner, consumer and producer, taxpayer and civil servant, foreman and laborer, white-collar worker and manual laborer. But we are not ready to assume that these differences of function degenerate into a hostility such that one cannot expect justice at the hands of occupations and groups other than his own. Were this true, an extremely rich man could rarely have a fair trial, for his class is not often found sitting on juries.[35]

Nor is there any such persuasive reason for dealing with purposeful occupational or economic discriminations if they do exist as presumptive constitutional violations, as would be the case with regard to purposeful discriminations because of race or color. We do not need to find

[34] *Cf. Rawlins* v. *Georgia,* 201 U. S. 638, 640: "The nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act."

[35] We are unable to say that mere exclusion of jurors of one's occupation renders a jury unconstitutional, even though the occupation tends to give those who practice it a particular and distinctive viewpoint. New York has some 20,000 policemen presumably otherwise qualified for jury service. It is not unknown that a defendant is a policeman. Can he not be constitutionally tried if policemen are exempt from service or even excluded from the panel? There is some discretion left in the states to say that persons in some occupations are more needed at their work than on jury duty and, perhaps, that some have occupational attitudes that make it appropriate to leave them off the list so long as an unexceptionable list remains on call. *Cf. Rawlins* v. *Georgia,* 201 U. S. 638. See Knox, *Selection of Federal Jurors,* 31 Journal of the American Judicature Society 9, 11.

prejudice in these latter exclusions, but *cf. Strauder* v. *West Virginia,* 100 U. S. 303, 306–309, for Congress has forbidden them, and a tribunal set up in defiance of its command is an unlawful one whether we think it unfair or not. But as to other exclusions, we must find them such as to deny a fair trial before they can be labeled as unconstitutional.

There may be special cases where exclusion of laborers would indicate that those sitting were prejudiced against labor defendants, as where a labor leader is on trial on charges growing out of a labor dispute. The situation would be similar to that of a Negro who confronts a jury on which no Negro is allowed to sit. He might very well say that a community which purposely discriminates against all Negroes discriminates against him. But it is quite different if we assume that "persons of conservative views" do predominate on the special jury. Does it follow that "liberals" would be more favorably disposed toward a defense that nominal labor leaders were hiring out to employers to "handle" their labor problems? Does it follow that a jury from the "upper economic and social stratum" would be more disposed to convict those who so undertake to serve two masters than "those who might understand the point of view of the laboring man"? We should think it might be the other way about and defendants offer nothing but assertion to convince us. Our attention, moreover, is called to federal court records which show that Fay reported a net taxable income of over $65,000 for the years 1940 to 1942, while Bove reported over $39,000 for a similar period, both of them exclusive of the sums received from the contractors and involved in these charges. These earnings do not identify them very closely with the viewpoint of the depressed classes. The group with which they might be most closely identified is organized labor. But it cannot be claimed that union members were excluded from this special panel since three

union members were called for examination on this particular jury, two being rejected by the People and one by the defendants themselves. The defendants have shown no intentional and purposeful exclusion of any class, and they have shown none that was prejudicial to them. They have had a fair trial, and no reason appears why they should escape its results.

The function of this federal Court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ. No device, whether conventional or newly devised, can be set up by which the judicial process is reduced to a sham and courts are organized to convict. They must be organized to hear, try and determine on the evidence and the law. But beyond requiring conformity to standards of fundamental fairness that have won legal recognition, this Court always has been careful not so to interpret this Amendment as to impose uniform procedures upon the several states whose legal systems stem from diverse sources of law and reflect different historical influences.[36]

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[36] While English common law is the source from which it often is assumed a uniform system was derived by the States of the United States, it must not be overlooked that many of them have been deeply influenced by Roman and civil law to which their history exposed them. None of the territory west of the Alleghenies was more than briefly or casually subject to common law before the Revolution. French civil law prevailed in most of the Ohio and Mississippi Valleys from their settlement until Wolfe's decisive victory before Quebec in 1763. Its ascendancy in the north then was broken, and in 1803 the Louisiana Purchase ended French sovereignty in the rest of the Mississippi area. Louisiana continues, however, a system of law based on the Code Napoleon. The Southwest and Florida once were Spanish. See Colvin, *Participation of the United States of America with the Republics of Latin America in the Common Heritage of Roman*

We adhere to this policy of self-restraint and will not use this great centralizing Amendment to standardize administration of justice and stagnate local variations in practice. The jury system is one which has undergone great modifications in its long history, see *People* v. *Dunn,* 157 N. Y. 528, 52 N. E. 572, and it is still undergoing revision and adaptation to adjust it to the tensions of time and locality. In no place are American institutions put to greater strain than in the City of New York with its some seven and a half million inhabitants gathered from the four corners of the earth and a daily transient flow of two million, with all that this implies of difficulty in law enforcement. The citizen there, as in other jurisdictions, has been called for jury service to perform a variety of functions—the grand jury, the petit jury, the sheriff's jury, the coroner's jury, the foreign jury, the struck jury,

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and Civil Law, 10 Proceedings of the Eighth American Scientific Congress 467.

Even among the early seaboard States, the English common law had rivals. The Swedes on the banks of the Delaware held one of the earliest jury trials on this continent. The Governor followed Swedish law and custom in calling to his aid in judging "assistants" who were selected from among "the principal and wisest inhabitants" and were both judges and jurors and sometimes witnesses. See 1 Johnson, The Swedish Settlements on the Delaware (1911) 450 *et seq.* In New York, there was a deep and persistent influence from Roman Dutch law. Upon capitulation of New Amsterdam, it was stipulated that certain Dutch law, and judgments and customs should be respected. But even beyond this, in the organization of the courts the Dutch rule persisted although contrary to the "Duke's Laws" enacted by the conqueror. The history of the early Dutch influence in New York court procedure was preserved by the diligence and foresight of Judge Daly. 1 E. D. Smith's Reports (New York Common Pleas) xvii, xxxiv, xxxvii. The Roman-Dutch element in New York law is recognized by its courts, *e. g., Dunham* v. *Williams,* 37 N. Y. 251, 253; *Van Giessen* v. *Bridgford,* 83 N. Y. 348, 356; *Smith* v. *Rentz,* 131 N. Y. 169, 175, 30 N. E. 54, 56.

and the special jury. The states have had different and constantly changing tests of eligibility for service. Evolution of the jury continues even now, and many experiments are under way that were strange to the common law. Some states have taken measures to restrict its use; others, where jury service is a hardship, diminish the required number of jurors. Some states no longer require the unanimous verdict; others add alternate or substitute jurors to avoid mistrial in case of sickness or death. Some states have abolished the general verdict and require answers to specific questions.[37] Well has it been said of our power to limit state action that "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Mr. Justice Brandeis, dissenting in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311.

As there is no violation of a federal statute alleged, the challenge to this judgment under the due process clause must stand or fall on a showing that these defendants have had a trial so unfair as to amount to a taking of their liberty without due process of law. On this record we think that showing has not been made.

Affirmed.

MR. JUSTICE MURPHY, dissenting.

The equal protection clause of the Fourteenth Amendment prohibits a state from convicting any person by use of a jury which is not impartially drawn from a cross-section of the community. That means that juries must

[37] See 8 Encyclopedia of the Social Sciences 492.

be chosen without systematic and intentional exclusion of any otherwise qualified group of individuals. *Smith* v. *Texas,* 311 U. S. 128. Only in that way can the democratic traditions of the jury system be preserved. *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, 220; *Glasser* v. *United States,* 315 U. S. 60, 85. It is because I believe that this constitutional standard of jury selection has been ignored in the creation of the so-called "blue ribbon" jury panel in this case that I am forced to dissent.

Preliminarily, it should be noted that legislation by Congress prohibiting the particular kind of inequality here involved is unnecessary to enable us to strike it down under the Constitution. While Congress has the power to enforce by appropriate legislation the provisions of the Fourteenth Amendment, and has done so relative to discrimination in jury selection on the basis of race or color, its failure to legislate as to economic or other discrimination in jury selection does not permit us to stand idly by. We have consistently interfered with state procedure and state legislation when we felt that they were inconsistent with the Fourteenth Amendment or with the federal commerce power despite Congressional silence on the matter involved. See, *e. g., West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; *Nippert* v. *Richmond,* 327 U. S. 416; *Morgan* v. *Virginia,* 328 U. S. 373. And so in this case we are entitled to judge the action of New York by constitutional standards without regard to the absence of relevant federal legislation.

The constitutional vice inherent in the type of "blue ribbon" jury panel here involved is that it rests upon intentional and systematic exclusion of certain classes of people who are admittedly qualified to serve on the general jury panel. Whatever may be the standards erected by jury officials for distinguishing between those eligible

for such a "blue ribbon" panel and those who are not, the distinction itself is an invalid one. It denies the defendant his constitutional right to be tried by a jury fairly drawn from a cross-section of the community. It forces upon him a jury drawn from a panel chosen in a manner which tends to obliterate the representative basis of the jury.

The selection of the "blue ribbon" panel in this case rests upon the "degree of intelligence as revealed by the questionnaire" sent to prospective jurors, augmented by personal interviews. The questionnaire, however, does not purport to be a test of native intelligence, nor does it appear to offer any sound basis for distinguishing the intelligence of one person from another. The undeniable result has been to permit the jury officials to formulate whatever standards they desire, whether in terms of "intelligence" or some other factor, to eliminate persons from the "blue ribbon" panel, even though they admittedly are qualified for general jury service. That fact is strikingly borne out by the statistics compiled in this case as to the personnel of the "blue ribbon" panel. Certain classes of individuals are totally unrepresented on the panel despite their general qualifications and despite the fact that high intelligence is to be found in such classes.

	Percentage of total experienced labor forces in Manhattan.	Percentage of representation on "blue ribbon" panel.
Professional and semi-professional..	12.1	18.8
Proprietors, managers and officials..	9.3	43
Clerical, sales and kindred workers..	21.3	38
Craftsmen, foremen and kindred workers.....	7.7	0.2
Operatives and kindred workers....	17	0
Service workers	27.6	0
Laborers	4.9	0
Farmers	0.1	0

Such statistics can only mean that the jury officials have evolved some standard other than that of "intelligence" to exclude certain persons from the "blue ribbon" panel. And that standard is apparently of an economic or social nature, unjustified by the democratic principles of the jury system.

The Court points out some of the difficulties involved in comparing the personnel of the panel with 1940 census figures. But we are dealing here with a very subtle and sophisticated form of discrimination which does not lend itself to easy or precise proof. The proof here is adequate enough to demonstrate that this panel, like every discriminatorily selected "blue ribbon" panel, suffers from a constitutional infirmity. That infirmity is the denial of equal protection to those who are tried by a jury drawn from a "blue ribbon" panel. Such a panel is narrower and different from that used in forming juries to try the vast majority of other accused persons. To the extent of that difference, therefore, the persons tried by "blue ribbon" juries receive unequal protection.

In addition, as illustrated in this case, the distinction that is drawn in fact between "blue ribbon" jurors and general jurors is often of such a character as to destroy the representative nature of the "blue ribbon" panel. There is no constitutional right to a jury drawn from a group of uneducated and unintelligent persons. Nor is there any right to a jury chosen solely from those at the lower end of the economic and social scale. But there is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor

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of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people. *Smith* v. *Texas, supra.* To the extent that a "blue ribbon" panel fails to reflect this democratic principle, it is constitutionally defective.

The Court demonstrates rather convincingly that it is difficult to prove that the particular petitioners were prejudiced by the discrimination practiced in this case. Yet that should not excuse the failure to comply with the constitutional standard of jury selection. We can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof. It may be absent in one case and present in another; it may gradually and silently erode the jury system before it becomes evident. But it is no less real or meaningful for our purposes. If the constitutional right to a jury impartially drawn from a cross-section of the community has been violated, we should vindicate that right even though the effect of the violation has not yet put in a tangible appearance. Otherwise that right may be irretrievably lost in a welter of evidentiary rules.

Since this "blue ribbon" panel falls short of the constitutional standard of jury selection, the judgments below should be reversed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE join in this dissent.

UNITED STATES *v.* STANDARD OIL COMPANY OF CALIFORNIA ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 235. Argued April 8–9, 1947.—Decided June 23, 1947.

A soldier in the Army of the United States was injured by a motor truck, through negligence of the driver. The expenses of his hospitalization were borne by the United States; and he continued to receive his Army pay during the period of his disability. The United States brought suit in a federal district court against the owner and driver of the truck as tort-feasors to recover the amounts expended for hospitalization and soldier's pay during the period of disability, as for loss of the soldier's services. *Held:*

1. The decision is governed not by the law of the state where the injury occurred but by federal law, even though Congress has not acted affirmatively concerning the specific question. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, distinguished. Pp. 305–311.

2. In the absence of legislation by Congress on the subject, the United States was not entitled to recover on the claim. Pp. 311–317.

3. It is for Congress, not the judiciary, to make new laws concerning the right of the Government to recover for the loss of a soldier's services. Pp. 314–317.

153 F. 2d 958, affirmed.

The United States brought suit in the District Court to recover on a claim arising out of injuries sustained by a soldier as a result of negligence of the defendants. The District Court gave judgment for the United States. 60 F. Supp. 807. The Circuit Court of Appeals reversed. 153 F. 2d 958. This Court granted certiorari. 329 U. S. 696. *Affirmed,* p. 317.

Frederick Bernays Wiener argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Sonnett* and *Paul A. Sweeney.*

Frank B. Belcher argued the cause and filed a brief for respondents.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

Not often, since the decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, is this Court asked to create a new substantive legal liability without legislative aid and as at the common law. This case of first impression here seeks such a result. It arises from the following circumstances.

Early one morning in February, 1944, John Etzel, a soldier, was hit and injured by a truck of the Standard Oil Company of California at a street intersection in Los Angeles. The vehicle was driven by Boone, an employee of the company. At the Government's expense of $123.45 Etzel was hospitalized, and his soldier's pay of $69.31 was continued during his disability. Upon the payment of $300 Etzel released the company and Boone "from any and all claims and demands which I now have or may hereafter have, on account of or arising out of" the accident.[1]

From these facts the novel question springs whether the Government is entitled to recover from the respondents as tort-feasors the amounts expended for hospitalization and soldier's pay, as for loss of Etzel's services. A jury being waived, the District Court made findings of fact and conclusions of law in the Government's favor upon all the issues, including those of negligence and contributory negligence. Judgment was rendered accordingly. 60 F. Supp. 807. This the Circuit Court of Appeals reversed, 153 F. 2d 958, and we granted certiorari because of the novelty and importance of the principal question.[2] 329 U. S. 696.

[1] The instrument of release recited that the payment "is not, and is not to be construed as" an admission of liability.

[2] The Government's petition for certiorari asserted that "upwards of 450 instances of negligently inflicted injuries upon soldiers of the United States, requiring hospitalization at Government expense, and the payment of compensation during incapacitation, have been

As the case reaches us, a number of issues contested in the District Court and the Circuit Court of Appeals have been eliminated.[3] Remaining is the basic question of respondents' liability for interference with the government-soldier relation and consequent loss to the United States, together with questions whether this issue is to be determined by federal or state law[4] and concerning the

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reported by the War Department to the Department of Justice in the past three years," and that additional instances were being reported to the War Department at the rate of approximately 40 a month.

The suit also was said to be representative of a number already commenced, *e. g.*, *United States* v. *Atlantic Coast Line R. Co.*, 64 F. Supp. 289 (E. D. N. C.), dismissed on the ground that no master-servant relationship existed, and *United States* v. *Klein*, 153 F. 2d 55 (C. C. A. 8), an action to recover hospital and medical expenses incurred as a result of an injury to a Civilian Conservation Corps employee, dismissed for the reason that the United States Employees' Compensation Act, 5 U. S. C. § 751 *et seq.*, was held to afford the Government a method of recoupment, concededly not available here.

[3] Including the issues of negligence and contributory negligence, as to which a stipulation of record on the appeal to the Circuit Court of Appeals states that evidence other than that set forth in the stipulation is omitted "for the reason that appellants are not making any point on appeal as to the insufficiency of the evidence either to prove negligence or the absence of contributory negligence."

Although the District Court refused to find that Etzel as a soldier was "as such, a servant of the plaintiff," respondents designated as the points on appeal on which they intended to rely: That the United States had no cause of action or right to recover for the compensation paid Etzel or for the medical and hospital expenditures; that he "was not an employee of the plaintiff nor was plaintiff his master nor did the relation of employer or employee exist between them"; and that his release was effective to end "all right to recover for lost wages or medical or hospital expenses."

[4] The Circuit Court of Appeals, considering that at the outset it was "confronted with the problem of what law should apply," said: "Aside from any federal legislation conferring a right of subrogation or indemnification upon the United States, it would seem that the

effect of the release.[5] In the view we take of the case it is not necessary to consider the questions relating to the release,[6] for we have reached the conclusion that respondents are not liable for the injuries inflicted upon the Government.

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state rules of substantive common law would govern an action brought by the United States in the role of a private litigant. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 71, 78; *United States* v. *Moscow-Idaho Seed Co., supra* [92 F. 2d 170], at pages 173, 174." 153 F. 2d at 960. The court then indicated agreement with appellant that California's statutory law, namely, § 49 of the Civil Code, was controlling and concluded that the Government's case "must fail for two reasons: first, because the government-soldier relation is not within the scope of § 49 of the Code, and, second, because the government is not a 'master' and the soldier is not a 'servant' within the meaning of the Code section." 153 F. 2d at 961.

The court further concluded, however, that Etzel's release "covered his lost wages and medical expenses as elements of damage," and therefore was effective to discharge all liability, including any right of subrogation in the United States "without statutory authority." Finally the opinion stated: ". . . it seems clear that Congress did not intend that for tortious injuries to a soldier in time of war, the government should be subrogated to the soldier's claims for damages." *Id.* at 963.

[5] See note 3. The Government's claim, of course, is not one for subrogation. It is rather for an independent liability owing directly to itself as for deprivation of the soldier's services and "indemnity" for losses caused in discharging its duty to care for him consequent upon the injuries inflicted by appellants. See *Robert Marys's Case,* Vol. 5, Part 9 Co. Rep. at 113a. It is, in effect, for tortious interference by a third person with the relation between the Government and the soldier and consequent harm to the Government's interest, rights and obligations in that relation, not simply to subrogation to the soldier's rights against the tort-feasors.

[6] We may assume that the release was not effective to discharge any liability owing independently to the Government, cf. note 5, although fully effective as against any claim by the soldier. Only if such an independent liability were found to exist would any issue concerning the release be reached.

We agree with the Government's view that the creation or negation of such a liability is not a matter to be determined by state law. The case in this aspect is governed by the rule of *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, and *National Metropolitan Bank* v. *United States,* 323 U. S. 454, rather than that of *Erie R. Co.* v. *Tompkins, supra.* In the *Clearfield* case, involving liabilities arising out of a forged indorsement of a check issued by the United States, the Court said: "The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. Cf. *Board of Commissioners* v. *United States,* 308 U. S. 343; *Royal Indemnity Co.* v. *United States,* 313 U. S. 289. The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources. Cf. *Deitrick* v. *Greaney,* 309 U. S. 190; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.,* 315 U. S. 447. In the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." 318 U. S. at 366–367.

Although the *Clearfield* case applied these principles to a situation involving contractual relations of the Government, they are equally applicable in the facts of this case where the relations affected are noncontractual or tortious in character.

Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government

are fundamentally derived from federal sources and governed by federal authority. See *Tarble's Case,* 13 Wall. 397; *Kurtz* v. *Moffitt,* 115 U. S. 487. So also we think are interferences with that relationship such as the facts of this case involve. For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers,[7] equally clearly it has power in execution of the same functions to protect the relation once formed from harms inflicted by others.[8]

Since also the Government's purse is affected, as well as its power to protect the relationship, its fiscal powers, to the extent that they are available to protect it against financial injury, add their weight to the military basis for excluding state intrusion. Indeed, in this aspect the case is not greatly different from the *Clearfield* case or from one involving the Government's paramount power of control over its own property, both to prevent its unauthorized use or destruction and to secure indemnity for those injuries.[9]

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[7] Including the powers of Congress to "provide for the common Defence," "raise and support Armies," and "make Rules for the Government and Regulation of the land and naval Forces," U. S. Const., Art. I, § 8, as well as "To declare War" and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ." *Ibid.*

[8] The decision of the Circuit Court of Appeals seems to have been predicated upon the assumption that Congress could override any contrary rule of state law and that the California law governs only in the absence of Congress' affirmative action. See note 4 *supra.*

[9] See U. S. Const., Art. IV, § 3, cl. 2: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."; *Camfield* v. *United States,* 167 U. S. 518, 524: ". . . the Government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers"; *United States* v. *Walter,* 263 U. S. 15, 17: "The United States can protect its property by criminal laws . . . ."

As in the *Clearfield* case, moreover, quite apart from any positive action by Congress, the matter in issue is neither primarily one of state interest nor exclusively for determination by state law within the spirit and purpose of the *Erie* decision. The great object of the *Erie* case was to secure in the federal courts, in diversity cases, the application of the same substantive law as would control if the suit were brought in the courts of the state where the federal court sits. It was the so-called "federal common law" utilized as a substitute for state power, to create and enforce legal relationships in the area set apart in our scheme for state rather than for federal control, that the *Erie* decision threw out. Its object and effect were thus to bring federal judicial power under subjection to state authority in matters essentially of local interest and state control.

Conversely there was no purpose or effect for broadening state power over matters essentially of federal character or for determining whether issues are of that nature. The diversity jurisdiction had not created special problems of that sort. Accordingly the *Erie* decision, which related only to the law to be applied in exercise of that jurisdiction, had no effect, and was intended to have none, to bring within the governance of state law matters exclusively federal, because made so by constitutional or valid congressional command, or others so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings. Cf. *Clearfield Trust Co.* v. *United States,* 318 U. S. at 366–368. Hence, although federal judicial power to deal with common-law problems was cut down in the realm of liability or its absence governable by state law, that power remained unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question.

In this sense therefore there remains what may be termed, for want of a better label, an area of "federal common law" or perhaps more accurately "law of independent federal judicial decision," outside the constitutional realm, untouched by the *Erie* decision. As the Government points out, this has been demonstrated broadly not only by the *Clearfield* and *National Metropolitan Bank* cases, but also by other decisions rendered here since the *Erie* case went down,[10] whether or not the Government is also correct in saying the fact was foreshadowed the same day by *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 110, in a unanimous opinion delivered likewise by Mr. Justice Brandeis.[11]

It is true, of course, that in many situations, and apart from any supposed influence of the *Erie* decision, rights, interests and legal relations of the United States are determined by application of state law, where Congress has not acted specifically. "In our choice of the applicable federal rule we have occasionally selected state law." *Clearfield Trust Co.* v. *United States*, 318 U. S. at 367. The Government, for instance, may place itself in a position where its rights necessarily are determinable by state law, as when it purchases real estate from one whose title

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[10] *Board of Commissioners* v. *United States*, 308 U. S. 343; *Deitrick* v. *Greaney*, 309 U. S. 190; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447; *United States* v. *Allegheny County*, 322 U. S. 174; *Holmberg* v. *Armbrecht*, 327 U. S. 392. See also discussion in Notes, *Federal Common Law in Government Action for Tort* (1946) 41 Ill. L. Rev. 551; *Exceptions to Erie* v. *Tompkins: The Survival of Federal Common Law* (1946) 59 Harv. L. Rev. 966.

[11] If the ruling followed, that the waters of an interstate stream must be equitably apportioned among the states through which it flows in the arid regions of the West, is not properly to be characterized as merely one of "federal common law," it marks off at any rate another area for federal judicial decision not dependent on application of state law or, indeed, upon the existence of federal legislation.

is invalid by that law in relation to another's claim. Cf. *United States* v. *Fox,* 94 U. S. 315.[12] In other situations it may fairly be taken that Congress has consented to application of state law, when acting partially in relation to federal interests and functions, through failure to make other provision concerning matters ordinarily so governed.[13] And in still others state law may furnish convenient solutions in no way inconsistent with adequate protection of the federal interest.

But we do not undertake to delimit or categorize the instances where it is properly to be applied outside the *Erie* aegis. It is enough for present purposes to point out that they exist, cover a variety of situations, and generally involve matters in which application of local law not only affords a convenient and fair mode of disposition, but also is either inescapable, as in the illustration given above, or does not result in substantially diversified treatment where uniformity is indicated as more appropriate, in view of the nature of the subject matter and the specific issues affecting the Government's interest.

Whether or not, therefore, state law is to control in such a case as this is not at all a matter to be decided by application of the *Erie* rule. For, except where the Government has simply substituted itself for others as successor to rights governed by state law, the question is one of federal policy, affecting not merely the federal judicial establishment and the groundings of its action, but also the Government's legal interests and relations, a factor not controlling in the types of cases producing and gov-

[12] The problem of the Government's immunity to suit is different, of course, from that of the nature of the substantive rights it may acquire, for example, by the purchase of property as against claims of others for which there may or may not be available a legal remedy against it.

[13] See *Blair* v. *Commissioner,* 300 U. S. 5; *Reconstruction Finance Corp.* v. *Beaver County,* 328 U. S. 204.

erned by the *Erie* ruling. And the answer to be given necessarily is dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law. These include not only considerations of federal supremacy in the performance of federal functions, but of the need for uniformity and, in some instances, inferences properly to be drawn from the fact that Congress, though cognizant of the particular problem, has taken no action to change long-settled ways of handling it.

Leaving out of account, therefore, any supposed effect of the *Erie* decision, we nevertheless are of opinion that state law should not be selected as the federal rule for governing the matter in issue. Not only is the government-soldier relation distinctively and exclusively a creation of federal law, but we know of no good reason why the Government's right to be indemnified in these circumstances, or the lack of such a right, should vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies across state lines.

Furthermore, the liability sought is not essential or even relevant to protection of the state's citizens against tortious harms, nor indeed for the soldier's personal indemnity or security, except in the remotest sense,[14] since his personal rights against the wrongdoer may be fully protected without reference to any indemnity for the Government's loss.[15] It is rather a liability the principal, if not the only, effect of which would be to make whole the fed-

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[14] That is, if potential added liability ever can be considered as having effect to deter the commission of negligent torts, the imposition of liability to indemnify the Government in addition to indemnifying the soldier conceivably could be thought to furnish some additional incentive for avoiding such harms.

[15] See note 5 *supra*.

eral treasury for financial losses sustained, flowing from the injuries inflicted and the Government's obligations to the soldier. The question, therefore, is chiefly one of federal fiscal policy, not of special or peculiar concern to the states or their citizens. And because those matters ordinarily are appropriate for uniform national treatment rather than diversified local disposition, as well where Congress has not acted affirmatively as where it has, they are more fittingly determinable by independent federal judicial decision than by reference to varying state policies.

We turn, finally, to consideration of the policy properly to be applied concerning the wrongdoer, whether of liability or of continued immunity as in the past. Here the Government puts forward interesting views to support its claim of responsibility. It appeals first to the great principle that the law can never be wholly static. Growth, it urges, is the life of the law as it is of all living things. And in this expansive and creative living process, we are further reminded, the judicial institution has had and must continue to have a large and pliant, if also a restrained and steady, hand. Moreover, the special problem here has roots in the ancient soil of tort law, wherein the chief plowman has been the judge, notwithstanding his furrow may be covered up or widened by legislation.

Bringing the argument down to special point, counsel has favored us with scholarly discussion of the origins and foundations of liabilities considered analogous and of their later expansion to include relations not originally comprehended. These embrace particularly the liabilities created by the common law, arising from tortious injuries inflicted upon persons standing in various special legal relationships, and causing harm not only to the injured person but also, as for loss of services and assimilated

injuries, to the person to whom he is bound by the relation's tie. Such, for obvious examples, are the master's rights of recovery for loss of the services of his servant or apprentice;[16] the husband's similar action for interference with the marital relation, including loss of consortium as well as the wife's services; and the parent's right to indemnity for loss of a child's services, including his action for a daughter's seduction.[17]

Starting with these long-established instances, illustrating the creative powers and functions of courts, the argument leads on in an effort to show that the government-soldier relation is, if not identical, still strongly analogous;[18] that the analogies are not destroyed by any of the variations, some highly anomalous,[19] characterizing one or more of the settled types of liability; and that an

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[16] As to the ancient action for loss of services, existent in Bracton's day, see Wigmore, Interference With Social Relations (1887) 21 Amer. L. Rev. 764; VIII Holdsworth, A History of English Law (2d ed., 1937) 427–430; II *Id.*, 459–464; IV *Id.*, 379–387; Pollock, The Law of Torts (13th ed.) 234–239; Clerk & Lindsell on Torts (8th ed.) 201–212.

[17] Extension of the action *per quod servitium amisit* to domestic relations, upon a fictional basis, took place as early as 1653. *Norton* v. *Jason*, Style 398; see Winfield, Textbook of the Law of Tort (2d ed.) 257.

[18] Analogies are drawn concerning the nature of the relation both on the basis of status, underlying the earlier forms of liability, and on that of its asserted contractual character, in the latter instance to the rather far-fetched extent of regarding the drafted soldier as having entered into a "contract implied in law."

[19] *E. g.*, in the fiction of loss of services involved in the father's action for a daughter's seduction and in the husband's action for loss of consortium. Compare Serjeant Manning's oft-quoted statement that "the *quasi* fiction of *servitium amisit* affords protection to the rich man, whose daughter occasionally makes his tea, but leaves without redress the poor man, whose child, as here, is sent, unprotected, to earn her bread amongst strangers." Note to *Grinnell* v. *Wells*, 7 Man. & Gr. at p. 1044.

exertion of creative judicial power to bring the government-soldier relation under the same legal protection against tortious interferences by strangers would be only a further and a proper exemplification of the law's capacity to catch up with the times. Further elaboration of the argument's details would be interesting, for the law has no more attractive scene of action than in the broad field compendiously labeled the law of torts, and within it perhaps none more engrossing than those areas dealing with these essentially human and highly personal relations.

But we forego the tendered opportunity. For we think the argument ignores factors of controlling importance distinguishing the present problem from those with which the Government seeks to bring it into companionate disposition. These are centered in the very fact that it is the Government's interests and relations that are involved, rather than the highly personal relations out of which the assertedly comparable liabilities arose; and in the narrower scope, as compared with that allowed courts of general common-law jurisdiction, for the action of federal courts in such matters.

We would not deny the Government's basic premise of the law's capacity for growth, or that it must include the creative work of judges. Soon all law would become antiquated strait jacket and then dead letter, if that power were lacking. And the judicial hand would stiffen in mortmain if it had no part in the work of creation. But in the federal scheme our part in that work, and the part of the other federal courts, outside the constitutional area is more modest than that of state courts, particularly in the freedom to create new common-law liabilities, as *Erie R. Co.* v. *Tompkins* itself witnesses. See also *United States* v. *Hudson*, 7 Cranch 32.

Moreover, as the Government recognizes for one phase of the argument but ignores for the other,[20] we have not here simply a question of creating a new liability in the nature of a tort.[21] For grounded though the argument is in analogies drawn from that field, the issue comes down in final consequence to a question of federal fiscal policy, coupled with considerations concerning the need for and the appropriateness of means to be used in executing the policy sought to be established. The tort law analogy is brought forth, indeed, not to secure a new step forward in expanding the recognized area for applying settled principles of that law as such, or for creating new ones. It is advanced rather as the instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities.

Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court or the other federal courts, is the custodian of the national purse. By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs. And these com-

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[20] That is, in the phase stressing that the question is not to be determined by applying state law, the emphasis is put upon the federal aspect of the case, but in that advancing the thesis of liability for acceptance as the federal rule, stress goes to the tort grounding of the argument.

[21] The Government does not contend that the liability sought has existed heretofore. It frankly urges the creation of a new one. The only decision determining the matter, which has come to our attention, in addition to the cases cited above in note 2, is that of the High Court of Australia in *Commonwealth* v. *Quince*, 68 C. L. R. 227, aff'g, (1943) Q. S. R. 199, denying liability. See also *Attorney-General* v. *Valle-Jones*, [1935] 2 K. B. 209, reaching a contrary result, in which however the principal issue apparently went by concession.

prehend, as we have said, securing the treasury or the government against financial losses however inflicted, including requiring reimbursement for injuries creating them, as well as filling the treasury itself.

Moreover Congress without doubt has been conscious throughout most of its history that the Government constantly sustains losses through the tortious or even criminal conduct of persons interfering with federal funds, property and relationships. We cannot assume that it has been ignorant that losses long have arisen from injuries inflicted on soldiers such as occurred here. The case therefore is not one in which, as the Government argues, all that is involved is application of "a well-settled concept of legal liability to a new situation, where that new situation is in every respect similar to the old situation that originally gave rise to the concept . . . ." Among others, one trouble with this is that the situation is not new, at any rate not so new that Congress can be presumed not to have known of it or to have acted in the light of that knowledge.

When Congress has thought it necessary to take steps to prevent interference with federal funds, property or relations, it has taken positive action to that end.[22] We

[22] See, *e. g.*, 35 Stat. 1097, 18 U. S. C. § 94 (enticing desertion from the military or naval service); 35 Stat. 1097, 18 U. S. C. § 95 (enticing workmen from arsenals or armories); 35 Stat. 1097, 18 U. S. C. § 99 (robbery of personal property belonging to the United States); 35 Stat. 1097, 18 U. S. C. § 100 (embezzlement of property belonging to the United States).

Of course it has not been necessary for Congress to pass statutes imposing civil liability in those situations where it has been understood since the days of the common law that the sovereign is protected from tortious interference. Thus, trespass on land belonging to the United States is a civil wrong to be remedied in the courts. *Cotton* v. *United States,* 11 How. 229.

think it would have done so here, if that had been its desire. This it still may do, if or when it so wishes.

In view of these considerations, exercise of judicial power to establish the new liability not only would be intruding within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action. To accept the challenge, making the liability effective in this case, also would involve a possible element of surprise, in view of the settled contrary practice, which action by Congress would avoid,[23] not only here but in the many other cases we are told may be governed by the decision.

Finally, if the common-law precedents relied on were more pertinent than they are to the total problem, particularly in view of its federal and especially its fiscal aspects, in none of the situations to which they apply was the question of liability or no liability within the power of one of the parties to the litigation to determine. In them the courts stood as arbiters between citizens, neither of whom could determine the outcome or the policy properly to be followed. Here the United States is the party plaintiff to the suit. And the United States has power at any time to create the liability. The only question is which organ of the Government is to make the determination that liability exists. That decision, for the rea-

[23] Necessarily such an element or effect often, if not always, exists whenever a new liability is created, as at common law, in the nature of responsibility for tort. This, however, could not be made an invariably controlling consideration in cases presenting common-law issues concerning such liabilities to tribunals whose business it is primarily to decide them, for to do this would forestall all growth in the law except by legislative action. The factor, however, is one generally to be taken into account and weighed against the social need dictating the new responsibility, in cases squarely presenting those issues and not complicated, as this case is, by considerations arising from distributions of power in the federal system.

sons we have stated, is in this instance for the Congress, not for the courts. Until it acts to establish the liability, this Court and others should withhold creative touch.

The judgment is

Affirmed.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE JACKSON, dissenting.

If the defendant in this case had been held liable for negligently inflicting personal injuries on a civilian, it would have been obliged to pay, among other items of damage, the reasonable cost of resulting care by his doctor, hospital and nurse, and the earnings lost during the period of disability. If the civilian bore this cost himself, it would be part of his own damage; if the civilian were a wife and the expense fell upon her husband, he would be entitled to recover it; if the civilian were a child, it would be recoverable by the parent. The long-established law is that a wrongdoer who commits a tort against a civilian must make good to somebody these elements of the costs resulting from his wrongdoing.

What the Court now holds is that if the victim of negligence is a soldier, the wrongdoer does not have to make good these items of expense to the one who bears them. The United States is under the duty to furnish medical services, hospitalization and nursing to a soldier and loses his services while his pay goes on. These costs, which essentially fall upon the United States by reason of the sovereign-soldier relationship, the Court holds cannot be recovered by the United States from the wrongdoer as the parent can in the case of a child or the husband can in the case of a wife. As a matter of justice, I see no reason why taxpayers of the United States should relieve a wrongdoer of part of his normal liability for personal

injury when the victim of negligence happens to be a soldier. And I cannot see why the principles of tort law that allow a husband or parent to recover do not logically sustain the right of the United States to recover in this case.

But the Court has qualms about applying these well-known principles of tort law to this novel state of facts, unless directed to do so by Congress. The law of torts has been developed almost exclusively by the judiciary in England and this country by common law methods. With few exceptions, tort liability does not depend upon legislation. If there is one function which I should think we would feel free to exercise under a Constitution which vests in us judicial power, it would be to apply well-established common law principles to a case whose only novelty is in facts. The courts of England, whose scruples against legislating are at least as sensitive as ours normally are, have not hesitated to say that His Majesty's Treasury may recover outlay to cure a British soldier from injury by a negligent wrongdoer and the wages he was meanwhile paid. *Attorney-General* v. *Valle-Jones*, [1935] 2 K. B. 209. I think we could hold as much without being suspected of trying to usurp legislative function.

UNITED STATES *v.* NATIONAL LEAD CO. ET AL.

NO. 89. APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

Argued February 3–5, 1947.—Decided June 23, 1947.

1. In a suit to enjoin violations of §§ 1 and 2 of the Sherman Antitrust Act, the District Court found that defendants had participated in an "international cartel" constituting a combination or conspiracy in restraint of trade and commerce in titanium products among the several states of the United States and with foreign nations through the pooling of patents and the allocation of markets and that they had been and still were parties to agreements in restraint of such trade and commerce in violation of § 1 of the Sherman Act. *Held:*

   (a) Counsel for two of the defendants having accepted cancellation of the agreements and an injunction against their continuation or renewal, this Court accepts without discussion the District Court's finding that these two defendants participated since 1920 in the cartel in violation of § 1 of the Sherman Act. Pp. 325–326.

   (b) This Court sustains the finding of the District Court that the third defendant participated in such illegal combination after 1933. Pp. 326–327.

   (c) This Court sustains the finding of the District Court that the contract between two of the defendants, under which they utilized their patents to control and regulate the manufacture and sale of titanium products in the United States, was offensive to the antitrust laws apart from the relation of that contract, and of the parties thereto, to foreign producers. Pp. 327–328.

2. The District Court adjudged unlawful and canceled certain agreements between defendants and between them and various co-conspirators; enjoined further performance, continuation or renewal of such agreements; enjoined defendants from entering into similar agreements in the future; ordered defendants to grant to any applicant therefor a nonexclusive license under certain patents at a uniform reasonable royalty; authorized reciprocal licenses on certain terms; ordered certain defendants to present to the court for its

*Together with No. 90, *National Lead Co. et al.* v. *United States,* and No. 91, *E. I. du Pont de Nemours & Co.* v. *United States,* also on appeal from the same Court.

approval a plan for divesting themselves of their stockholdings and other financial interests in certain other companies or for the purchase of the entire stockholdings and other financial interests in such companies; retained jurisdiction; and provided for supervision. *Held:* This decree did not exceed the District Court's discretion. Pp. 328–335.

(a) To a large extent, the provisions of this decree are matters lying in the discretion of the District Court. P. 334.

(b) The District Court was confronted with an obligation to give effect, on the one hand, to the provisions of the patent laws granting certain valuable rights in the nature of monopolies and, on the other hand, to the provisions of the Sherman Act prohibiting any combination or conspiracy in restraint of trade. Pp. 334–335.

(c) The essential consideration is that the remedy shall be as effective and fair as possible in preventing continued or future violations of the Sherman Act in the light of the facts of the particular case. P. 335.

3. The decree should not be modified so as to provide for compulsory royalty-free licenses or so as to enjoin the patentees or licensees from enforcing the terms of the patents involved. Pp. 335–351.

(a) Without reaching the question whether royalty-free licensing or a perpetual injunction against the enforcement of a patent is permissible as a matter of law in any case, the present decree represents an exercise of sound judicial discretion. P. 338.

(b) This being a civil, not a criminal, proceeding, the purpose of the decree is not punishment but effective and fair enforcement. Pp. 338, 348.

(c) On the facts of this case, such a modification of the decree has not been shown to be necessary in order to enforce effectively the Antitrust Act. Pp. 338–349.

(d) To reduce all royalties automatically to zero, regardless of their nature and regardless of their number, appears, on its face, to be inequitable without special proof to support such a conclusion. P. 349.

(e) What will be "reasonable royalties" will depend upon the facts of each case. P. 349.

(f) Under its decree, the District Court retains sufficient jurisdiction to enable it to vacate or modify its orders fixing reasonable royalty rates if it finds such action to be necessary or appropriate. P. 351.

4. On the facts of this case, there was neither precedent nor good reason for a requirement (requested by the Government and denied by the District Court) that National Lead and du Pont each submit

a plan for the divestiture of one of its two principal titanium pigment plants, together with the related physical properties. Pp. 351–353.

(a) The existing vigorous competition between these two defendants suggested that the District Court would do well to remove unlawful handicaps from it but demonstrates no sufficient basis for weakening its force by divesting each of the two largest competitors of one of its principal plants. Pp. 352–353.

(b) It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the antitrust laws. P. 353.

(c) To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need or the feasibility of it would amount to an abuse of discretion. P. 353.

5. The District Court did not exceed its discretion in requiring that, during a period of three years, defendants make available to licensees under their patents, at a reasonable charge, certain information in writing as to the methods and processes used by the licensor at the date of licensing. *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 413, 418, distinguished. Pp. 353–358.

(a) The justification for the compulsory imparting of methods and processes rests upon its appropriateness and upon the necessity for it in providing an effective decree—not upon a punitive purpose. P. 357.

(b) Since the public interest requires that the court be permitted to produce the most effective and generally fair decree that it can devise to give effect simultaneously to the antitrust laws and the patent laws, the decree represents a permissible exercise of judicial discretion—even though it includes, within narrow limits, disclosure of technical information by one defendant to another defendant which is its leading competitor. Pp. 358–359.

6. The District Court did not exceed its discretion in denying the Government's request that there be substituted a requirement that defendants furnish to any applicant, at a reasonable charge, during the period of three years, technical information desired by the applicant relating to the methods and processes for manufacturing titanium pigments. Pp. 353, 359.

(a) The decree is within the permissible breadth of the District Court's discretion over the conditions under which technical information shall be required to be shared with the world. P. 359.

(b) The proposal to throw the field of technical knowledge in this field wide-open would discourage, rather than encourage,

competitive research and thus would be contrary to, rather than in confirmity with, the present policy of the patent laws. P. 359.

7. The District Court did not exceed its discretion in denying the Government's request that there be omitted from the decree a provision that defendants may make the grant of any license by either of them to an applicant under the decree conditioned upon the reciprocal grant of a license by the applicant, at a reasonable royalty, under certain described patents owned or controlled by such applicant. Pp. 359–360.

8. The Government's request to omit the six-months' time limit imposed by the decree upon the options of certain corporations to secure certain licenses under the decree need not be granted, since the new effective date to be given the decree pursuant to the order of this Court will allow ample time for the exercise of this option under its terms. Pp. 360–361.

9. The District Court did not exceed its discretion in denying the request of a defendant to modify the decree so as to eliminate language which, the defendant claimed, forbids normal and usual business arrangements between the defendant and other producers of titanium products. Pp. 361–363.

(a) This provision deals solely with the future enforceability of existing contracts which have been found to violate the Sherman Act and it imposes no unjustified restriction on defendant's power to contract. P. 362.

(b) If defendant later can demonstrate that its right of contract has been unduly restricted, it may, under the terms of the decree, apply to the District Court for a modification. P. 363.

10. The acquisition by defendants of stock and other financial interests in certain foreign companies having been part and parcel of unlawful territorial allocation agreements, the future performance of which has been enjoined, the District Court did not exceed its discretion in decreeing that, within one year, defendants shall present to the District Court for its approval a plan for divesting themselves of their stockholdings and other financial interests in such foreign companies or for the purchase of the entire stockholdings and interests, direct or indirect, therein. P. 363.

11. In view of the stay granted by a Justice of this Court suspending certain provisions of the decree pending determination of these appeals, the decree shall be deemed, for the purposes of those paragraphs and for the running of time thereon, to take effect on the effective date of the mandate to be issued by this Court. Pp. 363–364.

63 F. Supp. 513, affirmed.

In a proceeding in equity instituted under § 4 of the Sherman Antitrust Act, the District Court found that defendants had violated § 1 of the Act and issued a decree to prevent and restrain further violations. 63 F. Supp. 513. Both the Government and the defendants appealed. *Affirmed,* p. 364.

Assistant Attorney General Berge and *William C. Dixon* argued the cause for the United States. With them on the brief in No. 89 were *Acting Solicitor General Washington, Elliott H. Moyer, Robert A. Nitschke, Robert L. Stern* and *Robert L. Tollefsen. Acting Solicitor General Washington* was also on the brief with *Mr. Berge* and *Mr. Dixon* in Nos. 90 and 91.

Bethuel M. Webster argued the cause for the National Lead Company et al., appellees in No. 89 and appellants in No. 90. With him on the brief were *Clifton P. Williamson* and *Edward L. Rea.*

Wm. Dwight Whitney argued the cause for E. I. du Pont de Nemours & Co., appellee in No. 89 and appellant in No. 91. With him on the brief were *Gerhard A. Gesell, John Logan O'Donnell, Nestor Shea Foley, Oscar A. Provost* and *John Hancock.*

MR. JUSTICE BURTON delivered the opinion of the Court.

This action was brought by The United States of America, June 24, 1944, in the District Court of the United States for the Southern District of New York, against National Lead Company (a New Jersey corporation, here called National Lead or NL), its wholly owned subsidiary, Titan Company, Inc. (a Delaware corporation, here called Titan Inc. or Tinc) and E. I. du Pont de Nemours and Company (a Delaware corporation, here called du Pont

or DP). It is a proceeding in equity instituted under § 4 of the Sherman Antitrust Act, 26 Stat. 209, 36 Stat. 1167, 15 U. S. C. § 4, to prevent and restrain alleged violations of §§ 1 and 2 of that Act, 26 Stat. 209, 50 Stat. 693, 15 U. S. C. §§ 1 and 2. The trial was conducted by Judge Simon H. Rifkind of that court. It began December 4, 1944, and ended March 14, 1945. His opinion was filed July 5, 1945. His 96 findings of fact and two conclusions of law were entered October 2, 1945. After extended consideration of its terms, by the court and by counsel for all parties, the decree was entered October 11, 1945. The opinion and decree are reported in 63 F. Supp. 513–535. The findings of fact, conclusions of law and much of the detailed discussion of the decree are in the record. Separate appeals were filed in this Court, in case No. 89 by the United States, in case No. 90 by National Lead and Titan Inc. and in case No. 91 by du Pont. The three companies are sometimes referred to as "the appellant companies." We noted probable jurisdiction in each appeal, May 20, 1946, and the three appeals were argued together February 3–5, 1947. A partial stay of the decree had been granted by MR. JUSTICE REED, on January 2, 1946, pending determination of the appeals. Reference is made to the opinion of the District Court for a recital of the complex facts which it had to consider in order to reach its conclusion that National Lead, Titan Inc. and du Pont each violated § 1 of the Sherman Act,[1] although it found

[1] "SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 50 Stat. 693–694, 15 U. S. C. § 1.

a marked difference between the conduct of National Lead and of its subsidiary, Titan Inc., on the one hand, and that of du Pont on the other. This Court affirms the judgment of the District Court, except as to the original effective dates of certain of its provisions, and our discussion will relate largely to the assignments of error as to the terms of the decree.

I. The first issue presented to the District Court was that of the participation of National Lead and Titan Inc. in a so-called "international cartel" dating back to 1920, and constituting a combination or conspiracy in restraint of trade and commerce in titanium pigments and compounds, among the several states of the United States and with foreign nations, which combination, after 1933, was alleged to include du Pont. The District Court found such participation.[2] In their brief on appeal in No. 90, National Lead and Titan Inc. said:

> "The Government's case was based on a series of closely related agreements made between 1920 and 1944. The agreements have been cancelled and continuation or renewal has been enjoined. The appeals are greatly simplified by the fact that we accept the cancellation and the injunction against continuation

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[2] The conclusions of law of the District Court were as follows:

"1. Beginning on or about July 30, 1920, NL and co-conspirator TAS [Titan Co. A/S to which Titan Inc. became a successor in interest] and on various dates thereafter Tinc, DP and the others found herein to be co-conspirators continuing at all times thereafter to the date of these findings have been continuously engaged in a combination and conspiracy in restraint of trade and commerce in titanium pigments and compounds among the several states of the United States and with foreign nations and have been and are now parties to contracts, agreements and understandings in restraint of such trade and commerce.

"2. Plaintiff is entitled to a decree." See also, *United States* v. *National Lead Co.*, 63 F. Supp. 513, 527, 531, 532.

or renewal. We submit, however, that the court went too far in forbidding normal and usual contractual arrangements."

Accordingly, the finding of the District Court, as to the participation of National Lead and Titan Inc. in the violation of § 1 of the Sherman Act, is accepted here without further discussion.

II. The second issue was that of the participation of du Pont in such combination after 1933. The District Court found that du Pont "joined the conspiracy found herein to exist between, NL and its foreign associates. DP's status rights and obligations were different from those of the other members of the combination. DP did not thereafter withdraw." Finding of Fact 73. The District Court, in its opinion, also stated that—

> "At least then as to territorial delimitations of the titanium pigment business, DP joined the combination. . . .
>
> . . . . .
>
> "My general summary of the evidence on this issue is that DP was a member of the combination—true, a special member, with a status, rights and obligations, different from that of the other members, but a member nonetheless." 63 F. Supp. at 530, 531, and see the preamble to the decree at 532.[3]

This finding is contested vigorously by du Pont and is the principal subject matter of its appeal in No. 91. After careful consideration, we agree with the following conclusion of the District Court:

> "In sharp contrast with NL, DP exhibited, from the very beginning of its interest in titanium, an alert consciousness of the anti-trust laws and moved cautiously and under the guidance of trained anti-

[3] See note 4, *infra*.

> trust lawyers. The question is whether it succeeded in avoiding not only the form but also the substance of transgression. I have concluded that it has not; . . . ." *Id.* at 527.

It would serve no beneficial purpose to review here the evidence upon which that court based its conclusion. Its opinion analyzes the facts (*Id.* at 527–531) and, in the light of the record as a whole, we find in those facts the support necessary for the conclusion reached.

III. Related to these issues was a third. This was whether the contract between National Lead and du Pont was offensive to the antitrust laws apart from the relation of that contract, and of the parties thereto, to the foreign producers. The District Court found that it was and also related it to the international situation. It found that—

> "The defendants NL, DP and Tinc have utilized their patents which relate to the manufacture and use of titanium pigments to control and regulate the manufacture and sale of titanium pigments and compounds in the United States; and NL and Tinc with the co-operation of DP have done so throughout the rest of the world." Finding of Fact 95, subparagraph 9.

In its opinion the District Court emphasized also "the great power they acquired" (*Id.* at 531) and indicated criticism of limitations originally inserted in certain important licenses, although later removed from them. *Id.* at 532. Added together, the control of the patents covered by this agreement gave to National Lead and du Pont "domination and control over the titanium pigment business in the U. S." Finding of Fact 79. The District Court referred to the "proliferation of patents" as another "inevitable consequence" of the agreement. *Id.* at 532. This was explained to mean the great multiplication of

related patents, resulting in increasing the difficulty of an attack upon them. The validity of none of the hundreds of patents involved has been litigated.

> "These patents, through the agreements in which they are enmeshed and the manner in which they have been used, have, in fact, been forged into instruments of domination of an entire industry. The net effect is that a business, originally founded upon patents which have long since expired, is today less accessible to free enterprise than when it was first launched." *Id.* at 532.

Referring to the exchange of patents between National Lead and du Pont, the District Court added:

> ". . . in the context of the present case, . . . this exchange between two corporations, who between them controlled the entire market, becomes an instrument of restraint, available for use and used, to continue the mastery of the market which NL and DP achieved by means of the illegal international agreements." *Id.* at 532.

These facts are important not only in affirming, as we do, the finding that National Lead, Titan Inc. and du Pont each has violated § 1 of the Sherman Antitrust Act, but also in passing upon the terms of the decree entered in order to prevent future violations of that Act by them.

IV. The remaining issues relate to the terms of the decree. The entire decree, exclusive of its Appendix, is reported at 63 F. Supp. 532–535, and, for reference purposes, is here reprinted in the margin, as there reported.[4]

[4] "This cause came on to be heard upon the complaint and the answers thereto upon the evidence and upon argument of counsel. The Court having thereafter rendered and filed its opinion and having made and entered findings of fact and conclusions of law wherein the defendants have been found to have been engaged in a combination in restraint of trade and commerce in titanium pigments among

This decree represents a careful attempt to fit the remedy to the needs of this case. The record upon which

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the several states of the United States and of foreign nations, and that the defendants have been and now are parties to contracts, agreements, and understandings in restraint of such trade and commerce in violation of Section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. A. § 1;

"Now, therefore, upon motion of plaintiff by Wendell Berge, Assistant Attorney General, Herbert Berman and William C. Dixon, Special Assistants to the Attorney General, Julian Caplan and Ephraim Jacobs, Special Attorneys, and John F. X. McGohey, United States Attorney, for relief in accordance with the prayer of the complaint, and the defendants having severally appeared by counsel, it is ordered, adjudged and decreed as follows:

"1. The term 'titanium pigments' as used herein shall mean any product containing two percent (2%) or more of the element titanium in a chemically, mechanically or physically combined state and mixtures thereof which can be used as pigments, whether or not adapted for other uses, and also extenders to be used in conjunction with any such product.

"2. The term 'defendants' shall mean the corporations hereinafter listed who may be identified by the designated abbreviations:

NL	National Lead Company
Tinc	Titan Company, Inc.
DP	E. I. du Pont de Nemours and Company

"3. The term 'co-conspirators' shall mean the corporations hereinafter listed, who may be identified by the designated abbreviations:

TP	The Titanium Pigment Company, Inc.
Krebs	Krebs Pigment & Color Corporation
TAS	Titan Co. A/S
IG	Interessengemeinschaft Farbenindustrie Aktiengesellschaft
TG	Titangesellschaft m.b.H.
SIT	Société Industrielle du Titane
ICI	Imperial Chemical Industries, Ltd.
GW	Goodlass Wall and Lead Industries, Ltd.
ISC	Imperial Smelting Corporation, Ltd.
BTP	British Titan Products Company, Ltd.
NTP or Laporte	National Titanium Pigments, Ltd.

it is based consists of two large volumes of testimony and four larger volumes of exhibits, representing a total of

CIL	Canadian Industries, Ltd.
CTP	Canadian Titanium Pigments, Ltd.
Kokusan or KK	Kokusan Kogyo Kabushiki Kaisha
TK	Titan Kogyo Kabushiki Kaisha
Terres Rares	Société des Produits Chimiques des Terres Rares
Thann	Fabriques des Produits Chimiques de Thann et de Mulhouse
Montecatini	Societa Anonima Titanium
Aussig	Verein fur Chemische und Metallurgische Produktion

"4. The term 'patents as herein defined' shall mean United States letters patent and applications as follows: (a) the letters patent and patent applications listed in Appendix A hereof; (b) all divisions, continuations or reissues of any of the foregoing patents and applications; (c) all patents issued upon such applications; (d) all patents which cover any titanium pigments or any process for the manufacture of titanium pigments issued to any of the defendants within five years from the date of this decree; and all such patents which any of the defendants acquires within such five years; and all such patents of which any of the defendants becomes the exclusive licensee within such five years with power to sublicense.

"5. The following agreements are hereby adjudged to be unlawful under Section 1 of the Sherman Act and each of them is hereby cancelled and the defendants and each of them and all persons acting or claiming to act through, for or under them and all successors and subsidiaries of any of the defendants are hereby enjoined and restrained from the further performance of any of the provisions of said agreements and of any agreements amendatory thereof or supplemental thereto:

Agreement dated July 30, 1920, between TP and TAS (Exhibit A);

Agreement between TP and Krebs dated January 1, 1933, as amended January 1, 1941 (Exhibits E and E–3);

Agreements dated July 30, 1920, between NL, TP, The Titanium Alloy Manufacturing Company and TAS (Exhibits A–1 and A–2);

Agreement between TAS and SIT dated March 3, 1927 (Exhibit B);

Agreement between TAS and IG dated October 3 and 20, 1927 (Exhibit C);

over 5,500 pages, reflecting more than three months of trial. It demonstrates a commendable procedure. Pro-

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Agreement between TAS and IG signed June 24 and October 20, 1927 (Exhibit C–1);

Agreement between TAS and TG signed October 3 and 20, 1927 (Exhibit C–3);

Agreement between TG and TAS dated October 3 and 20, 1927 (Exhibit C–7);

Agreement between TG and TAS dated October 3 and 20, 1927 (Exhibit C–8);

Agreement dated February 16, 1933 between ICI, ISC, GW and TINC (Exhibit F);

Agreements between TINC, SIT, TERRES RARES, and Thann dated June 5 and 17, 1935 (Exhibits G–1 and G–2);

Agreements between TINC, TERRES RARES, and IG, and between TINC, Terres Rares, IG, TG, Thann, and Doitsu [Doitsu Senryo Gomei Kaisha, Kobe/Japan] both dated January 18, 1936 (Exhibits J and J–2);

Agreement between NL and CIL dated January 1, 1937 (Exhibit K);

Agreement between NL and CTP dated January 1, 1937, as amended February 27, 1939 (Exhibits K–1 and K–5);

Agreements between DP and TINC dated July 27, 1937, June 20, 1938, April 21, 1939, May 10, 1940, and June 23, 1941 (Exhibits M, N, Q, R and S), and the

'License Field Extender' agreements to which NL or TINC were parties, including the agreement between NL and TINC dated March 28, 1939 (Exhibit O);

provided, however, that the provisions of this paragraph with respect to the agreements between TP and Krebs dated January 1, 1933, as amended January 1, 1941 (Exhibits E and E–3) shall not go into effect until the expiration of nine months from the date of this decree.

"6. Each of the defendants and each of their directors, officers, agents, employees, successors and subsidiaries and all persons acting, or claiming to act under, through or for them or any of them are hereby enjoined and restrained (a) from entering into, adhering to, maintaining or furthering, directly or indirectly, or claiming any rights under any contract, agreement, understanding, plan or program among themselves, the co-conspirators, or with any other person,

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posed findings of fact and conclusions of law were submitted on behalf of the respective parties and a form of

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partnership or corporation, which has as its purpose or effect the continuing or renewing of any of the agreements listed in paragraph 5 hereof; (b) from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, undertaking, plan or program with any other producer or dealer relating to titanium pigments which has as its purpose or effect (1) to divide sales or manufacturing territories, (2) to allocate markets, (3) to limit or prevent United States imports or exports, (4) to grant to any third party any market as its exclusive territory, (5) to keep any third party out of any market; provided, however, that nothing contained in this subdivision (b) of this paragraph 6 shall prohibit any normal and usual arrangements between any defendant and its directors, officers, employees, agents, subsidiaries, or any dealer or distributor, whether or not a co-conspirator; (c) from restricting any purchaser of titanium pigments in the use thereof.

"7. Each of the defendants is ordered to grant to any applicant therefor, including any defendant or co-conspirator, a nonexclusive license under any or all of the patents as herein defined at a uniform, reasonable royalty. Such grant may, at the option of the licensor, be conditioned upon the reciprocal grant of a license by the applicant, at a reasonable royalty, under any and all patents covering titanium pigments or their manufacture, now issued or pending, or issued within five years from the date of this decree, if any, owned or controlled by such applicant. Such license or reciprocal license may, at the option of either party, contain a provision for the inspection of the books and records of the licensee by an independent auditor who shall report to the licensor only the amount of royalty due and payable and no other information. During a period of three years from the date of this decree such license or reciprocal license may at the option of either party contain a provision for the imparting in writing, at a reasonable charge, by the licensor to the licensee, of the methods and processes used by the former at the date of the license in its commercial practice under the licensed patents in connection with the production of titanium pigments. The Court reserves jurisdiction to pass upon the reasonableness of any royalty or charge herein directed to be reasonable. Defendants are restrained from attempting to enforce any rights under any foreign patents owned by them or under which they are the exclusive licensees to

decree was submitted on behalf of the Government to the District Court immediately following the trial. The

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prevent the exportation of titanium pigments from the United States to any foreign country.

"8. Within one year from the date of this decree, defendants NL and Tinc shall present to the Court for its approval a plan for divesting themselves of their stock holdings and other financial interest, direct and indirect, in BTP, CTP, TG and TK, or for the purchase of the entire stock holdings and other financial interests, direct and indirect, in said companies or any of them. Such plan of sale shall not provide for the transfer of such stock or interest to any other defendant or to any corporation in which any defendant will, upon consummation of the plan, have any interest, provided that this provision shall not preclude transfer of said defendants' stock holdings in BTP to ISC, GW, and ICI, or any of them, or preclude transfer of said defendants' stock holdings in CTP to CIL. The plan shall provide for its completion within two years from the date of this decree.

"9. Either American Zirconium Corporation or Virginia Chemical Corporation, their successors or assigns, may at their option, if exercised within six months from the date of this decree, apply for licenses from DP under the provisions of paragraph 7. In the event American Zirconium Corporation, Virginia Chemical Corporation or their respective successors or assigns exercise the foregoing option, DP is enjoined from collecting royalties under any existing license agreement relating to titanium pigments between it and the person exercising the option in respect of any period subsequent to such exercise. Defendants NL, Tinc and DP are hereby enjoined from bringing, or threatening to bring, any action against any person or corporation for the alleged infringement prior to the date of this decree of any patent as herein defined.

"10. The Attorney General of the United States or his proper representative shall, for the purpose of securing compliance with this decree, be permitted (1) access, during the office hours of the defendants, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the defendants, relating to any matters contained in this decree, (2) subject to any legally recognized privilege, without restraint or interference from the defendants, to interview officers or employees of the defendants, who may have counsel present, regarding any such matters; provided, however, that information obtained by

opinion of the District Court, when filed, formed the basis of further consultation and argument. After the District Court's findings of fact and conclusions of law were entered, further conferences were held with counsel and full opportunity was given to them to propose changes in the findings of fact and the decree. Much of this discussion was reported in the record and has been of benefit to this Court in reviewing the decree.

In our opinion, the provisions of this decree, to a large extent, are matters lying within the discretion of the District Court as a court of equity whose duty it was to make the remedy as effective as possible. The District Court

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the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings for the purpose of securing compliance with this decree in which the United States is a party or as otherwise required by law.

"11. Judgment is entered against the defendants for all costs to be taxed in this proceeding.

"12. The cancellations, injunctions and all executory action provided for under this decree shall not become effective or operative until ninety days from the date of this decree.

"13. Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this decree, or any other person or corporation that may hereafter become bound, in whole or in part, thereby to apply to the Court at any time for such further orders, modifications, vacations or directions as may be necessary or appropriate

(1) for the construction or carrying out of this decree, and

(2) for the enforcement of compliance therewith and the punishment of violations thereof."

"Appendix A" consists only of the identification of National Lead's 82 patents and 20 applications for patents; Titan Inc.'s 19 patents and 1 application; Titan Co. A/S's 2 patents; I. G. Farbenindustrie's 22 patents; Titangesellschaft's 2 patents; and du Pont's 175 patents and 30 applications. The references in the decree to Exhibits refer to such exhibits as they are identified in the record of this case in the District Court.

was confronted with an obligation to give effect to the provisions, on the one hand, of the patent laws granting certain valuable rights in the nature of monopolies to the patentees and their licensees, and also to give effect, on the other hand, to the provisions of the Sherman Antitrust Act prohibiting any combination or conspiracy in restraint of trade among the several states or with foreign nations. We believe that the District Court has not exceeded its discretion in the provisions of this decree but has employed its discretion with commendable fairness having especial regard to the needs of this case. It has succeeded in keeping within the lines of precedent thus far established, although, in this field, such lines cannot be much more than guides. The essential consideration is that the remedy shall be as effective and fair as possible in preventing continued or future violations of the Antitrust Act in the light of the facts of the particular case.

The issues are presented by the assignments of error in the three appeals. They will be considered separately in conjunction with their supporting arguments. In each instance we sustain the present decree.

A. Request to omit the requirement of the granting of compulsory, nonexclusive licenses at uniform, reasonable royalties and to substitute for that requirement, either a perpetual injunction against the enforcement of the titanium patents presently owned or controlled by the respective appellant companies, or a provision for compulsory licenses to be issued under those patents, free of royalties.

This is the major legal issue in this case.

The material provisions in the present decree are as follows:

> "4. The term 'patents as herein defined' shall mean United States letters patent and applications as follows: (a) the letters patent and patent applications

listed in Appendix A hereof; (b) all divisions, continuations or reissues of any of the foregoing patents and applications; (c) all patents issued upon such applications; (d) all patents which cover any titanium pigments or any process for the manufacture of titanium pigments issued to any of the defendants within five years from the date of this decree; and all such patents which any of the defendants acquires within such five years; and all such patents of which any of the defendants becomes the exclusive licensee within such five years with power to sublicense.

. . . . .

"7. Each of the defendants is ordered to grant to any applicant therefor, including any defendant or co-conspirator, a nonexclusive license under any or all of the patents as herein defined at a uniform, reasonable royalty. Such grant may, at the option of the licensor, be conditioned upon the reciprocal grant of a license by the applicant, at a reasonable royalty, under any and all patents covering titanium pigments or their manufacture, now issued or pending, or issued within five years from the date of this decree, if any, owned or controlled by such applicant. Such license or reciprocal license may, at the option of either party, contain a provision for the inspection of the books and records of the licensee by an independent auditor who shall report to the licensor only the amount of royalty due and payable and no other information. During a period of three years from the date of this decree such license or reciprocal license may at the option of either party contain a provision for the imparting in writing, at a reasonable charge, by the licensor to the licensee, of the methods and processes used by the former at the date of the license in its commercial practice under the licensed patents in connection with the production of titanium

pigments. The Court reserves jurisdiction to pass upon the reasonableness of any royalty or charge herein directed to be reasonable. Defendants are restrained from attempting to enforce any rights under any foreign patents owned by them or under which they are the exclusive licensees to prevent the exportation of titanium pigments from the United States to any foreign country."

The assignment of error originally made by the Government, in No. 89, as to this point was as follows:

"1. The court erred in failing to require each defendant to license its existing titanium pigment patents free of royalty until the court shall have determined, on application by any defendant, that the effects of the defendants' illegal combination, as set forth in the court's findings of fact and conclusions of law, have been fully dissipated."

Later the Government moved to amend this assignment of error so that it would read as follows:

"The court erred in failing to enter an injunction perpetually enjoining the defendants from enforcing the titanium patents presently owned or controlled by them."

This Court postponed consideration of the above motion to the hearing of the case on its merits. On oral argument, the Government supported its second proposal but indicated that, if that proposal were not satisfactory, it would prefer its original request to the provision for uniform, reasonable royalties now in the decree. The Government's motion to amend its assignment of errors accordingly is granted. National Lead, in its assignments of error in No. 90, however, assigns the orders contained in paragraph 7 of the decree on this subject as error and, in its briefs, argues that "The court erred in refusing to order royalty-free licensing of all patents

as defined in the judgment." Accordingly, both proposals have been considered.

While it has been contended that, because of the decision of this Court in *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, the District Court was not free in the present case to require the issuance of royalty-free licenses, we feel that, without reaching the question whether royalty-free licensing or a perpetual injunction against the enforcement of a patent is permissible as a matter of law in any case, the present decree represents an exercise of sound judicial discretion.

This is a civil, not a criminal, proceeding. The purpose of the decree, therefore, is effective and fair enforcement, not punishment. An understanding of the findings of fact is essential to an appreciation of the reasons for the decree.

Pure titanium pigment and its compounds represent a product of comparatively recent development but of major commercial value. The District Court found that—

> "Titanium pigments are possessed of great opacity, hiding power and chemical inertness, and are largely displacing other pigments such as lithopone and white lead. Titanium pigments are used in the manufacture of paints and are also used in the manufacture of rubber, glass, paper, vitreous enamels, and many other products. . . .
>
> "In and before 1920 there was no substantial trade or commerce in, and no commercial manufacture of, titanium pigments for use in paint, paper, rubber, or other products; . . . ." Finding of Fact 33.
>
> "The production of titanium pigments in the United States has risen from 100 tons (on the basis of pure TiO_2 content) in 1920 to approximately 110,000 tons in 1943 with a peak production of approximately 128,000 tons in the United States in

1941. The total production of titanium pigments and compounds outside of the United States has shown less growth, the estimated foreign production of titanium pigments and compounds being approximately 1,000 tons in 1920 and approximately 23,000 tons in 1938." Finding of Fact 35.

There are four producers of titanium products in the United States—National Lead, du Pont, American Zirconium (here called Zirconium), which is a subsidiary of Glidden Company, and Virginia Chemical Company (here called Virginia Chemical), which is a subsidiary of American Cyanamid Company. National Lead and du Pont have cross-licensed each other under their respective patents. Zirconium entered the field in 1935 with licenses from National Lead and du Pont, but the National Lead license has been canceled. Virginia Chemical entered the field in 1937 with a license from du Pont. Finding of Fact 42.

National Lead has assets of over $100,000,000 and is the largest manufacturer of titanium pigments and compounds not only in the United States but in the world. In 1943 it manufactured and sold 76.5% of the composite pigments and 46.4% of pure TiO_2 made in the United States. Finding of Fact 3. Du Pont is one of the largest chemical companies in the United States with assets of over $1,000,000,000. It is one of the largest manufacturers of titanium pigments in the United States. In 1943 it manufactured and sold approximately 23.5% of the composite pigments and 45.1% of pure TiO_2 made in the United States. Finding of Fact 9.

National Lead took an early lead in promoting the commercial manufacture and use of titanium pigments. In 1920 it acquired an interest in The Titanium Pigment Company, Inc., which had been organized by the Titanium Alloy Manufacturing Company at Niagara Falls, New York. It made use of a patented process developed

by Barton and Rossi. At about that time, a Norwegian chemist, Gustav Jebsen, made similar investigations but along different lines in Norway. He and his associates perfected a patented means for producing relatively pure titanium dioxide by a process much less costly than that in use at Niagara Falls. These associates had not, however, perfected processes for the manufacture of composite pigments. Finding of Fact 33. In about 1922, Joseph Blumenfeld, a chemist and managing director of a French company, obtained patents relating to the manufacture of titanium compounds. Finding of Fact 34.

On July 30, 1920, The Titanium Pigment Company, Inc., (affiliated with National Lead) and Titan Co. A/S (representing the Jebsen interests) entered into an agreement which is still uncanceled. Its principles became the basis for more than 60 subsequent agreements and for an international cartel [5] in titanium pigments. The es-

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[5] "Cartels have been defined by two of the foremost members and advocates of such bodies. In the words of Sir Alfred Mond, organizer of Imperial Chemical Industries:

" 'I use the word cartel to include fusion, pooling arrangement, quota arrangement and price convention, because a cartel is protean in its form. . . . In an ultratechnical way, a cartel might be defined as a combination of producers for the purpose of regulating, as a rule, production, and, frequently, prices. . . .'

"In the words of Sir Felix J. C. Pole, chairman of Associated Electrical Industries, Ltd.:

" 'A cartel or association usually means an association by agreement of companies or sections of companies having common interests. It is designed to prevent extreme or unfair competition and allocate markets, and it may also extend to interchange of knowledge resulting from scientific and technical research, exchange of patent rights, standardization of products, etc. Competition is not eliminated, but it is regulated. Competition in quality, efficiency, and service takes the place of the crude method of price cutting.' " Monograph No. 1, Subcommittee on War Mobilization of the Committee on Military Affairs, U. S. Senate, 78th Cong., 2d Sess., Part I, p. 1. Quoted also in *United States* v. *National Lead Co.*, 63 F. Supp. 513, 523, note 5.

sential features of this agreement are stated in Finding of Fact 44 and in the opinion of the District Court, 63 F. Supp. at 517–518.

Briefly stated, it applied to a licensed field, defined as including all substances containing above 2% of titanium unless containing by weight more than 5% of a metal other than titanium in its purely metallic form. It applied to all apparatus, methods and processes useful in obtaining or manufacturing such substances both in the titanium and in the titanium compound field.

Both parties agreed to grant and accept a license, exclusive of all others including the licensor, under all "existing or future" patents of the licensing party. They divided the globe territorially. The American company was to have the North American continent. The Norwegian company was to have the rest of the world, except that reciprocal, nonexclusive rights of sale were reserved for both companies in South America.

Detailed provision was made for exchange of copies of applications for patents filed by the parties or their other licensees. Neither party was ever to question or contest the validity of any patent of the other under which it was licensed within the field described.

The American company became the exclusive agent for the Norwegian company in North America and vice versa outside of North and South America. Sales were to be at prices and on terms determined by the agent. Notwithstanding these agencies, however, importations of "finished articles"—that is, paint, paper, rubber, glass, etc.—containing titanium products of the principal, its licensees or sublicensees, would be permitted provided such products did not constitute such an important part of such finished articles that sales within the agent's territory would interfere substantially with the agent's sales of its own titanium products.

Each party would impart semiannually to the other information in detail as to knowledge obtained in and ap-

plicable to the "licensed field," and would permit the other to inspect and study operations in its plants (exclusive of research laboratories). The reciprocal grants of exclusive licenses would extend to December 31, 1936, and thereafter for periods of ten years each, with provision for termination by notice to be given at least five years before the end of any such period. In particular, so long as each company held an exclusive license from the other under this agreement, it would have the right to grant licenses under its own patents, and sublicenses under the other's patents, on the condition, nevertheless, that every such licensee or sublicensee would grant to the party to the 1920 agreement (other than its licensor), its patent rights in the "licensed field" identical in character, territorial scope, and duration to those given by its licensor to such other party under the 1920 agreement, and would impart technical information to such other party in the same manner and to the same extent as its licensor.

In 1929, the obligations of Titan Co. A/S under this agreement were assumed by Titan Inc. and, in 1936, the obligations of The Titanium Pigment Company, Inc., were assumed by National Lead.

Other companies throughout the world joined in carrying out this program to restrain international commerce and to establish an international combination or conspiracy in restraint of trade. The complaint in the present case lists many of these foreign companies as co-conspirators with National Lead, Titan Inc. and du Pont, but it does not attempt to make such co-conspirators parties defendant. The District Court recognized that it did not have jurisdiction over such co-conspirators and found in that circumstance one of its difficulties in effectively restraining National Lead, Titan Inc. and du Pont from further violations of the Sherman Antitrust Act,

pursuant to this international as well as domestic program. To accomplish this purpose, the District Court has adjudged these agreements to be unlawful and it has canceled them. In addition, it has enjoined all three defendants, National Lead, Titan Inc. and du Pont, from further performance of any of the provisions of such agreements and of any agreements amendatory thereof or supplemental thereto. Pars. 5 and 6 of the decree, 63 F. Supp. at 533–534.

National Lead acquired an 87% interest in Titan Co. A/S, Jebsen retaining 13%. The District Court found that "The intended purpose of the acquisition of control of TAS by NL was to utilize TAS and the contract of 1920 to further control competition in the manufacture of titanium pigments and compounds in all markets of the world including the United States." Finding of Fact 47.[6]

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[6] "This purpose was accomplished. The defendant NL and TAS agreed to have TAS and subsequently defendant Tinc form in each of the important industrial countries of the world, in association with a local corporation or firm which contemplated the manufacture and sale of titanium pigments and compounds or which could contribute to the technical or commercial development or which threatened to be a serious competitor of NL and TAS, a new company in which NL or TAS were to have a part interest. Any new company so formed was to be given certain territory in which it would have the exclusive right to manufacture and sell titanium pigments and compounds free from any exports into said territory by NL. The new company so organized was to refrain from competing with NL in its territory (the United States and other countries of North America) or in the territory of any other company associated with NL. TAS and subsequently defendant Tinc were to make said contracts providing for the formation of the new companies and NL was to be bound to adhere to all of the territorial restrictions placed on TAS and subsequently defendant Tinc in such contracts by virtue of contract Exhibit A. [The agreement of July 30, 1920.] All the present and future patents belonging to NL or TAS or any of the companies associated with either in the formation of such new companies, as well as those of the new companies to be organized, were

While this combination and conspiracy in restraint of interstate and foreign commerce thus was developing from 1920 to 1931, with National Lead and Titan Inc. at its center, du Pont was unconnected with it. Du Pont had initiated independent, but unsuccessful, efforts to develop, through research, a new and patentable commercially feasible process in this field. It became convinced that if it were to undertake the manufacture and sale of titanium pigments as a development of its white pigment business, it would be necessary to enter the field as promptly as possible through the acquisition of the patents and of the going business of Commercial Pigments Company. That company had been formed by Commercial Solvents Corporation in 1928 and had acquired the Blumenfeld and other patents in the United States relating to the manufacture and sale of titanium pigments and compounds. It was operating a plant in Baltimore, Maryland, where it manufactured pure TiO_2 pigment only and sold it in competition with the The Titanium Pigment Company, Inc. (the affiliate of National Lead). In July, 1931, du Pont, through its subsidiary, Krebs Pigment & Color Corporation, acquired all of the assets and assumed some of the obligations of Commercial Pigments Company. It thus continued and, in fact, increased its competition in the titanium pigment field against National Lead. Findings of Fact 70, 12, 10 and 71.

> "Both NL and DP in good faith claimed that each infringed certain of the other's titanium pigment patents and both in good faith denied such infringement claiming, among other things, that the patents alleged to be infringed were of doubtful validity. NL and DP agreed in October, 1932, that the validity

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to be licensed exclusively to NL for North America and to the new companies to be organized for their respective exclusive territories and to TAS and subsequently defendant Tinc for the rest of the world." Finding of Fact 48.

of the patents claimed to be infringed should not be questioned except as a last resort and that they should try to arrive at a general understanding." Finding of Fact 72.

Finally, in 1933, The Titanium Pigment Company, Inc. (by that time a 100% subsidiary of National Lead), and Krebs Pigment & Color Corporation (subsidiary of du Pont) were the only producers of titanium pigments in the United States. The 1920 agreement, however, prevented The Titanium Pigment Company, Inc. (National Lead), from entering into a contract with Krebs Pigment & Color Corporation (du Pont) unless the latter subscribed to the provisions of the 1920 agreement. Such a subscription would have required an agreement by Krebs (du Pont) not to export into the territories of National Lead's foreign associates, and an agreement to grant to National Lead's foreign associates exclusive licenses under all of Krebs' (du Pont's) present and future patents for titanium pigments and compounds in the territories of the foreign associates. Finding of Fact 73. After extensive negotiations, National Lead and du Pont formulated an agreement in writing, dated as of January 1, 1933, which was executed August 28, 1933. It is summarized in Finding of Fact 73 and in the opinion of the lower court, 63 F. Supp. at 520–521. By its terms, it provided for cross-licensing but did not provide for the exclusive licensing and restrictive territorial and agency agreements specified in the 1920 program. Certain foreign associates of National Lead, particularly Interessengemeinschaft Farbenindustrie Aktiengesellschaft (usually referred to as I. G. Farbenindustrie), insisted upon some such commitment from du Pont or its subsidiary. This insistence never was abandoned. After further negotiations and an exchange of letters, all as set forth in full in Finding of Fact 73 and in the opinion of the District Court, 63 F. Supp. at 528–529, some understanding was reached as to the future con-

duct of du Pont, or of its subsidiary. On the strength of this, I. G. Farbenindustrie agreed to the situation. On the basis of all the evidence, the District Court found that—

> "DP, through Rupprecht [President of Krebs Pigment & Color Corporation] and Krebs [the corporation], by these assurances and Exhibit E [the agreement dated as of January 1, 1933], joined the conspiracy found herein to exist between, NL and its foreign associates. DP's status rights and obligations were different from those of the other members of the combination. DP did not thereafter withdraw." Finding of Fact 73.

That finding, which we accept, throws important light upon the conditions to which the decree is to be applied. Furthermore, although National Lead and du Pont exchanged technical information relating to the manufacturing or use of titanium pigments or compounds from about April, 1932, until April, 1940, this exchange was discontinued May 1, 1940. The agreement of 1933 between The Titanium Pigment Company, Inc., and Krebs Pigment & Color Corporation which then had been assumed by National Lead and du Pont, respectively, was amended on January 1, 1941, to eliminate provisions for the exchange of technical information. Finding of Fact 75. It was further amended to include extender pigments, which theretofore had been included by implication and practice. Finding of Fact 76. After January 1, 1941, patent applications were to be available between National Lead and du Pont only after six months from the date of their filing, instead of immediately. Finding of Fact 77.

> "From 1933 on there was active competition between NL and DP for customers. There has been a vast increase in sales; and repeated reductions in

the price of titanium pigments have taken place and a very few increases. DP entered the titanium pigment business in 1931 and since that date it has made frequent plant expansions for the manufacture of pure and composite TiO_2 and its production increased from 20,027 tons in 1935 to 50,674 tons in 1941 and then decreased to 42,843 tons in 1943.

"NL and DP have endeavored to match each other's titanium products; but each also manufactures certain titanium pigments having special applications not manufactured by the other.

"There is no allocation of territory or customers between NL and DP; and each maintains a large, highly trained technical sales force engaged in endeavoring to sell titanium pigments. To a very large extent the salesmen of the two companies are chemists whose contact with consumers (that is, manufacturers of paint, rubber, glass, etc.) consists in endeavoring to demonstrate that their products merit acceptance on the basis of technical superiority. The buyers of titanium pigments are mainly well-informed, experienced purchasing agents. NL and DP sell for identical prices; there is no evidence that such price identity is the product of agreement or collusion." Finding of Fact 78.

These findings disclose the special conditions which confronted the District Court in framing its decree. They disclose a vigorous, comparatively young, but comparatively large, world-wide industry in which two great companies, National Lead and du Pont, now control approximately 90% of the domestic production in substantially equal shares. The balance of that production is in the hands of two smaller companies. Each of these is affiliated with larger organizations, not parties to this case. The findings show vigorous and apparently profitable competition on the part of each of the four producers,

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including an intimation that the smaller companies are gaining ground rather than losing it. Keen competition has existed both before and after the elimination, by the 1933 agreement and understanding, of certain patent advantages from among the weapons of competition. The competition between National Lead and du Pont has been carried into this Court where today National Lead supports the Government's proposal for royalty-free licenses, while du Pont argues strongly for a complete dismissal of the proceedings and contends that, in any event, if there are to be compulsory licenses they at least should require payment of uniform, reasonable royalties as provided in the present decree.

Assuming, as is justified, that violation of the Sherman Act in this case has consisted primarily of the misuse of patent rights placing restraint upon interstate and foreign commerce, that conduct is not before this Court for punishment. It is brought before this Court in order to secure an order for its immediate discontinuance and for its future prevention. That will be accomplished largely through the strict prohibition of further performance of the provisions of the unlawful agreements. Further assurance against continued illegal restraints upon interstate and foreign commerce through misuse of these patent rights is provided through the compulsory granting to any applicant therefor of licenses at uniform, reasonable royalties under any or all patents defined in the decree. Such patents include not only the patents and patent applications listed in the appendix to the decree, but also, among others, all patents which cover any titanium pigments or any process for the manufacture of such pigments issued to, or acquired by, any of the appellant companies within five years from the date of the decree. It applies also to all such patents of which any of the appellant companies shall become the exclusive licensee within such five years with power to sublicense.

On the facts before us, neither the issuance of such licenses on a royalty-free basis nor the issuance of a permanent injunction prohibiting the patentees and licensees from enforcing those patents has been shown to be necessary in order to enforce effectively the Antitrust Act. We do not, in this case, face the issue of the constitutionality of such an order. That issue would arise only in a case where the order would be more necessary and appropriate to the enforcement of the Antitrust Act than here. In the absence of a showing to the contrary, it is obvious that some patents should entitle their owners to receive higher royalties than others. Also, it is clear that several patents, each of equal value, ordinarily should entitle their owners to a larger total return in royalties than would one of them alone. It follows that to reduce all royalties automatically to a total of zero, regardless of their nature and regardless of their number, appears, on its face, to be inequitable without special proof to support such a conclusion. On the other hand, it may well be that uniform, reasonable royalties computed on some patents will be found to be but nominal in value. Such royalties might be set at zero or at a nominal rate. The conclusion, however, would depend on the facts of each case.

Recognizing the difficulty of computing a reasonable royalty,[7] nevertheless, that conception is one that already has been recognized both by Congress and by this Court.[8]

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[7] *Hearings before Committee on Patents on H. R. 23,417*, 62d Cong., 2d Sess. (1912), Part XII, pp. 10–11; H. R. Rep. 1161, 62d Cong., 2d Sess. (1912), Part 2, p. 8; Report of Subcommittee of the American Bar Association appointed to consider the King Bill, S. 383, 74th Cong. (1935), p. 38.

[8] A recent recognition of a reasonable royalty test is contained in Chapter 726 of the 79th Congress, 2d Session:

"... upon a judgment being rendered in any case for an infringement the complainant shall be entitled to recover general damages which shall be due compensation for making, using, or selling the

The term frequently has been employed in Sherman Anti-trust case consent decrees.[9] In the present case, the royalties charged to and paid by Zirconium and Virginia Chemical provide enough guidance to indicate that the reasonableness of future royalties may be determined in this case with less difficulty than often might confront a court faced with such a task. Cf. *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U. S. 689,

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invention, *not less than a reasonable royalty therefor*, together with such costs, and interest, as may be fixed by the court. . . ." (Italics supplied.) R. S. § 4921, as amended August 1, 1946, 60 Stat. 778, 35 U. S. C. A. § 70 (Supp. 1946), relating to the power of courts to grant injunctions and estimate damages.

The most recent and outstanding example of its recognition is in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 413–417.

In patent accounting suits, where the profits or damages cannot be ascertained and no standard of comparison is available, the court may allow a reasonable royalty.

"But, as the patent had been kept a close monopoly, there was no established royalty. In that situation it was permissible to show the value by proving what would have been a reasonable royalty, considering the nature of the invention, its utility and advantages, and the extent of the use involved. Not improbably such proof was more difficult to produce, but it was quite as admissible as that of an established royalty." *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.*, 235 U. S. 641, 648.

See also, *Sheldon* v. *Metro-Goldwyn Corp.*, 309 U. S. 390, 404; *Suffolk Co.* v. *Hayden*, 3 Wall. 315, 320; 3 Walker on Patents § 833 (Deller's ed. 1937) (*Id.* 1945 pocket supp.); 56 Yale L. J. 77.

[9] *United States* v. *Owens-Illinois Glass Co.*, CCH Trade Reg. Serv. ¶ 57,498 (D. C. N. D. Calif., 1946); *United States* v. *American Air Filter Co.*, CCH Trade Reg. Serv. ¶ 57,492 (D. C. W. D. Ky. 1946); *United States* v. *Libbey-Owens-Ford Glass Co.*, CCH Trade Reg. Serv. ¶ 57,489 (D. C. N. D. Ohio 1946); *United States* v. *Diamond Match Co.*, CCH Trade Reg. Serv. ¶ 57,456 (D. C. S. D. N. Y. 1946); *United States* v. *General Elec. Co.*, CCH Trade Reg. Serv. ¶ 57,448 (D. C. N. J. 1946); *United States* v. *Bendix Aviation Corp.*, CCH Trade Reg. Serv. ¶ 57,444 (D. C. N. J. 1946); *Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore*, CCH Trade Reg. Serv. ¶ 57,336 (D. C. Mass. 1945).

697–698. The growing strength of those two royalty-paying licensees has demonstrated that royalty-free licenses have not been essential to such progress even under past conditions. Finally, the District Court, under paragraphs 7 and 13 of the decree, will retain sufficient jurisdiction to enable it to vacate or modify its orders fixing reasonable royalty rates if it finds such action to be necessary or appropriate. We hold, therefore, that paragraphs 4 and 7 of the decree should not be modified either so as to provide for compulsory royalty-free licenses or so as to enjoin the patentees or licensees from enforcing the terms of the patents involved.

B. Request to add a provision requiring National Lead and du Pont each to submit, within a year, a plan for the divestiture by it of one of its two principal titanium pigment plants, together with the related physical property. This request is urged by the Government in No. 89. It is strongly opposed both by National Lead and du Pont. The issue was discussed at length by the parties and the District Court in the reported conferences as to the form of the decree.

We believe there is neither precedent nor good reason for such a requirement. The violation of the Sherman Act is found in these cases in the patent pooling and in the related agreements restraining interstate and foreign commerce. There is neither allegation in the complaint nor finding of fact by the District Court that the physical properties of either National Lead or du Pont have been acquired or used in a manner violative of the Sherman Act, except as such acquisition or use may have been incidental or related to the agreements above mentioned. The cancellation of such agreements and the injunction against the performance of them by the appellant companies eliminate them. Paragraph 8 of the decree goes further. It requires National Lead and its subsidiary, Titan Inc., to present, within one year, a plan for

divesting themselves of their stockholdings and other financial interests in certain foreign corporations, or for the purchase of the entire stockholdings and other financial interests, direct or indirect, in such corporations or any of them. Such a plan, which was required also to provide for its completion within two years from the date of the decree, will go as far toward divestiture as the findings of fact indicate should be necessary to make the decree effective.

There is no finding of fact, and apparently no evidence, showing that the respective principal titanium plants of National Lead or du Pont were acquired in violation of law, that they ever were separately owned or operated, or that they are adapted to such operation. Presumably, the requested divestiture would be for the purpose of providing four instead of two independent major competing plants in the titanium pigment industry. However, there is no showing whether or not the two licensees, Zirconium (subsidiary of Glidden Company) and Virginia Chemical (subsidiary of American Cyanamid Company), may not be able to develop, under the decree, even more substantial competition against National Lead and du Pont than would new concerns operating the divested plants. No comparable precedents have been presented.

There is no showing that four major competing units would be preferable to two, or, including Zirconium and Virginia Chemical, that six would be better than four. Likewise, there is no showing of the necessity for this divestiture of plants or of its practicality and fairness. The findings of fact have shown vigorous and effective competition between National Lead and du Pont in this field. The general manager of the pigments department of du Pont characterized the competition with Zirconium and Virginia Chemical as "tough" and that with National Lead as "plenty tough." Such competition suggests that the District Court would do well to remove

unlawful handicaps from it but demonstrates no sufficient basis for weakening its force by divesting each of the two largest competitors of one of its principal plants. It is not for the courts to realign and redirect effective and lawful competition where it already exists and needs only to be released from restraints that violate the antitrust laws. To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such separation would amount to an abuse of discretion.

C. Request to add a provision requiring National Lead and du Pont to furnish to any applicant, at a reasonable charge, during a period of three years, technical information desired by the applicant relating to the methods and processes for manufacturing titanium pigments. This would supersede the provision now in the decree which, during a period of three years, makes available to a licensee certain information in writing, at a reasonable charge, as to the methods and processes used by his licensor at the date of the license. This is urged by the Government in No. 89 and opposed by National Lead and du Pont. Du Pont, in No. 91, goes further and urges the omission of all requirements compelling it to furnish technical information.

The request by du Pont to eliminate this requirement altogether is based, in part, upon the experience of the appellant companies. Du Pont emphasizes the fact that the titanium pigment industry has matured and that, since about May 1, 1940, the exchange of technical information between National Lead and du Pont has ceased. Also, the agreement between them which called for the exchange of technical information was amended January 1, 1941, to eliminate the provisions requiring such exchange. Finding of Fact 75. Du Pont argues that neither Zirconium, which entered the industry

in 1934, nor Virginia Chemical, which entered the industry in 1935, ever exchanged technical information with du Pont or received any from du Pont. However, Finding of Fact 84 shows that, as to National Lead in 1935—

> ". . . NL and Zirconium cross licensed each other under all patents in the titanium pigment field, then owned or thereafter acquired, and both parties agreed to exchange technical information and experience. . . .
>
> . . . . .
>
> "NL did render some engineering assistance to Zirconium in connection with the installation and use of its processes and imparted some technical information but frequently it refused to convey such technology to Zirconium on the ground that it was prevented by other agreements from so doing.
>
> . . . . .
>
> "On occasions before 1940 there was exchange of information between DP and NL relative to Zirconium's production."

Virginia Chemical was not licensed under National Lead's patents and apparently did not receive technical information from National Lead.

Finding of Fact 95, subparagraph 8, contains a further material finding, although this is disputed by du Pont:

> "The defendants NL and DP secured a monopoly on technical information relating to the manufacture and use of titanium pigments and certain apparatus and equipment necessary to the manufacture of certain titanium pigments to the exclusion and detriment of other producers now engaged in the titanium pigment business in the United States; when NL and DP ceased exchanging technical information, the titanium pigment business was a mature industry."

The requirement for the exchange of technical knowledge under the present decree is merely that included in paragraph 7, which is as follows:

> "During a period of three years from the date of this decree such license or reciprocal license may at the option of either party contain a provision for the imparting in writing at a reasonable charge, by the licensor to the licensee, of the methods and processes used by the former at the date of the license in its commercial practice under the licensed patents in connection with the production of titanium pigments."

The limited scope of this access to technical information is apparent. On the other hand, there is reason to believe that the knowledge which thus can be secured may be vital in giving value to the compulsory licenses which are a central feature of the decree. The information is put upon a basis comparable to that of a license. Just as a licensee is required to pay a uniform, reasonable royalty for the privilege of operating under the patent, so, also, he is required to pay a reasonable charge for the information as to methods and processes which may be important to him in his commercial practice under the licensed patents.

The need for technical information to accompany patent licenses in this field, at least where desired by a newcomer, is testified to repeatedly. If there be such a need, the reasonableness of this limited availability of it as stated in the decree is hard to deny. Findings of fact evidencing the importance of such information include the following:

> "NL wished to pool with DP all their patents and technical information relating to the manufacture or use of titanium pigments in the United States in

order to settle its patent controversies with DP and to obtain access to DP's patents and technical facilities and jointly to control and dominate the manufacture and sale of titanium pigments and compounds; . . . . Both TP and Krebs began to exchange extensively technical information relating to the manufacture and use of titanium pigments in 1932 and the information so exchanged related to much more than any alleged claims of patent infringement by either company. Blumenfeld and his foreign associates furnished technical aid and assistance to Krebs at its instance from August 1931 until the approximate date at which TP and Krebs commenced the exchange of technical information in 1932." Finding of Fact 72.

"DP and NL exchanged technical information relating in any manner to the manufacturing or use of titanium pigments or compounds from about April, 1932, until April, 1940." Finding of Fact 75.

"In entering into the agreement, Ex. E [the agreement of July 1, 1933], NL had several purposes:

1) For about a year prior to the making of Ex. E officials of NL had been concerned by the early expiration dates of many of the patents upon which NL relied. By exchanging patents and technology with DP, a large and powerful corporation, possessed of great research facilities, NL expected to strengthen the patent monopoly of NL and DP jointly, as against newcomers in the titanium pigment business.

. . . . .

"DP's purposes in entering into the agreement Ex. E were:

. . . . .

3) To obtain access to NL's technical experience and patents in the titanium pigment field as well

as the patents and the experience of NL's foreign associates.

. . . . .

"The necessary effects of the agreement Ex. E. and of DP assurances have been

1) The achievement of NL purposes.

2) The achievement of DP's purposes.

3) To give NL and DP together domination and control over the titanium pigment business in the U. S." Finding of Fact 79.

National Lead on this point now takes a middle ground. Apparently it supports the present provision in the decree and opposes its expansion as proposed by the Government. It expressly endorses the present provisions if the decree is amended so as to put the compulsory licenses on a royalty-free basis. If it approves this grant of access to technical information on that basis, it hardly can object to it in connection with licenses on a uniform, reasonable royalty basis.

The fact that this Court eliminated, without discussion, paragraph 24 (c) from the *Hartford-Empire* decree is not controlling here. *Hartford-Empire Co.* v. *United States, supra,* 413, 418. The fact that the violations of the Anti-trust Act may have been more reprehensible in that case than here is not persuasive because this provision is not and should not be punitive. The justification for the compulsory imparting of methods and processes rests upon its appropriateness and upon the necessity for it in providing an effective decree. In the *Hartford-Empire* decree, paragraph 24 (c) proposed to make available, to any licensee under paragraph 24 (a) (without royalties), or under paragraph 24 (b) (with reasonable royalties), at cost, plus a reasonable profit, "all drawings and patterns 'relating to the machinery or methods used in the manufacture of glassware' embodied in the licensed in-

ventions . . . ." *Id.* at 413–414. This Court, in that case, modified paragraphs 24 (a) and 24 (b) and deleted paragraph 24 (c). In the absence of a statement of this Court's reasons for the deletion of paragraph 24 (c), it cannot be assumed that, by such deletion, it announced its disapproval, in all future decrees, of provisions requiring the supplying of technical information to licensees at a reasonable charge.

It may well be that the District Court, in the present case, took into consideration the argument made by National Lead that, in this field, "The product claims cover practically all such improved titanium pigments; thus, of 23 different grades of titanium pigments (i. e. different products) sold by NL, 21 are covered by unexpired patents." Finding of Fact 37. Therefore, the imparting to the newcomer of methods and processes covered by the decree might be particularly important to him in entering this industry where substantially all the commercial products are covered either by process or product patents.

Du Pont has presented a strong case against compelling it to make further disclosure of its technical information to its leading competitor, National Lead, in this comparatively mature technical industry, especially since the agreement of 1941 between these companies expressly terminated their pre-existing agreement to supply such information. This argument does not apply, however, with comparable force, to the many other situations toward which this provision is directed. Under all the circumstances, and in view of the narrow limits written into the provision by the District Court, we believe that it represents a permissible exercise of judicial discretion. It is to be judged from the point of view of the public interest as well as that of the private interests concerned. That public interest requires that the court be permitted to produce the most effective and generally fair decree

that it can devise to give effect simultaneously to the antitrust laws and the patent laws.

This decision relies also on the permissible breadth of the District Court's discretion over the conditions under which technical information shall be required to be shared with the world. The attempt of the Government to throw the field of technical knowledge in the titanium pigment industry wide-open would reduce the competitive value of the independent research of the parties. It would discourage rather than encourage competitive research. It would be contrary to, rather than in conformity with, the policy of the patent laws now in force. Changes in the underlying policies of the patent laws frequently have been presented to Congress,[10] but Congress, by its failure to accept those changes, has added to, rather than detracted from, the strength of the present and traditional patent policies.

D. Request to omit the provision that National Lead and du Pont, respectively, may make the grant of any license by either of them to an applicant under the decree conditioned upon the reciprocal grant of a license by the applicant, at a reasonable royalty, under certain described patents owned or controlled by such applicant. This is urged by the Government in No. 89 and opposed by the appellant companies.

The District Court, during the conferences on the terms of the decree, summarized the need for this provision by a concrete illustration of what it suggested might happen without it. It said:

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[10] H. R. 20,388, 60th Cong., 1st Sess. (1908); H. R. 11,796, 61st Cong., 1st Sess. (1909); H. R. 2930, 62d Cong., 1st Sess. (1911); H. R. 16,828, 62d Cong., 2d Sess. (1912); H. R. 23,417, as amended, 62d Cong., 2d Sess. (1912); H. R. 1700, 63d Cong., 1st Sess. (1913); H. R. 14,865, 63d Cong., 2d Sess. (1914); S. 2783, 70th Cong., 1st Sess. (1928); S. 2491, 77th Cong., 2d Sess. (1942).

> "Otherwise you will arrive at a situation conceivably where Virginia Chemical would simply change places with du Pont in becoming the dominating factor in the industry under this extraordinary advantage of being able to take everything for itself and keeping everything that it has."

The District Court distinguished the present case from the *Hartford-Empire* case by showing that, in the latter, there had not been a similar reason for inserting the reciprocal requirement. In that case, the court was dealing with a licensor organization which had no use for patents except for the resulting control over licensing and, consequently, it would have derived no benefit from cross-licenses. The reciprocal clause includes an appropriate reference to future patents. As a five-year limit is put on the patents which will be subject to the compulsory license clause, under paragraphs 4 and 7 of the decree, so also the reciprocal licenses are limited by paragraph 7 to "patents covering titanium pigments or their manufacture, now issued or pending, or issued within five years from the date of this decree . . . ."

Here again, the provision is well within the discretion of the District Court in seeking means to fit the relief it grants to the needs of the particular case, always with due regard to the underlying public interest that is inherent in the antitrust and patent laws.[11]

E. Request to omit the six-months' time limit imposed by the decree upon the options of American Zirconium Corporation and Virginia Chemical Corporation, respectively, to secure certain licenses under the decree. This is urged by the Government in No. 89. It is not discussed

[11] Provisions for reciprocal licensing have been incorporated in consent decrees. See *United States* v. *General Elec. Co.*, CCH Trade Reg. Serv. ¶ 52,777 (D. C. N. J. 1942); *United States* v. *American Bosch Corp.*, CCH Trade Reg. Serv. ¶ 52,888 (D. C. S. D. N. Y. 1942).

here in the briefs of the other parties. The effective date of the decree of October 11, 1945, was stayed and suspended, by the order of MR. JUSTICE REED entered January 2, 1946, pending determination of the present appeals to this Court, so that more than six months already have passed since the original date of the decree without prejudicing the rights of the parties affected. In view of such suspension and of the new effective date to be given to the decree, pursuant to the order of this Court, there will be ample time for the exercise of this option under its terms.

F. Request to modify the language of the decree so as to eliminate language which, it is claimed, enjoins normal and usual business arrangements between the appellant companies and other producers of titanium products. This is urged by National Lead in No. 90 and is opposed by the Government. The precise request is to strike from paragraphs 5 and 6 of the decree certain language shown in the margin of this text in italics and to insert in paragraph 6 the word "producer" at the point there shown in capital letters.[12] National Lead contends that the can-

[12] " '5. The following agreements are hereby adjudged to be unlawful under Section 1 of the Sherman Act and each of them is hereby cancelled *and the defendants and each of them and all persons acting or claiming to act through, for or under them and all successors and subsidiaries of any of the defendants are hereby enjoined and restrained from the further performance of any of the provisions of said agreements and of any agreements amendatory thereof or supplemental thereto:* [followed by a list of the canceled agreements]'

" '6. Each of the defendants and each of their directors, officers, agents, employees, successors and subsidiaries and all persons acting, or claiming to act under, through or for them or any of them are hereby enjoined and restrained (*a*) *from entering into, adhering to, maintaining or furthering, directly or indirectly, or claiming any rights under any contract, agreement, understanding, plan or program among themselves, the co-conspirators, or with any other person, partnership or corporation, which has as its purpose or effect the*

cellation of the agreements, as ordered in paragraph 5, and the injunction, as ordered in paragraphs 5 and 6, against the further performance or the continuation or renewal of the unlawful provisions thereof (namely, division of sales or manufacturing territory, allocation of markets, limitation of imports or exports, restrictions on use, etc.) will insure complete and effective relief without subjecting National Lead or du Pont to undue hardship and losses. Accordingly, National Lead states that it asks for the changes here indicated in the interest of promoting trade and competition in titanium pigments.

We agree, however, with the Government's interpretation that paragraph 5 deals solely with the future enforceability of existing contracts and that the deletion of the words requested by National Lead is not necessary in order to remove barriers to future contracts. Paragraph 6 deals with future contracts. Clause (a) enjoins the parties from entering into or adhering to any agreement, plan or program "which has as its purpose or effect the continuing or renewing of any of the agreements listed in paragraph 5 . . . ." Since such agreements have been found to violate the Sherman Act, this provision imposes no unjustified restriction on National Lead's power to

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continuing or renewing of any of the agreements listed in paragraph 5 hereof; (b) from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, undertaking, plan or program with any other producer or dealer relating to titanium pigments which has as its purpose or effect (1) to divide sales or manufacturing territories, (2) to allocate markets, (3) to limit or prevent United States imports or exports, (4) to grant to any third party any market as its exclusive territory, (5) to keep any third party out of any market; provided, however, that nothing contained in this subdivision (b) of this paragraph 6 shall prohibit any normal and usual arrangements between any defendant and its directors, officers, employees, agents, subsidiaries, or any PRODUCER, dealer or distributor, whether or not a co-conspirator; (c) from restricting any purchaser of titanium pigments in the use thereof.' "

contract. We find also no sufficient basis for inserting the word "producer" as requested in paragraph 6. If National Lead later can demonstrate that its right of contract has been unduly restricted, it may, under the terms of the decree, apply to the District Court for a modification of the judgment.

G. Request to omit the requirement that National Lead and Titan Inc., within one year, shall present to the District Court, for its approval, a plan for divesting themselves of their stockholdings and other financial interests in certain foreign companies or for the purchase of the entire stockholdings and interests, direct or indirect, in such companies or any of them. To accomplish this, National Lead and Titan Inc., in No. 90, urge the deletion of paragraph 8 from the decree.[13] The Government opposes such deletion. The requirement imposed by paragraph 8 is merely that certain parties shall present to the District Court, within one year, a plan subject to its approval. That court, during the conferences on the terms of the decree, said: "In other words, the stock acquisitions were part and parcel of the territorial allocation agreements, and probably were a necessary element in the establishment of the territorial arrangement." We find ample reasons in the record for the action of the District Court in inserting paragraph 8 in the decree. It is related directly to the injunction against further performance of any of the provisions of the agreements listed in the decree as being in violation of the Sherman Act.

In thus disposing of the points relied upon in the respective appeals, the decree will remain as originally entered by the District Court, excepting only that, as a result of the dissolution of the stay and suspension of certain provisions of the decree contained in paragraphs

[13] For paragraph 8, see note 4, *supra.*

5, 8, 9, 10 and 11 thereof, which were granted pending determination of these appeals to this Court, the decree shall be deemed, for the purposes of those paragraphs and for the running of time thereunder, to take effect on the effective date of the mandate to be issued by this Court.

For the reasons set forth, the motion of the United States to amend its assignments of error is granted and the judgment of the District Court is

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE concur, dissenting in part.

I cannot agree that royalties should be charged on patents whose misuse has been so flagrant as to persuade us to approve compulsory licensing of all who desire to use the inventions. Nor do I think that the failure to provide for royalty-free licensing may be sustained as an exercise of the judicial discretion of the District Court. That would be the case if the District Court had been free to frame its decree unembarrassed by the ruling in *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 324 U. S. 570. In that case this Court modified an anti-trust decree so as to permit "reasonable" royalties on patents which had been ordered licensed without charge to all applicants. The language there used well might lead a court to the conclusion that royalty-free licensing is a remedy unacceptable as a matter of law.[1] In these

[1] "That a patent is property, protected against appropriation both by individuals and by government, has long been settled. In recognition of this quality of a patent the courts, in enjoining violations of the Sherman Act arising from the use of patent licenses, agree-

circumstances it is fair to assume that the action of the district judge in the present case was in deference to the *Hartford-Empire* rule rather than a reflection of his own judgment.[2]

The *Hartford-Empire* case presented the first instance, so far as I am aware, of the incorporation of a royalty-free licensing provision in an antitrust decree. Since the question is one of the greatest importance in the administration of the antitrust laws, and was not considered by the full Court,[3] I think it remains an open one, except as applied to the *Hartford-Empire* case, and we are free to consider whether that case should be followed under the facts and circumstances here presented.

In the *Hartford-Empire* case the Court stressed the fact that Congress had not specifically authorized forfeiture of patents in antitrust actions. It thought that "if, as we must assume on this record, a defendant owns valid patents, it is difficult to say that, however much in the past such defendant has abused the rights thereby conferred, it must now dedicate them to the public."

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ments, and leases, have abstained from action which amounted to a forfeiture of the patents.

"The Government urges that such forfeiture is justified by our recent decisions. . . . But those cases merely apply the doctrine that, so long as the patent owner is using his patent in violation of the antitrust laws, he cannot restrain infringement of it by others. We were not there concerned with the problem whether, when a violation of the antitrust laws was to be restrained and discontinued, the court could, as part of the relief, forfeit the patents of those who had been guilty of the violation. Lower federal courts have rightly refused to extend the doctrine of those cases to antitrust decrees by inserting forfeiture provisions." 323 U. S. pp. 415–416.

[2] He, indeed, stated on argument of a motion to determine reasonable royalties: "I would have liked to go along on the question of royalty-free patents, but I felt that I hadn't been given the green light on that."

[3] The *Hartford-Empire* decision was four to two on this point.

323 U. S. p. 415. The difficulty with that argument is that it proves too much. For the Court was at the same time sanctioning compulsory licensing, a most serious inroad on patent rights. The patent law gives to the patentee or his assignee the "exclusive right to make, use, and vend the invention or discovery . . . ." R. S. § 4884, 35 U. S. C. § 40. If the antitrust court could not interfere with patent rights, then it could not order licensing on any terms, for mandatory licensing is hardly consistent with exclusive rights. Again, if the failure of Congress specifically so to provide prevents a court from directing royalty-free licensing, then by the same token the failure to provide for compulsory licensing is a bar to that relief also.

It is thus clear that the criterion for choosing the appropriate antitrust remedies cannot be found in Congressional silence. The task of putting an end to monopolistic practices and restoring competition is one of magnitude and complexity; Congress has authorized use of the broadest powers of equity to cope with it. Under a statute providing more detailed remedies than do the antitrust laws, we have held that an equity court may mould additional ones. See *Porter* v. *Warner Holding Co.*, 328 U. S. 395. And its powers under the antitrust laws, though not specifically enumerated, are ample to thwart the plans of those who would build illegal empires, no matter how imaginative their undertakings or subtle their techniques. The power of the court is not limited to the restraint of future transgressions. The impairment of property rights is no barrier to the fashioning of a decree which will grant effective relief. *United States* v. *Union Pacific R. Co.*, 226 U. S. 470, 476–477. Divestiture or dissolution may be ordered in spite of hardship, inconvenience, or loss. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189. Devices or instrumentalities which may be used for legitimate ends may

nevertheless be outlawed entirely where they have been employed to build the monopoly or to create the restraint of trade. *United States* v. *Crescent Amusement Co., supra,* pp. 187–188. For the aim of the decree is not only to prevent a repetition of the unlawful practice but to undo what was done, to neutralize power unlawfully acquired, to prevent the defendants from acquiring any of the fruits of the condemned project. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 78.

If that is to be done here, I think we must do more than forbid further expansion of the existing monopolistic situation. The defendants have unlawfully acquired control and domination over this industry to the exclusion of competitors. This control was obtained in part through the unlawful acquisition and use of patents. As stated by the District Court, "These patents, through the agreements in which they are enmeshed and the manner in which they have been used, have, in fact, been forged into instruments of domination of an entire industry. The net effect is that a business, originally founded upon patents which have long since expired, is today less accessible to free enterprise than when it was first launched." 63 F. Supp. 513, 532. If defendants are allowed royalties on those patents, they do, indeed, reap dividends from their unlawful activities. As stated in a dissent in the *Hartford-Empire* case, "Every dollar hereafter, as well as heretofore, secured from licenses on the patents illegally aggregated in the combination's hands is money to which the participants are not entitled by virtue of the patent laws or others. It is the immediate product of the conspiracy." 323 U. S. p. 443.

But beyond that is the effect on the industry. Here defendants have been in a commanding and impregnable position. They have dominated the field and suppressed competition. If competition is to be restored strong measures must be adopted to provide the maximum op-

portunity for new ventures to compete with the established giants of the industry. It is here that the major vice of permitting royalties on the licensed patents becomes apparent. Each dollar of royalty adds a dollar to the costs of the new competitor and gives the established licensor another dollar with which to fight that competition. As stated by National Lead in its brief before this Court:

> "National and du Pont not only compete with their licensees but dominate the titanium industry. A requirement of uniform, reasonable royalties in no way frees competition because, no matter what the royalty may be, *in this industry* a licensee required to pay more than its licensor will be at a competitive disadvantage."
>
> . . . . .
>
> "Compulsory licensing alone would not be enough to restore the industry to a healthy, competitive condition. If National and du Pont are permitted to receive royalties on their existing patents, they will still be in position to dominate the industry."

If National Lead, the world's largest producer of titanium pigments, expects to find itself at a competitive disadvantage as a result of reasonable royalty licenses, what can be the probable fate of newcomers or existing independents of small stature? [4]

The decree approved by the Court stops short of granting effective relief. Divestiture is refused. Compulsory licensing is ordered, but only to those who are willing reciprocally to license use by the defendants of their patents.

[4] It must be remembered that one of the consequences of the unhealthy monopolistic condition in the industry has been a dearth of the ordinary patent litigation. The burden of testing potentially invalid patents will thus be placed on the first enterprise unwilling to pay the royalties.

In this additional respect the decree will enable the large established companies to strengthen their dominant position. To get the benefits of the decree an independent must give up one of his few competitive advantages—the exclusive right to use such patents as he may possess. These provisions, plus the additional requirement of royalties on the misused patents, even though those royalties be "reasonable," greatly increase the odds against restoration of competition in this industry.

Except as to the matters mentioned, I join in the opinion of the Court.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1947.

RODGERS *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 58. Argued October 16, 1947.—Decided November 10, 1947.

Penalties incurred under the Agricultural Adjustment Act of 1938, as amended, for marketing cotton in excess of farm marketing quotas fixed pursuant thereto, do not bear interest for the period between the date the penalties became due and the date judgment is entered therefor. Pp. 373–376.

158 F. 2d 835, reversed.

The District Court rendered judgment for penalties incurred under the Agricultural Adjustment Act of 1938, as amended, plus interest from the dates the penalties became due to the date of judgment. The Circuit Court of Appeals affirmed. 158 F. 2d 835. This Court granted certiorari. 331 U. S. 799. *Reversed,* p. 376.

Petitioner submitted on brief *pro se.*

Stanley M. Silverberg argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Sonnett, J. Stephen Doyle, Robert W. Ginnane* and *W. Carroll Hunter.*

MR. JUSTICE BLACK delivered the opinion of the Court.

In the years 1940, 1941 and 1942 the petitioner produced on his farms and sold more cotton than the quota allotted him under authority of Part IV of the Agricultural Adjustment Act of 1938 as amended. 52 Stat. 31, 55–60; 55 Stat. 203; 7 U. S. C. §§ 1281 *et seq.* The United States filed this suit against petitioner to recover money "penalties" to which § 348 [1] of the Act makes non-cooperating farmers "subject" who market cotton from their farms in excess of their quota. The District Court rendered judgment for $7,039.52 in penalties plus interest at 6% from the various dates the penalties became due to the date of judgment. The Sixth Circuit Court of Appeals affirmed. 158 F. 2d 835. The Fifth Circuit had previously decided that no interest is allowable on such penalties prior to judgment. *United States* v. *West Texas*

[1] Section 348 of the 1938 Act reads as follows:

"Any farmer who, while farm marketing quotas are in effect, markets cotton in excess of the farm marketing quota for the marketing year for the farm on which such cotton was produced, shall be subject to the following penalties with respect to the excess so marketed: 2 cents per pound if marketed during the first marketing year when farm marketing quotas are in effect; and 3 cents per pound if marketed during any subsequent year, except that the penalty shall be 2 cents per pound if cotton of the crop subject to penalty in the first year is marketed subject to penalty in any subsequent year." 52 Stat. 59; 7 U. S. C. § 1348.

The 1941 amendment required computation of the penalty on the following basis:

"That notwithstanding the provisions of the Agricultural Adjustment Act of 1938, as amended (hereinafter referred to as the Act)—

. . . . .

"(9) The marketing penalty for cotton and rice produced in the calendar year in which any marketing year begins (if beginning with or after the 1941–1942 marketing year) shall be at a rate equal to 50 per centum of the basic rate of the loan for cooperators for such marketing year under section 302 of the Act and this resolution." 55 Stat. 203, 205; 7 U. S. C. (Supp. V, 1946), § 1330 (9).

Cottonoil Co., 155 F. 2d 463. We therefore granted certiorari limited to this single question. 331 U. S. 799.

Since penalties under the Agricultural Adjustment Act are imposed under an Act of Congress, they bear interest only if and to the extent such interest is required by federal law. *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 714–716; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 295–297. There is no language in the Agricultural Adjustment Act or in any other act of Congress which specifically allows or forbids interest on penalties such as these prior to judgment.[2] But the failure to mention interest in statutes which create obligations has not been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest. *Billings* v. *United States*, 232 U. S. 261, 284–288. For in the absence of an unequivocal prohibition of interest on such obligations, this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in the light of general principles deemed relevant by the Court. See, *e. g.*, *Royal Indemnity Co.* v. *United States, supra; Board of Comm'rs* v. *United States*, 308 U. S. 343.

As our prior cases show, a persuasive consideration in determining whether such obligations shall bear interest is the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed. And this Court has generally weighed these relative equities in accordance with the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained. See,

[2] 28 U. S. C. 811 does allow interest on district court judgments in all civil cases where interest would be allowed by the law of the state in which the court is held.

e. g., Brooklyn Savings Bank v. *O'Neil, supra; United States* v. *North Carolina,* 136 U. S. 211, 216; *Funkhouser* v. *J. B. Preston Co.,* 290 U. S. 163, 168.

The contention is hardly supportable that the Federal Government suffers money damages or loss, in the common law sense, to be compensated for by interest, when one convicted of a crime fails promptly to pay a money fine assessed against him. The underlying theory of that penalty is that it is a punishment or deterrent and not a revenue-raising device; unlike a tax, it does not rest on the basic necessity of the Government to collect a carefully estimated sum of money by a particular date in order to meet its anticipated expenditures. For the foregoing reasons this Court's holding that a criminal penalty does not bear interest, *Pierce* v. *United States,* 255 U. S. 398, 405–406, is consistent with its holding that the Government does suffer recoverable damages if a taxpayer fails to pay taxes when due and is therefore equitably entitled to interest. *Billings* v. *United States, supra.* Furthermore, denial of interest on criminal penalties might well be rested on judicial unwillingness to expand punishment fixed for a criminal act beyond that which the plain language of the statute authorizes.

Viewed in light of these principles, we think that the question of interest on the penalties provided in the Agricultural Adjustment Act on non-cooperators should be governed by the rule previously applied by this Court to criminal fines. Although Congress neither wholly prohibited nor made it a crime for a farmer to market cotton in excess of his quota, still it imposed sanctions upon non-cooperators analogous to those of the criminal law. The purpose of Congress in requiring payment of penalties into the Federal Treasury for marketing above the allotted amount was not to raise revenue for the Government's financial advantage but to deter farmers from planting and marketing more than their quotas. In fact, the whole

philosophy of the Agricultural Adjustment Act is based on the theory that the public will be benefited, not damaged, if farmers produce and market within these quotas, thereby avoiding the payment of penalties. The framework of the Act itself, both as originally passed and as amended, and the reports of the congressional committees that drafted it, show a prime purpose to limit national and individual farm production and marketing to the quotas allotted, and show that the penalties were solely intended to deter farmers from exceeding those quotas.[3] After careful consideration the original 1938 Act was amended in 1941 for the express purpose of making the farmers' penalties higher, because the prior penalties had not in practice proved a severe enough sanction to reduce production the desired amount. The House committee said in its report on the 1941 amendment:

> "As in the case of corn and wheat, it appears that the present rate of penalty [for cotton] is too low to result in the desired adjustment of the amount to be marketed during the marketing year." [4]

And with reference to wheat and corn, the committee had reported:

> "With the higher penalties, it is expected that growers generally will store the farm marketing excesses rather than pay the penalty and place the commodity on the market at the time when it is not needed." [5]

In addition to these high penalties, the Act, as originally passed and as amended, wholly deprived non-cooperators like petitioner of substantial benefits authorized by the

[3] Sen. Rep. No. 1295, 75th Cong., 2d Sess., 6 (1937); H. R. Rep. No. 1645, 75th Cong., 2d Sess., 1, 36 (1937); H. R. Rep. No. 1767, 75th Cong., 3d Sess., 90 (1938); H. R. Rep. No. 364, 77th Cong., 1st Sess., 3 (1941).

[4] H. R. Rep. No. 364, 77th Cong., 1st Sess., 3 (1941).

[5] *Id.* at 2.

Soil Conservation Act and of a large part of the loan value provided by the Government for cotton farmers who did not exceed their quota.[6] We are unable to say that it would be consistent with the congressional purpose for the courts to add interest to these very substantial penalties already imposed upon non-cooperating farmers.[7]

Reversed.

MR. JUSTICE BURTON, dissenting.

The sums due to the Government are fixed obligations with fixed times of payment. They are debts incidental to the lawful conduct of business and not penalties imposed for violations of law. Accordingly, the debtor should pay and the Government should collect interest on them, as on other debts to the Government, to compensate for delays in their payment. The Agricultural Adjustment Act expressly fixed the amount and time for payment of the sums in question although it did not expressly mention the accrual or denial of interest on delayed payments. However, the federal rule is well-established that, without express statutory reference to the subject of interest, interest is due to the Government on unpaid statutory debts after they have become due in fixed amounts at fixed times, such as those for customs duties and taxes.

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[6] §§ 302 (c), 349 of the Agricultural Adjustment Act of 1938; 52 Stat. 43, 59; 7 U. S. C. § 1302 (c), 1349.

[7] See as to penalties in general, *Helwig* v. *United States*, 188 U. S. 605; *United States* v. *Chouteau*, 102 U. S. 603; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 401; *Helvering* v. *Mitchell*, 303 U. S. 391; *United States* v. *Childs*, 266 U. S. 304; *Rodgers* v. *United States*, 138 F. 2d 992. For decisions of state courts which grant interest on statutory obligations but disallow interest on statutory penalties, see cases collected in Note, 27 Ann. Cas. 1913 B, 853, 855–856; Note, 28 L. R. A. (N. S.) 1, 74–75 (1910); 1 *Sutherland, Damages*, § 330 (1916).

"Thus, as to the necessity for a statute it was long ago here decided in view of the true conception of interest, that a statute was not necessary to compel its payment where in accordance with the principles of equity and justice in the enforcement of an obligation, interest should be allowed." *Billings* v. *United States,* 232 U. S. 261, 286.[1]

This statement was made by Chief Justice White, speaking for the Court, in a case upholding the collection of interest on a tax payable to the United States, under a statute that contained no reference to the accrual of interest.

The requirement that interest be paid to the Government upon the debts due to it under the Agricultural Adjustment Act not only is "in accordance with the principles of equity and justice" called for by the general rule just stated but the accrual of interest in favor of the Government under that Act also is thoroughly consistent with, and helpful to, the accomplishment of its purpose of price and crop control. The disallowance of such interest is equally inconsistent with, and a limitation upon, the accomplishment of that purpose.

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[1] "The conflict between the systems is pronounced and fundamental. In the one, the state rule, except as to contract, no interest without statute; in the United States rule, interest in all cases where equitably due unless forbidden by statute. In one no suit for taxes as a debt without express statutory authority, in the other the right to sue for taxes as for a debt in every case where not prohibited by statute.

"From this review it results that the doctrine as to non-liability to pay interest for taxes which have become due which prevails in the state courts is absolutely in conflict with the doctrine applied to the same subject in this court and cannot now be made the rule without repudiating settled principles which have been here applied for many years in various aspects and without in effect disregarding the sanction either expressly or impliedly given by Congress to such rules. . . . Under this condition we can see no ground for departing from the rule which the cases enforced, ..." *Billings* v. *United States, supra,* at pp. 287–288.

The defaulted payments on which interest is claimed here became due because of the petitioner's sales of cotton in excess of his statutory quota and such payments are referred to in the Act as "penalties." However, the context shows that, instead of being criminal penalties imposed for violations of the law, they are "marketing penalties" consisting of governmental charges added to the presale expenses of the seller, especially to help keep prices and sales in line with the economic program of the Government. Satisfaction of these charges is made a condition of the seller's *legal* right to sell his excess cotton at a particular time. They are the very opposite of penalties imposed for making *illegal* sales. They are lawful, "ordinary and necessary" business expenses incidental to his sales. They are deductible from his taxable income, whereas criminal penalties are not deductible from taxable income.[2] These "marketing penalties" are also unlike

[2] "Although the amounts paid by the producer are designated as penalties in the statute and regulations referred to above, it appears that the purpose of the statute is to place a charge against the producer on the sale of the commodity which was produced in excess of the quota. The statute does not prohibit producers from producing the commodity, but merely places a charge on the excess of the quota produced and marketed. The so-called penalties are not paid for the violation of, or noncompliance with, a statute or regulation or for any illegal act, but are paid for the purpose of legalizing the marketing of the excess production, which with this condition the statute sanctions, and are, therefore, made in compliance with the statute. It is accordingly the view of this office that the so-called penalties are deductible from gross income under section 23 (a) of the Internal Revenue Code in computing net income as ordinary and necessary expenses incurred in carrying on a trade or business." I. T. 3530, 1942–1 Cum. Bull., 43, 45–46.

Payments in the nature of penalties for the *violation* of federal or state statutes in the ordinary use of that term are not deductible. *Commissioner* v. *Longhorn Portland Cement Co.*, 148 F. 2d 276; *Burroughs Bldg. Material Co.* v. *Commissioner*, 47 F. 2d 178; *Great Northern R. Co.* v. *Commissioner*, 40 F. 2d 372.

criminal penalties in that they may be paid in advance, deposited in escrow or security given for their payment. When that is done, the seller may, in his usual manner, dispose of the excess-quota cotton to which the payments relate. Cotton marketing quota regulations, 1942–43, § 722.440 (c), 7 Fed. Reg. 4369; *id.* § 722.453, 7 Fed. Reg. 4374. These debts are more comparable to customs duties than to criminal penalties.[3] Apparently these charges are collectible by the Government only by civil proceedings and liability for them need not be established beyond a reasonable doubt. *Usher* v. *United States,* 146 F. 2d 369, 371.

The payments are imposed in part for revenue purposes although especially as a means of inducing cotton owners to control their sales of cotton in interstate and foreign commerce in accordance with the economic policies of the Government. During its consideration of the Agricultural Adjustment Act, Congress declined to adopt a proposal to treat such sales as in violation of law[4] and

[3] Customs duties are personal debts to the United States. *Meredith* v. *United States,* 13 Pet. 486, 493. Interest is collectible on the debt to the Government arising out of the imposition of customs duties. *United States* v. *Mexican International R. Co.,* 154 F. 519. It is common knowledge that, while some customs duties or tariffs may have been levied "for revenue only," many have been enacted as "protective tariffs" in which a primary interest of the Government was, as under the Agricultural Adjustment Act, to restrict the flooding of the market with certain goods at a certain time. The collection of interest on delayed payments of customs duties would bear a similar relation of helpfulness to the Government's economic and financial policies as would the collection of interest on defaulted market penalties. The Government, under the Agricultural Adjustment Act, not only seeks to restrict excess-quota sales, but it also seeks to add to its current cash resources from which it proposes to make the loans to cooperating producers which are authorized by the Act.

[4] § 33, H. R. 8505, 75th Cong., 2d Sess. (1937), as passed by the Senate but later rejected.

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adopted instead the policy recognizing such sales as lawful sales conditioned upon payment to the Government of the charges here being considered. Financial burdens which may be postponed without the payment of interest are much less burdensome than those that are not postponable or that are subject to the accrual of interest during their postponement. The omission of the usual interest charge on postponed marketing penalties therefore decreases the force of the Act as a deterring factor and runs counter to the special purpose of the Act.

For these reasons, the judgment of the Circuit Court of Appeals, affirming that of the District Court allowing interest from the date of default, should have been affirmed.

MR. JUSTICE RUTLEDGE joins in this dissent.

FEDERAL CROP INSURANCE CORP. *v.* MERRILL ET AL., DOING BUSINESS AS MERRILL BROS.

CERTIORARI TO THE SUPREME COURT OF IDAHO.

No. 45. Argued October 16, 1947.—Decided November 10, 1947.

1. The Federal Crop Insurance Corporation, a wholly government-owned corporation created by the Federal Crop Insurance Act to insure producers of wheat against crop losses due to unavoidable causes, including drought, promulgated and published in the Federal Register regulations specifying the conditions on which it would insure wheat crops, including a provision making "spring wheat which has been reseeded on winter wheat acreage" ineligible for insurance. Without actual knowledge of this provision, a wheat grower applied to the Corporation's local agent for insurance on his wheat crop, informing the local agent that most of it was being reseeded on winter wheat acreage; but this information was not included in the written application. The Corporation accepted the application subject to the terms of its regulations. Most of the crop on the reseeded acreage was destroyed by drought. *Held:* The Corporation is not liable for the loss on the reseeded acreage. Pp. 381–386.

2. Having been published in the Federal Register, the Wheat Crop Insurance Regulations are binding on all who seek to come within the Federal Crop Insurance Act, regardless of lack of actual knowledge of the regulations. P. 385.

67 Idaho 196, 174 P. 2d 834, reversed.

The Supreme Court of Idaho affirmed a judgment against the Federal Crop Insurance Corporation for loss of a wheat crop which had been reseeded on winter wheat acreage. 67 Idaho 196, 174 P. 2d 834. This Court granted certiorari. 331 U. S. 798. *Reversed,* p. 386.

Harry I. Rand argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Ford* and *Paul A. Sweeney.*

A. A. Merrill argued the cause for respondent. With him on the brief was *O. A. Johannesen.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

We brought this case here because it involves a question of importance in the administration of the Federal Crop Insurance Act. 331 U. S. 798.

The relevant facts may be briefly stated. Petitioner (hereinafter called the Corporation) is a wholly Government-owned enterprise, created by the Federal Crop Insurance Act, as an "agency of and within the Department of Agriculture." Sec. 503 of Chapter 30, Act of February 16, 1938, 52 Stat. 72, 7 U. S. C. § 1503, as amended. To carry out the purposes of the Act, the Corporation, "Commencing with the wheat . . . crops planted for harvest in 1945" is empowered "to insure, upon such terms and conditions not inconsistent with the provisions of this title as it may determine, producers of wheat . . . against loss in yields due to unavoidable causes, including drought . . . ." 52 Stat. 74, § 508 (a) as

amended, 55 Stat. 255, in turn amended by the Act of December 23, 1944, Chapter 713, 58 Stat. 918, 7 U. S. C. (Supp. V, 1946), § 1508 (a). In pursuance of its authority, the Corporation on February 5, 1945, promulgated its Wheat Crop Insurance Regulations, which were duly published in the Federal Register on February 7, 1945. 10 Fed. Reg. 1586.

On March 26, 1945, respondents applied locally for insurance under the Federal Crop Insurance Act to cover wheat farming operations in Bonneville County, Idaho. Respondents informed the Bonneville County Agricultural Conservation Committee, acting as agent for the Corporation, that they were planting 460 acres of spring wheat and that on 400 of these acres they were reseeding on winter wheat acreage. The Committee advised respondents that the entire crop was insurable, and recommended to the Corporation's Denver Branch Office acceptance of the application. (The formal application itself did not disclose that any part of the insured crop was reseeded.) On May 28, 1945, the Corporation accepted the application.

In July, 1945, most of the respondents' crop was destroyed by drought. Upon being notified, the Corporation, after discovering that the destroyed acreage had been reseeded, refused to pay the loss, and this litigation was appropriately begun in one of the lower courts of Idaho. The trial court rejected the Corporation's contention, presented by a demurrer to the complaint, that the Wheat Crop Insurance Regulations barred recovery as a matter of law. Evidence was thereupon permitted to go to the jury to the effect that the respondents had no actual knowledge of the Regulations, insofar as they precluded insurance for reseeded wheat, and that they had in fact been misled by petitioner's agent into believing that spring wheat reseeded on winter wheat acreage was insurable by the Corporation. The jury

returned a verdict for the loss on all the 460 acres and the Supreme Court of Idaho affirmed the resulting judgment. 67 Idaho 196, 174 P. 2d 834. That court in effect adopted the theory of the trial judge, that since the knowledge of the agent of a private insurance company, under the circumstances of this case, would be attributed to, and thereby bind, a private insurance company, the Corporation is equally bound.

The case no doubt presents phases of hardship. We take for granted that, on the basis of what they were told by the Corporation's local agent, the respondents reasonably believed that their entire crop was covered by petitioner's insurance. And so we assume that recovery could be had against a private insurance company. But the Corporation is not a private insurance company. It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures.[1] Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the man-

[1] Judging from the legislative history of the Act, the Government engaged in crop insurance as a pioneer. Private insurance companies apparently deemed all-risk crop insurance too great a commercial hazard. See Report and Recommendations of the President's Committee on Crop Insurance, H. Doc. No. 150, 75th Cong., 1st Sess., pp. 2–4, 11–12; H. R. Rep. No. 1479, 75th Cong., 1st Sess., p. 2; 81 Cong. Rec. 2866, 2867, 2887, 2891, 2893, 2895; Hearings before a Subcommittee of the Senate Committee on Agriculture and Forestry on S. 1397, 75th Cong., 1st Sess., 125, 185. But this does not affect the legal issues. It merely underscores the fact that the undertaking by the Government is not an ordinary commercial undertaking, and thereby reenforces the conclusion that the rules of law whereby private insurance companies are rendered liable for the acts of their agents are not bodily applicable to a Government agency like the Corporation, unless Congress has so provided.

ner in which the Government conducts it. The Government may carry on its operations through conventional executive agencies or through corporate forms especially created for defined ends. See *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 390. Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority. See, e. g., *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409; *United States* v. *Stewart*, 311 U. S. 60, 70, and see, generally, *The Floyd Acceptances*, 7 Wall. 666.

If the Federal Crop Insurance Act had by explicit language prohibited the insurance of spring wheat which is reseeded on winter wheat acreage, the ignorance of such a restriction, either by the respondents or the Corporation's agent, would be immaterial and recovery could not be had against the Corporation for loss of such reseeded wheat. Congress could hardly define the multitudinous details appropriate for the business of crop insurance when the Government entered it. Inevitably "the terms and conditions" upon which valid governmental insurance can be had must be defined by the agency acting for the Government. And so Congress has legislated in this instance, as in modern regulatory enactments it so often does, by conferring the rule-making power upon the agency created for carrying out its policy. See § 516 (b), 52 Stat. 72, 77, 7 U. S. C. § 1516 (b). Just as everyone is charged with knowledge of the United States Statutes at Large,

Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents. 49 Stat. 502, 44 U. S. C. § 307.

Accordingly, the Wheat Crop Insurance Regulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance. The oft-quoted observation in *Rock Island, Arkansas & Louisiana Railroad Co.* v. *United States,* 254 U. S. 141, 143, that "Men must turn square corners when they deal with the Government," does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury. The "terms and conditions" defined by the Corporation, under authority of Congress, for creating liability on the part of the Government preclude recovery for the loss of the reseeded wheat no matter with what good reason the respondents thought they had obtained insurance from the Government. Indeed, not only do the Wheat Regulations limit the liability of the Government as if they had been enacted by Congress directly, but they were in fact incorporated by reference in the application,[2] as specifically required by the Regulations.[3]

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[2] "H. Acceptance by the Federal Crop Insurance Corporation.—It is understood and agreed that upon acceptance of the application by a duly authorized representative of the Corporation as evidenced by his approval below, the insurance contract shall be in effect, provided the application has been submitted in accordance with the provisions of the application and the applicable Wheat Crop Insurance Regulations. It is further understood and agreed that the accepted application and the applicable Wheat Crop Insurance Regulations, including any amendments thereto, constitute the contract between the Corporation and the insured."

[3] "§ 414.3 *Acceptance of applications by the Corporation.* (a) Upon acceptance of an application by a duly authorized representa-

We have thus far assumed, as did the parties here and the courts below, that the controlling regulation in fact precluded insurance coverage for spring wheat reseeded on winter wheat acreage. It explicitly states that the term "wheat crop shall not include . . . winter wheat in the 1945 crop year, and spring wheat which has been reseeded on winter wheat acreage in the 1945 crop year." (Sec. 414.37 (v) of Wheat Crop Insurance Regulations, 10 Fed. Reg. 1591.) The circumstances of this case tempt one to read the regulation, since it is for us to read it, with charitable laxity. But not even the temptations of a hard case can elude the clear meaning of the regulation. It precludes recovery for "spring wheat which has been reseeded on winter wheat acreage in the 1945 crop year." Concerning the validity of the regulation, as "not inconsistent with the provisions" of the Federal Crop Insurance Act, no question has been raised.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE dissent.

MR. JUSTICE JACKSON, dissenting.

I would affirm the decision of the court below. If crop insurance contracts made by agencies of the United States Government are to be judged by the law of the State in which they are written, I find no error in the court below.

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tive of the Corporation, the insurance contract shall be in effect, provided such application is submitted in accordance with the provisions of the application and of these regulations, including any amendments thereto." 10 Fed. Reg. 1586. The regulation defined "insurance contract" as "the contract of insurance entered into between the applicant and the Corporation by virtue of the application for insurance and these regulations and any amendments thereto." 10 Fed. Reg. 1591.

If, however, we are to hold them subject only to federal law and to declare what that law is, I can see no reason why we should not adopt a rule which recognizes the practicalities of the business.

It was early discovered that fair dealing in the insurance business required that the entire contract between the policyholder and the insurance company be embodied in the writings which passed between the parties, namely, the written application, if any, and the policy issued. It may be well enough to make some types of contracts with the Government subject to long and involved regulations published in the Federal Register. To my mind, it is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops. Nor am I convinced that a reading of technically-worded regulations would enlighten him much in any event.

In this case, the Government entered a field which required the issuance of large numbers of insurance policies to people engaged in agriculture. It could not expect them to be lawyers, except in rare instances, and one should not be expected to have to employ a lawyer to see whether his own Government is issuing him a policy which in case of loss would turn out to be no policy at all. There was no fraud or concealment, and those who represented the Government in taking on the risk apparently no more suspected the existence of a hidden regulation that would render the contract void than did the policyholder. It is very well to say that those who deal with the Government should turn square corners. But

there is no reason why the square corners should constitute a one-way street.

The Government asks us to lift its policies out of the control of the States and to find or fashion a federal rule to govern them. I should respond to that request by laying down a federal rule that would hold these agencies to the same fundamental principles of fair dealing that have been found essential in progressive states to prevent insurance from being an investment in disappointment.

MR. JUSTICE DOUGLAS joins in this opinion.

DELGADILLO *v.* CARMICHAEL, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 63. Argued October 22, 1947.—Decided November 10, 1947.

More than five years after he had entered the United States legally, an alien shipped as a seaman on an American ship bound from Los Angeles to New York. The ship was torpedoed and he was rescued and taken to Havana, whence he was returned to the United States. He was convicted of a crime involving moral turpitude committed within five years thereafter and was sentenced to imprisonment for a term of one year to life. Proceedings were instituted for his deportation. *Held:* He is not subject to deportation, since his return to the United States was not "the entry of the alien to the United States" within the meaning of § 19 (a) of the Immigration Act of February 5, 1917, as amended. Pp. 389–391.

159 F. 2d 130, reversed.

On a petition for a writ of habeas corpus, the District Court discharged a resident alien who was being held for deportation under § 19 (a) of the Immigration Act of February 5, 1917, as amended, 8 U. S. C. § 155 (a). The Circuit Court of Appeals reversed. 159 F. 2d 130. This

Court granted certiorari. 331 U. S. 801. William A. Carmichael was substituted for Albert Del Guercio as respondent. 332 U. S. 806. *Reversed,* p. 391.

Fred Okrand argued the cause for petitioner. With him on the brief was *A. L. Wirin.*

Robert W. Ginnane argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Robert S. Erdahl* and *Sheldon E. Bernstein.*

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner is detained by respondent under a deportation order, the validity of which is challenged by a petition for a writ of habeas corpus. The District Court granted the petition and discharged petitioner. The Circuit Court of Appeals reversed. 159 F. 2d 130. The case is here on a petition for a writ of certiorari which we granted because of the seeming conflict between the decision below and *Di Pasquale* v. *Karnuth,* 158 F. 2d 878, from the Second Circuit Court of Appeals.

Petitioner is a Mexican citizen who made legal entry into this country in 1923 and resided here continuously until 1942. In June of that year, when this nation was engaged in hostilities with Germany and Japan, he shipped out of Los Angeles on an intercoastal voyage to New York City as a member of the crew of an American merchant ship. The ship was torpedoed after passing through the Panama Canal on its way to New York City. Petitioner was rescued and taken to Havana, Cuba, where he was taken care of by the American Consul for about one week. On July 19, 1942, he was returned to the United States through Miami, Florida, and thereafter continued to serve as a seaman in the merchant fleet of this nation. In March 1944 he was convicted in California of second-

degree robbery and sentenced to imprisonment for a term of one year to life. While he was confined in the California prison, proceedings for deportation were commenced against him under § 19 (a) of the Immigration Act of February 5, 1917, 39 Stat. 874, as amended 54 Stat. 671, 8 U. S. C. § 155 (a).

That section provides in part:

> ". . . any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States . . . shall, upon the warrant of the Attorney General, be taken into custody and deported. . . ."

Those requirements for deportation are satisfied if petitioner's passage from Havana, Cuba, to Miami, Florida, on July 19, 1942, was "the entry of the alien to the United States" within the meaning of the Act.

In *United States ex rel. Claussen* v. *Day,* 279 U. S. 398, *United States ex rel. Stapf* v. *Corsi,* 287 U. S. 129, and *United States ex rel. Volpe* v. *Smith,* 289 U. S. 422, there is language which taken from its context suggests that every return of an alien from a foreign country to the United States constitutes an "entry" within the meaning of the Act. Thus in the *Smith* case it was stated, 289 U. S. p. 425, that "any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one" is such an "entry." But those were cases where the alien plainly expected or planned to enter a foreign port or place. Here he was catapulted into the ocean, rescued, and taken to Cuba. He had no part in selecting the foreign port as his destination. His itinerary was forced on him by wholly fortuitous circumstances. If, nonetheless, his return to this country was an "entry" into the United States within the meaning of the Act, the

law has been given a capricious application as *Di Pasquale* v. *Karnuth, supra,* suggests.

In that case an alien traveled between Buffalo and Detroit on a railroad which, unknown to him, passed through Canada. He was asleep during the time he was in transit through Canada and was quite unaware that he had left or returned to this country. The court refused to hold that the alien had made an "entry," for to do so would impute to Congress a purpose to subject aliens "to the sport of chance." 158 F. 2d 879. In this case petitioner, of course, chose to return to this country, knowing he was in a foreign place. But the exigencies of war, not his voluntary act, put him on foreign soil.[1] It would indeed be harsh to read the statute so as to add the peril of deportation to such perils of the sea. We might as well hold that if he had been kidnapped and taken to Cuba, he made a statutory "entry" on his voluntary return. Respect for law does not thrive on captious interpretations.

Deportation can be the equivalent of banishment or exile. See *Bridges* v. *Wixon,* 326 U. S. 135, 147. The stakes are indeed high and momentous for the alien who has acquired his residence here. We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme.

Other grounds are now sought to be advanced for the first time in support of the deportation order. They are not open on the record before us.

Reversed.

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[1] If his intercoastal voyage had continued without interruption, it is clear that he would not have made an "entry" when he landed at its termination. *United States ex rel. Claussen* v. *Day, supra,* p. 401.

INTERNATIONAL SALT CO., INC. *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 46. Argued October 16, 1947.—Decided November 10, 1947.

1. It is violative *per se* of § 1 of the Sherman Act and § 3 of the Clayton Act for a corporation engaged in interstate commerce in salt, of which it is the country's largest producer for industrial uses, and which also owns patents on machines for utilization of salt products, to require lessees of such machines to use only the corporation's unpatented products in them. Pp. 394–396.
2. The defendant in a civil action to enjoin violations of § 1 of the Sherman Act and § 3 of the Clayton Act having admitted practices which were unlawful and unreasonable *per se*, the District Court was justified in granting summary judgment under Rule 56 of the Rules of Civil Procedure. P. 396.
3. Agreements which "tend to create a monopoly" being forbidden, it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement. P. 396.
4. A requirement in a lease of patented machines that the lessee use only the lessor's unpatented products in them is not saved from unreasonableness and from the tendency to monopoly by provisions entitling the lessee to the benefit of any general price reduction in the lessor's products and permitting the lessee to purchase the products in the open market if the lessor fails to furnish them at a price equal to the lowest price offered by any competitor. Pp. 396–397.
5. Rules for use of leased machinery must not be disguised restraints of free competition, though they may set reasonable standards which all suppliers must meet. Pp. 397–398.
6. The fact that they have not been included in all leases and have not always been enforced when included does not justify the general use of clauses requiring lessees of patented machines to use the lessor's unpatented products therein. P. 398.
7. In enjoining the practice of leasing patented machines on condition that the lessees would use only the lessor's unpatented products

in them, it was not improper for the District Court to include a requirement that such machines be leased, sold or licensed to all applicants on non-discriminatory terms and conditions—especially where the Court retained jurisdiction to consider applications for the amendment, modification or termination of any provision of the decree. Pp. 398–402.

6 F. R. D. 302, affirmed.

On the Government's motion for summary judgment under Rule 56 of the Rules of Civil Procedure, the District Court enjoined violations of § 1 of the Sherman Act and § 3 of the Clayton Act. 6 F. R. D. 302. On direct appeal to this Court, *affirmed*, p. 402.

Lemuel Skidmore argued the cause and filed a brief for appellant.

Robert L. Stern argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Sonnett, John C. Stedman* and *George L. Derr.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

The Government brought this civil action to enjoin the International Salt Company, appellant here, from carrying out provisions of the leases of its patented machines to the effect that lessees would use therein only International's salt products. The restriction is alleged to violate § 1 of the Sherman Act,[1] and § 3 of the Clayton Act.[2] Upon appellant's answer and admissions of fact, the Government moved for summary judgment under Rule 56 of the Rules of Civil Procedure, upon the ground that no issue as to a material fact was presented and

[1] 26 Stat. 209, § 1, 15 U. S. C. § 1.

[2] 38 Stat. 730, § 3, 15 U. S. C. § 14.

that, on the admissions, judgment followed as matter of law. Neither party submitted affidavits. Judgment was granted [3] and appeal was taken directly to this Court.[4]

It was established by pleadings or admissions that the International Salt Company is engaged in interstate commerce in salt, of which it is the country's largest producer for industrial uses. It also owns patents on two machines for utilization of salt products. One, the "Lixator," dissolves rock salt into a brine used in various industrial processes. The other, the "Saltomat," injects salt, in tablet form, into canned products during the canning process. The principal distribution of each of these machines is under leases which, among other things, require the lessees to purchase from appellant all unpatented salt and salt tablets consumed in the leased machines.

Appellant had outstanding 790 leases of an equal number of "Lixators," all of which leases were on appellant's standard form containing the tying clause [5] and other

[3] 6 F. R. D. 302.

[4] Probable jurisdiction noted April 28, 1947.

[5] "It is further mutually agreed that the said Lixate Process Dissolver shall be installed by and at the expense of said Lessee and shall be maintained and kept in repair during the term of this lease by and at the expense of said Lessee; that the said Lixate Process Dissolver shall be used for dissolving and converting into brine only those grades of rock salt purchased by the Lessee from the Lessor at prices and upon terms and conditions hereafter agreed upon, PROVIDED:

"If at any time during the term of this lease a general reduction in price of grades of salt suitable for use in the said Lixate Process Dissolver shall be made, said Lessee shall give said Lessor an opportunity to provide a competitive grade of salt at any such competitive price quoted, and in case said Lessor shall fail or be unable to do so, said Lessee, upon continued payment of the rental herein agreed upon, shall have the privilege of continued use of the said equipment with salt purchased in the open market, until such time as said

standard provisions; of 50 other leases which somewhat varied the terms, all but 4 contained the tying clause. It also had in effect 73 leases of 96 "Saltomats," all containing the restrictive clause.[6] In 1944, appellant sold approximately 119,000 tons of salt, for about $500,000, for use in these machines.

The appellant's patents confer a limited monopoly of the invention they reward. From them appellant derives a right to restrain others from making, vending or using the patented machines. But the patents confer no right

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Lessor shall furnish a suitable grade of salt at the said competitive price."

It further provides as follows:

". . . should said Lessee fail to pay promptly the aforesaid rental, or shall at any time discontinue purchasing its requirements of salt from said Lessor, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon 30 days' written notice of intention to do so, to remove the said Lixate Process Dissolver from the possession of said Lessee."

[6] "It is further mutually agreed that the said Salt Tablet Depositor(s) shall be installed and maintained in good condition during the term of this lease: that the said Salt Tablet Depositor(s) shall be used only in conjunction with Salt Tablets sold or manufactured by the Lessor, and that the Lessee shall purchase from the Lessor, or its agent, Salt Tablets for use in the Salt Tablet Depositor(s) at prices and upon terms and conditions hereinafter agreed upon, Provided: If, at any time during the term of this lease, a general reduction in Lessor's price of Salt Tablets suitable for use in the Depositor(s) shall be made, said Lessor shall provide said Lessee with Salt Tablets at a like price."

The lease further provides:

". . . should Lessee fail to pay promptly the aforesaid rental, or at any time discontinue purchasing its requirements of Salt Tablets for said Salt Tablet Depositor(s) from said Lessor, or its agent, or otherwise breach any of the terms and conditions of this lease, said Lessor shall have the right, upon ten days' written notice of intention to do so, to remove the said Salt Tablet Depositor(s) from the premises and/or possession of said Lessee."

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to restrain use of, or trade in, unpatented salt. By contracting to close this market for salt against competition, International has engaged in a restraint of trade for which its patents afford no immunity from the antitrust laws. *Morton Salt Co.* v. *G. S. Suppiger Co.,* 314 U. S. 488; *Mercoid Corp.* v. *Mid-Continent Investment Co.,* 320 U. S. 661; *Mercoid Corp.* v. *Minneapolis-Honeywell Co.,* 320 U. S. 680.

Appellant contends, however, that summary judgment was unauthorized because it precluded trial of alleged issues of fact as to whether the restraint was unreasonable within the Sherman Act or substantially lessened competition or tended to create a monopoly in salt within the Clayton Act. We think the admitted facts left no genuine issue. Not only is price-fixing unreasonable, *per se, United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150; *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, but also it is unreasonable, *per se,* to foreclose competitors from any substantial market. *Fashion Originators Guild* v. *Federal Trade Commission,* 114 F. 2d 80, affirmed, 312 U. S. 457. The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious. Under the law, agreements are forbidden which "tend to create a monopoly," and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement.

Appellant contends, however, that the "Lixator" contracts are saved from unreasonableness and from the tendency to monopoly because they provided that if any competitor offered salt of equal grade at a lower price, the lessee should be free to buy in the open market, unless appellant would furnish the salt at an equal price; and

the "Saltomat" agreements provided that the lessee was entitled to the benefit of any general price reduction in lessor's salt tablets. The "Lixator" provision does, of course, afford a measure of protection to the lessee, but it does not avoid the stifling effect of the agreement on competition. The appellant had at all times a priority on the business at equal prices. A competitor would have to undercut appellant's price to have any hope of capturing the market, while appellant could hold that market by merely meeting competition. We do not think this concession relieves the contract of being a restraint of trade, albeit a less harsh one than would result in the absence of such a provision. The "Saltomat" provision obviously has no effect of legal significance since it gives the lessee nothing more than a right to buy appellant's salt tablets at appellant's going price. All purchases must in any event be of appellant's product.

Appellant also urges that since under the leases it remained under an obligation to repair and maintain the machines, it was reasonable to confine their use to its own salt because its high quality assured satisfactory functioning and low maintenance cost. The appellant's rock salt is alleged to have an average sodium chloride content of 98.2%. Rock salt of other producers, it is said, "does not run consistent in sodium chloride content and in many instances runs as low as 95% of sodium chloride." This greater percentage of insoluble impurities allegedly disturbs the functioning of the "Lixator" machine. A somewhat similar claim is pleaded as to the "Saltomat."

Of course, a lessor may impose on a lessee reasonable restrictions designed in good faith to minimize maintenance burdens and to assure satisfactory operation. We may assume, as matter of argument, that if the "Lixator" functions best on rock salt of average sodium chloride content of 98.2%, the lessee might be required to use

only salt meeting such a specification of quality. But it is not pleaded, nor is it argued, that the machine is allergic to salt of equal quality produced by anyone except International. If others cannot produce salt equal to reasonable specifications for machine use, it is one thing; but it is admitted that, at times, at least, competitors do offer such a product. They are, however, shut out of the market by a provision that limits it, not in terms of quality, but in terms of a particular vendor. Rules for use of leased machinery must not be disguised restraints of free competition, though they may set reasonable standards which all suppliers must meet. *Cf. International Business Machines Corp.* v. *United States,* 298 U. S. 131.

Appellant urges other objections to the summary judgment. The tying clause has not been insisted upon in all leases, nor has it always been enforced when it was included. But these facts do not justify the general use of the restriction which has been admitted here.

The appellant also strongly objects to the provisions of the sixth paragraph of the decree.[7] Appellant denies

[7] "Defendant International Salt is directed to offer to lease or sell or license the use of the Lixator or Saltomat machines, or any other machine which is then being or about to be offered or shall have been offered by such defendant in the United States embodying inventions covered by any of the patents referred to in paragraph II hereof, to any applicant on non-discriminatory terms and conditions; *provided* that

"(a) A machine or machines is or are available for such purposes and

"(b) Defendant shall not be required to make such offer unless it is offering, about to offer, or has offered such machines for lease or sale or license within the United States and at any time the defendant may discontinue the business of renting or selling or licensing the use of such machines; and

"(c) Such sale or lease or license is not required to be made without cash payment or security to any person not having proper credit rating, and

"(d) The rental or sale price or license royalty may differ as to dif-

the necessity for such provision and it is true that the record discloses no threat to discriminate after the judgment of the court is pronounced. It also suggests that we modify the judgment to accept a proposed alternative provision [8] similar to one it says it urged upon the District Court, which rejected it. The record does not show what proceedings were had between rendering of the court's opinion and signing of the decree.

The specific ground of objection raised by appellant to paragraph sixth is that International may find it necessary in some sections of the country to reduce the rental rates of the machines in order that its machines may compete with those of others. Of course, the Clayton Act itself [9] permits one charged with price discrimination to show that he lowered his price in good faith to meet competition. Obviously, the District Court was not intending to prevent competition or to disable the appellant from meeting or offering it. The Government, too, says it would not oppose permitting a lower price to meet, in good faith, the equally low price of a competitor if the need arose.

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ferent types and sizes of machines and from time to time so long as the rental or sale price or royalty at any one time is uniform as to each size or type of machine. The terms of this paragraph shall apply to all future contracts and modifications of existing contracts. Any person with whom defendant International Salt now has a lease agreement relating to the Lixator or Saltomat machines may elect to retain his rights under the existing lease or to enter into a lease or sale or license contract with defendant International Salt in accordance with the provisions of this paragraph."

[8] Defendant would be enjoined "from refusing to sell, lease or license the use of any such machine to any person, firm or corporation, or from discriminating in the terms of any contract of sale, lease or license of any such machine with any person, firm or corporation, against the prospective buyer, lessee or licensee on the ground that he has used or dealt in, or intends or proposes to use or deal in, salt not manufactured or sold by the defendant International Salt."

[9] 38 Stat. 730, 49 Stat. 1526, 15 U. S. C. § 13b.

The short of the contention is that since the company never has threatened to violate any decree entered in this case to restrain future use of the illegal leases, it feels that the provision invalidating the objectionable leases should end the matter and that, as to any additional provisions, appellant is entitled to stand before the court in the same position as one who has never violated the law at all—that the injunction should go no farther than the violation or threat of violation. We cannot agree that the consequences of proved violations are so limited. The fact is established that the appellant already has wedged itself into this salt market by methods forbidden by law. The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market. When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention. And it is desirable, in the interests of the court and of both litigants, that the decree be as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know their duties and unintended contempts may not occur.

The framing of decrees should take place in the District rather than in Appellate Courts.[10] They are invested

[10] That court is authorized, but not required, to call upon the Federal Trade Commission to assist in framing decrees in antitrust cases. § 7, Federal Trade Commission Act, 38 Stat. 722. This would

with large discretion to model their judgments to fit the exigencies of the particular case. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185; *United States* v. *National Lead Co.*, 332 U. S. 319. In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause.

The District Court has retained jurisdiction, by the terms of its judgment, for the purpose of "enabling any of the parties . . . to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment" and "for the amendment, modifications or termination of any of the provisions . . . ." We think it would not be good judicial administration to strike paragraph VI from the judgment to meet a hypothetical situation when the District Court has purposely left the way open to remedy any such situations if and when the need arises. The factual basis of the claim for modification should appear in evidentiary form before the District Court rather than in the argumentative form in which it is before us. Nor are we impressed that this will require a multitude of separate applications. Once the concrete problem is before the District Court it will no doubt be able to fashion a provision that will avoid repetitious applications which would be as vexatious to the Court as to the litigants. We leave the appellant to proper appli-

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seem unnecessary if Congress intended a simple prohibition of the particular practice proved before the court. It indicates the Congress has intended decrees to deal with the future economic condition of the enterprise as well as past violations.

cation to the court below and deny the relief here, upon the present state of the record, without prejudice.

Judgment affirmed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE REED and MR. JUSTICE BURTON join, dissenting in part.

Agreeing wholeheartedly with the Court's opinion on the main issue, I am left unpersuaded by its justification for retaining Paragraph VI [1] in the judgment.

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[1] "VI

"Defendant International Salt is directed to offer to lease or sell or license the use of the Lixator or Saltomat Machines, or any other machine which is then being or about to be offered or shall have been offered by such defendant in the United States embodying inventions covered by any of the patents referred to in paragraph II hereof, to any applicant on non-discriminatory terms and conditions; *provided* that

"(a) A machine or machines is or are available for such purposes and

"(b) Defendant shall not be required to make such offer unless it is offering, about to offer, or has offered such machines for lease or sale or license within the United States and at any time the defendant may discontinue the business of renting or selling or licensing the use of such machines; and

"(c) Such sale or lease or license is not required to be made without cash payment or security to any person not having proper credit rating, and

"(d) The rental or sale price or license royalty may differ as to different types and sizes of machines and from time to time so long as the rental or sale price or royalty at any one time is uniform as to each size or type of machine. The terms of this paragraph shall apply to all future contracts and modifications of existing contracts. Any person with whom defendant International Salt now has a lease agreement relating to the Lixator or Saltomat machines may elect to retain his rights under the existing lease or to enter into a lease or sale or license contract with defendant International Salt in accordance with the provisions of this paragraph."

Inasmuch as the holder of patents on machines is not obliged to dispose of them to all comers or to do so at a uniform price, Paragraph VI in and of itself undoubtedly deprives appellant of a legal right. It is not merely a theoretical right. Practical considerations may make it important for appellant to act upon its legal right not to have a uniform price for all its customers. It was conceded at the bar that competition may require this. No doubt, when a court condemns practices as violative of the Sherman Law and the Clayton Act, it has the duty so to fashion its decree as to put an effective stop to that which is condemned. But the law also respects the wisdom of not burning even part of a house in order to roast a pig. Ordinarily, therefore, when acts are found to have been done in violation of antitrust legislation, restraint of such acts in the future is the adequate relief. See *New York, New Haven & Hartford R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361, 404; *Standard Oil Co.* v. *United States,* 221 U. S. 1, 77; *Labor Board* v. *Express Publishing Company,* 312 U. S. 426, 435–37. Reflecting the dictates of fairness, equity does not put under ban that which is intrinsically legitimate unless for all practical purposes it is tied with the illegitimate, or the circumstances of the case make it reasonable to assume that pursuit of what is legitimate would be a cover for doing what is forbidden.

The Government argues, in effect, that to compel appellant to observe uniformity of price for its machines removes any temptation for more favorable treatment of a customer who buys its salt. But that is precisely the aim of the main decree—it prohibits extension of the patent for the machines by requiring as a condition of its acquisition the purchase of non-patented salt. The presupposition of Paragraph VI is that the appellant will disobey that which the court explicitly forbids, so that the with-

drawal of an otherwise legal right to fix the purchase price of patented machines is employed as a precautionary screw to hold the appellant down from disobeying the court's decree. Surely a court of equity ought not to add to its prohibition of the illicit a prohibition of the licit unless the two are practically intertwined or there is some ground for believing that the licit will surreptitiously be misused in order to accomplish the illicit. There should be no such prohibition merely as a re-enforcement of the appropriate presupposition that a litigant, not shown to have been recalcitrant or underhanded, will obey the court's decree. If he does, the power of contempt is there to enforce obedience. It is suggested that if the presupposition of obedience is to be entertained it is unnecessary to enjoin even illegal conduct. But, surely, it is one thing to decree prohibition of conduct found to be illegal and a wholly different thing to add thereto the prohibition of that which is otherwise legal on the theory that thereby any temptation to persist in the forbidden illegality is removed.

Upon the record before us there is nothing to suggest that the appellant is likely to disobey the decree not only of the District Court against a continuance of illegal leases, but what in effect, upon affirmance, becomes a decree of this Court. It must be remembered that the Government saw fit to move for judgment on the pleadings. It thereby raised a pure legal question as to the validity of the leases on their face. The Government chose not to try to lay bare, as is often done in Sherman Law cases, fair and unfair practices inextricably blended. In such a situation the lawful has to fall with the unlawful. Having invited judgment on the bare bones of the pleadings which merely raise the validity of the tying clauses, the Government is not entitled to remedies which go beyond the justification of the pleadings. The Gov-

ernment ought not to have it both ways. The Government is not entitled to a provision in the decree which can be justified only on some indication in the record, of which here there is none, that appellant's past shows a devious temper which needs to be hobbled by withdrawing a conceded legal right.

In comparable situations, where orders of the Federal Trade Commission come here for review, this Court has sought to protect otherwise legitimate rights even where a business has indulged in unfair methods of competition. The Commission is not authorized to make its order needlessly destructive. The baby is not to be thrown out with the bath. See *Federal Trade Commission* v. *Royal Milling Co.,* 288 U. S. 212, and *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608. Accordingly, if this were a review of an order of the Federal Trade Commission, I should remit the order for appropriate reconsideration by the Commission. Since this is a review of a lower federal court and the record presumably presents to us all that was before the District Court in support of Paragraph VI, we could dispose of the matter here.

But the molding of decrees in Sherman Law cases is normally the business of district courts. They have a scope of discretion which should not unduly be cut off by a recasting of the decree on appeal here. (It is worth noting that the availability of the Federal Trade Commission in the role of a master in chancery to help mold decrees in suits under the antitrust statutes apparently does not apply to a suit like the present, where judgment was asked on the pleadings and no testimony was taken. See § 7 of the Federal Trade Commission Act, 38 Stat. 717, 722, 15 U. S. C. § 47.) And so I would remand the case to the District Court. It has been suggested that Paragraph VI is merely a roundabout way of saying that the appellant should not discriminate in the price of its

patented machines in favor of a purchaser of its salt. If such was the intention of Paragraph VI, the District Court will want to convey such meaning less ambiguously.[2]

As the paragraph stands, I do not see how any lawyer would advise that the appellant could vary its prices among customers in different localities for a legitimate reason without each time going to the District Court for a modification of the decree. That is not a burden which, on this record, ought to be placed on the appellant. The undue sting of Paragraph VI is not saved by the fact that it is "specific." Of course it is in the interest of courts and of litigants that the terms of a decree be as specific as possible. But the desideratum of explicitness does not dispense with the requirement that remedies be appropriate to the condemned illegality. It does not draw the sting of undue prohibition of lawful conduct to make the prohibition specific.

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[2] See the clause which the appellant proposed to the District Court, enjoining it "from refusing to sell, lease or license the use of any such machine to any person, firm or corporation, or from discriminating in the terms of any contract of sale, lease or license of any such machine with any person, firm or corporation, against the prospective buyer, lessee or licensee on the ground that he has used or dealt in, or intends or proposes to use or deal in, salt not manufactured or sold by the defendant International Salt."

PRIEBE & SONS, INC. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 16. Argued October 13, 1947.—Decided November 17, 1947.

1. Pursuant to a program for aiding England and Russia under the Lend-Lease Act of March 11, 1941, petitioner contracted to supply to the Federal Surplus Commodities Corporation a quantity of dried eggs. The contract specified "May 18 [1942] delivery," which date "shall be the first day of a 10-day period within which the FSCC will accept delivery, the particular day within the period being at the FSCC's option"; required petitioner to have the eggs inspected and that delivery be accompanied by inspection and weight certificates; and provided that "failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer" would make operative a provision for "liquidated damages." It did not provide for notice to the Government when the shipments were ready. Inspection and certification, though not completed by May 18, were completed prior to the dates designated by the FSCC for deliveries; and petitioner made timely deliveries pursuant to instructions. *Held:* The provision for "liquidated damages" constituted a penalty and was not enforceable. Pp. 408–414.
2. The contract is construed to mean that the time for delivery by petitioner was not May 18, 1942, but the time or times chosen by the FSCC within the 10-day period which began on May 18; *i. e.*, performance was not due until request was made and instructions given for delivery. P. 410.
3. Since the provision in question did not cover delays in deliveries, it could not possibly be a reasonable forecast of just compensation for damage caused by breach of contract. P. 412.
4. Congress did not expressly grant the power to impose penalties as sanctions to the program adopted pursuant to the Lend-Lease Act; and that power may not be implied. Pp. 413–414.

106 Ct. Cl. 789, 65 F. Supp. 457, reversed.

The Court of Claims dismissed petitioner's suit to recover sums alleged to be due upon a contract with the

Government. 106 Ct. Cl. 789, 65 F. Supp. 457. This Court granted certiorari. 330 U. S. 815. *Reversed,* p. 414.

J. Arthur Miller and *Allen H. Gardner* argued the cause for petitioner. With them on the brief was *Samuel Williston.*

Philip Elman argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Ford, Paul A. Sweeney* and *Melvin Richter.*

Mr. Justice Douglas delivered the opinion of the Court.

This case, here on certiorari to the Court of Claims, presents the question whether a provision in a government contract for "liquidated damages," as construed and applied, should be denied enforcement on the ground that it constitutes a "penalty."

Shortly after the enactment of the Lend-Lease Act of March 11, 1941, 55 Stat. 31, 22 U. S. C. (Supp. V, 1946), § 411 *et seq.,* the United States acting through agencies of the Department of Agriculture embarked on a program of purchasing dried eggs for shipment to England and Russia. Petitioner agreed to furnish a quantity of dried eggs under that program to the Federal Surplus Commodities Corporation (FSCC). The contract called for "May 18 [1942] delivery" which date, according to the contract, "shall be the first day of a 10-day period within which the FSCC will accept delivery, the particular day within the period being at the FSCC's option." Petitioner was also required to have the eggs inspected, delivery to be accompanied by inspection and weight certificates.

The contract contained two provisions respecting "liquidated damages." One, contained in paragraph 9, was

applicable to delays in delivery.[1] It has no application here, for as we shall see, deliveries were timely. The provision for "liquidated damages" with which we are concerned is contained in paragraph 7 and is applicable to a totally different situation. It provides, with exceptions not material here, that "failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer" will be cause for payment of "liquidated damages." [2]

On May 18, 1942, petitioner had not made delivery nor had the eggs been inspected. Inspection was, however, completed and certificates issued by May 22, which was prior to the time when FSCC asked for delivery. For it was not until May 26 that FSCC gave the first of several written notices for the shipment of eggs involved in this litigation. Petitioner made timely shipments pursuant to those instructions. Subsequently FSCC ascer-

[1] That provision of the contract provided:

"Inasmuch as the failure of the vendor to deliver the quantity of the commodity or commodities specified in the contract in accordance with the terms of this announcement will, because of the urgent need for the commodity by the purchaser arising from the present emergent conditions, cause serious and substantial damages to the purchaser, and it will be difficult, if not impossible, to prove the amount of such damages, the vendor agrees to pay to the FSCC liquidated damages as stated in this paragraph. The sum is agreed upon as liquidated damages and not as a penalty and shall be in the amount set forth below for each pound of dried egg product undelivered in accordance with the terms of this announcement. . . . The parties have computed, estimated, and agreed upon this sum as an attempt to make a reasonable forecast of probable actual loss because of the difficulty of estimating with exactness the damages which result."

The "liquidated damages" ranged from 10 to 30 cents per pound dependent upon the elapsed time between the acceptance date and May 18, 1942.

[2] The measure of "liquidated damages" in this situation was the same as that for delays in delivery set forth in note 1, *supra*.

tained that petitioner's inspection certificates had been issued after May 18 and accordingly deducted from the price 10 cents per pound on the theory that the failure to have the eggs inspected and ready for delivery by May 18 was a default which put into operation the "liquidated damages" provision of the contract.

Petitioner brought this suit in the Court of Claims to recover the amounts withheld plus interest. The Court of Claims, being of the view that there had been a breach of contract for which the United States was entitled to "liquidated damages," dismissed the petition. 106 Ct. Cl. 789, 65 F. Supp. 457.

We construe the contract to mean that the time for delivery by petitioner was not May 18, 1942 but the time or times chosen by the FSCC within the ten-day period which began on May 18. That is to say, performance by petitioner was not due until request was made and instructions given for delivery. That interpretation is in accord with the uncontested finding of the Court of Claims that petitioner promised delivery "within a ten-day period commencing May 18, the precise date to be selected" by the FSCC.

The contract was drawn, however, to make the "liquidated damages" provisions include so-called defaults of petitioner which antedated the time when delivery was due but which in no way interfered with or caused delay in that performance. As noted, "liquidated damages" became payable on "failure to have specified quantities of dried egg products inspected and ready for delivery by the date specified in the offer," viz. by May 18, 1942. The Court of Claims held this provision enforceable even though petitioner had made prompt delivery of the eggs, because it felt that the provision enabled respondent to carry on its dried-egg program "with assurance that it could count on the dried-egg products being ready on the specified date." That position is amplified by respond-

ent. The argument in short is that liability to pay "liquidated damages" for failure to have goods ready for delivery even prior to the time when delivery is due gives assurance against tardy deliveries; that a prompt timetable of shipments was important here because of war conditions and the necessity of having goods ready for loading whenever shipping space was available; that delay in deliveries would cause unmeasurable damage; and that even though no damage were apparent in a particular case, the "liquidated damages" provision should be enforced as a deterrent of tardy deliveries in the whole class of contracts relating to this procurement program.

It is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law. *United States* v. *Standard Rice Co.,* 323 U. S. 106, 111, and cases cited. That has been done in other cases where the Court has considered the enforceability of "liquidated damages" provisions in government contracts. *United States* v. *Bethlehem Steel Co.,* 205 U. S. 105, 120–121; *Wise* v. *United States,* 249 U. S. 361, 365–366. We adhere to those decisions and follow the same course here.

Today the law does not look with disfavor upon "liquidated damages" provisions in contracts. When they are fair and reasonable attempts to fix just compensation for anticipated loss caused by breach of contract, they are enforced. *Wise* v. *United States, supra,* p. 365; *Sun Printing & Pub. Assn.* v. *Moore,* 183 U. S. 642, 672–674; Restatement, Contracts § 339; *Dunlop Pneumatic Tyre Co.* v. *New Garage & M. Co.,* [1915] A. C. 79. And see *Kothe* v. *Taylor Trust,* 280 U. S. 224, 226. They serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts. *United States* v. *Bethlehem Steel Co., supra,* p. 121; *Clydebank Engineering & Shipbuilding Co.* v. *Castaneda,* [1905] A. C. 6, 11–13, 20;

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United States v. *Walkof,* 144 F. 2d 75, 77. And the fact that the damages suffered are shown to be less than the damages contracted for is not fatal. These provisions are to be judged as of the time of making the contract. *United States* v. *Bethlehem Steel Co., supra,* p. 121.

Judged by these standards, the provision in question may not be sustained as an agreement for "liquidated damages." It does not cover delays in deliveries.[3] It can apply only where there was prompt performance when delivery was requested but where prompt delivery could not have been made, due to the absence of the certificates, had the request come on the first day when delivery could have been asked. A different situation might be presented had the contract provided for notice to the Government when the certificates were ready. Then we might possibly infer that promptness in obtaining them served an important function in the preparation of timetables for overseas shipments. But the contract contains no such provision; and it is shown that FSCC had no knowledge that the certificates were not ready on May 18 until long after deliveries had been made. So, it is apparent that the certificates were only an essential of proper delivery under this contract.

It likewise is apparent that the only thing which could possibly injure the government would be failure to get prompt performance when delivery was due. We have no doubt of the validity of the provision for "liquidated damages" when applied under those circumstances. *United States* v. *Bethlehem Steel Co., supra; Wise* v. *United States, supra.* And see *Maryland Dredging Co.* v. *United States,* 241 U. S. 184; *Robinson* v. *United States,* 261 U. S. 486. But under this procurement program delays of the contractors which did not interfere with

[3] They are covered, as we have already noted, by the provision set forth in note 1, *supra.*

prompt deliveries plainly would not occasion damage. That was as certain when the contract was made as it later proved to be. Yet that was the only situation to which the provision in question could ever apply. Under these circumstances this provision for "liquidated damages" could not possibly be a reasonable forecast of just compensation for the damage caused by a breach of contract. It might, as respondent suggests, have an *in terrorem* effect of encouraging prompt preparation for delivery. But the argument is a tacit admission that the provision was included not to make a fair estimate of damages to be suffered but to serve only as an added spur to performance. It is well-settled contract law that courts do not give their imprimatur to such arrangements. See *Kothe* v. *Taylor Trust, supra;* Restatement, Contracts § 339. All provisions for damages are, of course, deterrents of default. But an exaction of punishment for a breach which could produce no possible damage has long been deemed oppressive and unjust. See Salmond & Williams on Contracts (2d ed. 1945) § 202.

It is said, however, that a different rule should obtain here because of the broad procurement powers involved under the Lend-Lease Act. We are pointed, however, to no provision by which the Congress authorized the imposition of penalties as sanctions to that program; nor do we find any. We cannot infer such a power. The power to purchase on appropriate terms and conditions is, of course, inferred from every power to purchase. But if that is the source of congressional authority to impose penalties, then any procurement officer, in war or in peace, could impose them. That is contrary to the premise underlying all our decisions on this question which involve government contracts. The rule which they announce has been applied both to the exigencies of war

(*United States* v. *Bethlehem Steel Co., supra*) and of peace (*Wise* v. *United States, supra*). The other view is such a radical break with the past and so counter to the whole development of the law as to indicate that the congressional purpose should be plain before we take the step.

Reversed.

MR. JUSTICE BLACK, with whom MR. JUSTICE MURPHY agrees, dissenting.

The Court today invokes elusive and uncertain principles of "general contract law" to strike down a clause in a government contract executed under the recognized congressional authority of the Lend-Lease Act. Without reliance upon any indication of congressional policy, the Court assumes that it can discover somewhere a "general contract law," and that it is empowered to apply this law to wartime contracts of the Federal Government. I regard the decisions of this Court since *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, as having established that the construction and validity of *all* government contracts are governed by federal law, whether executed under authority of the Lend-Lease Act or any other. *Metropolitan Bank* v. *United States,* 323 U. S. 454, 456; see *United States* v. *Allegheny County,* 322 U. S. 174, 183; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363. And Congress has enacted many laws, both general and specific in nature, to guide all contracting agents of the Federal Government, 41 U. S. C. §§ 1 *et seq.,* as well as many detailed rules applicable solely to certain categories of contracts. See, *e. g.,* Merchant Marine Act of 1936, 49 Stat. 1985, Titles V, VII, VIII. But I can find no act of Congress which expressly or impliedly prohibits such generally authorized agents from making a contract containing a liquidated damage provision such as here involved.

Nor has Congress ever intimated that contracts within the general powers of government agents should be invalidated by this Court's invocation of a nebulous "general contract law," or because such contracts failed to harmonize with this Court's views of what is "fair and reasonable." I had not supposed that the federal courts were vested with such supervisory and revisory powers over the terms of contracts voluntarily and advisedly entered into by business groups with congressionally authorized government agents.

The available indications of congressional policy point to the very opposite conclusion. Far from indicating a hostility to liquidated damage clauses, Congress has made it mandatory that such clauses to protect against delay in performance be inserted in all government building contracts; and it has provided that such clauses "shall be conclusive and binding upon all parties" without the necessity for the Government to prove "actual or specific damages sustained . . . by reason of delays . . . ." 32 Stat. 326; 40 U. S. C. § 269. Surely this provision would not permit federal judges to ignore liquidated damage clauses in building contracts because actual damages were not proved and could not have been reasonably forecast. And in no other act of Congress is there a suggestion that liquidated damage provisions in other government contracts are unenforceable because the courts believe no actual damages could be sustained from a breach. Yet the majority adopts such a principle today to invalidate a clause in this contract, and thereby, as I see it, embarks upon the very undesirable practice of supervising and revising the congressionally authorized conduct of federal contracting agents. This Court has previously refused to initiate such a practice in a case where the Government on most appealing grounds urged us to revise its agent's contract. *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 308–309.

In this case procurement officers of the Federal Government, admittedly acting within their authority, advertised for bids for the sale of dried eggs which the advertisement provided were to be ready for delivery to the Government on a date to be chosen by the bidder. Actual delivery of the eggs was to be made on the Government's demand any time within a ten-day period following the ready date named by the bidder. The advertisement also contained a provision for the assessment of liquidated damages for delay in delivering the eggs or in having them inspected, certified, and ready for delivery by the bidder's chosen date.

The efficient integration of a large-scale procurement program, such as was here involved, made it highly advisable for the Government to exact assurances that goods would be ready for delivery in advance of selection of the date for actual delivery. Essential to the program was the coordinated movement of boxcars and ships, both of which were then scarce and in great demand. Each day's idleness of cars and ships might mean injuries to the Government of large but uncertain amounts. Under such circumstances it would have been a serious omission for government agents to fail to check and double check, contract and double contract, in order to have goods ready for delivery to cars and ships with the least possible lost time in the use of transport facilities. And the Government had a right to depend on its contractors living up to their promise to have goods ready on the date they said they would so that the Government might thereafter select a delivery date with certainty that no transportation delays would occur. Failure to do so might well disrupt the Government's prearranged train and ship schedules, causing it cumulative difficulties not easily translated into money damages. And all of these damages might result from failure to have the goods ready as promised, even

though the contractor might later be able to deliver when called for and thus escape the delivery liquidated damage provision.

This contract was made at arm's length. The petitioner knew of the necessity for faithful performance of its obligations. It undoubtedly gave consideration to this fact and fixed its price high enough to satisfy itself of its profits. I can think of no persuasive reason why it should now be relieved of the obligation it advisedly assumed which was, in effect, to charge less for its goods if they were not ready for delivery on the date it promised. I do not deny that this Court can fill gaps in statutes so as to execute broad congressional purposes and that courts generally have made large contributions to laws governing contracts. But I think that the Court here makes a law which frustrates congressional purposes and tends most unwisely to handicap government purchasing agents in the performance of their authorized duties. I adhere to the belief that it is unwise for the courts to interfere with the making of contracts by government agents in harmony with valid congressional authority. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127–128, 131–132. I would affirm this judgment.

MR. JUSTICE FRANKFURTER, whom THE CHIEF JUSTICE joins, dissenting.

Upon failure to perform the undertaking of a contract the law secures the money equivalent for the loss thereby incurred. In order to avoid the waste of controversy as to the extent of a loss, should it occur, and to save judges and juries from having to guess about it, parties, naturally enough, often stipulate in advance the compensation for such loss, and courts in appropriate situations will enforce such a provision for liquidated damages. But exactions for a breach of contract not giving

rise to damages and merely serving as added pressure to carry out punctiliously the terms of a contract, are not enforced by courts. In familiar language, penal provisions in a contract—those that concern defaults that bring no loss in their train—are not enforceable. I assume that the basic reason for this doctrine is that the infliction of punishment through courts is a function of society and should not inure to the benefit of individuals. So-called *qui tam* actions, suits for treble damages and the like, stand on a different footing. In such situations society makes individuals the representatives of the public for the purpose of enforcing a policy explicitly formulated by legislation. The essence of the law's remedy for breach of contract is that he who has suffered from a breach should be duly compensated for the loss incurred by non-performance. But one man's default should not lead to another man's unjust enrichment.

If the contract in controversy is to be treated as an ordinary commercial transaction, to be governed by the ordinary rules applicable also to Government contracts in ordinary times, I could not escape the conclusion that the provision for "damages" merely for failure to secure inspection certificates without failure of delivery operates as a penalty to deter non-observance of this requirement. It is not a determination in advance of the money lost to the Government due to default. The Government wanted delivery of eggs. But failure of delivery or inability to deliver for want of certificates brings into operation the provisions for liquidated damages of paragraph 9. There is no money loss to the Government through failure of any of the intervening preparatory steps in the process leading to delivery. Of course a contractor is interested in having the steps leading to performance duly carried out. Exactions for any of the intervening steps would undoubtedly have a coercive influence in securing per-

formance of that which is the real object of a contract. But if a contract is performed, the promisee has suffered no loss even though some intervening step by the promisor has been delayed. And so, such a provision for default of an intervening step, when due delivery has been made, is plainly exaction of an amount for which the promisee has not been out of pocket. Accordingly, if this contract were an ordinary commercial contract subject to the ordinary rules of the law of contract, I should have to find against the Government.

But this is not an ordinary peace-time Government contract. The Government may certainly assure performance of contracts upon which the effective conduct of the war depended by tightening the consequence of non-performance of each stage in the ultimate process of delivery of essential goods to the extent of having a tariff of deductions for non-performance of each step in the ultimate goal of the contract. Congress certainly could specifically authorize such pressures on each step in the sequence of a contract-performance by provisions like that of paragraph 7. Congress did not do this. Instead of particularizing to that extent, such a provision would, as a matter of fair construction, also be authorized by Congress if it empowered an agency to procure "under appropriate terms and conditions" essential war goods. I could not hold that an authority by Congress to a procurement agency to make contracts for carrying out the food program for the successful conduct of the war could not appropriately require of those who voluntarily enter into such contracts with the Government to incur a reasonable penalty for default for necessary certificates upon which delivery depended. And this would be so even though for reasons themselves relating to the war effort, the Government reserved a necessary margin of time within which to call for delivery and by a delayed

call obtained delivery when required, though if the call had been previously made the failure of certification might have been serious. Congress did not add to its authorization for entering into the making of these war contracts the assumed provision "with appropriate terms and conditions." But I find the distinction between what Congress did and the indicated addition too thin for denying to the contracting officers of the Government the implied right, under the circumstances of the times. Congress authorized the President, through appropriate delegation, to "procure . . . any defense article" deemed "vital to the defense of the United States." Section 3 (a) of the Lend-Lease Act of 1941, 55 Stat. 31. And so I conclude that the provisions of paragraph 7 were, on a fair reading of Congressional legislation, within the contracting powers of the President as much so as if Congress had in terms authorized such a provision.

It hardly needs to be added that neither formal logic nor practical judgment requires that authority to impose safeguards for preventing breaches short of ultimate default, similar to those contained in paragraph 7 of this contract for vital war products, be inferred from the ordinary implied powers of Government contracting officers in making ordinary contracts for the Government.

If one starts with the assumption that, in the absence of specific Congressional authority, a fixed rule of law precludes contracting officers from providing in a Government contract terms reasonably calculated to assure its performance even though there be no money loss through a particular default, there is no problem. But answers are not obtained by putting the wrong question and thereby begging the real one. It is misleading to ask: "What remedies has Congress provided for breaches of contract?" The answer to that depends on the answer to the true question: "With what scope has Congress pre-

sumably invested the Executive in order to carry out the duty, not defined with particularity, of assuring the necessary war supplies?"

The enforceability of a clause like that now in controversy, regardless of whether it is fairly to be regarded as one for "liquidated damages" or for a "penalty," is a matter of appropriate implications drawn from a total absence of expressed Congressional desire. Such implications do not rest on dogma. They derive from the considerations of policy underlying them. It is one thing to attribute to Congress the desire to confine the Government's remedies for breaches of its ordinary procurement contracts to the rules of law governing ordinary commercial contracts. It is quite another thing to infer that when in March, 1941, Congress gave the President, through the Lend-Lease Act, unrestricted power to "procure" essential war materials, it meant to fetter the procurement agencies selected by the President, by forbidding them to include, among the terms of bids to be voluntarily accepted, conditions reasonably calculated to secure performance.

While Congress presumably wishes the ordinary rules of contract law to apply in ordinary times, the Lend-Lease Act was the most potent proof that the times were far from ordinary. The inclusion of paragraph 7 in contracts such as this was an appropriate regard by the Executive for the very emergency which impelled Congress to act and to give its agencies power to act.

MORRIS *v.* McCOMB, WAGE AND HOUR ADMINISTRATOR.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 7. Argued October 13, 1947.—Decided November 17, 1947.

1. Under § 204 of the Motor Carrier Act, 1935, the Interstate Commerce Commission has power to establish qualifications and maximum hours of service with respect to drivers and mechanics employed full time, as such, by a common carrier by motor vehicle, when the services rendered through such employees by such carrier in interstate commerce are distributed generally throughout the year, constitute 3% to 4% of the carrier's total carrier services, and the performance of such services is shared indiscriminately among such employees and mingled with their performance of other like services for such carrier not in interstate commerce. Pp. 423–424, 431–437.
2. It is the character of the employee's activities rather than the proportion of either his time or of his activities that determines the actual need for the Commission's power to establish qualifications and maximum hours of service. *Levinson* v. *Spector Motor Service*, 330 U. S. 649. Pp. 431–432.
3. Section 13 (b) (1) of the Fair Labor Standards Act makes the overtime requirements of § 7 inapplicable to such employees. *Levinson* v. *Spector Motor Service, supra.* Pp. 423–424, 437–438.

155 F. 2d 832, judgment vacated and cause remanded.

The District Court dismissed a suit by the Wage and Hour Administrator to enjoin alleged violations of § 15 (a) (1) and (2) of the Fair Labor Standards Act. The Circuit Court of Appeals reversed. 155 F. 2d 832. This Court granted certiorari. 330 U. S. 817. Judgment of the Circuit Court of Appeals *vacated* and cause *remanded* to the District Court for further proceedings consistent with the opinion of the Circuit Court of Appeals, as here modified, p. 438.

George S. Dixon argued the cause and filed a brief for petitioner.

Harold C. Nystrom argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Stanley M. Silverberg* and *William S. Tyson.*

Daniel W. Knowlton filed a brief for the Interstate Commerce Commission, as *amicus curiae.*

MR. JUSTICE BURTON delivered the opinion of the Court.

This case requires further application of the principles stated in *Levinson* v. *Spector Motor Service,* 330 U. S. 649, and *Pyramid Motor Freight Corp.* v. *Ispass,* 330 U. S. 695. The first question is whether the Interstate Commerce Commission has the power, under § 204 of the Motor Carrier Act, 1935,[1] to establish qualifications and maximum hours of service with respect to drivers and mechanics employed full time, as such, by a common carrier by motor vehicle, when the services rendered, through such employees, by such carrier, *in interstate commerce,* are distributed generally throughout the year, constitute 3% to 4% of the carrier's total carrier services, and the performance of such services is shared indiscriminately among such employees and mingled with their performance of other like services for such carrier *not in interstate commerce.* The other question is whether, if the Commission

[1] "SEC. 204 (a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment. . . ." 49 Stat. 546, 49 U. S. C. § 304 (a) (1).

has that power, the overtime requirements of § 7 of the Fair Labor Standards Act of 1938 [2] apply to such employees in view of the exemption stated in § 13 (b) (1) of that Act.[3] We hold that the Commission has the power in question and that the overtime requirements of § 7 of the Fair Labor Standards Act therefore do not apply to such employees.

This action was brought March 26, 1942, in the United States District Court for the Eastern District of Michigan by the Administrator of the Wage and Hour Division, United States Department of Labor, under § 17 of the Fair Labor Standards Act,[4] to enjoin the petitioner, James

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[2] "SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. . . ." 52 Stat. 1063, 29 U. S. C. § 207 (a).

[3] "SEC. 13. . . .

"(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; . . . ." 52 Stat. 1068, 29 U. S. C. § 213 (b) (1).

[4] "SEC. 17. The district courts of the United States . . . shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15." 52 Stat. 1069, 29 U. S. C. § 217.

F. Morris, from violating § 15 (a) (1) and (2) of that Act [5] through failure to pay his employees compensation for overtime in accordance with § 7 of that Act.[6] After a trial based on the pleadings and stipulated facts, the complaint was dismissed September 26, 1945. In its unreported conclusions of law the court stated that neither the petitioner nor his employees were engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act and that, to the extent that they might be considered to be engaged "in commerce" within the meaning of that Act, the requirements of its § 7, as to compensation for overtime, did not apply to them. The Circuit Court of Appeals for the Sixth Circuit reversed this judgment May 29, 1946, and remanded the case for further proceedings. *Walling* v. *Morris,* 155 F. 2d 832. Because of its importance in interpreting the Motor Carrier Act and the Fair Labor Standards Act and because the question first stated above had not been passed upon in our decisions in the *Levinson*

[5] "SEC. 15. (a) . . . , it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14; . . . ." 52 Stat. 1068, 29 U. S. C. § 215.

[6] See note 2, *supra.*

and *Pyramid* cases, *supra,* we granted certiorari, 330 U. S. 817, limited to the following question:

> "2. Where such employees [*i. e.,* those of a common carrier for hire who conducts a general cartage business] during a minority of their time are engaged in the transportation of interstate traffic are they exempt under the provisions of Section 13 (b) (1) of the Act from the maximum hours provision of Section 7 of the Act as employees with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935 (49 U. S. C. sec. 301, *et seq.*)?"

In response to our invitation, the Interstate Commerce Commission filed a brief *amicus curiae.*

The material facts are treated by the parties as being those shown by the record to have been in effect when the complaint was filed in 1942. They may be summarized as follows:

The petitioner then was, and for the past 12 years had been, the sole owner and proprietor of the J. F. Morris Cartage Company which operated a general cartage business as a common carrier by motor vehicle in and about the metropolitan area of Detroit, Michigan, and all within three contiguous counties of that State. His operations were centralized at Ecorse, Michigan, at his garage and yard, used for a dispatching office, general maintenance and repair garage and storage space for equipment.

His principal business was the transportation of steel. In the regular course of his business, in 1941, he generally employed about 60 persons, 40 as truck drivers, 14 as mechanics, painters, washers and repairmen in the garage, three as dispatchers and three as general office workers. His equipment consisted of about 50 trucks or tractors and 60 trailers.

He was prepared to and did render general cartage service to the general shipping public. In 1941, he rendered such service to 47 consigning firms, but about 97% of his revenue came from the Great Lakes Steel Corporation and the Michigan Steel Corporation, both in Ecorse. His general cartage services, in 1941, were made up of three intermingled types of service, generally classifiable as follows on the basis of the revenue derived from them: (1) 35%: Transportation of steel largely within steel plants. This was transported for further processing in those plants and an unsegregated portion of it was shipped ultimately in interstate commerce. (2) 61%: Transportation between steel mills and industrial establishments. These shipments consisted principally of bumper stock, fender stock and other types of steel used in connection with the manufacture of automobiles, a substantial portion of which entered interstate commerce. (3) 4%: Transportation of miscellaneous freight directly in interstate commerce, either as part of continuous interstate movements or of interstate movements begun or terminated in metropolitan Detroit.[7]

[7] This activity is described as follows:

"C. Approximately three (3) per cent of the defendant's operations consists of the transportation of freight between the plants of the Great Lakes Steel Corporation and the plants of the Michigan Steel Corporation on the one hand, and, on the other hand, interchange points, such as boat docks, railroad depots, freight terminals and truck terminals lying in the Detroit Metropolitan Area, wholly within the boundaries of the State of Michigan, involving the picking up of freight from or the delivery of freight to water carriers, railroad carriers and line haul motor carriers, which freight either has moved across the Michigan State lines or is about to move across the Michigan State lines in continuous transportation through connection between the defendant and such other interstate carriers. The defendant's compensation for his portion of the through transportation service is in some instances paid to him by the interstate carrier, the compensation

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Ever since § 7 of the Fair Labor Standards Act took effect, October 24, 1938, petitioner's employees, with the exception of his office workers, consistently worked enough hours to entitle them to additional compensation at the rate of one and one-half times their regular wages if such Section were applicable to them. They were, however, paid on the assumption that the Section did not apply to them and, therefore, for the most part, received only their regular rate of pay for such overtime. Accordingly, if it is found that § 7 is applicable to them, there is ground for an injunction against its further violation. No issue is presented here as to the office workers because there is no proof of overtime services having been rendered by them or being now in prospect. No issue is presented here as to the dispatchers. The Circuit Court of Appeals held that § 7 applies to them as employees engaged in the production of goods for interstate commerce and that they are not exempt as administrative employees. Those issues, however, are not within the limited grant of certiorari. As to the garagemen and laborers, including mechanics, painters, washers and repairmen, together with their superintendent of maintenance, there is no issue presented here, except to the extent that such classifications include mechanics doing the class of work defined as that of "mechanics" in *Ex*

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representing a division of the through rates on the transportation movement, and other instances being compensated by the shipper.

. . . . . .

"E. Approximately one (1) per cent of the defendant's operations consists of the transportation of miscellaneous freight in general cartage service for hire and for shippers other than Great Lakes Steel Corporation or Michigan Steel Corporation. Cartage in this category is of the same physical character as that described in subparagraphs A, C, and D above, except that it is done on behalf of and for the account of shippers other than Great Lakes Steel Corporation and Michigan Steel Corporation."

Parte No. MC–2, 28 M. C. C. 125, 132, 133,[8] including the making of mechanical repairs directly affecting the safe operation of motor vehicles. All of the garagemen and laborers, except their superintendent of maintenance,

[8] "(*1*) *Mechanics and other garage workers.*—The evidence is clear that carriers that do not operate approximately 10 motor vehicles or more cannot economically employ mechanics to do repair work, and they do not do so. . . .

"The larger carriers, however, do employ mechanics whose primary duties are to keep the motor vehicles in a good and safe working condition. They are required, for example, to keep the lights and brakes in such condition. They perform many other duties, of course, but these are sufficient to show clearly that the duties of these employees do affect safety of operation directly, as it is obvious that a large motor vehicle without the required lights or adequate brakes is a great potential hazard to highway safety. All witnesses testifying at the hearing agreed that the work of mechanics has such a direct and intimate relation to safety of operation, and no conflicting evidence was submitted.

. . . . . .

"Our conclusion is that mechanics devote a large portion of their time to activities which directly affect the safety of operation of motor vehicles operated in interstate or foreign commerce, and hence that we have power to establish qualifications and maximum hours of service for such employees under said section 204 (a).

"There are other garage employees who do not perform work which affects safety of operation directly. Some carriers employ men who do nothing but paint vehicles. Others employ carpenters, and some few employ tarpaulin tailors. We find that the work done by none of these employees affects safety of operation.

"It is possible, although the record does not clearly establish the fact, that some of the larger carriers employ men whose sole duty is to see that the motor vehicles are properly supplied with oil, gas, and grease, or to wash the vehicles. In the majority of cases, undoubtedly, the mechanics perform this work. However, if there be employees who do nothing but oil, gas, grease, or wash the motor vehicles, we find that they do not perform duties which directly affect the safety of operation and are not subject to our jurisdiction. To make our finding in this regard entirely clear, it is that mechanics are the only garage workers we find subject to our jurisdiction." *Ex Parte No. MC–2,* 28 M. C. C. 125, 132, 133.

were paid for their overtime work at "straight" or regular hourly rates. He was paid a weekly wage, and received no overtime pay, although he devoted approximately 25% of his time to the performance of routine physical tasks of the same general character as those of the employees working under his direction. The Circuit Court of Appeals held that the superintendent of maintenance was not exempt as an executive or administrative employee and should be classified in the same manner as the others in this group. There is nothing in the record showing the extent to which the respective garagemen and laborers devoted themselves to the several classes of work above mentioned and, if this were an action to recover overtime compensation for individual employees, it would be necessary to determine that fact. However, as this is an action only for an injunction relating to future practices, the situation can be met by limiting the injunction to the appropriate classifications of workers. On this basis, the injunction against violation of § 7 of the Fair Labor Standards Act may be issued as to those garagemen and laborers who are not "mechanics" as defined by the Interstate Commerce Commission, and the issue before us is limited to the proper application of such an injunction to such "mechanics."

The drivers are full-time drivers of motor vehicles well within the definition of that class of work by the Commission if the work is done in interstate commerce.[9] From October 24, 1938, to August 1, 1940, the drivers received their "straight" or regular hourly rate of pay for all overtime work. Since August 1, 1940, their overtime work has been paid for in accordance with a collective bargaining agreement in force as to union drivers, throughout metropolitan Detroit, employed either in intrastate or interstate general cartage. From August 1,

[9] Safety Regulations (Carriers by Motor Vehicle), 49 CFR Cum. Supp., Parts 190–193.

1940, to August 1, 1941, these agreements required payment of overtime in excess of 52 hours a week at one and one-half times the regular rate. After August 1, 1941, as a concession to wartime conditions, this additional rate was applied only to overtime in excess of 54 hours a week. The statutory workweek which would be applicable under § 7 of the Fair Labor Standards Act at all times has been substantially shorter than those just mentioned.[10]

As to these drivers and these "mechanics" whose work affects safety of transportation, the first question here, as in the *Levinson* case, is whether the Commission has the power, under § 204 of the Motor Carrier Act, to establish qualifications and maximum hours of service with respect to them. The special situation presented is that, on the average, only about 4% of their time and effort has been, or is likely to be, devoted to services in interstate commerce. The issue would appear in its simplest form if each driver were required, each day, to devote 24 minutes (*i. e.*, 4% of his allowable daily aggregate of ten hours of driving time) to driving in interstate commerce. The question then would be whether the Commission has the power to establish his qualifications and maximum hours of service in view of the relation of this driving to safety of operation in interstate commerce. Under the tests of the Commission's power, as approved in both the majority and minority opinions in the *Levinson* case, and, under the analysis of that power developed by the Interstate Commerce Commission and cited in that case, it is "the character of the activities rather than the proportion of either the employee's time or of his activities that determines the actual need for the Commission's power to establish reasonable requirements with respect to qualifications, maximum hours of service, safety of

[10] See note 2, *supra*.

operation and equipment." [11] It is beyond question that, under such circumstances, § 204 (a) (1) of the Motor Carrier Act [12] has authorized the Commission to establish reasonable requirements with respect to qualifications and maximum hours of service of such drivers. The Fair Labor Standards Act, which was passed three years later, has recognized and does not restrict the Commission's power over the safety of operation under the Motor Carrier Act. What is thus true for the driver is true also for the mechanic who repairs his truck.

In the record before us, instead of 4% of the driving time of each driver being devoted each day to interstate commerce without relation to what the driver does at other times, the parties present the actual experience of the petitioner and his drivers throughout 1941. The printed record, together with an unprinted exhibit filed with the Clerk, classifies all of the 19,786 trips taken in 1941 by the 43 drivers who respectively drove motor vehicles for the petitioner during not less than eight weeks in that year. Only the "Pickup Trips" and "Boat Dock Trips" are counted as being in "interstate commerce." These involved movements of goods to or from railroad freight houses, line haul motor carrier depots or the boat docks of the several steamship companies in Detroit. It was stipulated that the petitioner was "engaged as a common carrier for hire in the local transportation of property by motor vehicle," was "engaged in a general cartage business and . . . [was] prepared to render such service to

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[11] *Levinson* v. *Spector Motor Service*, 330 U. S. 649, 674–675.

"For, factually speaking, not the amount of time an employee spends in work affecting safety, but what he may do in the time thus spent whether it be large or small determines the effect on safety. Ten minutes of driving by an unqualified driver may do more harm on the highway than a month or a year of constant driving by a qualified one." *Id.*, dissenting opinion, at p. 687.

[12] See note 1, *supra*.

the general shipping public . . . ." Each driver appears to have been a full-time driver during each week that he worked. The tables show 464 "Pickup Trips" and 260 "Boat Dock Trips," or a total of 724 made in interstate commerce, when and as required by petitioner's consignors. These constituted 3.65% of the petitioner's total trips. They were not distributed equally to each driver nor on the basis of 4% of his time each day. However, apparently in the normal operation of the business, these strictly interstate commerce trips were distributed generally throughout the year and their performance was shared indiscriminately by the drivers and was mingled with the performance of other like driving services rendered by them otherwise than in interstate commerce. These trips were thus a natural, integral and apparently inseparable part of the common carrier service of the petitioner and of his drivers.

One or more such trips were taken by one or more drivers each week. The average number of drivers making one or more such trips in each week was nine drivers out of 37, or 24.4%. There were six weeks in which more than half of the drivers thus engaged directly in interstate commerce. The highest percentage of drivers making such trips in one week was 78.1%, when 25 drivers, out of the 32 then on duty, did so. As to the distribution of such trips, throughout the year, among the total of 43 drivers, every driver, except two, made at least one such trip with interstate freight. Each of the two who failed to make any such trip was employed for only about one-half the year and that was during the months when the trips in interstate commerce were the less frequent. On the other hand, one driver made 97 such trips in interstate commerce. Another made 52 and the average per driver was over 16. The greatest number of such trips made by a single driver in a single week was seven out of nine. In several other weeks he made six such trips out of a total of

seven in the week. The net result is a practical situation such as may confront any common carrier engaged in a general cartage business, and who is prepared and offering to serve the normal transportation demands of the shipping public in an industrial metropolitan center. From the point of view of safety in interstate commerce, the hazards are not distinguishable from those which would be presented if each driver drove 4% of his driving time each day in interstate commerce. In both cases there is the same essential need for the establishment of reasonable requirements with respect to qualifications and maximum hours of service of employees. If the common carrier is required, by virtue of that status, to take this interstate business he must perform the required service in accordance with the requirements established by the Commission. The Commission has made no exception in these qualifications and maximum hours of service that would exempt the drivers of the petitioner from them as a class. The applicability of the Commission's present requirements as to specific drivers during specific weeks is not the issue before us. We hold that the Commission has the *power* to establish qualifications and maximum hours of service, pursuant to the provisions of § 204 of the Motor Carrier Act, for the entire classification of petitioner's drivers and "mechanics" and it is the existence of that power (rather than the precise terms of the requirements actually established by the Commission in the exercise of that power) that Congress has made the test as to whether or not § 7 of the Fair Labor Standards Act is applicable to these employees.[13]

[13] "We recognize, as a practical matter, that private carriers transport property both in interstate and intrastate commerce. The same motor vehicle, operated by the same driver, on 1 or 2 days in a week may be engaged in transporting property in interstate commerce and the rest of the week may be engaged in intrastate commerce. In our opinion if a driver operates a motor vehicle in the transportation of interstate or foreign commerce on any day of a given week,

Congress has gone out of its way to make this purpose clear in cases comparable to the one before us. It has done this by making the power of the Commission, under § 204 of the Motor Carrier Act, expressly applicable to motor vehicle pickup and delivery service within terminal areas [14] to transportation in interstate commerce

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such driver is subject to the weekly maximum herein prescribed. Likewise if a driver employed by a private carrier of property is engaged in interstate commerce during any one period of 24 consecutive hours, he is subject to the daily maximum herein prescribed. If such a driver does not drive or operate a truck in the transportation of property in interstate or foreign commerce for an entire week, he is not subject to the regulations *herein prescribed* during that week. *We express no opinion as to whether or not during that week the driver is subject to the provisions of section 7 of the Fair Labor Standards Act.*" (Italics supplied.) *Ex Parte No. MC–3,* 23 M. C. C. 1, 39.

The above statement demonstrates the Commission's opinion as to its power to establish qualifications and maximum hours of service in the field of mixed interstate and intrastate transportation. The rules that it has prescribed have not extended to its full power to make rules in this field. The fact that this statement was made in 1940, three years before the decision of this Court in *Southland Co.* v. *Bayley,* 319 U. S. 44, explains the express reservation made as to the Commission's opinion relating to the effect of the scope of its unexercised powers under § 204 of the Motor Carrier Act in relation to § 7 of the Fair Labor Standards Act. For the Commission's regulations of Hours of Service (Carriers by Motor Vehicle) see 49 CFR Cum. Supp., Part 191.

[14] "SEC. 202. . . .

"(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

"(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; . . ." § 202 (c) (1), 49 Stat. 543, as amended by 56 Stat. 300, 49 U. S. C. (Supp. V, 1946), § 302 (c) (1).

wholly within a metropolitan area,[15] and to casual, occasional, or reciprocal transportation of property in interstate commerce by any person not engaged in transportation by motor vehicle as a regular occupation or business.[16] It has made the Commission's power over safety requirements expressly applicable to these operations, even though, at the same time, Congress has exempted them from general regulatory control.

Congress furthermore has provided a special procedure by which, in an appropriate case, an *intrastate motor carrier* or any other party in interest, may secure the general exemption of such a carrier from compliance with the Motor Carrier Act even though such carrier does perform some interstate transportation. Congress, however, expressly has authorized the Commission, and not the courts, to decide when the case is an appropriate one

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[15] "SEC. 203. . . .

"(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business." 49 Stat. 545–546, 49 U. S. C. § 303 (b) (8) and (9).

[16] See note 15, *supra.*

for such a general exemption.[17] It does not appear that any such certificate of exemption has been obtained or sought as to this petitioner.

Having determined that the Commission has the power to establish qualifications and maximum hours of service for these drivers and "mechanics" under § 204 of the Motor Carrier Act, the question recurs as to whether, in the face of the exemption stated in § 13 (b) (1) of the Fair Labor Standards Act, the requirements of § 7 of that Act nevertheless apply to these employees. This issue as to the possible reconciliation of the language of these Acts so as to provide for concurrent jurisdiction was con-

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[17] "SEC. 204 (a) It shall be the duty of the Commission—

. . . . . .

"(4a) To determine, upon its own motion, or upon application by a motor carrier, a State board, or any other party in interest, whether the transportation in interstate or foreign commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation solely within a single State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in this Act. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this part, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof, if it shall find that the transportation in interstate or foreign commerce performed by the carrier or class of carriers designated in such certificate shall be, or shall have become, or is reasonably likely to become, of such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Commission of interstate or foreign transportation by motor carriers in effectuating the national transportation policy declared in this Act. . . ." 49 Stat. 546, as amended by 54 Stat. 921, 49 U. S. C. § 304 (a) (4a).

sidered at length in the *Levinson* case and the conclusion was there reached that such a construction was not permissible.

This discussion has proceeded on the basis of the facts which were stipulated to exist in 1942. This treatment, however, should not be interpreted as necessarily restricting the District Court to the present record if, for good cause, that court finds it advisable to consider additional evidence or to retry the case *de novo*.

For these reasons, the judgment of the Circuit Court of Appeals is vacated and the cause is remanded to the District Court for further proceedings consistent with the opinion of the Circuit Court of Appeals, as here modified.

It is so ordered.

MR. JUSTICE MURPHY, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur, dissenting.

Apart from § 13 (b) (1), it is clear that petitioner's truck drivers and mechanics are subject to the wage and hour provisions of the Fair Labor Standards Act. They spend virtually all of their time in transportation activities which are an integral part of the production of goods for interstate commerce. *Walling* v. *Comet Carriers,* 151 F. 2d 107. The issue thus becomes one of determining whether these employees are plainly and unmistakably within the terms and spirit of the § 13 (b) (1) exemption, giving due regard to the rule that exemptions from the operation of humanitarian legislation are to be narrowly construed. *Phillips Co.* v. *Walling,* 324 U. S. 490, 493.

By a pedantically literal reading of § 13 (b) (1), it is possible to say that these employees are among those as to whom the Interstate Commerce Commission has "power" to establish qualifications and maximum hours of service. A sporadic and minute portion of their activities, approximating 3% to 4% of the total, affects the

safety of operation of trucks in interstate commerce. The Commission's power under § 204 (a) of the Motor Carrier Act is confined to regulation of transportation in interstate and foreign commerce; and its jurisdiction over employees' activities is limited to those which affect the safety of operation of motor vehicles engaged in such transportation. *United States* v. *American Trucking Assns.*, 310 U. S. 534. Hence the potential scope of the Commission's "power" over petitioner's employees is extremely narrow. Approximately 97% of their activities are beyond the jurisdiction of the Commission. Yet it is by the slender thread of this "power" that they fall within § 13 (b) (1) and hence are deprived of the benefits of the Fair Labor Standards Act.

Due respect for the legislative purpose militates against such a result. We are dealing here with a statute that is dedicated to the proposition that laboring men are to be treated as something more than chattels. And their statutory rights are not to be discarded by adherence to formalistic dogmas of interpretation. Section 13 (b) (1) is not just an exercise in grammar. It is part of the living fiber embodying the rights of those who labor for others. It must be read and interpreted in the light of reason and in the light of the aims which Congress sought to achieve.

When that is done, it becomes clear that when § 13 (b) (1) speaks of those over whom the Interstate Commerce Commission has "power" it means those who perform at least a substantial amount of activities within the Commission's jurisdiction. Congress was not concerned with insignificant conflicts between Fair Labor Standards Act regulations and Interstate Commerce Commission regulations. Nor was it desirous of leaving unregulated nearly all of the working time of those who are engaged in the production of goods for commerce but who spend infinitesimal amounts of time directly in interstate transportation. In other words, engaging in

an occasional and microscopic amount of activities affecting safety of operation should no more exclude employees from the Act than sporadically shipping insubstantial amounts of goods in interstate commerce should bring those engaged in such shipments within the purview of the Act. See *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 181. That was implicitly recognized by the Court in *Pyramid Motor Corp.* v. *Ispass*, 330 U. S. 695, 708, and I had not supposed until now that that case or *Levinson* v. *Spector Motor Co.*, 330 U. S. 649, justified any other result.

Interpreting § 13 (b) (1) in disregard of reality only acts as an open invitation to evade the Act and to destroy the statutory rights of those trucking concern employees who now perform no activities which affect the safety of operations. All that the employer need do to withdraw the benefits of the Act from these employees is to send them occasionally to a terminal to pick up or deliver a piece of interstate freight. They then fall into the "power" of the Interstate Commerce Commission and automatically lose their rights under the Fair Labor Standards Act. I accordingly dissent.

MR. JUSTICE RUTLEDGE, dissenting.

But for this Court's decisions in the *Levinson* and *Ispass* cases, my views in this case would be in substantial accord with those expressed by MR. JUSTICE MURPHY. See *Levinson* v. *Spector Motor Service*, 330 U. S. 649, dissenting opinion at 685; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U. S. 695. I thought the decisions in those cases foreshadowed the extreme result here, which goes so far as to exclude from the Fair Labor Standards Act's protection at least two employees who made no trips in what petitioner regards as the interstate phase of his business. While on the other hand one driver made 97 such trips, there were others who made only very occasional ones.

Although I regarded the *Levinson* and *Ispass* decisions as foreshadowing and perhaps concluding any situation where the employee's work would substantially affect safety in interstate operations, and thus as going to the extent of exempting from Fair Labor Standards Act coverage any employee whose work substantially affects such safety, I did not understand that all employees driving for a company engaged principally in intrastate commerce but doing a very small amount of interstate commerce would be lumped together, for purposes of the exclusion, on the basis of the proportionate amounts of work done by the company in those phases of its business. That I think is the effect of the present decision. To that extent, I also think the ruling constitutes an extension of the exemption beyond that sustained in the *Levinson* and *Ispass* cases.

On the basis of the decision last term in *United States* v. *Yellow Cab Company,* 332 U. S. 218, I also have difficulty with the view that any of the carrier's services here were rendered in interstate commerce. That decision held that the transportation in Chicago of passengers and their luggage from their homes, offices, hotels, etc. to railroad stations for the purpose of boarding trains on interstate journeys, and conversely the like use of taxicabs in the reverse direction after leaving trains on arrival in Chicago following such journeys, were "too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act." 332 U. S. at 230. While I was not in agreement with the *Yellow Cab* decision, the same ruling, if applied to the facts here, would make the so-called "interstate commerce," *i. e.,* the transportation of freight from petitioner's customers' places of business to shipping terminals, intrastate rather than interstate commerce.[1]

I am unable to agree with the Court's opinion.

[1] I do not read the stipulation of facts in this case as showing that petitioner engaged in transportation from terminal to terminal.

COX *v.* UNITED STATES.

NO. 66. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.*

Argued October 14–15, 1947.—Decided November 24, 1947.

Petitioners, Jehovah's Witnesses, were convicted in prosecutions for absence without leave from a civilian public service camp, in violation of § 11 of the Selective Training and Service Act of 1940. The defense in each case was that the local board's classification of the petitioner as a conscientious objector rather than as an exempt minister of religion was invalid. *Held:*

1. Judgments of the Circuit Court of Appeals affirming the convictions are here affirmed. Pp. 443–444, 455.

2. Having exhausted their remedies in the selective service process and complied with the orders of the local boards to report to camp, petitioners were entitled to raise the issue of the validity of their classifications in their criminal trials for absence without leave. P. 448.

3. The local boards' denial to the defendants of the classification of minister of religion is final unless it is without basis in fact. Pp. 448–452.

4. The question whether the local boards' denial to the defendants of the classification of minister of religion was without basis in fact is a question of law for determination by the court. Pp. 452–453.

5. In the criminal trials, review of the local boards' classifications was properly limited to the evidence which was before the boards and upon which they acted. Pp. 453–455.

157 F. 2d 787, affirmed.

Petitioners were convicted in the District Court of violating the Selective Training and Service Act of 1940. The convictions were affirmed by the Circuit Court of Appeals. 157 F. 2d 787. This Court granted certiorari. 331 U. S. 801. *Affirmed,* p. 455.

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*Together with No. 67, *Thompson* v. *United States,* and No. 68, *Roisum* v. *United States,* also on certiorari to the same Court.

Hayden C. Covington argued the cause and filed a brief for petitioners.

Irving S. Shapiro argued the cause for the United States. With him on the brief were *Solicitor General Perlman* and *Robert S. Erdahl.*

MR. JUSTICE REED announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, MR. JUSTICE JACKSON, and MR. JUSTICE BURTON join.

These cases present the question of the scope of review of a selective service classification in a trial for absence without leave from a civilian public service camp. Petitioners are Jehovah's Witnesses who were classified as conscientious objectors despite their claim to classification as ministers of religion. Ministers are exempt from military and other service under the Act. All three petitioners exhausted their remedies in the selective service process and complied with the order of the local board directing them to report to camp. Cox and Thompson were indicted for leaving the camp without permission, and Roisum was indicted for failing to return after proper leave, in violation of § 11 of the Selective Training and Service Act of 1940. 54 Stat. 885, 57 Stat. 597, 50 U. S. C. Appendix §§ 301–318.

On their trials petitioners requested directed verdicts, at appropriate times, because the selective service orders were invalid and requested the court to charge the jury that they acquit petitioners if they found that they were ministers of religion and therefore exempt from all service. The trial judge did not grant petitioners' requests, however, and instructed the juries that they were not to concern themselves with the validity of the classification orders. Petitioners were convicted, and on appeal

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to the Circuit Court of Appeals their convictions were affirmed. 157 F. 2d 787. We granted certiorari in order to resolve questions concerning the submission to the jury of evidence, to wit, the files of the local board of the selective service system, as relevant to the charge of violation of selective service orders. 331 U. S. 801.

Petitioner Cox registered under the Selective Training and Service Act on October 16, 1940, and in his questionnaire stated that he was 22 years old and had been employed as a truck driver since 1936. The local board classified him IV–F, as not physically fit for service, on January 31, 1941, and on March 10, 1942, changed the classification to I–A. Ten days later Cox filed a request for reclassification as IV–E (conscientious objector), stating that he had become a Jehovah's Witness in January 1942. The board at first rejected the claim, but on June 12 of the same year granted him the requested classification. Ten days later petitioner first made his claim for total exemption from service, claiming to be a minister of religion; the local board refused the exemption and its action was sustained by the board of appeal. On May 18, 1944, the board ordered Cox to report to camp, and on May 26 he complied and then immediately left camp and did not return.

Upon trial Cox's selective service file was received in evidence. It contained an ordination certificate from the Watch Tower Bible and Tract Society stating that Cox was "a duly ordained minister of the Gospel" and that his "entire time" was devoted to missionary work. The file also contained an affidavit of a company servant, Cox's church superior, dated October 29, 1942, stating that Cox "regularly and customarily serves as a minister by going from house to house and conducting Bible Studies and Bible Talks." There was also an affidavit by Cox, dated October 28, 1942, stating that he was enrolled in the "Pioneer service" on October 16 and that he was "able

to average 150 hours per month to my ministerial duties without secular work." He added that "my entire time will be devoted to preaching the Gospel as a pioneer." Cox testified at the trial in October 1944 as to his duties as a minister that he preached from house to house, conducted funerals, and "instructed the Bible" in homes. No evidence was introduced showing the total amount of time Cox had spent in religious activities since October 16, 1942. Nor was there evidence of the secular activities of Cox nor the time employed in them. Although the selective service file was introduced in evidence, and the trial court denied the motion for a directed verdict, it does not appear that the trial judge examined the file to determine whether the action of the local board was arbitrary and capricious or without basis in fact. At that time the lower federal courts interpreted *Falbo* v. *United States,* 320 U. S. 549, as meaning that no judicial review of any sort could be had of a selective service order. In *Estep* v. *United States,* 327 U. S. 114, we held that a limited review could be obtained if the registrant had exhausted his administrative remedies, and the Circuit Court of Appeals in accordance with that decision reviewed the file of Cox and found that the evidence was "substantially in support" of the classification found by the board.

Petitioner Thompson also registered on October 16, 1940, claiming exemption as a minister. He stated in his questionnaire that he was 30 years old and that for the past 13 years he had operated a grocery store and had been a minister since August 1, 1940. At first the local board gave him a deferred classification because of dependency, but then changed his classification to IV–E. Thompson appealed to the board of appeal on November 5, 1943, explaining his duties as a minister and presenting a full statement of his argument that as a colporteur he was within the exemption for ministers as interpreted by

selective service regulations. He attached an affidavit from the company servant, which stated that Thompson during the preceding twelve months had devoted 519½ hours to "field service," representing time spent in going from house to house, and making "back-calls on the people of good will," but not including time spent in conducting studies at the "local Kingdom Hall." Another affidavit from the company servant stated that Thompson was an ordained minister of the Gospel, that he was serving as assistant company servant, and that he was a "School Instructor in a Course in Theocratic Ministry." Thompson also attached three certificates from the national headquarters of the Watch Tower Bible and Tract Society which stated that Thompson had been associated with the Society since 1941, that he served as assistant company servant and Theocratic Ministry Instructor, and also as advertising servant and book study conductor. Unlike the other two petitioners, Thompson did not introduce an ordination certification from national headquarters stating that he devoted his entire time as a minister. Thompson also filed a statement signed by twelve Witnesses which stated that they regarded Thompson as an ordained minister of the gospel. No evidence was submitted indicating any change in Thompson's activities in operating his grocery store. The board of appeal sustained the local board in its classification, the board ordered Thompson to report to camp, and on April 18, 1944, he reported and immediately left. Thompson's trial followed the same pattern as Cox's, except that Thompson was not allowed to testify concerning his duties as a minister.

Petitioner Roisum also registered on the initial registration day, and filed a questionnaire stating that he was 22 years old, that he had worked for the past 15 years as a farmer, and that he was ordained as a minister in June 1940. Roisum made claim to a minister's ex-

emption but at the same time submitted an affidavit signed by his father saying that petitioner was necessary to the operation of his father's farm. In June 1942 Roisum filed a conscientious objector's form claiming exemption from both combatant and non-combatant military service; this form was apparently filed under misapprehension, since Roisum did not abandon his contention that he should be classified as a minister. In the form he stated that he preached the gospel of the Kingdom at every opportunity. Roisum also enclosed a letter from national headquarters of the Society stating that Roisum had been affiliated with the Society since 1936, that he had been baptized in 1940 and "was appointed direct representative of this organization to perform missionary and evangelistic service in organizing and establishing churches and generally preaching the Gospel of the Kingdom of God in definitely assigned territory in 1941" and that Roisum devoted his "entire time" to missionary work and was a duly ordained minister. The local board classified Roisum as a conscientious objector to combat service (I–A–O), and Roisum appealed on June 30, 1943. Roisum attached an affidavit from his company servant stating that Roisum was an assistant company servant, a back call servant, and book study conductor, and that by performance of these duties Roisum had acquitted himself as a "regular minister of the gospel." The company servant submitted a schedule showing the number of hours which Roisum had spent in religious activities for six months from October 1942 to March 1943, ranging from as little as 11 hours per month to as many as 69, averaging about 40. The board of appeal changed the classification to IV–E and rejected Roisum's request that an appeal be taken to the President. Roisum was ordered to report to camp, disobeyed the order, and was arrested and indicted. The trial court declared a mistrial on Roisum's undertaking to obey the board's order

and seek release on *habeas corpus*. Roisum subsequently failed to comply, apparently because of transportation difficulties, but finally reported to camp on May 23, 1944, as directed. He remained in camp for five days, left on a week-end pass, and never returned.

Upon trial Roisum made no effort to introduce new evidence showing the nature of his duties as a minister. He did request the court to charge that if the decision of the local board erroneously classified him in IV–E the order was void and after conviction he moved for a judgment of acquittal or a new trial on the ground that the evidence in his selective service file showed that the classification of the board was arbitrary and capricious. The trial judge examined the file and concluded that there was no ground to support Roisum's motion.

Petitioners are entitled to raise the question of the validity of their selective service classifications in this proceeding. They have exhausted their remedies in the selective service process, and whatever their position might be in attempting to raise the question by writs of *habeas corpus* against the camp custodian, they are entitled to raise the issue as a defense in a criminal prosecution for absence without leave. *Gibson* v. *United States,* 329 U. S. 338, 351–360. The scope of review to which petitioners are entitled, however, is limited; as we said in *Estep* v. *United States,* 327 U. S. 114, 122–23: "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no

basis in fact for the classification which it gave the registrant." Compare *Eagles* v. *United States ex rel. Samuels,* 329 U. S. 304, and *Eagles* v. *United States ex rel. Horowitz,* 329 U. S. 317, in which a similar scope of review is enunciated in *habeas corpus* proceedings by registrants claiming to have been improperly inducted.

Section 5 (d) of the Selective Training and Service Act provides that "regular or duly ordained ministers of religion" shall be exempt from training and service under the Act, and § 622.44 of Selective Service Regulations defines the terms "regular minister of religion" and "duly ordained minister of religion." [1] In order to aid the local boards in applying the regulation, the Director of Selective Service issued Opinion No. 14 (amended)

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[1] 54 Stat. 885, 888:

"SEC. 5. . . .

"(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

Selective Service Regulations, 32 C. F. R., 1941 Supp.:

Section 622.44. *"Class IV–D: Minister of religion or divinity student.* (a) In Class IV–D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

"(b) A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

"(c) A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

on November 2, 1942,[2] which described the tests to be applied in determining whether Jehovah's Witnesses were entitled to exemption as ministers, regular or ordained. The opinion stated that Witnesses who were members of the Bethel Family (producers of religious supplies) or pioneers, devoting all or substantially all of their time to the work of teaching the tenets of their religion, generally were exempt, and appended a list of certain members of the Bethel Family and pioneers who were entitled to this exemption. None of these Witnesses were on the list. The opinion stated that members of the Bethel Family and pioneers whose names did not appear on the list, as well as all other Witnesses holding official titles in the organization, must be classified by the boards according to the facts in each case. The determining criteria were stated to be "whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded." The opinion further stated that the local board should place in the registrant's file "a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision."

It will be observed that § 622.44 of the regulation makes "ordination" the only practical difference between a "regular" and a "duly ordained minister." This seems consistent with § 5 of the Act. We are of the view that the regulation conforms to the Act and that it is valid under the rule-making power conferred by § 10 (a). We agree,

[2] Opinion 14 (amended) is on file at the Office of Selective Service Records, Washington, D. C.

also, that Opinion 14 furnishes a proper guide to the interpretation of the Act and Regulations.

Our examination of the facts, as stated herein in each case, convinces us that the board had adequate basis to deny to Cox, Thompson and Roisum classification as ministers, regular or ordained. We confine ourselves to the facts appearing in the selective service files of the three petitioners, although the only documents dealing with the petitioners' status as ministers were submitted by petitioners themselves. The documents show that Thompson and Roisum spent only a small portion of their time in religious activities, and this fact alone, without a far stronger showing than is contained in either of the files of the registrants' leadership in church activities and the dedication of their lives to the furtherance of religious work, is sufficient for the board to deny them a minister's classification. As for Cox, the documents suggest but do not prove that Cox spent full time as a "pioneer" between October 1942 and May 1944 when he was ordered to camp. As he made claim of conscientious objector classification only after he was reclassified I–A from IV–F and still later claimed ministerial exemption, the board was justified in deciding from the available facts that Cox had not established his ministerial status. The board might have reasonably held that nothing less than definite evidence of his full devotion of his available time to religious leadership would suffice under these circumstances.[3] Nor

[3] For a similar conclusion under the same subdivision of the statute, giving exemption to regular and duly ordained ministers of religion and students, see *Eagles* v. *Samuels*, 329 U. S. 304, 316–17:

"Nor can we say there was no evidence to support the final classification made by the board of appeal. Samuels' statement that he was best fitted to be a Hebrew school teacher and spiritual leader, the two-year interruption in his education, his return to the day session of the seminary in the month when his selective service questionnaire was returned, and the fact that the seminary in question was appar-

may Cox and Thompson complain that the district court failed to pass on the validity of the classification orders. If there was error of the district court in failing to examine the files of the board to determine whether or not there was basis for their classification, it was cured in the Circuit Court of Appeals by that court's examination.

Petitioners do not limit themselves to the claim that directed verdicts should have been entered in their favor because of the invalidity of their classifications as a matter of law; they claim that the issue should have been submitted with appropriate instructions to the jury.[4] The charge requested by Roisum that he be acquitted if the jury found that he was "erroneously" classified was improper. In *Estep* v. *United States* it was distinctly stated that mere error in a classification was insufficient grounds for attack. Cox and Thompson requested charges under which the jury would determine "whether or not the defendant is a minister of religion" without considering the action of the local board. We hold that such a charge would also have been improper. Whether there was "no basis in fact" for the classification is not

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ently not preparing men exclusively for the rabbinate make questionable his claim that he was preparing in good faith for the rabbinate. A registrant might seek a theological school as a refuge for the duration of the war. Congress did not create the exemption in § 5 (d) for him. There was some evidence that this was Samuels' plan; and that evidence, coupled with his demeanor and attitude, might have seemed more persuasive to the boards than it does in the cold record. Our inquiry is ended when we are unable to say that the board flouted the command of Congress in denying Samuels the exemption."

[4] The Circuit Court of Appeals on April 5, 1946, ordered the judgments in these cases reversed on the ground that the jury should have passed on petitioners' claims. Upon rehearing the opinion was withdrawn, and on October 4 the court handed down an opinion affirming the judgments. 157 F. 2d 787. In *Smith* v. *United States*, 157 F. 2d 176, the Circuit Court of Appeals held that the submission of the issue of classification to the jury constituted reversible error. But cf. *United States ex rel. Kulick* v. *Kennedy*, 157 F. 2d 811.

a question to be determined by the jury on an independent consideration of the evidence. The concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order. *Yakus* v. *United States,* 321 U. S. 414. Although we held in *Estep* that Congress did not intend to cut off all judicial review of a selective service order, petitioners have full protection by having the issue submitted to the trial judge and the reviewing courts to determine whether there was any substantial basis for the classification order. When the judge determines that there was a basis in fact to support classification, the issue need not and should not be submitted to the jury. Perhaps a court or jury would reach a different result from the evidence but as the determination of classification is for selective service, its order is reviewable "only if there is no basis in fact for the classification." *Estep* v. *United States, supra,* 122. Consequently when a court finds a basis in the file for the board's action that action is conclusive. The question of the preponderance of evidence is not for trial anew. It is not relevant to the issue of the guilt of the accused for disobedience of orders. Upon the judge's determination that the file supports the board, nothing in the file is pertinent to any issue proper for jury consideration.[5]

Petitioners also claim that they were denied the right to introduce new evidence at the trial to support their contention that the orders were invalid. Roisum made no attempt to introduce such evidence, Cox was in fact

[5] For an analogous power of a judge as to admissibility, see Wigmore (3d ed.) § 2550; *Steele* v. *United States No. 2,* 267 U. S. 505, 510–11; *Ford* v. *United States,* 273 U. S. 593, 605; *Doe dem. Jenkins* v. *Davies,* 10 Ad. & E. N. S. 314, 323–24; Phipson, Evidence (8th ed.), p. 9.

allowed to testify as to his duties as a minister, and only Thompson was denied the opportunity so to testify. Thompson did not specify this point as error in his appeal to the Circuit Court of Appeals. Passing the possible waiver on the part of Thompson by failing to argue this point below, we hold that his contention is without merit. Petitioner claims that his status as a minister is a "jurisdictional fact" which may be determined *de novo* (reexamination of the record of the former hearing with right to adduce additional evidence) in a criminal trial, and relies on *Ng Fung Ho* v. *White*, 259 U. S. 276, where we held that an alleged alien was entitled to a judicial trial on the issue of alienage in *habeas corpus* proceedings. But that case is different from this. The alien, there, claimed American citizenship. As such, this Court said, he had a right to a judicial hearing of his claim as a matter of due process. This he could not get before the Commissioner of Immigration. Therefore, since the deportation of a citizen may involve loss "of all that makes life worth living," this Court decided that the "jurisdiction" of the Commissioner to try the alleged alien could be tested by *habeas corpus*. P. 284. That gave the alleged alien a judicial hearing. In these cases judicial review of administrative action is allowed in the criminal trial. This assures judicial consideration of a registrant's rights. Petitioners' objection on this point is in essence that the review is limited to evidence that appeared in the administrative proceeding. It seems to us that it is quite in accord with justice to limit the evidence as to status in the criminal trial on review of administrative action to that upon which the board acted.[6] As we have said elsewhere the board records were made by petitioners. It was open to them there to furnish full information as to

[6] See *Goff* v. *United States*, 135 F. 2d 610, and *United States* v. *Messersmith*, 138 F. 2d 599.

their activities. It is that record upon which the board acted and upon which the registrants' violation of orders must be predicated.

We perceive no error to petitioners' prejudice in the records.

Affirmed.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I agree with the majority of the Court that we can reverse the judgments below only if there was no basis in fact for the classification. I also agree that that question is properly one of law for the Court. To that extent I join in the opinion of the Court. But I do not agree that the local boards had adequate basis to deny to petitioners the classification of ministers. My disagreement is required by what I conceive to be the mandate of Congress, that all who preach and teach their faith and are recognized as ministers within their religious group are entitled to the statutory exemption.

The exemption runs to "regular or duly ordained ministers of religion." There is no suggestion that only ministers of the more orthodox or conventional faiths are included. Nor did Congress make the availability of the exemption turn on the amount of time devoted to religious activity. It exempted all regular or duly ordained ministers. Hence, I think the Selective Service Regulations properly required that a "regular" minister, as distinguished from a "duly ordained" minister,[1] only be

[1] A "duly ordained" minister is defined as one "who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies

one who "customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister." 32 C. F. R. Cum. Supp. § 622.44 (b).

It is not disputed that Jehovah's Witnesses constitute a religious sect or organization. We have, moreover, recognized that its door-to-door evangelism is as much religious activity as "worship in the churches and preaching from the pulpits." *Murdock* v. *Pennsylvania,* 319 U. S. 105, 109. The Selective Service files of these petitioners establish, I think, their status as ministers of that sect. Their claims to that status are supported by affidavits of their immediate superiors in the local group and by their national headquarters. And each of them was spending substantial time in the religious activity of preaching their faith. If a person is in fact engaging in the ministry, his motives for doing so are quite immaterial.[2]

To deny these claimants their statutory exemption is to disregard these facts or to adopt a definition of minister which contracts the classification provided by Congress.

The classification as a minister may not be denied because the registrant devotes but a part of his time to religious activity. It is not uncommon for ordained min-

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in public worship; and who customarily performs those duties." 32 C. F. R. Cum. Supp. § 622.44 (c).

The distinction between "regular" and "duly ordained" ministers is, I think, more than the ordination of the latter. The "duly ordained" minister performs all the customary functions of a minister of a church. The concept of "regular" minister more nearly fits those who, like Jehovah's Witnesses, follow less orthodox or conventional practices.

[2] *Eagles* v. *Samuels,* 329 U. S. 304, is not controlling here. It involved the exemption given students preparing for the ministry. Mere presence in a school not exclusively confined to preparing men for the rabbinate did not entitle the student to exemption.

isters of more orthodox religions to work a full day in secular occupations, especially in rural communities. They are nonetheless ministers. Their status is determined not by the hours devoted to their parish but by their position as teachers of their faith. It should be no different when a religious organization such as Jehovah's Witnesses has part-time ministers. Financial needs may require that they devote a substantial portion of their time to lay occupations. And the use of part-time ministers may be dictated by a desire to disseminate more widely the religious views of the sect. Whatever the reason, these part-time ministers are vehicles for propagation of the faith; by practical as well as historical standards they are the apostles who perform the minister's function for this group.

MR. JUSTICE MURPHY, with whom MR. JUSTICE RUTLEDGE concurs, dissenting.

With certain limitations, this Court has recognized that a person on trial for an alleged violation of the Selective Training and Service Act has the right to prove that the prosecution is based upon an invalid draft board classification. But care must be taken to preclude the review of the classification by standards which allow the judge to do little more than give automatic approval to the draft board's action. Otherwise the right to prove the invalidity of the classification is drained of much of its substance and the trial becomes a mere formality. Such empty procedure has serious connotations, especially when we deal with those who claim they have been illegally denied exemptions relating to conscientious beliefs or ministerial status.

Specifically, I object to the standard of review whereby the draft board classification is to be sustained unless there is no evidence to support it. Less than a substantial amount of evidence is thus permitted to legalize the clas-

sification. Whatever merit this standard may have in other situations, I question the propriety of its use in this particular setting. This differs from an ordinary civil proceeding to review a non-punitive order of an administrative agency, an order which is unrelated to freedom of conscience or religion. This is a criminal trial. It involves administrative action denying that the defendant has conscientious or religious scruples against war, or that he is a minister. His liberty and his reputation depend upon the validity of that action. If the draft board classification is held valid, he will be imprisoned or fined and will be branded as a violator of the nation's law; if that classification is unlawful, he is a free man. Moreover, he has had no previous opportunity to secure a judicial test of this administrative action, no chance to prove that he was denied his statutory rights. Everything is concentrated in the criminal proceeding.

These stakes are too high, in my opinion, to permit an inappreciable amount of supporting evidence to sanction a draft board classification. Since guilt or innocence centers on that classification, its validity should be established by something more forceful than a wisp of evidence or a speculative inference. Otherwise the defendant faces an almost impossible task in attempting to prove the illegality of the classification, the presence of a mere fragment of contrary evidence dooming his efforts. And such a scant foundation should not justify brushing aside bona fide claims of conscientious belief or ministerial status. If respect for human dignity means anything, only evidence of a substantial nature warrants approval of the draft board classification in a criminal proceeding.

It is needless to add that, from my point of view, the proof in these cases falls far short of justifying the conviction of the petitioners. There is no suggestion in the record that they were other than bona fide ministers.

And the mere fact that they spent less than full time in ministerial activities affords no reasonable basis for implying a non-ministerial status. Congress must have intended to exempt from statutory duties those ministers who are forced to labor at secular jobs to earn a living as well as those who preach to more opulent congregations. Any other view would ascribe to Congress an intention to discriminate among religious denominations and ministers on the basis of wealth and necessity for secular work, an intention that I am unwilling to impute. Accordingly, in the absence of more convincing evidence, I cannot agree that the draft board classifications underlying petitioners' convictions are valid.

LILLIE *v.* THOMPSON, TRUSTEE.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 206. Decided November 24, 1947.

A complaint under the Federal Employers' Liability Act alleged that the hours, location and circumstances of the complainant's work created a likelihood that she would suffer injuries through the criminal acts of a person not an employee; that the railroad failed to exercise its duty of taking reasonable measures to protect her against the foreseeable danger, and that she suffered injuries as a result of the railroad's failure to take such measures. *Held:*

1. The complaint stated a cause of action under the Act. Pp. 460–461.

2. That the danger was from criminal misconduct by an outsider is irrelevant. If that danger was foreseeable, the railroad had a duty to make reasonable provision against it. Pp. 461–462.

162 F. 2d 716, reversed.

Petitioner's suit against a railroad for damages under the Federal Employers' Liability Act was dismissed by the District Court for failure to state a cause of action. The Circuit Court of Appeals affirmed. 162 F. 2d 716. This

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Court grants a petition for certiorari, reverses the judgment, and remands the case to the District Court, p. 462.

Grover N. McCormick and *N. Murry Edwards* for petitioner.

PER CURIAM.

Petitioner sued for damages under the Federal Employers' Liability Act.[1] The essence of her claim was that she was injured as a result of the respondent's negligence in sending her to work in a place he knew to be unsafe without taking reasonable measures to protect her.

The district court dismissed the complaint for failure to state a cause of action and entered summary judgment for the respondent. The Circuit Court of Appeals affirmed without opinion. 162 F. 2d 716.

There is thus a single issue in the case: Could it be found from the facts alleged in the complaint, as supplemented by any uncontroverted allegations by the respondent, that petitioner's injuries resulted at least in part from respondent's negligence? [2]

Petitioner's allegations may be summarized as follows: Respondent required her, a 22-year-old telegraph operator, to work alone between 11:30 p. m. and 7:30 a. m. in a one-room frame building situated in an isolated part of respondent's railroad yards in Memphis. Though respondent had reason to know the yards were frequented by dangerous characters, he failed to exercise reasonable care

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[1] 45 U. S. C. § 51.

[2] "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . ." *Ibid.*

It is not questioned that respondent was engaged in interstate commerce and that petitioner was injured while employed in such commerce.

to light the building and its surroundings or to guard or patrol it in any way. Petitioner's duties were to receive and deliver messages to men operating trains in the yard. In order for the trainmen to get the messages it was necessary for them to come to the building at irregular intervals throughout the night, and it was petitioner's duty to admit them when they knocked. Because there were no windows in the building's single door or on the side of the building in which the door was located, petitioner could identify persons seeking entrance only by unlocking and opening the door. About 1:30 a. m. on the night of her injury petitioner responded to a knock, thinking that some of respondent's trainmen were seeking admission. She opened the door, and before she could close it a man entered and beat her with a large piece of iron, seriously and permanently injuring her.

In support of his motion for summary judgment respondent alleged, and petitioner did not deny, that the assailant was not an employee of the respondent and that the attack was criminal.

The district court stated, in explanation of its action, that there would be no causal connection between the injury and respondent's failure to light or guard the premises, and that the law does not permit recovery "for the intentional or criminal acts" of either a fellow-employee or an outsider.[3]

We are of the opinion that the allegations in the complaint, if supported by evidence, will warrant submission to a jury. Petitioner alleged in effect that respondent was aware of conditions which created a likelihood that a young woman performing the duties required of peti-

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[3] The court cited *Davis* v. *Green*, 260 U. S. 349 (1922); *St. Louis-San Francisco R. Co.* v. *Mills*, 271 U. S. 344 (1926); *Atlantic Coast Line R. Co.* v. *Southwell*, 275 U. S. 64 (1927); and *Atlanta & Charlotte Air Line R. Co.* v. *Green*, 279 U. S. 821 (1929), reversing *per curiam* 151 S. C. 1, 148 S. E. 633.

tioner would suffer just such an injury as was in fact inflicted upon her. That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it.[4] Breach of that duty would be negligence, and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence. The cases cited by the district court,[5] we believe, do not support the broad proposition enunciated by it, and do not cover the fact situation set forth by the pleadings in this case.

Certiorari is granted, and the judgment is reversed and the case remanded to the district court.

Reversed.

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[4] See Restatement of Torts, § 302, Comment *n*:

"*n*. The actor's conduct may create a situation which affords an opportunity or temptation to third persons to commit more serious forms of misconducts which may be of any of several kinds. (1) The third person may intend to bring about the very harm which the other sustains. . . . The actor is required to anticipate and provide against all of these misconducts under the following conditions in all of which it is immaterial to the actor's civil liability that the third person's misconduct is or is not criminal . . . :

. . . . .

"8. where he knows of peculiar conditions which create a strong likelihood of intentional or reckless misconduct (see Illustrations 21 and 22).

"*Illustrations:*

. . . . .

"21. The employees of the X and Y Railroad Company are on a strike. They or their sympathizers have torn up tracks, misplaced switches and otherwise attempted to wreck trains. A train of the X and Y Company is wrecked by an unguarded switch so misplaced. A, a passenger, and B, a traveler upon a highway adjacent to the track sustain harm. The X and Y Company is liable to A and B because it did not guard the switch."

[5] See note 3, *supra*.

Syllabus.

PATTON *v.* MISSISSIPPI.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

No. 122. Argued November 21, 24, 1947.—Decided December 8, 1947.

1. Petitioner, a Negro, was indicted for murder by an all-white grand jury and convicted by an all-white petit jury, notwithstanding a timely motion to quash the indictment. Although there were 12,511 adult Negroes in the county out of a total adult population of 34,821 and there were at least 25 Negro qualified male electors eligible for jury service, the venires for the term from which the grand and petit juries were selected did not contain the name of a single Negro and no Negro had served on a grand or petit criminal court jury in the county for 30 years. *Held:* The record sustains petitioner's claim of a systematic, purposeful, administrative exclusion of Negroes from jury duty contrary to the Equal Protection Clause of the Fourteenth Amendment; the conviction is reversed; and the case is remanded for further proceedings. Pp. 465–469.
2. Whether there has been systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case. P. 466.
3. The fact that no Negro had served on a criminal court grand or petit jury for a period of 30 years created a strong presumption that Negroes were systematically excluded from jury service because of race; and it became the State's duty to justify such an exclusion as having been brought about for some reason other than racial discrimination. P. 466.
4. Such a presumption was not overcome by an attempt to disprove systematic racial discrimination in the selection of jurors by percentage calculations applied to the composition of a single venire. P. 468.
5. When a jury selection plan operates in such a way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand. P. 469.

201 Miss. 410, 29 So. 2d 96, reversed.

The Supreme Court of Mississippi affirmed a state trial court's denial of a motion to quash an indictment for

murder because of systematic racial discrimination in the selection of jurors contrary to the Fourteenth Amendment. 201 Miss. 410, 29 So. 2d 96. This Court granted certiorari. 331 U. S. 804. *Reversed and remanded,* p. 469.

Thurgood Marshall argued the cause for petitioner. With him on the brief was *Andrew Weinberger.*

George H. Ethridge, Assistant Attorney General of Mississippi, argued the cause for respondent. With him on the brief was *Greek L. Rice,* Attorney General.

Mr. Justice Black delivered the opinion of the Court.

The petitioner, a Negro, was indicted in the Circuit Court of Lauderdale County, Mississippi, by an all-white grand jury, charged with the murder of a white man. He was convicted by an all-white petit jury and sentenced to death by electrocution. He had filed a timely motion to quash the indictment alleging that, although there were Negroes in the county qualified for jury service, the venires for the term from which the grand and petit juries were selected did not contain the name of a single Negro. Failure to have any Negroes on the venires, he alleged, was due to the fact that for a great number of years previously and during the then term of court there had been in the county a "systematic, intentional, deliberate and invariable practice on the part of administrative officers to exclude negroes from the jury lists, jury boxes and jury service, and that such practice has resulted and does now result in the denial of the equal protection of the laws to this defendant as guaranteed by the 14th amendment to the U. S. Constitution." In support of his motion petitioner introduced evidence which showed without contradiction that no Negro had served on the grand or petit criminal court juries for thirty years or more. There was evidence that a single Negro had once been

summoned during that period but for some undisclosed reason he had not served, nor had he even appeared. And there was also evidence from one jury supervisor that he had, at some indefinite time, placed on the jury lists the names of "two or three" unidentified Negroes. In 1940 the adult colored population of Lauderdale County, according to the United States Census, was 12,511 out of a total adult population of 34,821.

In the face of the foregoing the trial court overruled the motion to quash. The Supreme Court of Mississippi affirmed over petitioner's renewed insistence that he had been denied the equal protection of the laws by the deliberate exclusion of Negroes from the grand jury that indicted and the petit jury that convicted him. 201 Miss. 410, 29 So. 2d 96. We granted certiorari to review this serious contention.[1] 331 U. S. 804.

Sixty-seven years ago this Court held that state exclusion of Negroes from grand and petit juries solely because of their race denied Negro defendants in criminal cases the equal protection of the laws required by the Fourteenth Amendment. *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). A long and unbroken line of our decisions since then has reiterated that principle, regardless of whether the discrimination was embodied in statute[2] or was apparent from the administrative practices of state jury selection officials,[3] and regardless of whether the system

[1] Petitioner also argued that his conviction was based solely on an extorted confession; that use of this extorted confession denied him due process of law; and that the case should be reversed for that reason. The view we take as to the systematic exclusion of Negro jurors makes it unnecessary to pass on the alleged extorted confession.

[2] *Bush* v. *Kentucky*, 107 U. S. 110, 122.

[3] *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370; *Carter* v. *Texas*, 177 U. S. 442; *Rogers* v. *Alabama*, 192 U. S. 226; *Norris* v. *Alabama*, 294 U. S. 587; *Hollins* v. *Oklahoma*, 295 U. S. 394; *Hale* v. *Kentucky*, 303 U. S. 613; *Pierre* v. *Louisiana*, 306 U. S. 354; *Smith* v. *Texas*, 311 U. S. 128; *Hill* v. *Texas*, 316 U. S. 400.

for depriving defendants of their rights was "ingenious or ingenuous." [4]

Whether there has been systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case. In this case the Mississippi Supreme Court concluded that petitioner had failed to prove systematic racial discrimination in the selection of jurors, but in so concluding it erroneously considered only the fact that no Negroes were on the particular venire lists from which the juries were drawn that indicted and convicted petitioner.[5] It regarded as irrelevant the key fact that for thirty years or more no Negro had served on the grand or petit juries. This omission seriously detracts from the weight and respect that we would otherwise give to its conclusion in reviewing the facts, as we must in a constitutional question like this.[6]

It is to be noted at once that the indisputable fact that no Negro had served on a criminal court grand or petit jury for a period of thirty years created a very strong showing that during that period Negroes were systematically excluded from jury service because of race.[7] When such a showing was made, it became a duty of the State to try to justify such an exclusion as having been brought about for some reason other than racial discrimination. The Mississippi Supreme Court did not conclude, the State did not offer any evidence, and in fact did not make any claim, that its officials had abandoned their old jury selection practices. The State Supreme Court's conclu-

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[4] *Smith* v. *Texas,* 311 U. S. 128, 132.

[5] *Akins* v. *Texas,* 325 U. S. 398, 403.

[6] *Norris* v. *Alabama,* 294 U. S. 587, 590; *Pierre* v. *Louisiana,* 306 U. S. 354, 358; *Akins* v. *Texas,* 325 U. S. 398, 402; *Fay* v. *New York,* 332 U. S. 261, 272.

[7] *Neal* v. *Delaware,* 103 U. S. 370, 397; *Norris* v. *Alabama,* 294 U. S. 587, 591; *Pierre* v. *Louisiana,* 306 U. S. 354, 361.

sion of justification rested upon the following reasoning. Section 1762 of the Mississippi Code enumerates the qualifications for jury service, the most important of which apparently are that one must be a male citizen and "a qualified elector." Sections 241, 242, 243 and 244 of the State Constitution set forth the prerequisites for qualified electors. Among other things, these provisions require that each elector shall pay an annual poll tax, produce satisfactory proof of such payment, and be able to read any section of the State Constitution, or to understand the same when read to him, or to give a reasonable interpretation thereof. The evidence showed that a very small number of Negro male citizens (the court estimated about 25), as compared with white male citizens, had met the requirements for qualified electors, and thereby become eligible to be considered under additional tests for jury service. On this subject the State Supreme Court said:

> "Of the 25 qualified negro male electors there would be left, therefore, as those not exempt, 12 or 13 available male negro electors as compared with 5,500 to 6,000 male white electors as to whom, after deducting 500 to 1,000 exempt, would leave a proportion of 5,000 nonexempt white jurors to 12 or 13 nonexempt negro jurors, or about one-fourth of one per cent negro jurors,—400 to 1. . . . For the reasons already heretofore stated there was only a chance of 1 in 400 that a negro would appear on such a venire and as this venire was of one hundred jurors, the sheriff, had he brought in a negro, would have had to discriminate against white jurors, not against negroes,—he could not be expected to bring in one-fourth of one negro." [8]

[8] Although this latter statement was made with particular reference to the special venire from which the petit jury was drawn, the reasoning of the court applied also to its grounds for holding that there was no discrimination in excluding Negroes from the grand jury.

The above statement of the Mississippi Supreme Court illustrates the unwisdom of attempting to disprove systematic racial discrimination in the selection of jurors by percentage calculations applied to the composition of a single venire.[9]

The petitioner here points out certain legislative record evidence [10] of which it is claimed we can take judicial notice, and which it is asserted establishes that the reason why there are so few qualified Negro electors in Mississippi is because of discrimination against them in making up the registration lists. But we need not consider that question in this case. For it is clear from the evidence in the record that there were some Negroes in Lauderdale County on the registration list. In fact, in 1945, the circuit clerk of the county, who is himself charged with duties in administering the jury system, sent the names of eight Negroes to the jury commissioner of the Federal District Court as citizens of Lauderdale County qualified for federal jury service. Moreover, there was evidence that the names of from thirty to several hundred qualified Negro electors were on the registration lists. But whatever the precise number of qualified colored electors in the county, there were some; and if it can possibly be conceived that all of them were disqualified for jury service by reason of the commission of crime, habitual drunkenness, gambling, inability to read and write, or to meet any other or all of the statutory tests, we do not doubt that the State could have proved it.[11]

We hold that the State wholly failed to meet the very strong evidence of purposeful racial discrimination made out by the petitioner upon the uncontradicted showing that for thirty years or more no Negro had served as a juror

[9] *Akins* v. *Texas,* 325 U. S. 398, 403.

[10] *Hearings before Special Committee to Investigate Senatorial Campaign Expenditures, 1946,* 79th Cong., 2d Sess. (1947).

[11] *Hill* v. *Texas,* 316 U. S. 400, 404–405.

in the criminal courts of Lauderdale County. When a jury selection plan, whatever it is, operates in such way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand. As we pointed out in *Hill* v. *Texas,* 316 U. S. 400, 406, our holding does not mean that a guilty defendant must go free. For indictments can be returned and convictions can be obtained by juries selected as the Constitution commands.

The judgment of the Mississippi Supreme Court is reversed and the case is remanded for proceedings not inconsistent with this opinion.

Reversed.

SILESIAN-AMERICAN CORP. ET AL. *v.* CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 6. Argued May 1, 1947.—Reargued November 12, 1947.—Decided December 8, 1947.

1. Pursuant to the Trading with the Enemy Act, as amended by the First War Powers Act of 1941, and Executive Order 9095, as amended, the Alien Property Custodian issued an order vesting in himself title to certain shares of stock in petitioner, a Delaware corporation, and directing petitioner to cancel the certificates for such stock outstanding on its books and to issue new certificates to the Custodian. The order contained a finding that, although prior to August 31, 1939, the shares stood on the books of petitioner in the name of a Swiss corporation, they were held for the benefit of a German corporation, and constituted property belonging to a national of Germany. It was contended that the shares were pledged to certain Swiss banks as collateral for a loan. *Held:* The Custodian's order is valid and must be complied with. Pp. 474–479.

2. Petitioner has no legal interest in the issue as to ownership of its stock and no standing to represent the interests of its shareholders or pledgees of its stock. P. 474.
3. Under the war power, which includes reasonable preparation for war, the United States, acting under a statute, may summarily reduce to possession in furtherance of the war effort any property in this country of any alien; and the problems of compensation may await the judicial process. Pp. 474–477.
4. The vesting order of the Custodian was authorized by § 5 (b) (1) of the Trading with the Enemy Act, as amended, and Executive Order 9095, as amended. P. 477.

   (a) The fact that the stock certificates did not come into the hands of the Custodian is immaterial. P. 477.

   (b) The power to require the issuance of new certificates was incidental to the Custodian's power to vest in himself the property of a foreign national, including stock ownership in an American corporation. P. 477.
5. Sections 5 (b) (2) and 7 (e) of the Trading with the Enemy Act, as amended, protect petitioner from any liability to bona fide holders of its shares by reason of any infirmity in the Custodian's vesting order or his direction that new certificates be issued to him. Pp. 477–478.
6. The Custodian's vesting order was not contrary to § 8 (a) of the Trading with the Enemy Act, which formerly exempted property pledged to "any person not an enemy or ally of enemy"; because the later enactment of § 5 (b) (1) rendered § 8 (a) inapplicable to the property of friendly aliens. Pp. 478–479.
7. The Constitution guarantees to friendly aliens the right to just compensation for the requisitioning of their property by the United States; and it must be assumed that the United States will meet its obligations under the Constitution. Pp. 479–480.

156 F. 2d 793, affirmed.

A Bankruptcy Court instructed a corporation in reorganization proceedings under Chapter X to comply with an order of the Alien Property Custodian vesting in himself shares of the corporation's stock outstanding in the name of a friendly alien and directing the corporation to cancel the shares on its books and to issue new certificates therefor to the Custodian. The Circuit Court of Appeals affirmed. 156 F. 2d 793. This Court denied

certiorari, 329 U. S. 730; but, on rehearing, granted certiorari and substituted the Attorney General, successor to the Alien Property Custodian, as the party respondent. 330 U. S. 852. *Affirmed,* p. 480.

Leonard P. Moore argued the cause for petitioners. With him on the briefs were *George W. Whiteside* and *William Gilligan.*

James C. Wilson argued the cause on the original argument for respondent. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Harry LeRoy Jones, M. S. Isenbergh, James L. Morrisson* and *John Ward Cutler.*

James L. Morrisson reargued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Bazelon* and *M. S. Isenbergh.*

Mr. Justice Reed delivered the opinion of the Court.

The Alien Property Custodian on November 17, 1942, executed Vesting Order No. 370. This order was issued under the authority of the Trading with the Enemy Act, 40 Stat. 411, as amended, and Executive Order No. 9095, as amended, and in terms vested the property therein described in the Alien Property Custodian in the interest and for the benefit of the United States. The order found the property to belong to a national of Germany. The property covered by the order was two blocks of stock—one common, one preferred—in the Silesian American Corporation, a Delaware corporation, hereinafter called Silesian. The stock, prior to August 31, 1939, stood in the stock book of Silesian in the name of Non Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle, Zurich, Switzerland, a Swiss corporation,

hereinafter referred to as the Non Ferrum Company. Non Ferrum, it was determined by the Custodian's order, held the stock for the benefit of Bergwerksgesellschaft Georg von Giesche's Erben, a German corporation. The certificates, it is asserted, had been deposited as security for loans with a group of banks, all of which apparently were chartered by Switzerland and are hereinafter referred to as the Swiss Banks.[1]

To carry out the purpose of his vesting order, the Custodian directed Silesian to cancel on its books the outstanding Non Ferrum certificates, above referred to, and to issue in lieu thereof new certificates to the Custodian. This controversy revolves around the objection of Silesian so to act because the Custodian did not have physical possession of the pledged Non Ferrum certificates so as to be able to surrender them for cancellation, as the corporation's by-laws required. Silesian feared liability to the holders of the Non Ferrum certificates for issuing other certificates in such circumstances.

Silesian had been a debtor under Chapter X of the Bankruptcy Act since July 30, 1941. It therefore asked the Bankruptcy Court for instructions as to its compliance with the Custodian's direction. The other petitioner here, Silesian Holding Company, a Delaware corporation also, appeared and throughout has remained as a party to this litigation. It is the majority stockholder of Silesian but claims no different or other interest in the issue than Silesian. For the purpose of this case, it may and will be treated as having no more interest in the issue than Silesian has. The Swiss Banks asked the Reorganization Court to give instructions to the Debtor that no new shares be issued until the controversy between the Swiss Banks and the Custodian could be "fully, firmly and finally ad-

[1] They are Union Bank of Switzerland, La Roche & Company, Banque Cantonale de Berne, and Aktiengesellschaft Leu & Company.

judicated." This prayer was based on a verified answer to Silesian's request for instruction, which answer alleged that the "Swiss Banks were the owners of the 'Non Ferrum' stock." The Swiss Banks notified Silesian that any issue of new certificates representing the Non Ferrum stock, with or without court direction, would be at Silesian's risk. Affidavits supporting the objection of the Swiss Banks to instructions to Silesian to issue the new certificates to the Custodian were filed with the District Court. These affidavits declared the Non Ferrum stock was pledged, prior to 1938, to groups of Swiss banks. It is not clear whether they are the same institutions that are named in the answer of the Swiss Banks to the Debtor's request for instructions. For the purpose of this case, we assume that the groups are identical.

The District Court instructed the debtor to issue new certificates to the Alien Property Custodian. The court said:

> "The vesting order of the Custodian found that the stock was held for the benefit of an enemy. The statutory discharge from liability, § 5b or § 7e, [Trading with the Enemy Act] protects the debtor corporation and relieves it of doubt in the premises."

The court added:

> "Whatever may be the interests or rights of the Swiss banks, they cannot be considered here. Hearsay statements, unsupported by documents, allege that these banks are pledgees of the stock. These statements create no issue for our consideration. The banks are parties herein only to the extent that they have been recognized in the reorganization proceeding as possible owners of a claimed interest which they have never been called upon to prove. They are not here because of any action taken against them

> or any recognition given them by the Custodian or even by reason of any established interest in the stock."

No appeal to the Circuit Court of Appeals was taken by the Swiss Banks. They do not appear here as parties to this writ of certiorari or otherwise. We therefore express no opinion as to the effect of the order and decision of the District Court upon the claims of the Swiss Banks as pledgees of the Non Ferrum stock. See *Silesian-American Corporation* v. *Markham,* 156 F. 2d 793, 795.

An appeal was taken to the Circuit Court of Appeals by Silesian. That court affirmed the order of the Bankruptcy Court. We first denied a petition for certiorari and then granted it so that this case might be considered in relation to other issues, thereafter presented here, in connection with the administration of the Trading with the Enemy Act. 329 U. S. 730 and 330 U. S. 852; *Clark* v. *Uebersee Finanz-Korporation,* 330 U. S. 813.

It was held by the Circuit Court of Appeals that Silesian had no "standing vicariously" to assert the interests of its shareholders. We agree. Silesian has no legal interest in the issue as to the ownership of its stock. It follows that Silesian has no standing to represent the interests of the pledgees of the Non Ferrum shares, if that is the present position of those shares. See *Anderson Nat. Bank* v. *Luckett,* 321 U. S. 233, 242. This reduces petitioners' objection to the order directing the issue of new certificates in favor of the Custodian for the Non Ferrum stock to the claim that the sections of the Trading with the Enemy Act under which the Custodian acted are invalid as applied to Silesian in these circumstances. If the provisions do not authorize the order and direction, Silesian, over its own objections, cannot be compelled to obey.

The Custodian vested the stock in himself by virtue of the Trading with the Enemy Act, as amended by the First

War Powers Act of 1941, including, of course, § 5 (b) (1),[2] and Executive Order No. 9095, C. F. R. Cum. Supp. 1121, as amended 1174. This property was vested during war. There is no doubt but that under the war power,[3] as heretofore interpreted by this Court, the United States, acting under a statute, may vest in itself the property of a national of an enemy nation. Unquestionably to wage war successfully, the United States may confiscate enemy property. *United States* v. *Chemical Foundation,* 272 U. S. 1, 11. Nor can there, we think, be any doubt that any property in this country of any alien may be summarily reduced to possession by the United States in fur-

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[2] Trading with the Enemy Act, 40 Stat. 411, as amended by the First War Powers Act of 1941, 55 Stat. 839, § 5 (b) (1):

"During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

. . . . . .

"(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; . . . ."

[3] Art. I, § 8, cl. 11.

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therance of the war effort. Every resource within the ambit of sovereign power is subject to use for the national defense. This section was amended during war to cover the taking of alien property. It is limited to a war or a declared emergency period. While a natural hesitancy exists against so interpreting the war power clause as to expand its scope to cover incidents not intimately connected with war, we think reasonable preparation for the storm of war is a proper exercise of the war power. This seizure of alien property, in a time of emergency, is of that character. We need not consider whether the general welfare clause could be a source of congressional power over alien property.[4] This taking may be done as a means of avoiding the use of the property to draw earnings or wealth out of this country to territory where it may more likely be used to assist the enemy than if it remains in the hands of this government. Or the commandeered property of a friendly alien may be used to prosecute the war. The problems of compensation may await the judicial process. *Central Union Trust Co.* v.

[4] Compare with the statement below: "The power of Congress to seize and confiscate enemy property rests upon Art. 1, § 8, Clause 11 of the Constitution. Stoehr v. Wallace, supra, 255 U. S. at page 242 . . . ; United States v. Chemical Foundation, Inc., 272 U. S. 1, 11 . . . . Whether it exists at international law may be doubted; but nobody contends that the war power of Congress includes the seizure of the property of friendly aliens. The amendment of § 5 (b) must therefore rest upon some other power of Congress, not only for that reason, but because the amendment itself was expressly not limited to time of war (although it was in fact passed flagrante bello) but was to go into effect upon any 'national emergency declared.' It can rest upon Art. 1, § 8, Clause 1: i. e. upon the power 'to provide for the common Defence and general Welfare'; indeed, so far as we can see, the debtor does not challenge the power itself, but its exercise. It complains that the amendment delegates an unrestricted discretion to the President, and does not provide 'just compensation' for seizures." 156 F. 2d 793, 796.

Garvan, 254 U. S. 554, 567–68. War brooks no delay. The Constitution imposes none.

The section, 5 (b) (1), and Executive Order under which the Custodian acted authorized the vesting in him by his order of the property of a foreign national. This description covered stock ownership of a foreign national in Silesian. The fact that the certificates did not come into the hands of the Custodian is immaterial. They are evidences of the property right of the foreign national in Silesian that is subject to be vested in the Custodian by the Act. See *Great Northern R. Co.* v. *Sutherland,* 273 U. S. 182. Section 5 (b) (1) specifically states, "and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes." See note 2 above. Since the Custodian was authorized to vest and to sell the property by § 5, we think that the power to require the issue of new certificates was incidental to that authority. As one purpose of § 5 (b) (1) was to authorize the seizure of the interests of foreign nationals in domestic corporations so that such interest could be used or sold, such authority to participate in management or to transfer the stock interests would be frustrated if customary evidences of the ownership could not be required from the corporation. The power of the Custodian to demand the certificates is plain. The correlative duty to obey the order equally so, if the effect of obedience does not do violence to other valid requirements of the statute or make Silesian liable to bona fide holders of the old stock.

Silesian in specific terms is protected from any liability to bona fide holders such as Non Ferrum or the Swiss Banks by reason of any infirmity in the Custodian's vesting order or his direction to Silesian to issue new certificates for the Non Ferrum stock. The applicable language of § 7 (e) of the Trading with the Enemy Act, 40

Stat. 418, and § 5 (b) (2), as amended, 55 Stat. 839–40, are set out in the margin.[5] But Silesian argues that protection cannot follow from an order contrary to the Trading with the Enemy Act. The order to issue the new certificates is said to be unauthorized because it allows the property of friendly alien pledgees, the Swiss Banks, to be taken contrary to § 8 (a).[6] Section 8 (a) is said to be a limitation on the Custodian's power to seize property pledged to "any person not an enemy or ally of enemy." It is suggested that if § 7 (e) or § 5 (b) (2) is interpreted to require Silesian to carry out the Custodian's

[5] 40 Stat. 418, § 7 (e):

"No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act."

55 Stat. 840, § 5 (b) (2):

"Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder."

[6] 40 Stat. 418–19, § 8 (a):

"That any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand . . . may continue to hold said property, and, after default, may dispose of the property . . . . *Provided further,* That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order."

direction, even though this seizure is contrary to § 8 (a), a way has been found to "coerce an interested party [Silesian] into compliance with his [the Custodian's] unlawful actions." The answer to this contention is made by the Circuit Court of Appeals. It makes unnecessary any discussion of the protection afforded Silesian by § 7 (e) and § 5 (b) (2) from the claims of a pledge of stock exempted by statute from seizure. 156 F. 2d at 797. When § 5 (b) (1) was enacted as an amendment in the First War Powers Act of 1941, it authorized the taking of any property or interest therein of any foreign national. This broadening of the scope of the Custodian's power to vest so as to include interests of friendly aliens in property includes the power to vest the interest which friendly aliens have from pledges. As the Circuit Court of Appeals said, p. 797:

> "Any other interpretation of the section would make the pledges of friendly aliens a wholly irrational exception to the general purpose to subject all alien interests to seizure."

Therefore, as we hold that § 5 (b) (1) rendered § 8 (a) inapplicable to the property of friendly aliens, the order of the Custodian was valid and Silesian's objection disappears.

Finally there is the argument that Silesian cannot be compelled to issue the new certificates because the friendly aliens who claim interests in the Non Ferrum stock may not succeed in recovering the just compensation for the taking. See *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489.[7] The Constitution guarantees to friendly aliens the right to just compensa-

[7] The Circuit Court of Appeals said: "Thus it can be argued with much force that, unless some provision can be found by which he may secure compensation, § 5 (b) is unconstitutional; and, if so, it would at best be doubtful whether the protection given by subsection (2) would be valid." 156 F. 2d 793, 797.

tion for the requisitioning of their property by the United States. *Russian Fleet* v. *United States, supra.* We must assume that the United States will meet its obligations under the Constitution. Consequently, friendly aliens will be compensated for any property taken and Silesian is protected by the exculpatory clauses of the Act from any claim from its alien stockholders.

Judgment affirmed.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* UEBERSEE FINANZ-KORPORATION, A. G.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 35. Argued May 1, 1947.—Reargued November 12, 1947.—Decided December 8, 1947.

1. Respondent, a corporation organized under the laws of Switzerland and having its principal place of business in that country, sued under § 9 (a) of the Trading with the Enemy Act to reclaim property which the Alien Property Custodian had vested in himself under § 5 (b), as amended by the First War Powers Act of 1941. The property seized consisted of shares of stock in corporations organized under the laws of various States of this Nation and of an interest in a contract between two such corporations and, according to the allegations of the complaint which are assumed to be true, was free of all enemy taint—*i. e.*, the corporations whose shares had been seized, the corporations which had a contract in which respondent had an interest, and respondent itself, were corporations in which no enemy, ally of an enemy, or any national of either, had any interest of any kind whatsoever, and respondent had not done business in the territory of the enemy or any ally of an enemy. *Held:* Respondent is entitled to maintain the suit. Pp. 482–490.

2. By the amendment to § 5 (b) of the Trading with the Enemy Act contained in the First War Powers Act of 1941, the property of all foreign interests was placed within reach of the vesting power, not to appropriate friendly or neutral assets but to reach enemy interests which masquerade under those innocent fronts. Pp. 484–486.
3. Although §§ 2 and 9 (a) were not amended in 1941, they must be read harmoniously with § 5 (b) as amended in 1941, so as not to defeat the purpose of the 1941 amendment. Pp. 486–489.
4. Section 2, defining the terms "enemy" and "ally of enemy," must be read differently than it was previously, so as to give the concept of enemy or ally of enemy a scope which helps the 1941 amendment fulfill its mission without nullifying § 9 (a). P. 489.
5. When §§ 2, 5 (b) and 9 (a) are thus read together harmoniously, § 9 (a) cannot be construed as affording no remedy for the recovery of property by foreign interests which have no possible connection with the enemy, merely because such property was made subject to seizure under § 5 (a), as amended. Pp. 486–489.

81 U. S. App. D. C. 284, 158 F. 2d 313, affirmed.

The District Court dismissed a suit brought by respondent under § 9 (a) of the Trading with the Enemy Act to recover property vested by the Alien Property Custodian in himself under § 5 (b), as amended by the First War Powers Act of 1941. The United States Court of Appeals for the District of Columbia reversed. 81 U. S. App. D. C. 284, 158 F. 2d 313. This Court granted certiorari. 330 U. S. 813. *Affirmed,* p. 490.

M. S. Isenbergh argued the cause for petitioner. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Stanley M. Silverberg, Harry LeRoy Jones, James L. Morrisson* and *John Ward Cutler.*

Richard J. Connor argued the cause for respondent. With him on the brief was *Bart W. Butler.*

Wm. Harvey Reeves filed a brief for the National Foreign Trade Council, Inc., as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent brought this suit to reclaim property which the Alien Property Custodian,[1] acting under § 5 (b) of the Trading With the Enemy Act, 40 Stat. 411, 50 U. S. C. App. § 1, as amended by the First War Powers Act of 1941, 55 Stat. 839, 50 U. S. C. App. (Supp. V, 1946), § 5 (b), had vested in himself. Respondent is a corporation organized under the laws of Switzerland and having its principal place of business in that country. The property seized consisted of shares of stock in corporations organized under the laws of various States of this nation and of an interest in a contract between two such corporations.

The complaint alleges that respondent is not an enemy or ally of an enemy and that at no time at or since the vesting has the property in question been owned or controlled, directly or indirectly, in whole or in part, by an enemy, ally of an enemy, or a national of a designated enemy country. It also alleges that none of the property has been owing or belonging to or held on account of or for the benefit of any such person or interest. We construe these allegations to mean that the property is free of all enemy taint and particularly that the corporations whose shares have been seized, the corporations which have a contract in which respondent has an interest, and respondent itself, are companies in which no enemy, ally of an enemy, nor any national of either has any interest of any kind whatsoever, and that respondent has not done business in the territory of the enemy or any ally of an enemy. Those allegations, as so construed, are indeed taken as true for the purposes of the present ruling, since petitioner's motion to dismiss is based solely on the fact that respondent is a national of a foreign country.

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[1] The powers and functions of the Custodian were subsequently transferred to the Attorney General. Executive Order No. 9788, 11 Fed. Reg. 11981 (Oct. 14, 1946).

The District Court granted petitioner's motion to dismiss. The Court of Appeals reversed, one justice dissenting. 81 U. S. App. D. C. 284, 158 F. 2d 313. The case is here on petition for a writ of certiorari which we granted because of the importance of the question in the administration of the Act. 330 U. S. 813.

Under the Act as it read prior to the 1941 amendment respondent would have been able to maintain this suit on a showing, without more, that it was a corporation organized under the laws of a friendly nation and not doing business in the territory of an enemy nation or any of its allies. That result would be reached as follows: Sec. 7 (c) permitted seizure by the Custodian only of property in which an enemy or ally of an enemy had an interest. Sec. 9 (a) permitted "any person not an enemy or ally of enemy" claiming an interest in any seized property to sue to reclaim it. And the Court held in *Behn, Meyer & Co.* v. *Miller,* 266 U. S. 457, that a corporation organized under the laws of a friendly nation and not doing business in the territory of an enemy nation or any of its allies [2]

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[2] Sec. 2 provides:

"That the word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

"(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

"(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if

could maintain such a suit even though the corporation was enemy owned or controlled. The scheme of the Act as it was then drawn was "to seize the shares of stock when enemy owned rather than to take over the corporate property." *Hamburg-American Co.* v. *United States,* 277 U. S. 138, 140.

That was at least one respect in which the Act had a "rigidity and inflexibility" that was sought to be cured by the amendment to § 5 (b) in 1941. See H. R. Rep. No. 1507, 77th Cong., 1st Sess., p. 3. It was notorious that Germany and her allies had developed numerous techniques for concealing enemy ownership or control of property which was ostensibly friendly or neutral. They had through numerous devices, including the cor-

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he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'enemy.'

"The words 'ally of enemy,' as used herein, shall be deemed to mean—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

"(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

"(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'ally of enemy.'"

poration, acquired indirect control or ownership in industries in this country for the purposes of economic warfare.[3] Sec. 5 (b) was amended on the heels of the declaration of war to cope with that problem. Congress by that amendment granted the President the power to vest in an agency designated by him "any property or interest of any foreign country or national thereof."[4] The property of all foreign interests was placed within reach of the vesting power, not to appropriate friendly or neutral assets but to reach enemy interests which masqueraded under those innocent fronts.

Thus the President acquired new "flexible powers" (H. R. Rep. No. 1507, *supra,* p. 3) to deal effectively

[3] Some of the uses of the corporation in promotion of these subversive projects are summarized in Administration of the Wartime Financial and Property Controls of the United States Government, Treasury Dept. (1942), pp. 29–30. It is pointed out that technical legal title "to some of the most dangerous of the Axis-influenced enterprises may be Swiss, Dutch, Swedish or American." It is also said that "Actual ownership of business enterprises frequently runs through tangled mazes of holding companies. These holding companies were normally incorporated in neutral countries and the ownership of the holding companies themselves was normally represented by bearer shares, making it extremely difficult to negate a claim that the ownership of the corporation was coincident with the state of incorporation."

[4] Sec. 5 (b) (1), as amended, also granted the President the power to "investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States . . . ."

Sec. 5 (b) (1), as amended, further provided as respects property which had been vested that "upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States . . . ."

with property interests which had either an open or concealed enemy taint.

While the scope of the President's power was broadened, there was no amendment restricting the scope of § 9 (a). As we have noted, § 9 (a) granted "any person not an enemy or ally of enemy," claiming an interest in property seized, the right to reclaim it. So the provision reads today. Yet, as petitioner suggests, if *Behn, Meyer & Co.* v. *Miller, supra,* is applied despite the 1941 amendment, § 9 (a) will undo much of the good which the 1941 amendment to § 5 (b) was designed to accomplish. All a corporate claimant would need do to recover the property seized would be to show that it was organized in this country or in some friendly or neutral country and was not doing business within the territory of an enemy or any of its allies.[5] The fact that it was owned or controlled by enemy interests and might sap the strength of this nation through economic warfare would be immaterial. We agree that a construction so destructive of the objectives of the 1941 amendment to § 5 (b) must be rejected.

Petitioner therefore suggests that once the seizure is shown to be permissible under § 5 (b), there is no remedy for the return of the property under § 9 (a). It is said that § 9 (a) was designed to provide an ultimate judicial determination of the question whether the property seized was within the vesting power defined in § 5 (b). *Central Trust Co.* v. *Garvan,* 254 U. S. 554, 567–568. The argument accordingly is that since § 5 (b) allows seizure and vesting of "any property or interest of any foreign country or national thereof," a suit to reclaim it is defeated by a mere showing that the claimant is a corporation organized under the laws of another nation.

That is to make the right to sue run not to "any person not an enemy or ally of enemy" as § 9 (a) in terms pro-

[5] See note 2, *supra.*

vides but to "any person not an enemy or ally of enemy or national of any foreign country." That would wipe out all suits to reclaim property brought by any foreign interest, no matter how friendly. We stated in *Markham* v. *Cabell,* 326 U. S. 404, 410–411, "The right to sue, explicitly granted by § 9 (a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission." Such a drastic contraction, if not complete sterilization, of § 9 (a) as petitioner suggests should therefore be made only if no other alternative is open.

There are several reasons which make us hesitate to take that course. In the first place, as we have suggested, the phase of the problem with which we are presently concerned and with which Congress was wrestling when it amended the Act in 1941 started and ended with property having an enemy taint. We find not the slightest suggestion that Congress was concerned under this Act with property owned or controlled by friendly or neutral powers and in no way utilized by the Axis. Those interests were not waging economic warfare against us. Secondly, we are dealing here with the power "to affirmatively compel the use and application of foreign property in a manner consistent with the interests of the United States." [6] Sen. Rep. No. 911, 77th Cong., 1st Sess., p. 2. It is hard for us to assume that Congress adopted that drastic course in the case of friendly or neutral foreign interests whose investments in our economy were in no way infected with enemy ownership or control. Our hesitation is, moreover, increased when we note that § 7 (c) makes the remedy under the Act the only one Congress has granted a claimant. It is not easy for us to assume that Congress treated all non-enemy nations, including

[6] As to the powers of the custodian or other agency designated by the President over the property, see § 5 (b) (1), *supra* note 4, and § 12.

our recent allies, in such a harsh manner, leaving them only with such remedy as they might have under the Fifth Amendment.

The problem is not without its difficulties whichever way we turn. But we think that we adhere more closely to the policy of both § 5 (b) as amended and § 9 (a), if we do not carry over into the amended Act the consequences of *Behn, Meyer & Co.* v. *Miller, supra.*

As we have observed, the scheme of the Act when *Behn, Meyer & Co.* v. *Miller* was decided was to respect the corporate form, even though the enemy held all the stock of the corporate claimant. *Hamburg-American Co.* v. *United States, supra.* The 1941 amendment to § 5 (b) reflected a complete reversal in that policy. The power of seizure and vesting was extended to all property of any foreign country or national so that no innocent appearing device could become a Trojan horse. Congress did not, however, alter the definitions of enemy or of ally of enemy contained in § 2. They remain the same as they were at the time *Behn, Meyer & Co.* v. *Miller* was decided.[7]

Yet if the question were presented for the first time under the amended Act, we could not confine the statutory definitions of enemy or ally of enemy to the narrow categories indicated by *Behn, Meyer & Co.* v. *Miller.* To do so would be to run counter to the policy of the Act and be disruptive of its purpose. We are dealing with hasty legislation which Congress did not stop to perfect as an integrated whole. Our task is to give all of it—1917 to 1941—the most harmonious, comprehensive meaning possible. *Markham* v. *Cabell, supra.* So if the definitions contained in § 2[8] are to be harmonized with the policy underlying § 5 (b) and § 9 (a) of the amended Act, we would have to say that they are merely illus-

[7] See note 2, *supra.*

[8] See note 2, *supra.*

trative, not exclusionary. To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.

There is perhaps in logic some basis for saying that that should be the consequence since Congress did not amend § 2 when it revised the Act by its amendment of § 5 (b). The argument is that the only change effected was in § 5 (b) and that § 2 which stands unamended should be taken to mean what it meant before 1941. But the answer to our problem cannot be had by the use of logic alone. We are dealing here with conflict and confusion in the statute. Though neither § 2 nor § 9 (a) was amended with § 5 (b) in 1941, one of them must be read differently after than before that event. We believe it is more consonant with the functions sought to be served by the Act to apply § 2 differently than it was previously applied than to read § 9 (a) more restrictively. We believe a more harmonious reading of § 2, § 5 (b) and § 9 (a) is had if the concept of enemy or ally of enemy is given a scope which helps the amendment of 1941 fulfill its mission and which does not make § 9 (a) for the first time in its history and contrary to the normal connotation of its terms stand as a barrier to the recovery of property by foreign interests which have no possible connection with the enemy.

It is suggested, however, that this approach may produce results which are both absurd and uncertain. It is said that the entire property of a corporation would be jeopardized merely because a negligible stock interest, perhaps a single share, was directly or indirectly owned or controlled by an enemy or ally of an enemy. It is also pointed out that securities or interests other than stock might be held by an enemy or ally of an enemy and used effectively in economic warfare against this country. But what these interests are, the extent of holdings necessary to constitute an enemy taint, what part of a friendly alien

corporation's property may be retained where only a fractional enemy ownership appears, are left undecided. Since we assume from the allegations of the complaint that respondent is free of enemy taint and therefore is not within the definition of enemy or ally of an enemy, those problems are not now before us. We recognize their importance; but they must await legislative [9] or judicial clarification.

Affirmed.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

WILLIAMS ET AL. *v.* FANNING, POSTMASTER OF LOS ANGELES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 47. Argued October 22, 1947.—Decided December 8, 1947.

1. Those against whom the Postmaster General has issued a postal fraud order may sue the local postmaster to enjoin him from carrying out the order; and the Postmaster General is not an indispensable party. Pp. 492–494.
2. The superior officer is an indispensable party if a decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him. Pp. 492–493.
3. The superior officer is not an indispensable party if the decree which is entered would effectively grant the relief desired by expending itself on the subordinate official who is before the court. Pp. 493–494.

158 F. 2d 95, reversed.

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[9] See 60 Stat. 50, adding § 32 (a) (2) (E) to the Act.

The District Court dismissed a suit to enjoin a postmaster from carrying out a fraud order issued by the Postmaster General. The Circuit Court of Appeals affirmed. 158 F. 2d 95. This Court granted certiorari. 331 U. S. 797. *Reversed,* p. 494.

Richard L. North argued the cause for petitioners. With him on the brief was *Irving M. Walker.*

Frederick Bernays Wiener argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Herbert A. Bergson, Paul A. Sweeney* and *Melvin Richter.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case, here on certiorari to resolve a conflict between the circuits,[1] presents the question whether those against whom the Postmaster General has issued a postal fraud order may sue the local postmaster to enjoin him from carrying out the order or whether the Postmaster General is an indispensable party.

The Postmaster General, after a hearing in Washington, D. C., found that petitioners' weight-reducing enterprise was fraudulent. He accordingly issued a fraud order (R. S. §§ 3929, 4041, 39 U. S. C. §§ 259, 732) directing respondent, postmaster at Los Angeles, California (where petitioners do business) to refuse payment of any money order drawn to the order of petitioners, to

[1] The Circuit Court of Appeals in the instant case followed its earlier decisions holding that the Postmaster General was an indispensable party. *Neher* v. *Harwood,* 128 F. 2d 846; *Dolphin* v. *Starr,* 130 F. 2d 868. Accord: *National Conference* v. *Goldman,* 85 F. 2d 66 (Second Circuit). Contra: *Jarvis* v. *Shackelton Inhaler Co.,* 136 F. 2d 116 (Sixth Circuit). For collection and review of the cases see 158 A. L. R. 1126.

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advise the remitter of such money order that payment had been forbidden, and to stamp "fraudulent" on all mail matter directed to petitioners and to return it to the senders.

Petitioners thereupon brought this suit in the District Court for the Southern District of California to enjoin respondent from carrying out the order,[2] claiming that they had been deprived of the hearing to which they were entitled and that the fraud order was without the support of substantial evidence. On motion of respondent the District Court dismissed the complaint, holding in accord with the view of the Ninth Circuit Court of Appeals[3] that the Postmaster General was an indispensable party. The Circuit Court of Appeals affirmed. 158 F. 2d 95.

It was long assumed that the Postmaster General was not an indispensable party in these fraud order cases. Beginning at least with *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94, decided in 1902, the maintenance of the suit against the local postmaster alone was not challenged.[4]

Meanwhile, another line of cases was emerging. *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28, held that a suit against the Secretary of the Interior to compel him to issue patents to public lands abated on his resignation. As the purpose of the bill was "to control the action of the Secretary of the Interior" (165 U. S. p. 34), he was held to be an indispensable party. Next came *Gnerich* v. *Rutter,* 265 U. S. 388, which was a suit to enjoin a representative of the Commissioner of Internal Revenue from

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[2] Jurisdiction was invoked under § 24 (6) of the Judicial Code, 28 U. S. C. § 41 (6).

[3] See note 1, *supra.*

[4] And see *Public Clearing House* v. *Coyne,* 194 U. S. 497; *Leach* v. *Carlile,* 258 U. S. 138.

enforcing a restriction embodied in a permit issued under the National Prohibition Act. The subordinate official, acting for the Commissioner, had refused to give plaintiffs the more liberal permit which they desired; and he had no power to grant the desired permit without revision of his delegated authority. The Commissioner was held to be an indispensable party. *Webster* v. *Fall,* 266 U. S. 507, followed. That was a suit brought by an Osage Indian to require payment to him of funds under an act of Congress. The power and responsibility of making the payments being in the Secretary of the Interior, he was held to be an indispensable party.

These cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him.

That principle was brought into clearer relief by *Colorado* v. *Toll,* 268 U. S. 228. There the director of national parks had issued regulations forbidding operation in the Rocky Mountain National Park of automobiles for hire. Toll was the superintendent of the park who was enforcing the regulation. A suit to enjoin him was allowed to be maintained without joining his superior, the director, who had promulgated the regulation. That result followed, 268 U. S. p. 230, by analogy to those cases which permit suit against a public official who invades a private right either by exceeding his authority or by carrying out a mandate of his superior. *United States* v. *Lee,* 106 U. S. 196; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 619, 620. In those situations relief against the offending officer could be granted without risk that the judgment awarded would "expend itself on the public treasury or domain, or interfere with the public administration." *Land* v. *Dollar,* 330 U. S. 731, 738.

But the distinction we have noted between these two lines of cases apparently was not as clear to others as it seems to us. For a conflict among the circuits developed in these postal fraud cases.[5] *National Conference* v. *Goldman,* 85 F. 2d 66, which held that the Postmaster General must be made a party, suggested that if he were not, the local postmaster would be left under a command of his superior to do what the court has forbidden. But that seems to us immaterial if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court. It seems plain in the present case that that will be the result even though the local postmaster alone is sued. It is he who refuses to pay money orders, who places the stamp "fraudulent" on the mail, who returns the mail to the senders. If he desists in those acts, the matter is at an end. That is all the relief which petitioners seek. The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as in the *Rutter* case. No concurrence on his part is necessary to make lawful the payment of the money orders and the release of the mail unstamped. Yet that is all the court is asked to command.

Reversed.

THE CHIEF JUSTICE and MR. JUSTICE BURTON dissent.

[5] See note 1, *supra.*

Syllabus.

AERO MAYFLOWER TRANSIT CO. *v.* BOARD OF RAILROAD COMMISSIONERS OF MONTANA ET AL.

APPEAL FROM THE SUPREME COURT OF MONTANA.

No. 39. Argued October 15, 1947.—Decided December 8, 1947.

Appellant, a foreign corporation engaged exclusively in interstate transportation of freight by motor trucks and doing a continuous and substantial amount of such business in Montana, challenged the validity under the Commerce Clause of two Montana taxes on all interstate and intrastate motor carriers operating there: (1) a flat tax of $10 for each vehicle operated over the State's highways; and (2) a "gross revenue" tax which, as applied to the appellant, amounted to an additional flat fee of $15 per vehicle. The taxes are imposed expressly "in consideration of the use of the highways of this state" and "in addition to all other licenses, fees and taxes imposed upon motor vehicles in this state." *Held:*

1. As applied to appellant, the taxes do not violate the Federal Constitution. Pp. 501–507.

2. This Court is bound by the state court's construction of the tax statute as applying alike to interstate and intrastate commerce, and of "gross operating revenue" as comprehending only such revenue as is derived from appellant's operations within Montana. Pp. 499–500.

3. The fact that the proceeds of the taxes go into the State's general fund, subject to appropriation for general state purposes, does not render them invalid. Pp. 502–505.

4. The taxes are levied as compensation for the use of the highways, and not on the privilege of doing interstate business. P. 505.

5. It is immaterial that the State imposes two taxes rather than one, or that appellant pays other taxes which in fact are devoted to highway maintenance. Pp. 506–507.

119 Mont. 118, 172 P. 2d 452, affirmed.

A state court of Montana sustained one of two state taxes as applied to appellant, and enjoined appellant from operating within the State until the tax was paid.

The Supreme Court of Montana upheld both taxes as applied to appellant. 119 Mont. 118, 172 P. 2d 452. *Affirmed,* p. 507.

Edmond G. Toomey argued the cause and filed a brief for appellant.

Clarence Hanley, Assistant Attorney General of Montana, argued the cause for appellees. With him on the brief were *R. V. Bottomly,* Attorney General, and *Edwin S. Booth.*

Mr. Justice Rutledge delivered the opinion of the Court.

Again we are asked to decide whether state taxes as applied to an interstate motor carrier run afoul of the commerce clause, Art. I, § 8, of the Federal Constitution.

Two distinct Montana levies are questioned. Both are imposed by that state's Motor Carriers Act, Rev. Codes Mont. (1935) §§ 3847.1–3847.28. One is a flat tax of $10 for each vehicle operated by a motor carrier over the state's highways, payable on issuance of a certificate or permit, which must be secured before operations begin, and annually thereafter. § 3847.16 (a).[1] The other is a quarterly fee of one-half of one per cent of the motor car-

[1] The section was enacted originally as Mont. Laws, 1931, c. 184, § 16. Textually it is as follows: "(a) In addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state, and in consideration of the use of the public highways of this state, every motor carrier, as defined in this act, shall, at the time of the issuance of a certificate and annually thereafter, on or between the first day of July and the fifteenth day of July, of each calendar year, pay to the board of railroad commissioners of the state of Montana the sum of ten dollars ($10.00), for every motor vehicle operated by the carrier over or upon the public highways of this state. . . ."

In further relation to issuance of the permit, see note 5.

rier's "gross operating revenue," but with a minimum annual fee of $15 per vehicle for class C carriers, in which group appellant falls. § 3847.27.[2] Each tax is declared expressly to be laid "in consideration of the use of the highways of this state" and to be "in addition to all other licenses, fees and taxes imposed upon motor vehicles in this state . . . ."

Prior to July 1, 1941, the fees collected pursuant to §§ 3847.16 (a) and 3847.27 were paid into the state treasury and credited to "the motor carrier fund."[3] After that date, by virtue of Mont. Laws, 1941, c. 14, § 2, they were allocated to the state's general fund.

Appellant is a Kentucky corporation, with its principal offices in Indianapolis, Indiana. Its business is exclusively interstate. It consists in transporting household

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[2] This section originally was Mont. Laws, 1935, c. 100, § 2. It reads as follows: "In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity issued by the public service commission, shall between the first and fifteenth days of January, April, July and October of each year, file with the public service commission a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the board a fee of one-half of one per cent of the amount of such gross operating revenue; provided, however, that the minimum annual fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars ($30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars ($15.00)."

Section 3847.2, Rev. Codes Mont. (1935), contains the definitions of the three classes of carriers.

[3] The moneys in the motor carrier fund were subject to appropriation for use in supervision and regulation of many activities other than those connected with the public highways. See Rev. Codes Mont. (1935), §§ 3847.17, 3847.28; and cf. note 13.

goods and office furniture from points in one state to destinations in another. Appellant does no intrastate business in Montana. The volume of its interstate business there is continuous and substantial, not merely casual or occasional.[4] It holds a certificate of convenience and necessity issued by the Interstate Commerce Commission, pursuant to which its business in Montana and elsewhere is conducted.

In 1935 appellant received a class C permit to operate over Montana highways, as required by state law.[5] Until 1937, apparently, it complied with Montana requirements, including the payment of registration and license plate fees for its vehicles operating in Montana and of the 5¢ per gallon tax on gasoline purchased there.[6] However, in 1937 and thereafter appellant refused to pay the flat $10 fee imposed by § 3847.16 (a) and the $15 minimum "gross revenue" tax laid by § 3847.27. In consequence, after hearing on order to show cause, the appellee

[4] Appellant's answer and cross-complaint set forth statistics concerning its use of Montana highways during the years 1937, 1938 and 1939. The figures show appellant's equipment operating on Montana highways during 227 days in 1937; 385 trucking days in 1938; and 405 trucking days in 1939. See also note 6.

[5] The statute was Mont. Laws, 1931, c. 184, § 23, now Rev. Codes Mont. (1935), § 3847.23. The section applied the act of which it was a part to interstate and foreign commerce "insofar as such application may be permitted under the provisions of" the Federal Constitution, treaties and acts of Congress, but expressly exempted interstate carriers from making "any showing of public convenience and necessity" in order to secure the certificate or permit.

[6] These taxes were imposed separately from the two involved in this case. Appellant's brief states the registration and license plate fees increased from $660.50 in 1937 to $1,212.50 in 1938 and to $1,630.50 in 1939. The gasoline tax increased from $745.30 in 1937 to $1,257.90 in 1938 and $1,649.98 in 1939. The gallonage tax, though ultimately borne by the consumer, was laid on the sale and collected from the dealer.

board [7] in 1939 revoked the 1935 permit and brought this suit in a state court to enjoin appellant from further operations in Montana.

Upon appellant's cross-complaint, the trial court issued an order restraining the board from enforcing the "gross revenue" tax laid by § 3847.27. But at the same time it enjoined appellant from operating in Montana until it paid the fees imposed by § 3847.16 (a). On appeal the state supreme court held both taxes applicable to interstate as well as intrastate motor carriers and construed the term "gross operating revenue" in § 3847.27 to mean "gross revenue derived from operations in Montana." [8] It then sustained both taxes as against appellant's constitutional objections, state and federal. Accordingly, it reversed the trial court's judgment insofar as the "gross revenue" tax had been held invalid, but affirmed the decision relating to the flat $10 tax. 119 Mont. 118, 172 P. 2d 452.

We put aside at the start appellant's suggestion that the Supreme Court of Montana has misconstrued the state statutes and therefore that we should consider them, for purposes of our limited function, according to appellant's view of their literal import. The rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given to

[7] It should be noted that "the board of railroad commissioners," as used in § 3847.16 (a), and "the public service commission," as used in § 3847.27, designate a single body, invested with regulatory power over various public utilities in addition to motor carriers, *e. g.*, railroads, common carriers of oil, etc. By Rev. Codes Mont. (1935), § 3880, "The board of railroad commissioners . . . shall be ex-officio the public service commission hereby created . . . ." The two terms were said by the Montana Supreme Court in this case to be "used interchangeably." 119 Mont. 118, 136, 172 P. 2d 452, 461.

[8] This judicial construction was embodied in an amendment to the section made by Mont. Laws, 1947, c. 73, § 2.

state statutes by the state courts.[9] Accordingly, we accept the state court's rulings, insofar as they are material, that the two sections apply alike to interstate and intrastate commerce and that "gross operating revenue" as employed in § 3847.27 comprehends only such revenue derived from appellant's operations within Montana, not outside that state.[10]

Moreover, since Montana has not demanded or sought to enforce payment by appellant of more than the flat $15 minimum fee for class C carriers under § 3847.27,[11] we limit our consideration of the so-called "gross revenue" tax to that fee. This too is in accordance with the state supreme court's declaration: "Even if it be admitted

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[9] *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459; *Huddleston* v. *Dwyer,* 322 U. S. 232; *Minnesota* v. *Probate Court,* 309 U. S. 270; *Morehead* v. *N. Y. ex rel. Tipaldo,* 298 U. S. 587; cf. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64.

[10] Acting not only in the view that statutes are presumptively constitutional and, if necessary, are to be so construed as to make them so, the court noted that § 3847.16 (b) expressly provides that, when service "is rendered partly in this state and partly in an adjoining state or foreign country," carriers "shall comply with *the provisions of this act*" concerning "payment of compensation" and making reports by showing "the total business performed *within the limits of this state.*" (Emphasis added.) Accordingly it held that §§ 3847.27 and 3847.16 should be read together and the limitation of § 3847.16 (b) "within the limits of this state" thus became a part of § 3847.27 as well as § 3847.16 (a). 119 Mont. 118, 134, 172 P. 2d 452, 460.

[11] Appellant's vice president and general manager, Wheating, testified that for purposes of applying § 3847.27 he had calculated, for each of the years 1939 through 1942, "the [gross] income for that operation of the load miles operated *in Montana* by using an average income per mile figure based upon the probable load factor we would have had in Montana." (Emphasis added.) On this basis the amount of the tax as calculated at one-half of one per cent quarterly was substantially below the statutory minimum for each of the four years. See note 19. These figures apparently were reported to and accepted by the board as the basis for its demands upon the taxpayer for the flat $15 minimum annual tax.

that the manner of arriving at a sound basis upon which the tax on gross revenue [should be calculated] is not provided by the statute, a contention to which we do not agree, no difficulty would arise in putting into effect the minimum fee of $15.00 required for each company vehicle operated within the state." [12] Although the state court did not concede that the statute comprehended no workable or sound basis for calculating the tax above the minimum, we take this statement as a clear declaration that it would sustain the minimum charge even if for some reason the amount of the tax above the minimum would have to fall.

With the issues thus narrowed, we have, in effect, two flat taxes, one for $10, the other for $15, payable annually upon each vehicle operated on Montana highways in the course of appellant's business, with each tax expressly declared to be in addition to all others and to be imposed "in consideration of the use of the highways of this state."

Neither exaction discriminates against interstate commerce. Each applies alike to local and interstate operations. Neither undertakes to tax traffic or movements

[12] 119 Mont. 118, 134, 172 P. 2d 452, 460. Appellant had argued, as it does here, that even if the "gross revenue" tax is limited to revenue derived from operations in Montana, it is nevertheless invalid for want of any prescribed method on the face of the statute for ascertaining or calculating the tax. The state court held that the statute by necessary implication authorized the board to "adopt any fair and reasonable mode of enforcement designed to effectuate the purposes of the Act." 119 Mont. 118, 135, 172 P. 2d 452, 461. In view of our limitation of the question before us, as stated in the text, we need not express opinion concerning this ruling or any tax above the minimum calculated in accordance with it. Cf. note 11.

In another connection the state supreme court adverted to the separability clause contained in § 3847.24 of the statute, though not referring to it expressly in relation to the statement quoted in the text.

taking place outside Montana or the gross returns from such movements or to use such returns as a measure of the amount of the tax. Both levies apply exclusively to operations wholly within the state or the proceeds of such operations, although those operations are interstate in character.

Moreover, it is not material to the validity of either tax that the state also imposes and collects the vehicle registration and license fee and the gallonage tax on gasoline purchased in Montana. The validity of those taxes neither is questioned nor well could be. *Hendrick* v. *Maryland*, 235 U. S. 610; *Aero Transit Co.* v. *Georgia Comm'n*, 295 U. S. 285; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506; *Edelman* v. *Boeing Air Transp.*, 289 U. S. 249. Nor does their exaction have any significant relationship to the imposition of the taxes now in question. *Dixie Ohio Co.* v. *Comm'n*, 306 U. S. 72, 78; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, 251. They are imposed for distinct purposes and the proceeds, as appellant concedes, are devoted to different uses, namely, the policing of motor traffic and the maintenance of the state's highways.[13]

Concededly the proceeds of the two taxes presently involved are not allocated to those objects.[14] Rather they now go into the state's general fund, subject to appropriation for general state purposes.[15] Indeed this fact, in appellant's view, is the vice of the statute. But in that

[13] See note 6 and text. It is admitted by the pleadings that the proceeds of the vehicle registration and license tax and the gallonage tax are allocated to the construction, repair and maintenance of state highways.

[14] The board concedes in the brief filed here that the state supreme court was in error in the statement that the revenue from the two taxes presently in issue "is devoted to the building, repairing and policing of such highways . . . ." 119 Mont. 118, 138, 172 P. 2d 452, 462.

[15] See note 3 and text.

view appellant misconceives the nature and legal effect of the exactions. It is far too late to question that a state, consistently with the commerce clause, may lay upon motor vehicles engaged exclusively in interstate commerce, or upon those who own and so operate them, a fair and reasonable nondiscriminatory tax as compensation for the use of its highways. *Hendrick* v. *Maryland, supra; Clark* v. *Poor,* 274 U. S. 554; *Aero Transit Co.* v. *Georgia Comm'n, supra; Morf* v. *Bingaman,* 298 U. S. 407; *Dixie Ohio Co.* v. *Comm'n, supra; Clark* v. *Paul Gray, Inc.,* 306 U. S. 583; cf. *S. C. Hwy. Dept.* v. *Barnwell Bros.,* 303 U. S. 177. Moreover "common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use." *Clark* v. *Poor, supra* at 557.

The present taxes on their face are exacted "in consideration of the use of the highways of this state," that is, they are laid for the privilege of using those highways. And the aggregate amount of the two taxes taken together is less than the amount of similar taxes this Court has heretofore sustained. Cf. *Dixie Ohio Co.* v. *Comm'n, supra; Aero Transit Co.* v. *Georgia Comm'n, supra.* The state builds the highways and owns them.[16] Motor carriers for hire, and particularly truckers of heavy goods, like appellant, make especially arduous use of roadways, entailing wear and tear much beyond that resulting from general indiscriminate public use. *Morf* v. *Bingaman, supra* at 411. Although the state may not discriminate against or exclude such interstate traffic generally in the use of its highways, this does not mean that the state is required to furnish those facilities to it free of charge or indeed on equal terms with other traffic not inflicting similar destructive effects. Cf. *Clark* v. *Poor, supra; Morf* v. *Bingaman, supra* at 411. Interstate traffic equally with

[16] It is immaterial that the state receives federal aid for state road construction, a fact on which appellant places some emphasis.

intrastate may be required to pay a fair share of the cost and maintenance reasonably related to the use made of the highways.

This does not mean, as appellant seems to assume, that the proceeds of all taxes levied for the privilege of using the highways must be allocated directly and exclusively to maintaining them. *Clark* v. *Poor, supra* at 557; *Morf* v. *Bingaman, supra* at 412. That is true, although this Court has held invalid, as forbidden by the commerce clause, certain state taxes on interstate motor carriers because laid "not as compensation for the use of the highways but for the privilege of doing the interstate bus business." *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183, 186; cf. *McCarroll* v. *Dixie Lines,* 309 U. S. 176, 179. Those cases did not hold that all state exactions for the privilege of using the state's highways are valid only if their proceeds are required to go directly and exclusively for highway maintenance, policing and administration. Both before and after the *Interstate Transit* decision this Court has sustained state taxes expressly laid on the privilege of using the highways, as applied to interstate motor carriers, declaring in each instance that it is immaterial whether the proceeds are allocated to highway uses or others. *Clark* v. *Poor, supra* at 557; *Morf* v. *Bingaman, supra* at 412.[17]

Appellant therefore confuses a tax "assessed for a proper purpose and . . . not objectionable in amount," *Clark* v. *Poor, supra* at 557, that is, a tax affirmatively laid for the privilege of using the state's highways, with a tax not imposed on that privilege but upon some other such as the privilege of doing the interstate business. Though necessarily related, in view of the nature of interstate motor traffic, the two privileges are not identical, and it is useless to confuse them or to confound a tax for the priv-

[17] See note 18 *infra* and text.

ilege of using the highways with one the proceeds of which are necessarily devoted to maintaining them. Whether the proceeds of a tax are used or required to be used for highway maintenance "may be of significance," as the Court has said, "when the point is otherwise in doubt, to show that the fee is in fact laid for that purpose and is thus a charge for the privilege of using the highways. *Interstate Transit, Inc.* v. *Lindsey, supra.* But where the manner of the levy, like that prescribed by the present statute, definitely identifies it as a fee charged for the grant of the privilege, it is immaterial whether the state places the fees collected in the pocket out of which it pays highway maintenance charges or in some other." *Morf* v. *Bingaman, supra* at 412.[18]

The exactions in the present case fall clearly within the rule of *Morf* v. *Bingaman* and its predecessors in authority, and therefore, like that case, outside the decisions in the *Interstate Transit* and like cases. Both taxes are levied "in consideration of the use of the highways of this state," that is, as compensation for their use, and bear only on the privilege of using them, not on the privilege of doing the interstate business. Moreover, the flat $10 fee laid by § 3847.16 (a) is further identified as one on the privilege of use by the fact that "unlike the general tax in *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183, the levy of which was unrelated to the use of the highways, grant of the privilege of their use is by the present statute made conditional upon payment of the fee." *Morf* v. *Bingaman, supra* at 410.

The minimum so-called "gross revenue" fee, on the other hand, is technically conditioned on the receipt of

[18] In *Clark* v. *Poor,* the Court stated: "Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs." 274 U. S. 554, 557.

such revenue from the operations within Montana. But the flat minimum of $15 annually, which is all we have before us in the shape the case has taken for the purposes of decision here, has none of the alleged vices characteristic of gross income taxes heretofore held to vitiate such taxes laid by the states on interstate commerce. And appellant has advanced no tenable basis in rebuttal of the legislative declaration that this tax too is exacted in consideration of the use of the state's highways, *i. e.*, for the privilege of using them, not for that of doing the interstate business. Here, as in *Morf* v. *Bingaman*, "there is ample support for a legislative determination that the peculiar character of this traffic involves a special type of use of the highways," with enhanced wear, tear and hazards laying heavier burdens on the state for maintenance and policing than other types of traffic create. 298 U. S. 407, 411. It is to compensate for these burdens that the taxes are imposed, and appellant has not sustained its burden, *Clark* v. *Paul Gray, Inc., supra* at 599, and authorities cited, of showing that the levies have no reasonable relation to that end.[19]

It is of no consequence that the state has seen fit to lay two exactions, substantially identical, rather than combine them into one, or that appellant pays other taxes

[19] Appellant claims that the $15 minimum fee is unreasonable since it is roughly ten times greater than the tax that would be required if the percentage standard provided in the statute were applied. To accept appellant's position would mean that a state could never impose a minimum fee, but would have to adjust its taxes to the inevitable variations in the use of the highways made by various carriers. The Federal Constitution does not require the state to elaborate a system of motor vehicle taxation which will reflect with exact precision every gradation in use. In return for the $15 fee appellant can do business grossing $3,000 per vehicle annually for operations on Montana roads. Appellant was not wronged by its failure to make the full use of the highways permitted. *Aero Transit Co.* v. *Georgia Comm'n*, 295 U. S. 285; *Morf* v. *Bingaman*, 298 U. S. 407; cf. *Kane* v. *New Jersey*, 242 U. S. 160.

which in fact are devoted to highway maintenance. For the state does not exceed its constitutional powers by imposing more than one form of tax. *Interstate Busses Corp.* v. *Blodgett, supra; Dixie Ohio Co.* v. *Comm'n, supra.* And, as we have said, the aggregate amount of both taxes combined is less than that of taxes heretofore sustained. In view of these facts there is not even semblance of substance to appellant's contention that the taxes are excessive.

Neither is there merit in its other arguments, which we have considered, including those urging due process and equal protection grounds for invalidating the levies.

The judgment of the Supreme Court of Montana is

Affirmed.

PANHANDLE EASTERN PIPE LINE CO. *v.* PUBLIC SERVICE COMMISSION OF INDIANA ET AL.

APPEAL FROM THE SUPREME COURT OF INDIANA.

No. 69. Argued November 14, 17, 1947.—Decided December 15, 1947.

1. Sales of imported natural gas by an interstate pipeline carrier direct to industrial consumers are sales in interstate commerce, even though the gas leaves the main transmission line within the state and is piped to the consumers through branch lines or laterals at reduced pressure. Pp. 512–513.
2. In view of the position of the state commission as construed by the state supreme court, the orders of the commission, directing immediately only the filing of information, constituted an assertion of power to regulate appellant's rates and service under the state's comprehensive scheme of regulation; and appellant was not required to await a further regulatory order before contesting the commission's jurisdiction. P. 511.
3. In the light of the legislative history, provisions, and policy of the Natural Gas Act, and of the judicial history leading to its enactment, sales of natural gas by an interstate pipeline carrier direct to industrial consumers, although in interstate commerce, are subject to regulation by the states. Pp. 513–524.

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4. By the Natural Gas Act, Congress did not occupy the entire field open to federal regulation of the transportation and sale of natural gas in interstate commerce, but extended federal regulation only to that area which this Court previously had held the states could not reach. Pp. 516–519.
5. It is unnecessary in this case to consider the effect of the Commerce Clause of the Federal Constitution independently of the effect of the Natural Gas Act as here construed. P. 524.

224 Ind. 662, 71 N. E. 2d 117, affirmed.

Orders of a state commission requiring a pipeline company to file tariffs, regulations, reports, etc., were vacated and enjoined by a state court. The Supreme Court of the State reversed. 224 Ind. 662, 71 N. E. 2d 117. On appeal to this Court, *affirmed,* p. 524.

John S. L. Yost argued the cause for appellant. With him on the brief were *Ira Lloyd Letts* and *Alan W. Boyd.*

Karl J. Stipher, Deputy Attorney General of Indiana, argued the cause for the Public Service Commission of Indiana, appellee. With him on the brief were *Cleon H. Foust,* Attorney General, *Frank E. Coughlin,* First Deputy Attorney General, and *Urban C. Stover.*

William P. Evans argued the cause for the Indiana Gas & Water Co. et al., appellees. With him on the brief were *John C. Lawyer, R. Stanley Anderson, Wm. A. McClellan, Robert R. Batton, Carl E. Hartley* and *John E. Fell.*

Frederick G. Hamley and *John E. Benton* filed a brief for the National Association of Railroad and Utilities Commissioners, as *amicus curiae,* in support of appellees.

Mr. Justice Rutledge delivered the opinion of the Court.

Broadly the question is whether Indiana has power to regulate sales of natural gas made by an interstate

pipe-line carrier direct to industrial consumers in Indiana. More narrowly we are asked to decide whether the commerce clause, Const. Art. I, § 8, by its own force forbids the appellee, Public Service Commission, to require appellant to file tariffs, rules and regulations, annual reports, etc., as steps in a comprehensive plan of regulation preliminary to possible exercise of jurisdiction over rates and service in such sales.[1]

Panhandle Eastern transports natural gas from Texas and Kansas fields into and across intervening states, including Indiana, to Ohio and Michigan. In Indiana it furnishes gas to local public utility distributing companies and municipalities. These in turn supply the needs of over 112,000 residential, commercial and industrial consumers.

Since 1942 appellant also has sold gas in large amounts direct to Anchor-Hocking Glass Corporation for industrial consumption.[2] Shortly before beginning this service appellant had informed a number of its customers, local distributing companies in Indiana, that it intended to render service directly to large industrial consumers wherever possible.[3] Pursuant to that policy, since these pro-

[1] The Commission is authorized to take these steps by Indiana statutes creating the state's regulatory scheme for public utilities. Burns Ind. Stat. Ann. §§ 54–101 *et seq.*

[2] Appellant's sales to Anchor-Hocking are far larger than sales made to several of the local distributing companies. Thus, in 1943 appellant sold 1,150,279 cubic feet to Anchor-Hocking and only 151,065 cubic feet to the local utility served from the same branch line. See note 8 *infra.*

[3] This was in 1941. In 1943 the chairman of appellant's board stated that "Panhandle was anxious to take over such business because it was unregulated transaction both as to the Federal Power Commission and the Public Service Commission of Indiana and that he intended to establish higher industrial rates based on a competitive fuel basis."

ceedings began direct service has been extended to another big industrial user.[4]

In 1944 the Commission initiated hearings relative to direct service by Panhandle Eastern to Indiana consumers. It concluded that "the distribution in Indiana by Panhandle of natural gas direct to consumers is subject to regulation by this Commission under the laws of this state," notwithstanding any alleged contrary effect of the commerce clause upon appellant's direct sales to industrial users. Accordingly it issued its order of November 21, 1945, for the filing of tariffs, etc., as has been stated.

Early in 1946 Panhandle Eastern brought this suit in a state court to set aside and enjoin enforcement of the order. While the cause was pending the Commission issued a supplemental order declining appellant's offer to submit the specified tariffs, reports, etc., "as information only," and reasserting its full regulatory power as conferred by the Indiana statutes.[5] 63 P. U. R. (N. S.) 309.

The trial court vacated the orders and enjoined the Commission from enforcing them. It accepted appellant's view of the effect of the commerce clause on its

[4] Prior to the hearings before the Commission appellant had entered into arrangements to provide direct industrial service to an E. I. DuPont de Nemours & Company plant near Fortville, Indiana. That service was commenced subsequent to the hearings.

[5] In the trial court the Commission had urged, as it still does, that its first order merely required the filing of information and that no action would lie to contest its power to fix rates or otherwise regulate the sales until that power was exercised. This resulted in bringing forth appellant's tender of compliance as "information only," conditioned upon the Commission's acceptance of the filing as such and without prejudice to appellant's right to contest the validity of any subsequent order. The supplemental order expressly stated that the filing, if any, would be deemed to be for the purpose of and available for use by the Commission in carrying out its further duties under the statute.

operations. The Supreme Court of Indiana reversed that judgment and denied the relief appellant sought. 224 Ind. 662. It held first that the Commission's orders amounted to an unequivocal assertion of power to regulate rates and service on appellant's direct industrial sales and thus presented squarely the question of the Commission's jurisdiction over such sales as affected by the commerce clause. The court did not flatly hold that the sales are in interstate rather than intrastate commerce. But, taking them to be of the former kind, it held them nevertheless subject to the state's power of regulation under the doctrine of *Cooley* v. *Board of Wardens,* 12 How. 299. The court further held that appellant, in making these sales, is a public utility within the meaning and application of the state's regulatory statutes, Burns Ind. Stat. Ann. §§ 54–105 and Ind. Acts 1945, c. 53, p. 110. It is this decision we have to review pursuant to § 237 of the Judicial Code, 28 U. S. C. 344 (a).[6]

The effect of the state statutes, whether permitting the filing of the tariffs, etc., as information unrelated to further regulation or requiring the filing as initial and integral steps in the regulatory scheme, and thus as presenting at the threshold of the scheme's application the question of the state's power to go further with it, is primarily a question of construction for the state courts to determine. In view of the Commission's position, as construed by the state supreme court, we cannot say that the only thing presently involved is the state's power to require the filing of information without reference to its further use for controlling these sales. Cf. *Arkansas Louisiana Gas Co.* v. *Department of Public Utilities,* 304 U. S. 61. Here

[6] Several of the local utility companies, which had been intervenors in the proceedings before the Commission, were permitted to intervene in the court test of the orders and are appellees here. The National Association of Railroad and Utilities Commissioners has filed a brief *amicus curiae* in support of the Commission's position.

the orders constituted "an unequivocal assertion of power" to regulate rates and service. Indeed they involve something more than a mere threat to apply the regulatory plan in its later phases. They represent the actual application of that plan in its initial stage. In such a situation appellant was not required to await a further regulatory order before contesting the Commission's jurisdiction. Cf. *Public Utilities Comm'n* v. *Gas Co.*, 317 U. S. 456.

This does not mean that we now express opinion concerning the validity of any further order which the Commission may enter. No such order is before us. It does mean that we are required to decide whether the sales in question lie within the scope of the state's power to regulate rates and service, so that some further order in those respects may or may not be entered.

Nor do we question that these sales are interstate transactions. The contrary suggestion left open in the state supreme court's treatment rests upon the view that gas transported interstate takes on the character of a commodity which has come to rest or broken bulk when it leaves the main transmission line and, under reduced pressure, enters branch lines or laterals irrevocably on its way to final distribution or consumption. Those merely mechanical considerations are no longer effective, if ever they were exclusively, to determine for regulatory purposes the interstate or intrastate character of the continuous movement and resulting sales we have here.[7]

[7] In *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 504, the Court referred to earlier decisions turned by "applying this mechanical test for determining when interstate commerce ends and intrastate commerce begins," namely, "upon the introduction of the gas into the service pipes of the distributor," and then stated: "In other cases, the Court, in determining the validity of state regulations, has been less concerned to find a point in time and space where the interstate commerce in gas ends and intrastate commerce begins, and

Thus gas furnished to local utilities for resale is supplied unquestionably, both as to transportation and as to sale, in interstate commerce. Yet it is subjected to practically identical changes in pressure with the gas sold by appellant directly for industrial use.[8] Neither practical common sense nor constitutional sense would tolerate holding that reduction in pressure makes the industrial sales to Anchor-Hocking wholly intrastate for purposes of local regulation while deliveries at similar pressures to utility companies remain exclusively interstate. Variations in main pressure are not the criterion of the states' regulatory powers under the commerce clause. Cf. *Interstate Gas Co.* v. *Power Comm'n,* 331 U. S. 682, 689. The sales here were clearly in interstate commerce.

The controlling issues therefore are two: (1) Has Congress, by enacting the Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717, in effect forbidden the states to regulate such sales as those appellant makes directly to industrial

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has looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce. Cf. *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 185, 187, *et seq.; California* v. *Thompson,* 313 U. S. 109, 113, 114; *Duckworth* v. *Arkansas* [314 U. S.], p. 390." 314 U. S. at 505.

[8] Appellant's gas enters Indiana in a 22-inch main at a pressure of 250 pounds or more per square inch. In the state the gas enters a 16-inch branch line at a pressure of 200 pounds per square inch, and then a 6-inch lateral line at a pressure of 100 pounds per square inch. In the lateral line the gas is transported to two adjacent meter houses. From one house gas is delivered to Anchor-Hocking at pressures as low as 10 pounds per square inch, while from the other deliveries are made to a local distributing company at pressures ranging from 9 to 25 pounds per square inch.

Similarly, gas from other laterals stemming from appellant's main line is reduced to a pressure of 16 pounds per square inch before being furnished to the DuPont plant and to pressures of approximately 20 pounds per square inch for two utility companies served from the same lateral as the DuPont plant.

consumers; (2) if not, are those sales of such a nature, as related to the *Cooley* formula, that the commerce clause of its own force forbids the states to act.

We think there can be no doubt of the answer to be given to each of these questions, namely, that the states are competent to regulate the sales. The two questions may best be considered in the background of the legislative history of the Natural Gas Act and of the judicial history leading to its enactment in 1938.

Prior to that time this Court in a series of decisions had dealt with various situations arising from state efforts to regulate the sale of imported natural gas. The story has been adequately told [9] and we do not stop to review it again or attempt reconciliation of all the decisions or their groundings. Suffice it to say that by 1938 the Court had delineated broadly between the area of permissible state control and that in which the states could not intrude. The former included interstate direct sales to local consumers, as exemplified in *Pennsylvania Gas Co.* v. *Public Service Comm'n,* 252 U. S. 23; the latter, service interstate to local distributing companies for resale, as held in *Missouri* v. *Kansas Gas Co.,* 265 U. S. 298, reinforced by *Public Utilities Comm'n* v. *Attleboro Co.,* 273 U. S. 83.

Shortly then, as the decisions stood in 1938, the states could regulate sales direct to consumers, even though made by an interstate pipe-line carrier. This was true of sales not only for domestic and commercial uses but also for industrial consumption, at any rate whenever the interstate carrier engaged in distribution for all of these

[9] For a summary of the leading decisions concerning the sale and transportation of gas prior to the passage of the Natural Gas Act, see *Illinois Gas Co.* v. *Public Service Co.,* 314 U. S. 498, 504–505. See also Powell, Note, Physics and Law—Commerce in Gas and Electricity, 58 Harv. L. Rev. 1072; Howard, Gas and Electricity in Interstate Commerce, 18 Minn. L. Rev. 611.

uses.[10] On the other hand, sales for resale, usually to local distributing companies, were beyond the reach of state power, regardless of the character of ultimate use. This fact not only prevented the states from regulating those sales but also seriously handicapped them in making effective regulation of sales within their authority.[11]

[10] Appellant contends that "wholesale," *i. e.*, large quantity, service direct to industrial consumers, as exemplified by its sales to Anchor-Hocking, is to be distinguished from the sales in *Pennsylvania Gas Co.* v. *Public Service Comm'n,* 252 U. S. 23, which were made in a manner commonly associated with a local distribution system supplying gas to consumers in a city. Nothing in the decision, however, requires it to be so limited. On the contrary, emphasis may rather be placed on the fact that both situations involve sales to ultimate consumers, Anchor-Hocking being just as clearly in that category as the "factories and residences" served by the company in the *Pennsylvania Gas Co.* case. See *Illinois Gas Co.* v. *Public Service Co.,* 314 U. S. 498, 505, where Chief Justice Stone, in summarizing the *Pennsylvania Gas Co.* case, stated that it involved gas "sold directly to ultimate local consumers"; *Jersey Central Co.* v. *Power Comm'n,* 319 U. S. 61, 78, 80 (dissenting opinion); Powell, Note, 58 Harv. L. Rev. 1072, 1082, quoted *infra* note 12.

[11] The *Attleboro* decision, 273 U. S. 83, had been made in the face of the Rhode Island Commission's finding that the Narragansett company in selling electric current interstate to the Attleboro company was suffering an operating loss while the rates to its other customers yielded a fair return; and over the Commission's contentions grounded on that finding that it could not effectively regulate rates of the Narragansett company to its local consumers without also regulating its rates to the Attleboro company.

Compare the memorandum submitted on behalf of the National Association of Railroad and Utilities Commissioners by its general solicitor, Mr. John E. Benton, Hearing before Committee on Interstate and Foreign Commerce on H. R. 4008, 75th Cong., 1st Sess. 141, 143: "Sales for industrial use ought not to be exempt from all regulation, for the result may very well be that unjustifiable discrimination will result, and there will be no commission to which complaint may be made. Sales for industrial uses plainly ought to be subject to regulation by the same Commission which regulates sales to other classes of consumers, so that just and reasonable rates, for the several classes of service, properly related to each other, may be established."

This impotence of the states to act in relation to sales for resale by interstate carriers brought about the demand for federal regulation and Congress' response in the Natural Gas Act. To reach those sales and prevent the hiatus in regulation their immunity caused, the Act declared in § 1 (b):

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

This section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.

The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act "shall not apply *to any other . . . sale . . .*" (Emphasis added.) Those words plainly mean that the Act shall not apply to any sales other than sales "for resale for ultimate public consumption for domestic, com-

mercial, industrial, or any other use." Direct sales for consumptive use of whatever sort were excluded.

The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed.[12]

Moreover, this unusual legislative precision was not employed with any view to relieving or exempting any segment of the industry from regulation. The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions.[13] The Act was drawn with meticulous re-

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[12] ". . . [T]he Supreme Court has from the beginning allowed the state both to tax and to fix the price on the first sale or delivery of gas or electricity brought in from a sister state when and if this first sale is also necessarily the last sale because consummated by consumption." Powell, Note, 58 Harv. L. Rev. 1072, 1082.

[13] In H. R. Rep. No. 709, 75th Cong., 1st Sess., the Committee on Interstate and Foreign Commerce said of the proposed bill which became the Natural Gas Act: "It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23.) There is no intention in enacting the present legislation to disturb the

gard for the continued exercise of state power, not to handicap or dilute it in any way. This appears not merely from the situation which led to its adoption and the legislative history, including the committee reports in Congress cited above, but most plainly from the history of § 1 (b) in respect to the changes which took place in reaching its final form.[14]

States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (1927) 273 U. S. 83.) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

See also H. R. Rep. No. 2651, 74th Cong., 2d Sess. 1–3; Sen. Rep. No. 1162, 75th Cong., 1st Sess.

[14] In the hearings on H. R. 4008, the bill in the 75th Congress, the representative of several large pipe-line companies construed § 1 (b) as it then stood to exempt sales to industrial consumers from all regulation, state as well as federal, and proposed an amendment exempting sales for resale, when for industrial use only, from regulation under the proposed legislation. Hearing before Committee on Interstate and Foreign Commerce on H. R. 4008, 75th Cong., 1st Sess., 124. In an answering memorandum, Mr. Benton pointed out the pipeline representative's misunderstanding of the purposes of § 1 (b), stating that "Service to an industrial user is just as much a local service . . . as is a sale to a householder for domestic use" and until "Congress occupies the field, a sale for industrial use is accordingly subject to State regulation . . . ." *Id.* at 143. He proposed an alternative amendment to render it clear beyond doubt that federal regulation of sales for resale extended to transactions where the gas was to be used for industrial purposes only. *Id.* at 142. Mr. Benton's amendment was adopted by the House committee and appears in substantially unaltered form in § 1 (b) of the Natural Gas Act as finally enacted. In H. R. Rep. No. 709, 75th Cong., 1st Sess., the

It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption. Yet this, in effect, is what appellant asks us to do. For the essence of its position, apart from standing directly on the commerce clause, is that Congress by enacting the Natural Gas Act has "occupied the field," *i. e.*, the entire field open to federal regulation, and thus has relieved its direct industrial sales of any subordination to state control.

The exact opposite is the fact. Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach.[15] That area did not include direct consumer sales, whether for industrial or other uses. Those sales had been regulated by the states and the regulation had been repeatedly sustained. In no instance reaching this Court had it been stricken down.[16]

It is true that no case came here involving state regulation of direct industrial sales wholly apart from sales for other uses. In the cases sustaining state power,

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committee emphasized that Mr. Benton and other representatives of state commissions and municipalities appeared in support of the bill.

In support of its position appellant relies in part on H. R. Rep. No. 800, 80th Cong., 1st Sess., favorably reporting H. R. 4051 amending the Natural Gas Act. This bill did not become law. The views expressed in the committee report made in 1947, some nine years after the Natural Gas Act's passage, are hardly determinative or, in juxtaposition with the contemporaneous history, persuasive of the congressional intent in passing that Act.

[15] See notes 12 and 13 *supra*.

[16] *Ibid.*

whether to regulate or to tax, the company making the industrial sales was selling also to domestic and commercial users.[17] But there was no suggestion, certainly no decision, that a different result would follow if only direct industrial sales were being made. Neither the prior judicial line nor the statutory line was drawn between kinds of use or on the relation between sales for different uses. Both lines were drawn between sales for use, of whatever kind, and sales for resale. Cf. *Colorado Interstate Co.* v. *Comm'n,* 324 U. S. 581, 595–596.

The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority. *Public Utilities Comm'n* v. *Gas Co.,* 317 U. S. 456, 467; *Power Comm'n* v. *Hope Gas Co.,* 320 U. S. 591, 609–610; *Interstate Gas Co.* v. *Power Comm'n,* 331 U. S. 682, 690. And, as was pointed out in *Power Comm'n* v. *Hope Gas Co., supra* at 610, "the primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies." The scheme was one of cooperative action[18] between federal and state agencies.

[17] *Pennsylvania Gas Co.* v. *Public Service Comm'n,* 252 U. S. 23, appears to be the only case flatly ruling the point for regulatory purposes. But its authority was clearly recognized in *Illinois Gas Co.* v. *Public Service Co.,* 314 U. S. 498, 505, cf. note 10 *supra; Missouri* v. *Kansas Gas Co.,* 265 U. S. 298, 308; *Public Utilities Comm'n* v. *Attleboro Co.,* 273 U. S. 83, 87, and other cases, as well as in the congressional report quoted in note 13.

[18] The jurisdiction granted the Federal Power Commission by the Natural Gas Act necessitates close correlation with state regulatory bodies. Section 17 of the Act provides for cooperation between the federal and state agencies. See note 23 and text.

It could accomplish neither that protective aim nor the comprehensive and effective dual regulation Congress had in mind, if those companies could divert at will all or the cream of their business to unregulated industrial uses.[19]

The Natural Gas Act therefore was not merely ineffective to exclude the sales now in question from state control. Rather both its policy and its terms confirm that control. More than "silence" of Congress is involved. The declaration, though not identical in terms with the one made by the McCarran Act, 59 Stat. 33, 15 U. S. C. § 1011, concerning continued state regulation of the insurance business, is in effect equally clear, in view of the Act's historical setting, legislative history and objects, to show intention for the states to continue with regulation where Congress has not expressly taken over. Cf. *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408. Congress has undoubted power to define the distribution of power over interstate commerce. *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 769, and authorities cited; cf. *Prudential Ins. Co.* v. *Benjamin, supra.* Here the power has been exercised in a manner wholly inconsistent with exclusion of state authority over the sales in question.

Congress' action moreover was an unequivocal recognition of the vital interests of the states and their people, consumers and industry alike, in the regulation of rates and service. Indiana's interest in appellant's direct sales is obvious. That interest is certainly not less than the

[19] Over 38 per cent of the gross revenues of the local Indiana utilities from the sale of gas is derived from service to the approximately 250 industrial consumers served by them. If service to any substantial number of the industrial users were to be taken over by appellant, the local utilities not only would suffer great losses in revenue, but would be unable to dispense with more than a trivial percentage of their plant properties. The resultant increase in unit cost of gas would lead necessarily to increased rates for the consumers served by the local companies.

interest of California and her people in their protection against the evil effects of wholly unregulated sale of insurance interstate. *Robertson* v. *California,* 328 U. S. 440. Not only would industrial consumers in most instances go without protection as to rates and service other than that supplied by competition from other fuels,[20] but the state's regulatory system would be crippled and the efforts of the Indiana Commission seriously hampered in protecting the interests of other classes of users equally if not more important.[21]

As against these vital local interests, becoming more important with every passing year in the steady transition from use of more primitive fuels to natural gas and fuel oils, appellant seeks to set up its own interest in complete freedom from regulation and, if any is to be imposed, a supposed national interest in uniform regulation. The national interest, considered apart from its own, is largely illusory on this record. For itself, the company asserts that state regulation of prices and service will amount to a power of blocking the commerce or impeding its free flow.

There are two answers. One is experience. Insofar as this phase of the natural gas industry has been subjected to state regulation to date, those effects have not been shown to occur. The other answer, in case that experience should vary, is the power of Congress to correct abuses in regulation if and when they appear. State

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[20] Pipe-line service, by the very physical conditions characterizing the industry and magnitude of investment required, acquires large monopolistic effects, more particularly in marketing areas distant from producing ones. Cf. *Power Comm'n* v. *Hope Gas Co.,* 320 U. S. 591, 610, n. 17 and text. Most often its competition is with other fuels rather than competing pipe lines.

[21] See note 19. Cf. *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346; *Robertson* v. *California,* 328 U. S. 440, 448; *Industrial Gas Co.* v. *Public Utilities Comm'n of Ohio,* 135 Ohio St. 408, 412; *Re Service Gas Co.,* 15 P. U. R. (N. S.) 202.

power to regulate interstate commerce, wherever it exists, is not the power to destroy it, unless Congress has expressly so provided.[22] It is the power to require that it be done on terms reasonably related to the necessity for protecting the local interests on which the power rests.

Appellant also envisages conflicting regulations by the commissions of the various states its main pipe line serves, particularly in relation to curtailment of service when weather conditions or others require it, and fears conflict also between the state commissions and the Federal Power Commission. It assigns these possibilities in support of its view that national uniform regulation alone is appropriate to its operations. There is no evidence thus far of substantial conflict in either respect[23] and we do not see that the probability of serious conflict is so strong as to outweigh the vital local interests to which we have referred requiring regulation by the states. Moreover, if such conflict should develop, the matter of interrupting service is one largely related, as appellees say, to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states.[24]

These considerations all would lead to the conclusion that the states are not made powerless to regulate the sales in question by any supposed necessity for uniform

[22] *Kentucky Whip & Collar Co.* v. *Illinois Cent. R. Co.*, 299 U. S. 334; *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311; *United States* v. *Darby*, 312 U. S. 100.

[23] There is no evidence of any conflict in the asserted exercise of jurisdiction by the appellee Commission with any functions of the Federal Power Commission. In granting appellant permission under § 7 (c) of the Natural Gas Act to extend its facilities to serve the DuPont plant, see note 4 *supra*, the Federal Power Commission specifically provided that the order was "without prejudice to the authority of the Indiana Commission in the exercise of any jurisdiction which it may have over the sale or service proposed to be rendered by Panhandle Eastern to du Pont." Cf. note 18.

[24] See note 23.

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national regulation but that on the contrary the matter is of such high local import as to justify their control, even if Congress had remained wholly silent and given no indication of its intent that state regulation should be effective. But in this case, in addition to those considerations taken independently, the policy which we think Congress has clearly delineated for permitting and supporting state regulation removes any necessity for determining the effect of the commerce clause independently of action by Congress and taken as operative in its silence.

The attractive gap which appellant has envisioned in the coordinate schemes of regulation is a mirage. The judgment of the Supreme Court of Indiana is

Affirmed.

MR. JUSTICE JACKSON concurs in the result.

MR. JUSTICE MURPHY took no part in the consideration or decision of this case.

JONES, COLLECTOR OF INTERNAL REVENUE, *v.* LIBERTY GLASS CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 71. Argued November 17–18, 1947.—Decided December 22, 1947.

1. Under § 322 (b) (1) of the Internal Revenue Code, a claim for refund of federal income tax, whether arising out of an income tax "erroneously or illegally assessed or collected" or not, must be filed within three years from the time the return was filed or within two years from the time the tax was paid. The four-year period prescribed by § 3313 is inapplicable to such a claim. Pp. 525–526, 534–535.
2. The word "overpayment" in § 322 of the Internal Revenue Code is to be read in its usual sense, as meaning any payment in excess of that which is properly due, whether traceable to an error in

mathematics or in judgment or in interpretation of facts or law, and whether the error be committed by the taxpayer or the revenue agents. P. 531.

3. Where the language and purpose of an Act of Congress are clear, legislative acquiescence in a rather recent contrary interpretation by lower federal courts is not to be assumed. Pp. 533–534.

159 F. 2d 316, reversed.

The District Court gave judgment for respondent in a suit for a refund of federal income taxes. 66 F. Supp. 254. The Circuit Court of Appeals affirmed. 159 F. 2d 316. This Court granted certiorari. 331 U. S. 800. *Reversed,* p. 535.

Lee A. Jackson argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Arnold Raum* and *Helen R. Carloss.*

Earl Foster argued the cause and filed a brief for respondent.

Reginald S. Laughlin filed a brief as *amicus curiae.*

MR. JUSTICE MURPHY delivered the opinion of the Court.

Our concern here is with the period of limitations applicable to the filing of claims for refund of federal income taxes. Must such claims be filed within two years after payment of the tax, as provided by § 322 (b) (1) of the Internal Revenue Code, or within four years after payment of the tax, as provided by § 3313 of the Code?

The corporate taxpayer, respondent herein, filed its income and excess-profits tax return for 1938, a return which indicated a tax liability of $1,193.25. This sum, plus a small additional assessment, was paid in 1939. A revenue agent later investigated the taxpayer's liability again, resulting in an additional assessment of $6,640.81.

Payment of this amount was made on March 8, 1941. Over three years later, on March 30, 1944, the taxpayer filed a claim for refund of $1,053.49. It was stated that the revenue agent erroneously had failed to allow certain credits for sums used by the taxpayer in 1938 to reduce its indebtedness. Reliance was placed by the taxpayer on the four-year limitation period specified in § 3313. The Commissioner of Internal Revenue rejected this claim, pointing out that § 3313 specifically exempts from its application income, war-profits, excess-profits, estate and gift taxes.

This suit was then brought by the taxpayer in the District Court to recover the amount alleged by the refund claim to be due. That court held that § 3313 was applicable and gave judgment for the taxpayer. 66 F. Supp. 254. The Tenth Circuit Court of Appeals, one judge dissenting, affirmed the judgment. 159 F. 2d 316. The problem being one of importance in the administration of the revenue laws, we granted certiorari.

Section 322 (b) (1) is to be found in Subtitle A of the Internal Revenue Code, a subtitle dealing with those taxes over which the Tax Court has jurisdiction. Such jurisdiction includes income, excess-profits, estate and gift taxes. More specifically, § 322 (b) (1) appears under Chapter 1 of the Code, pertaining to income taxes. It is concerned with overpayments of income taxes and provides quite simply that no refund shall be allowed unless a claim for refund "is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid . . . ."[1]

[1] The return in this case was filed in June, 1939. Since the claim was filed on March 30, 1944, no contention could be made that it was within the three-year period from the date the return was filed.

Section 3313, on the other hand, is located under Subtitle B of the Code, a subtitle devoted to miscellaneous taxes. It is in Chapter 28, which contains various provisions common to such taxes. And it is among those provisions dealing with the assessment, collection and refund of the taxes. It reads as follows: "All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund."

The substance of § 3313 of the Code has long been a part of federal statutory law. Its ancestry can be traced back to 1872, when § 3228 of the Revised Statutes was enacted.[2] Section 3228 established a procedure for filing claims for refund of any internal revenue tax alleged to have been "erroneously or illegally assessed or collected" and created a limitation period of two years from the time the cause of action accrued, later extended in 1921 to four years from the date of payment of the tax.[3] But soon after the entry of the income tax into the federal scene in 1913, separate provision was made for the filing of claims

[2] Section 3228 was in the nature of a revision of § 44 of the Act of June 6, 1872, 17 Stat. 230, 257.

[3] Revenue Act of 1921, § 1316, 42 Stat. 227, 314.

for refund of income taxes "paid in excess of those properly due." Section 14 (a) of the Revenue Act of 1916[4] was the first such provision and it made clear that § 3228 was inapplicable to claims of this nature. Section 252 of the Revenue Act of 1918,[5] followed by § 252 of the 1921 Act,[6] continued this scheme of separate treatment. These later provisions were written so as to include refund claims relating to war-profits and excess-profits taxes as well as those involving income taxes; and a limitation of five years from the date the return was due was placed on the filing of such claims. It was further specified that the procedure therein detailed was to be followed "notwithstanding the provisions" of § 3228.

Section 252, as it appeared in the 1921 Act, was then changed in 1923[7] so as to permit claims for refund of income and profits taxes "paid in excess of that properly

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[4] 39 Stat. 756, 772. This provided that the claim for refund might be presented "notwithstanding the provisions of section thirty-two hundred and twenty-eight of the Revised Statutes."

[5] 40 Stat. 1057, 1085.

[6] 42 Stat. 227, 268.

[7] Act of March 4, 1923, 42 Stat. 1504, 1505. In amending § 252, the Act of March 4, 1923, made mention of refunds of income taxes to withholding agents which might be made under the provisions of "section 3228 of the Revised Statutes." This was an obvious reference to the practice of the Treasury Department, admitted to be of "very doubtful legality," H. R. Rep. No. 1424, 67th Cong., 4th Sess., p. 2, of allowing a taxpayer who had permitted an additional assessment after the five-year period from the due date of the return (specified by § 252 of the 1921 Act) to file a claim for refund within four years after payment of the tax (pursuant to § 3228), even though the five-year period had elapsed. The Treasury had instituted this practice to prevent inequities which might otherwise ensue to such taxpayers, but it was without legislative sanction. It was to take care of the taxpayers who had taken advantage of the Treasury practice that the reference in question in the Act of March 4, 1923, was made. As to claims pending on March 4, 1923, which were timely filed under § 3228, but not timely under § 252, refunds to withholding agents were necessarily to be made under § 3228. This provision was not repeated

due" to be filed within two years after the tax was paid, in addition to the five-year period after the due date of the return. This change was made "so that the taxpayer who has, by agreement with the Treasury, permitted the time for the final assessment of the taxes due from him to be made after the expiration of the five-year period, will not be barred from making a claim for a refund when such assessment is made and the taxpayer *alleges that the assessment is illegal.*" [8] Amending § 252 rather than § 3228 of the Revised Statutes to accomplish this purpose was significant. It was an unequivocal indication that § 252, in speaking of claims for refund of "excess" payments of income and profits taxes, was designed by its framers to include not only those payments growing out of errors in the preparation of returns but also those payments resulting from illegal or erroneous assessments. See *Graham* v. *duPont,* 262 U. S. 234, 258.

The Revenue Act of 1924 [9] transferred the substance of the former § 252 to a new § 281. A four-year period of limitations from the date of the payment of the tax was established, a period coinciding in length with that prescribed by § 3228. The reference to the type of payments involved was recast; in place of speaking of payments "in excess of that properly due," § 281 used the simple term "overpayment." [10] And instead of stating in § 281 that its provisions should apply "notwithstand-

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in subsequent legislation and it was not indicative of a legislative intent to permit income tax refund claims to be governed by § 3228 in the future.

[8] Emphasis added. H. R. Rep. No. 1424, 67th Cong., 4th Sess., p. 2; S. Rep. No. 1137, 67th Cong., 4th Sess., p. 2.

[9] 43 Stat. 253, 301.

[10] The Revenue Act of 1924, 43 Stat. 253, 296, also created a new § 272, dealing with "overpayments" of income tax installments. This spoke of overpayments in the sense of payments of "more than the amount determined to be the correct amount of such installment." This provision now exists as § 321 of the Internal Revenue Code.

ing the provisions" of § 3228 of the Revised Statutes, § 3228 itself was amended [11] to make it applicable to all claims for the refunding or crediting of any internal revenue tax "except as provided in section 281 of the Revenue Act of 1924." This placing of an exceptive clause in § 3228 was done "to remove the doubt which now exists as to whether or not the provisions of section 3228, Revised Statutes, apply in any event to income taxes." [12] In other words, the statutory drafters intended to make certain that § 3228 was in no event to apply to income tax refund claims. Such claims were to be governed exclusively by § 281.

The essence of § 281 of the 1924 Act has been carried through to the present § 322 of the Internal Revenue Code.[13] The only significant change in the interval, for our purposes, was a reduction in the period of limitations, as measured from the payment of the tax, from four years to three years and finally to two years. And § 3228 of the Revised Statutes, as amended to state that it applies "except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes," has become the current § 3313 of the Code.

With this background in mind, we find the pattern of limitation periods for tax refund claims to be clear. Section 3313 of the Code establishes a four-year period for all internal revenue taxes, except as otherwise provided

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[11] 43 Stat. 253, 342.

[12] H. R. Rep. No. 179, 68th Cong., 1st Sess., p. 71; S. Rep. No. 398, 68th Cong., 1st Sess., p. 44. This quotation was taken verbatim by the congressional committees from the statement of A. W. Gregg of the Treasury Department, Statement of the Changes Made in the Revenue Act of 1921 by H. R. 6715 and the Reasons Therefor, Senate Committee Print, 68th Cong., 1st Sess., March 6, 1924, p. 37.

[13] See Revenue Act of 1926, § 284, 44 Stat. 9, 66; Revenue Act of 1928, § 322, 45 Stat. 791, 861; Revenue Act of 1932, § 322, 47 Stat. 169, 242; Revenue Act of 1934, § 322, 48 Stat. 680, 750.

by law in the case of specified taxes. Among the latter is the income tax, as to which § 322 (b) (1) makes provision "otherwise" by requiring that refund claims be presented within two years of payment or within three years from the filing of the return. Provisions are also made "otherwise" in the case of the estate tax (§ 910 of the Code) and the gift tax (§ 1027 of the Code).

The argument is made, however, that § 322 (b) (1) deals only with income tax "overpayments" and not with income taxes "erroneously or illegally assessed or collected." Overpayments are said to refer solely to excess payments resulting from errors by taxpayers in the preparation of their returns or in related activities, while erroneous or illegal assessments and collections are claimed to relate to various kinds of errors on the part of revenue agents. Since there is no provision "otherwise" for income tax refund claims involving the latter type of errors, the conclusion is reached that the four-year limitation period of § 3313 remains applicable. We cannot agree.

In the absence of some contrary indication, we must assume that the framers of these statutory provisions intended to convey the ordinary meaning which is attached to the language they used. See *Rosenman* v. *United States*, 323 U. S. 658, 661. Hence we read the word "overpayment" in its usual sense, as meaning any payment in excess of that which is properly due. Such an excess payment may be traced to an error in mathematics or in judgment or in interpretation of facts or law. And the error may be committed by the taxpayer or by the revenue agents. Whatever the reason, the payment of more than is rightfully due is what characterizes an overpayment.

That this ordinary meaning is the one intended by the authors of § 322 (b) (1) is quite evident from the legislative history which we have detailed. The word "over-

payment" first appeared in § 281 of the 1924 Revenue Act, one of the direct ancestors of § 322 (b) (1). The word was there used as a substitute for the previous reference to payments "in excess of that properly due," a phrase that is a perfect definition of an overpayment and that is not necessarily confined to overpayments occasioned by errors made by taxpayers. The immediate predecessor of § 281 had employed that phrase and had been enacted in 1923 with the expressed intention of including claims growing out of illegal assessments. There was not the slightest indication that the substitution of the word "overpayment" was designed to narrow the scope of § 281. It apparently was a mere simplification in phraseology. But it does make clear the sense in which the word was first used in this context. The generic character of the word was emphasized from the start.[14] And we see no basis for making it over into a word of art at this late date.

The legislative history further reveals a consistent intention to make a separate and complete limitation provision for income tax refund claims, whatever might be the underlying basis of the claims. Section 322 and its predecessors were devised in order to provide such an exclusive scheme. Claims relating to the income tax have at all times been explicitly excluded from § 3313.[15]

[14] Section 272 of the 1924 Act (now § 321 of the Code) referred to "overpayments" of income tax installments as payments of "more than the amount determined to be the correct amount of such installment." See note 10, *supra*. Such a definition admits of no distinction between errors by the taxpayer and errors by the revenue agents.

[15] Reference should also be made to the second sentence of § 3313, providing that the amount of refund may not exceed the amount of tax paid during the four-year period. There is a parenthetical phrase in this sentence which specifically excludes income, war-profits, excess-profits, estate and gift taxes. If the first sentence of § 3313, establishing the four-year limitation period, applied to income tax refund

This arrangement is but part of the general plan evident in the Internal Revenue Code of providing separate treatment for the income, profits, estate and gift taxes, as distinct from the miscellaneous taxes and the excise, import and temporary taxes. We would be doing unwarranted violence to this clear demarcation were we to read the word "overpayment" so as to place certain types of income tax refund claims within the scope of § 3313, a section that has always been divorced from the income tax portion of the revenue laws.

It is pointed out, however, that various lower federal courts, beginning in 1939, have reached a contrary result.[16] They have held that § 3313 rather than § 322 (b) (1) governs refund claims for income taxes alleged to have been "erroneously or illegally assessed or collected." Since Congress has subsequently convened from time to time and has amended § 322 in other respects without expressly disapproving this interpretation, the contention is advanced that legislative acquiescence in the interpretation must be assumed. But the doctrine of legislative

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claims arising out of illegal assessments, there would be no limit on the amount of refund by reason of this second sentence. Such a result is without support in the purpose or history of the provisions dealing with these refund claims.

[16] *Huntley* v. *Southern Oregon Sales,* 102 F. 2d 538, was the first case so holding. Subsequent decisions of the same tenor have relied in large part upon the *Huntley* case. *Olsen* v. *United States,* 32 F. Supp. 276; *United States* v. *Lederer Terminal W. Co.,* 139 F. 2d 679; *In re Tindle's Estate,* 59 F. Supp. 667, affirmed *per curiam sub nom. Pennsylvania Co. for Insurances on Lives* v. *United States,* 152 F. 2d 757; *Godfrey* v. *United States,* 61 F. Supp. 240; *Noble* v. *Kavanagh,* 66 F. Supp. 258, affirmed *per curiam,* 160 F. 2d 104; *Sbarbaro* v. *United States,* 73 F. Supp. 213. See also *Fawcett* v. *United States,* 70 F. Supp. 742. Compare *Central Hanover Bank & Trust Co.* v. *United States,* 67 F. Supp. 920. In many cases, however, the applicability of § 322 (b) (1) to claims of the type here involved was assumed without question and without an explicit holding on the point. See, for example, *United States* v. *Garbutt Oil Co.,* 302 U. S. 528.

acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions. See *Helvering* v. *Reynolds,* 313 U. S. 428, 432. Here the language and the purpose of Congress seem clear to us. The arrangement whereby all income tax refund claims are to be governed by what is now § 322 (b) (1) was established in an unmistakable manner nearly a quarter of a century ago, an arrangement that has been continued through various reenactments and changes in the revenue laws. And that arrangement has been consistently recognized and followed by the Treasury Department.[17] Under those circumstances, it would take more than legislative silence in the face of rather recent contrary decisions by lower federal courts to overcome the factors upon which we have placed reliance. Cf. *Electric Battery Co.* v. *Shimadzu,* 307 U. S. 5, 14; *Missouri* v. *Ross,* 299 U. S. 72, 75; *United States* v. *Elgin, J. & E. R. Co.,* 298 U. S. 492, 500. We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation. In short, the original legislative language speaks louder than such judicial action.

We accordingly conclude that all income tax refund claims, whatever the reasons giving rise to the claims, must be filed within three years from the time the return was filed or within two years from the time the tax was

[17] See I. T. 1447, I–2 Cum. Bull. 220 (1922); T. D. 3457, II–1 Cum. Bull. 177 (1923) and T. D. 3462, amending Regulations 62, II–1 Cum. Bull. 180 (1923); S. M. 1712, III–1 Cum. Bull. 345 (1924); S. M. 2293, III–2 Cum. Bull. 310 (1924); G. C. M. 3152, VII–1 Cum. Bull. 153 (1928); G. C. M. 13759, XIII–2 Cum. Bull. 102 (1934); Mim. 4814, 1938–2 Cum. Bull. 96; I. T. 3483, 1941–1 Cum. Bull. 397.

The present Treasury viewpoint is codified in Treasury Regulations 111, promulgated under the Internal Revenue Code, § 29.322–3 and § 29.322–7. See also Treasury Regulations 103, promulgated under the Code, § 19.322–3 and § 19.322–7, as amended by T. D. 5256, 1943 Cum. Bull. 550; and Treasury Regulations 101, promulgated under the Revenue Act of 1938, Articles 322–3 and 322–7.

paid, as provided in § 322 (b) (1). The four-year period prescribed by § 3313 is inapplicable to such claims. Since respondent filed its income tax refund claim more than three years after filing the return and more than two years after payment of the tax, its claim was out of time. That is true even though the claim arose out of an income tax alleged to have been "erroneously or illegally assessed or collected."

Reversed.

MR. JUSTICE DOUGLAS dissents.

KAVANAGH, COLLECTOR OF INTERNAL REVENUE, *v.* NOBLE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 70. Argued November 18, 1947.—Decided December 22, 1947.

1. Assuming that the deficiency assessment and collection of the federal income tax in this case were without legal authority, the taxpayer's payment of that illegal assessment was an "overpayment" within the meaning of § 322 (b) (1) of the Internal Revenue Code, and (the return having been filed more than three years previously) a claim for refund was barred by limitations where not filed within two years of the date of that payment. *Jones* v. *Liberty Glass Co., ante,* p. 524. Pp. 536–538.
2. It is for Congress, not the courts, to provide remedies for inequities resulting from the application of limitations on refunds of federal taxes. P. 539.

160 F. 2d 104, reversed.

The District Court gave judgment for the respondent in a suit upon a claim for refund of federal income tax. 66 F. Supp. 258. The Circuit Court of Appeals affirmed. 160 F. 2d 104. This Court granted certiorari. 331 U. S. 800. *Reversed,* p. 539.

Lee A. Jackson argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assist-*

ant Attorney General Caudle, Arnold Raum and *Helen R. Carloss.*

E. M. Baynes and *W. H. Harris* argued the cause and filed a brief for respondent.

Reginald S. Laughlin filed a brief as *amicus curiae.*

MR. JUSTICE MURPHY delivered the opinion of the Court.

This case is a companion to *Jones* v. *Liberty Glass Co., ante,* p. 524.

The stipulated facts show that on March 16, 1936, the respondent taxpayer filed with the Collector of Internal Revenue a joint individual income tax return for himself and his wife for the calendar year 1935. This disclosed a tax liability of $8,017.01, which was duly paid. In the return the losses and gains from sales of capital assets by the taxpayer and his wife were reported together, the losses of the wife being deducted from the gains of the husband, resulting in a net loss in excess of $2,000. This amount (the allowable limit of loss) was deducted on the return.

On June 7, 1937, the taxpayer was advised at a conference with revenue agents that there was additional income tax due for the year 1935, aggregating $421.80. The taxpayer's check, which was tendered for that amount, was later returned to him. Then by a letter dated June 11, 1937, a revenue agent notified the taxpayer that instead of a deficiency of $421.80 on the 1935 income tax return there was a deficiency of $19,973.93 and the taxpayer was furnished a computation showing the basis for such determination. The agent relied upon Article 117–5, Treasury Regulations 86, later declared void by this Court in *Helvering* v. *Janney,* 311 U. S. 189. After protest and further conference, the taxpayer gave

the agent a check for $21,527.70, covering the then proposed deficiency assessment of $19,973.93, plus interest of $1,553.77. This check was remitted to the United States Treasury, after having been received by the Collector on July 21, 1937.

On July 14, 1937, the taxpayer and his wife executed an agreement waiving certain statutory restrictions in their favor and consenting to the immediate assessment and collection against them of 1935 income tax in the principal sum of $19,973.93, plus deficiency interest of $1,553.77, which the Commissioner thereafter assessed. The agreement specified in a footnote that it was not a final closing agreement under § 606 of the Revenue Act of 1928 and that it did not therefore preclude the assertion of a further deficiency if one should be determined, nor did it extend the statutory period of limitation for refund, assessment or collection of the tax.

On January 28, 1941, the taxpayer and his wife filed a claim for refund of $21,105.90, plus interest, on the ground that there had been an illegal assessment and collection since the revenue agents had "refused to allow the losses of one spouse against the gains of the other spouse in the joint return of husband and wife." Reference was made to § 3313 of the Internal Revenue Code, specifying a four-year period of limitations. The Commissioner of Internal Revenue rejected this claim in reliance upon § 322 (b) (1) of the Revenue Act of 1934 (the same as § 322 (b) (1) of the Code), establishing a two-year period of limitations; it was pointed out that § 3313 specifically excludes income taxes from those for which a claim may be filed within four years after payment.

On July 12, 1941, the taxpayer filed his individual claim for refund of $21,527.70 paid with respect to the year 1935. The claim was on the same grounds as the claim previously filed by the taxpayer and his wife. This claim was returned with the request that the wife join

in the execution of the claim; this request was refused and the claim was returned to the Collector; once again the claim was returned to the taxpayer.

The taxpayer then brought this suit against the Collector to recover the amount alleged to be due in the refund claim. The District Court held that the decision of the Sixth Circuit Court of Appeals in *United States* v. *Lederer Terminal W. Co.*, 139 F. 2d 679, controlled the case and made it clear that the four-year period of § 3313 was applicable. Summary judgment was therefore entered for the taxpayer. 66 F. Supp. 258. The Sixth Circuit Court of Appeals affirmed *per curiam*, 160 F. 2d 104, citing its previous decision in the *Lederer Terminal* case.

For reasons which we have set forth in *Jones* v. *Liberty Glass Co.*, *ante*, p. 524, the decision below cannot stand. The two-year period provided by § 322 (b) (1), rather than the four-year period of § 3313, governs income tax refund claims. The overpayment which brings § 322 (b) (1) into operation occurs whenever the taxpayer has paid an amount over and above his true liability. Hence, if we assume that the deficiency assessment and collection in this case were without legal authority, the taxpayer's payment of that illegal assessment was an overpayment within the meaning of § 322 (b) (1). And he had two years from the date of that payment within which to file a claim for refund. Since he did not file his claim until three and a half years after payment, the claim was out of time.

It may well be that the taxpayer's refund claim was prompted by this Court's decision in *Helvering* v. *Janney*, *supra*, which set aside the Treasury regulation upon which the deficiency assessment was based. That decision was rendered on December 9, 1940, and the taxpayer filed his first refund claim on January 28, 1941. But assuming that the *Janney* decision makes clear that the taxpayer

here made an overpayment, the loss which he now suffers from an application of § 322 (b) (1) is a loss which is inherent in the application of any period of limitations. Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. *Rosenman* v. *United States,* 323 U. S. 658, 661. Remedies for resulting inequities are to be provided by Congress, not the courts.

Moreover, it is not our province to speculate as to why Congress established a shorter period of limitations relative to the income tax than is the case of those taxes governed by § 3313. It is enough that § 322 (b) (1) creates a two-year period applicable to all income tax refund claims and that the claim in this case is of that type.

Reversed.

MR. JUSTICE DOUGLAS dissents.

BLUMENTHAL *v.* UNITED STATES.

NO. 54. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.*

Argued October 23, 1947.—Decided December 22, 1947.

The four petitioners and another defendant were tried jointly and convicted for violating § 37 of the Criminal Code by conspiring to sell whiskey at prices above the ceiling set by the Office of Price Administration. Two of the defendants were the owner and sales manager, respectively, of a business holding a wholesale liquor license which was the ostensible owner of the whiskey; but they were proven, solely by their own admissions, which were received in evidence as to them alone, to have known that the concern was acting as intermediary for an undisclosed owner. The other

*Together with No. 55, *Goldsmith* v. *United States;* No. 56, *Weiss* v. *United States;* and No. 57, *Feigenbaum* v. *United States,* also on certiorari to the same Court.

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three defendants were salesmen who made the sales and collected the proceeds; and they were not proven to have known that the business was not the actual owner. *Held:*

1. Under the trial court's rulings on admissibility and instructions that the jury must determine the guilt or innocence of each defendant separately and must not take into consideration the admissions of the owner and sales manager in determining the guilt of the salesmen, the admissions were adequately excluded from consideration on the question of the salesmen's guilt. Pp. 550–553, 559–560.

2. With the admissions of the owner and sales manager thus excluded, the evidence summarized in the opinion was sufficient to show that the five defendants joined in a single conspiracy to sell the whiskey at over-ceiling prices in the guise of legal sales. Pp. 542–545, 553–556.

3. Although in a hypertechnical aspect the case might be regarded as showing two agreements, one among the owner of the business, the sales manager, and the undisclosed owner of the whiskey, and the other among the five defendants, the unique facts of this case revealed a single over-all conspiracy of which both agreements were essential and integral steps. Pp. 553–559.

4. *Kotteakos* v. *United States,* 328 U. S. 750, distinguished. Pp. 558–559.

5. The reception in evidence of the admissions made by the owner and the sales manager under the trial court's careful instructions that the jury must determine the guilt or innocence of each defendant separately and must not take those admissions into consideration in determining the guilt of the salesmen, was not prejudicial error as to the latter. Pp. 550–553, 559–560.

6. A conspiracy to violate the Emergency Price Control Act, coupled with an overt act in furtherance thereof, is punishable under § 37 of the Criminal Code. P. 560, n. 18.

158 F. 2d 883, affirmed.

Petitioners were convicted under § 37 of the Criminal Code for conspiring to violate the Emergency Price Control Act. The Circuit Court of Appeals affirmed, 158 F. 2d 883, and denied rehearing, one judge dissenting. 158 F. 2d 762. This Court granted certiorari. 331 U. S. 799. *Affirmed,* p. 560.

Arthur B. Dunne argued the cause for petitioners in Nos. 54, 55 and 57. With him on a brief filed for petitioner in No. 55 was *Walter H. Duane.*

Samuel S. Weiss, petitioner in No. 56, argued the cause and filed a brief *pro se.*

Hugh K. McKevitt filed a brief for petitioner in No. 54.

Leo R. Friedman filed a brief for petitioner in No. 57.

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Perlman* and *Robert S. Erdahl.*

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The four petitioners and Abel, another defendant, were convicted of conspiring to sell whiskey at prices above the ceiling set by regulations of the Office of Price Administration, in violation of the Emergency Price Control Act. 50 U. S. C. §§ 902 (a), 904 (a) and 925 (b). The charge was made pursuant to the general conspiracy statute, § 37 of the Criminal Code. The convictions were affirmed by the Circuit Court of Appeals, one judge dissenting. 158 F. 2d 883, dissenting opinion at 158 F. 2d 762. Abel has not sought review in this Court. Certiorari was granted as to the other four defendants because we thought important questions were presented concerning the applicability of our recent decision in *Kotteakos* v. *United States,* 328 U. S. 750.

We did not limit our grant of certiorari to that question, however, and on the record it is inseparably connected with the other issues, which relate to the admissibility and sufficiency of the evidence. Accordingly we have considered all of petitioners' contentions. The com-

petent proof was clearly sufficient to show that each petitioner had aided in the whiskey's illegal sale and had conspired with others to do so. The only phase of the case meriting further attention is whether, because of a difference in the state of the proof affecting two groups of defendants, the proof, in variance from the indictment, shows that there was more than one conspiracy.

I.

The indictment charges a single conspiracy in a single count. Ten overt acts are specified. The Government alleged and sought to establish that all of the defendants and other unidentified persons conspired together to dispose of two carloads, each consisting of about 2,000 cases, of Old Mr. Boston Rocking Chair Whiskey at over the ceiling wholesale prices.

This whiskey was shipped by rail from the distiller or his agent to the Francisco Distributing Company, in San Francisco, in December, 1943. Goldsmith was the individual and sole owner of that business and held a wholesale liquor dealer's basic permit as required by federal law. Weiss, his former partner, was sales manager for the business. Feigenbaum operated the Sunset Drugstore in San Francisco. Blumenthal owned and operated the Sportorium, a sporting goods and pawn shop in the same city. Abel either owned or worked in a jewelry store in Vallejo, California. The evidence does not show that any of these last three was connected with Francisco in any way except that each had part in arranging sales and deliveries of portions of these two shipments to purchasers. These were tavern owners in San Francisco and near-by towns such as Vallejo, Santa Rosa, Livermore, Cottonwood and El Cerrito. Proof of the activities of Feigenbaum, Blumenthal and Abel was made largely by

the testimony of the various tavernkeepers with whom they respectively dealt.

The evidence showed that on arrival of the whiskey in San Francisco legal title was taken in Francisco's name, in which the shipping documents were made out; that it honored sight drafts for both shipments, upon Goldsmith's directions to Francisco's bank to pay them out of Francisco's account; that some of the whiskey was delivered *ex car* directly to tavernkeepers who previously had arranged for purchases in lots varying from 25 to 200 cases; that the remainder was placed in storage with the San Francisco Warehouse Company, pursuant to arrangements made by Weiss, and thereafter was delivered by the warehouse to various purchasers holding invoices issued by Francisco [1] on orders given by Weiss. The *ex car* deliveries also were made pursuant to similar invoices and orders.

It further appeared that the cost of the whiskey to Francisco was $21.97 a case,[2] the wholesale ceiling price was $25.27, and Francisco received, by check of the purchasing tavernkeepers, $24.50 for each case sold. There was thus left to it a margin above cost of $2.53 on each case, out of which were to come storage charges, if any, and legitimate net profit.

Thus far no illegal act, transaction, intent or agreement appears. But by the testimony of purchasing tavernkeepers the Government proved that in connection with each sale the purchaser had paid to the selling intermediary, in addition to the $24.50 per case remitted

[1] Of the more than 4,000 cases received by Francisco, proof concerning disposition at over-ceiling prices related to less than half, or some 1,500-plus cases.

[2] Consisting of $19.24 per case to the distiller, 81¢ for freight, and $1.92 for state taxes.

by check to Francisco, an additional sum in cash amounting roughly to from $30 to $40 per case. Thus the actual cost to the retailer was from $55 to $65 per case.

In some instances the identity of the person arranging the transaction for the seller and receiving the cash payment was not established or known to the witness testifying to the sale and its details. In others, however, Blumenthal, Feigenbaum or Abel was identified as the salesman or intermediary. It was not brought out with what person or persons Abel, Feigenbaum, Blumenthal or the other salesmen dealt in securing the whiskey from Francisco.[3] In two sales, Figone, a tavernkeeper of El Cerrito, testified he arranged for the purchases in Francisco's offices, but could not identify the person with whom he dealt.

In all instances, however, whether involving sales to San Francisco or to out-of-town dealers and whether through identified or unidentified selling intermediaries, the sales followed the general pattern described above. That is, once the understanding had been reached, the purchaser made out his check at the price of $24.50 per case, to the order of "Francisco Distributing Co.," at the direction of the selling intermediary, to whom the check was delivered; at the same time or later the purchaser

[3] The witnesses identifying Feigenbaum testified they sought him out at the Sunset Drugstore in San Francisco and made the arrangements with him for their purchases there. Similar testimony was given by those identifying Blumenthal with the arrangements taking place in the Sportorium.

In some instances the out-of-town purchasing witnesses testified that they went to San Francisco in search of whiskey to buy and by one means or another, usually through inquiry of persons frequenting bars where the witnesses stopped, were directed to the selling agent. In other instances the intermediary sought out the tavernkeeper as a prospective purchaser at his place of business.

also paid in cash to the intermediary the difference between the amount of the check and the agreed over-ceiling purchase price; then or later the purchaser received invoices in the name of Francisco for the number of cases of Old Mr. Boston Rocking Chair Whiskey bought, showing only the legal price of $24.50 per case; and thereafter the purchaser received delivery of the whiskey from the warehouse company, by freight in the case of out-of-town buyers. Weiss gave the warehouse company instructions for shipments or local deliveries. Francisco collected the checks by endorsing and sending them through its bank for collection. Slight variations in detail of the pattern appear in some instances but they are insignificant for our purposes.

The foregoing is substantially the evidence used, not only in part to show the conspiracy, but also to connect Blumenthal, Feigenbaum and Abel with it. In addition to the evidence already related as it affects Goldsmith and Weiss, the court received as to them alone the testimony of Harkins, a special investigator for the Alcohol Tax Unit of the Treasury Department. He related conversations had with Goldsmith and Weiss, during which important admissions were made by one or the other or both. Those admissions give rise to the crucial problems in the case.

At the initial conference "early in January," 1944, attended by both Goldsmith and Weiss, the latter "did most of the talking." Questioned concerning who purchased the two carloads and how they were handled, Weiss said "that his firm received $2.00 a case for clearing it through their books." Goldsmith concurred in this and both stated that they divided the $2.00, each taking a dollar. "They both stated, agreed, that they did not sell any of the whiskey. It was sold by others, and they received

the check generally for the payment of [for] the whiskey in advance of the date that they had to take up the sight draft bills of lading. At that time they did not tell us who actually sold the whiskey."

Later conferences held separately with Goldsmith and Weiss simply confirmed the substance of the first to the effect that Francisco was not the actual owner, but that Goldsmith and Weiss were acting for an unidentified person in handling the shipments in Francisco's name.[4] The identity of the owner was not established. But Goldsmith added the admission that he wrote most of the invoices.

Shortly after the trial began the court announced that it would save time and be fairer to all for the evidence to be received initially only as against the particular defendant or defendants to whom it appeared expressly related, reserving to the Government, however, the right to move for its admission as against any or all of the other defendants whenever in the Government's opinion

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[4] At an interview with Goldsmith "early in September," Goldsmith was asked "who actually bought him the whiskey, who owned it." In reply "he said that Blumenthal brought it in, and when asked if he knew of his own knowledge, he said, 'No.' " He again stated that Francisco received $2 per case, of which he gave Weiss half.

A still further questioning of Goldsmith took place on September 13. Harkins showed Goldsmith several invoices given to purchasers in the name of Francisco. Goldsmith admitted that he wrote most of the invoices and identified his own handwriting, stating however that a few were written by his bookkeeper.

Harkins testified also regarding a conversation with Weiss on May 14, 1944. In this Weiss stated "it was true that he received half of the $2 commission paid to the Francisco Distributing Company for clearing this whiskey through their books, and he finally refused to answer who actually owned the whiskey. He said 'I don't want to involve myself.' " Weiss also admitted knowing Blumenthal, but "refused to state, to the best of my [the witness'] recollection, positively, whether Mr. Blumenthal was the owner of the whiskey or not."

sufficient facts had been introduced to show such defendants to have been connected with the conspiracy charged.

This course was followed. At the close of the Government's case, the court granted its motion to admit all of the evidence as against all of the defendants, except that it declined to allow Harkins' testimony concerning his conversations with Goldsmith and Weiss to be admitted as against the defendants Blumenthal, Feigenbaum and Abel. That testimony however was allowed to stand against both Goldsmith and Weiss insofar as it related the conversation had in the presence of both, and as to each of them respectively to the extent that the other interviews took place in his presence.

The court overruled numerous objections to these rulings by each defendant. None offered evidence in his own behalf.

Following its rulings on admissibility, the trial court concluded as against various objections that the evidence was sufficient to go to the jury on the issues whether the conspiracy charged had been made out and concerning each defendant's connection with it. Accordingly, it overruled the defendants' motions for directed verdicts and submitted the case to the jury. In the instructions the court expressly stated, in accordance with the previous rulings on admissibility, that Harkins' testimony was to be considered only as against Goldsmith and Weiss, not as against the other three defendants.

II.

In the *Kotteakos* case, *supra,* the Government conceded that, under the charge of a single, all-inclusive conspiracy, the proof showed distinct and separate ones connected only by the fact that one man, Brown, was a participant and key figure in all. But it urged that

under the ruling in *Berger* v. *United States,* 295 U. S. 78, the variance was at the most harmless error, a contention we rejected. Here the situation is the reverse. The Government has conceded, in effect, that prejudice has resulted if more than one conspiracy has been proved.[5] But it insists that the evidence establishes a single conspiracy and no more, an issue not presented or determined in the *Kotteakos* case.

The proof, in relation to whether one or more conspiracies were shown as well as relative to whether any was made out, requires somewhat different treatment concerning the two groups of defendants, Weiss and Goldsmith, on the one hand, and Blumenthal, Feigenbaum and Abel, on the other. This is by reason of the court's exclusion of the admissions of Goldsmith and Weiss from consideration as to the other three defendants.

The Government does not maintain that Francisco, or Goldsmith (or therefore Weiss), was the owner of the whiskey. It accepts the view that another or others, unidentified, were the real owner or owners and that Francisco (and thus Goldsmith and Weiss) was merely a channel for distributing the liquor and giving that unlawful process a legal façade. Indeed the "innocent appearing actions" of Weiss and Goldsmith in their use of Francisco, the brief asserts, "were the crux of the conspiracy . . . since the color of legitimacy was an essential part of the plan to dispose of the liquor to tavern owners at over-ceiling prices." [6]

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[5] The brief states: "The Government does not contend that if the proof showed several conspiracies, as the dissenting judge thought, the variance would not be prejudicial."

[6] The brief also declares that "the gist of the conspiracy . . . was the scheme to sell liquor to tavern owners at over-ceiling prices in an apparently legitimate fashion through the medium of Francisco."

The plan, it is said, "was not merely to sell liquor at over-ceiling prices; it was a plan to sell liquor at over-ceiling prices in an appar-

The evidence including the admissions was clearly sufficient to establish that the owner devised a plan which contemplated the entire chain of events from the original purchase in Francisco's name to the ultimate black market sales and deliveries. This includes the obvious inference that he made the arrangements for clearance through Francisco's books. Since Goldsmith and Weiss were the owner and sales manager respectively of Francisco and had active parts personally in carrying out those arrangements, there hardly can be any question that they knew the owner, had part in making the arrangements with him and, by virtue of those facts and their parts in facilitating the sales and deliveries to the tavernkeepers, knew also of his intention to resell the whiskey and of his plan for doing so in every material respect except that he intended to sell at over-ceiling prices.

The showing on that crucial question was entirely circumstantial. It was nonetheless substantial. Goldsmith and Weiss knew that there was a margin of only about 77¢ between the legal price ceiling and the $24.50 per case they received by check in payment for the whiskey.[7] They knew that the invoices sent by Francisco to each purchaser gave no room for even that slender margin but

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ently legitimate fashion" and "the core of the scheme was the arrangement by which the whiskey would clear to tavern owners through Francisco, a legitimate wholesaler."

[7] The $24.50 price was at the most 53¢ above the actual cost of the whiskey, see note 2, plus the $2.00 fee paid Francisco for the use of its books. There is no evidence that the unknown owner received any portion of this 53¢ margin. Since the record shows that Francisco was billed by the warehouse company for the storage of the liquor, the inference was fully justified that the 53¢ margin was largely dissipated by the storage charges and other overhead costs attributable to the sale of the whiskey and that the remaining sum, if any, was retained by Francisco.

represented only the owner's cost figure. They knew further that by using Francisco's name, services and facilities the owner was concealing his identity from the purchasers in the sales, making Francisco appear as the owner on the paper records; that sales were being made to numerous and widely scattered tavernkeepers; and that in every sale remittance was made to them uniformly not only by check, usually of the purchaser, but also in the exact amount of $24.50 per case.

The inference that the unknown owner was giving away the liquor is scarcely conceivable. The most likely inferences to be drawn were two, namely, that the owner was selling for a legal margin of not more than 77¢ or that he was selling at over-ceiling prices. The first inference is hardly tenable, especially in view of the prevailing and widespread shortage and demand, with accompanying black market activity, of which the most meticulous wholesale liquor dealer hardly could have been ignorant. The inference was not only justified, it was almost inescapable, that Goldsmith and Weiss knew of the owner's intent and purpose to sell above the lawful price, as well as most of the detail of his plan for doing so. With that knowledge their active aid toward executing his design made them co-conspirators with him, and he with them, toward accomplishing it.

III.

It remains however to consider whether, without the admissions, Blumenthal, Feigenbaum and Abel have been shown to have conspired together and with Goldsmith and Weiss in the scheme proved against the latter two.

The admissions alone disclosed the unknown owner's existence; that Goldsmith and Weiss were acting for him, not for themselves; received from the transactions, and divided equally, the $2 per case; and gave the use of

Francisco's name to cover up the unknown owner's existence, identity and part in the scheme.

Whether or not the evidence stripped of those facts was sufficient to sustain the charge, a preliminary question arises upon the trial court's disposition of the admissions. They supplied strong confirmatory or supplementing proof to show, not only the connections of Goldsmith and Weiss with the scheme, but also its existence and illegal character. If therefore it were shown, or even were doubtful, that the admissions had been improperly received as against Blumenthal, Feigenbaum and Abel, reversal would be required as to them.[8]

But the trial court's rulings, both upon admissibility [9] and in the instructions,[10] leave no room for doubt that the

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[8] Even if the evidence were sufficient with the admissions excluded, they were of such importance that if admitted improperly the jury might have drawn entirely different inferences from the whole evidence including them than from it without them.

[9] Before sending the case to the jury the court stated in its presence and for its benefit that it had granted the Government's motion to admit all the evidence against all the defendants except: "That the testimony of the last witness, Mr. Harkins, is admitted in evidence as against the defendant Goldsmith as to the conversation had by the witness with the defendant Goldsmith; that his testimony is admitted as to the defendant Weiss with respect to conversations with the defendant Weiss; and as to both defendants, Goldsmith and Weiss, as to all conversations at which both defendants, Goldsmith and Weiss, were present, and exceptions are noted as to this ruling on behalf of all the defendants separately." The court then added, on inquiry, that counsel was right in taking this to mean that the Harkins testimony "does not affect the defendants Blumenthal and the other two or three."

[10] At three distinct places the court made references either generally and abstractly or expressly applicable to the admissions.

In the first, after stating that the testimony of an accomplice or co-conspirator and oral admissions of a defendant must be received with caution, the court said: "In this case . . . proof of the conspiracy charged . . . must be made independent of admissions of

admissions were adequately excluded, insofar as this could be done in a joint trial, from consideration on the question of their guilt. The rulings told the jury plainly to disregard the admissions entirely, in every phase of the case, in determining that question.[11] The

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any defendant made after the termination of the alleged conspiracy." At a later point the jury was told: ". . . you must disregard entirely any testimony stricken out by the Court, or any testimony to which an objection has been sustained. . . . *Testimony which has been admitted only to apply as to a specified defendant may only be considered by you as to that defendant and none other.*" (Emphasis added.) And finally near the end of the instructions, expressly referring to the admissions of Goldsmith and Weiss, the court said: "Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all the conspirators, and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators can be considered only as against the person doing such acts or making such statements.

"*In that connection,* you will recall that I advised you during the trial of the case that the statements made by the defendants Goldsmith and Weiss to the witness Harkins could only be considered by you as against those two named defendants." (Emphasis added.)

[11] It is not entirely clear whether the words "In that connection," italicized in the last paragraph of note 10, refer only to the last or to both of the preceding sentences, in the specific context of the two paragraphs last quoted. But when those statements are taken in conjunction with the earlier ones and with the court's rulings on admissibility made in the jury's presence, we think the total effect of the instructions was to tell the jury plainly to disregard the admissions entirely in considering the guilt of Blumenthal, Feigenbaum and Abel.

This view, though apparently differing from the Government's, see note 12, is reinforced by the further instruction, immediately following the one last quoted in note 10, to the effect that admissions of a

direction was a total exclusion, not simply a partial one as the Government's argument seems to imply.[12] The court might have been more emphatic. But we cannot say its unambiguous direction was inadequate. Nor can we assume that the jury misunderstood or disobeyed it.

With the admissions thus entirely excluded, we think nevertheless that the remaining evidence was sufficient to show, in accordance with the charge, that the five defendants joined in a single conspiracy to sell the whiskey at over-ceiling prices in the guise of legal sales. We set forth in the margin the remaining evidence, in part, which justifies this conclusion both as to Goldsmith and Weiss [13] and as to the other three defendants.[14]

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conspirator not made in execution of the common design are not evidence against any of the parties other than the one making them. The admissions here fell clearly in that category, some of them because made after termination of the conspiracy, others because they had no effect to forward its object. None were made in furtherance of the conspiracy's object. Cf. *Fiswick* v. *United States,* 329 U. S. 211.

[12] Although we are not sure the argument goes so far, it seems to urge, see note 6 and text, that the admissions, as well as the other evidence expressly affecting only one or some of the defendants, were admissible and were received, not merely as against Weiss and Goldsmith on the whole case but also in part as against the other three, that is, to show even as to them the existence and illegal character of the scheme, though not to establish their connections with it. We do not read the record as showing this was the effect of the trial court's ruling.

[13] The evidence as to the unknown owner no longer being in the picture, the inference is almost irresistible that Francisco was the owner. On arrival of the whiskey, title was taken in Francisco's name, in which the shipping documents were made out; sight drafts for the two carloads were paid, at Goldsmith's direction, from Francisco's bank account; and the whiskey was stored and delivered by the warehouse company in accordance with Weiss' directions.

At a time when wholesale liquor distributors were hard put to supply even long-established customers, Francisco sold its liquor, through the medium of salesmen who had no previous connection

The main difference comes with the elimination of the unknown owner from view, and Francisco's consequent appearance as both actual and legal owner. This changes the detail of the façade, but does not remove either the

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with the firm and were not regularly engaged in the business of selling liquor, to various tavern owners who had not previously had dealings with Francisco. Moreover, the sales were billed at a price 77¢ per case below the OPA ceiling, despite the fact that tavern owners and other retail distributors considered themselves fortunate to secure whiskey at the full ceiling price. Also of interest are tavern owner Figone's over-ceiling purchases, which followed the pattern of the other sales, except in the important respect that they were made at the Francisco office, but with a person Figone could not identify. See text *supra* following note 3.

We are not prepared to say that the jury was not justified in inferring from this evidence that Goldsmith and Weiss, the guiding hands of Francisco, were willing to make the sales only because of an illegal agreement with the salesmen to receive over-ceiling prices.

The case would stand little better for Goldsmith and Weiss upon an inference that they sold to some other person, who in turn resold to the tavernkeepers through the salesmen. For then the 77¢ legal margin would remain, now for the intervening purchaser, together with the use of Francisco's books and records to conceal his existence and part in the transactions and the allowable inferences from those facts.

[14] Acting almost simultaneously in early December before the first carload arrived in San Francisco, Blumenthal and Feigenbaum, as well as Abel and other unidentified salesmen, made it known that they could obtain whiskey for tavernkeepers. There are compelling indications that these salesmen were kept informed of the status of the whiskey. Thus, on the 8th or 9th of December, Feigenbaum told one purchaser that the whiskey would arrive in San Francisco in "about a week or ten days," that it would come in by railroad, and that there would be "a carload of it." The first of the two carloads of liquor actually arrived on December 17. Similarly, on the 3d or 4th of December, Blumenthal told tavernkeeper Fingerhut that the whiskey would arrive in the latter part of the month. The whiskey did so arrive and the purchaser received delivery. Then, late in December, Fingerhut received a telephone call, which he said was from Blumenthal, asking whether he needed more whiskey. As

façade itself or the essence of the unlawful scheme. That still was to sell the whiskey illegally in the guise of legal sales,[15] to the knowledge of each defendant.[16] The gist of the conspiracy lay not in who actually owned the

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a result, Fingerhut made an additional purchase on January 3 or 4, 1944. The second carload was received by the warehouse company on or about January 3d.

In addition to being well informed as to the progress of the whiskey in its journey westward, the salesmen followed a singularly set pattern in making their respective sales. All knew and so told the prospective customer that he would receive Francisco's invoice for the whiskey at the same below-ceiling price, which invoice was of great importance because it enabled the tavernkeepers to comply with the record-keeping requirements imposed by the California law. See note 15. All made arrangements for the payment of the identical price of $24.50 per case to Francisco by check. All received the checks, which were delivered to Francisco and collected by it.

Of some significance, in connection with the other evidence, is the testimony of tavernkeeper Reinburg that on two occasions, at Abel's direction, he drove Abel to San Francisco, dropped him at the Sportorium, Blumenthal's place of business, and picked him up there about a half hour later.

The inference was justified that Blumenthal, Feigenbaum and the other salesmen were aware that their individual sales were part of a larger common enterprise, dependent on the carefully evolved arrangements to give the sales the guise of legitimacy, to dispose of a larger store of liquor. Where a salesman knew, as did Feigenbaum, that at least a carload of whiskey was involved, it was an entirely reasonable inference that he knew that other salesmen, paralleling his efforts, were making sales similar to his. On the basis of the evidence, the jury was well warranted in deciding that the facts dovetailed too neatly to be the result of mere chance.

[15] The evidence showed that some of the purchasers were unwilling to buy liquor without receiving a document to show purchase from a lawfully authorized source as required by state law. With Francisco appearing as actual owner the scheme took on the aspect of one to sell its own whiskey illegally in the guise of lawful sales.

[16] Each salesman knew that he was receiving $30 to $40 above the ceiling; that Francisco was supplying the whiskey; that the elaborate arrangements were made not merely for his sales, but also

whiskey, but in the agreement to sell it in this unlawful fashion, regardless of who might own it.

With the case thus posited, it is true the salesmen did not know of the unknown owner's existence or part in the plan. And in a hypertechnical aspect the case as a whole might be regarded as showing in one phase an agreement among Goldsmith, Weiss and the unknown owner, X, and in the other an agreement among the five defendants to which X was not a party. Thus in the most meticulous sense it might be regarded as disclosing two agreements, with Goldsmith and Weiss as figures common to both.

Indeed that may be what took place chronologically, for conspiracies involving such elaborate arrangements generally are not born full-grown. Rather they mature by successive stages which are necessary to bring in the essential parties. And not all of those joining in the earlier ones make known their participation to others later coming in.

The law does not demand proof of so much. For it is most often true, especially in broad schemes calling for the aid of many persons, that after discovery of enough

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for others, see note 14; and that he had to have the cash, as well as the check, before delivery from Francisco was completed.

The basis for imputing such knowledge to Goldsmith and Weiss becomes not so compelling as with the admissions included, but nevertheless remains adequate. However the case is viewed, apart from the admissions, they knew the margin of legal profit left, whether for themselves or for others, after deducting the $24.50 per case, was only 77¢. If they actually owned and sold the whiskey, why sell below the ceiling in the face of the shortage and demand, when selling costs including the salesmen's compensation still were to be paid? If they did not own or sell at the $24.50 figure, then why the checks and false invoices in that amount? The inference is justified that either they or someone else to their knowledge was receiving more than the lawful price.

to show clearly the essence of the scheme and the identity of a number participating, the identity and the fact of participation of others remain undiscovered and undiscoverable. Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others.[17] Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity.

Here, apart from the weight which the proof of the unknown owner's existence and participation added to the convictions of Weiss and Goldsmith, it added no essential feature to the charge against the five defendants. The whiskey was the same. The agreements related alike to its disposition. They comprehended illegal sales in the guise of legal ones. Who owned the whiskey was irrelevant to the basic plan and its essential illegality. It was a matter of indifferent detail to the salesmen, as by the same token was the fact that Goldsmith and Weiss were receiving and splitting only the $2 per case. It mattered nothing to the others whether those two received only that amount or the larger illegal sums.

We think that in the special circumstances of this case the two agreements were merely steps in the formation of the larger and ultimate more general conspiracy. In

[17] *Marino* v. *United States,* 91 F. 2d 691; *Lefco* v. *United States,* 74 F. 2d 66; *Jezewski* v. *United States,* 13 F. 2d 599; *Allen* v. *United States,* 4 F. 2d 688.

that view it would be a perversion of justice to regard the salesmen's ignorance of the unknown owner's participation as furnishing adequate ground for reversal of their convictions. Nor does anything in the *Kotteakos* decision require this. The scheme was in fact the same scheme; the salesmen knew or must have known that others unknown to them were sharing in so large a project; and it hardly can be sufficient to relieve them that they did not know, when they joined the scheme, who those people were or exactly the parts they were playing in carrying out the common design and object of all. By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal.

The case therefore is very different from the facts admitted to exist in the *Kotteakos* case. Apart from the much larger number of agreements there involved, no two of those agreements were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end or result. On the contrary each separate agreement had its own distinct, illegal end. Each loan was an end in itself, separate from all others, although all were alike in having similar illegal objects. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single, over-all, comprehensive plan.

Here the contrary is true. All knew of and joined in the overriding scheme. All intended to aid the owner, whether Francisco or another, to sell the whiskey unlawfully, though the two groups of defendants differed on the proof in knowledge and belief concerning the owner's identity. All by reason of their knowledge of the plan's general scope, if not its exact limits, sought a common end, to aid in disposing of the whiskey. True, each salesman aided in selling only his part. But he knew the lot to be sold was larger and thus that he was aiding in a larger plan. He thus became a party to it and not merely to the integrating agreement with Weiss and Goldsmith.

We think therefore that in every practical sense the unique facts of this case reveal a single conspiracy of which the several agreements were essential and integral steps, and accordingly that the judgments should be affirmed.

The grave danger in this case, if any, arose not from the trial court's rulings upon admissibility or from its instructions to the jury. As we have said, these were as adequate as might reasonably be required in a joint trial. The danger rested rather in the risk that the jury, in disregard of the court's direction, would transfer, consciously or unconsciously, the effect of the excluded admissions from the case as made against Goldsmith and Weiss across the barrier of the exclusion to the other three defendants.

That danger was real. It is one likely to arise in any conspiracy trial and more likely to occur as the number of persons charged together increases. Perhaps even at best the safeguards provided by clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions, are insufficient to ward off the danger entirely. It is therefore extremely important that those safeguards be made as

impregnable as possible. Here, however, the case as presented involved none of the risks common to mass trials. And, in view of the trial court's caution, the risk of transference of guilt over the border of admissibility was reduced to the minimum. So great was the court's concern that it expressly told the jury, in addition to the instructions set forth above, ". . . the guilt or innocence of each defendant must be determined by the jury separately. Each defendant has the same right to that kind of consideration on your part as if he were being tried alone."

We have considered petitioners' remaining contentions and find them without merit.[18]

The judgment is

Affirmed.

MR. JUSTICE DOUGLAS concurs in the result.

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[18] These include the argument that petitioners were prosecuted under the wrong statute. Section 4 (a) of the Emergency Price Control Act makes it unlawful, as a misdemeanor, § 205 (b), for any person to sell or deliver any commodity in violation of price regulations, "or to offer, solicit, attempt, *or agree* to do any of the foregoing." (Emphasis added.) Petitioners regard the prohibitory words "or agree," etc., as repeal by implication of the general conspiracy statute, § 37 of the Criminal Code, insofar as otherwise it might apply to the acts forbidden by § 4 (a). There was no "implied repeal." Conviction under the general conspiracy statute requires more than mere agreement, namely, the commission of an overt act. See also *Taub* v. *Bowles*, 149 F. 2d 817; H. R. Rep. No. 827, 79th Cong., 1st Sess., 7–8.

MARINO *v.* RAGEN, WARDEN.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WINNEBAGO COUNTY, ILLINOIS.

No. 93. Decided December 22, 1947.

1. Where an inferior state court quashes a writ of habeas corpus sought to review an alleged denial of rights under the Federal Constitution and its order cannot be reviewed by any higher state court, a petition for a writ of certiorari to obtain review of that order is properly addressed to this Court. P. 561.
2. Whether, upon the facts of this case, habeas corpus is an appropriate remedy in the state court to correct a denial of due process is a question of state law upon which this Court accepts the concession of the State's Attorney General. P. 562.
3. On the facts recited in the opinion and confession of error by the State's Attorney General, this Court concludes that in his trial for murder petitioner was denied due process of law contrary to the Fourteenth Amendment. P. 562.

Certiorari granted; judgment vacated and remanded.

Petitioner *pro se.*

George F. Barrett, Attorney General of Illinois, *William C. Wines* and *James C. Murray,* Assistant Attorneys General, for respondent.

PER CURIAM.

Petitioner sought a writ of habeas corpus in the Circuit Court of Winnebago County, Illinois, alleging that his conviction in 1925 on a charge of murder was the result of a denial of his rights under the Federal Constitution. That court, after a hearing, quashed the writ; and as its order cannot be reviewed by any higher Illinois court under Illinois practice, this petition for a writ of certiorari is properly addressed to this Court. See *Woods* v.

Nierstheimer, 328 U. S. 211; 15 U. of Chic. L. Rev. 118, 122.

The facts conceded by respondent are as follows:

The common-law record recites that petitioner was arraigned in open court and advised through interpreters of the meaning and effect of a plea of guilty and that petitioner signed a statement waiving jury trial and pleading guilty. He was sentenced to life imprisonment. It does not appear, however, that an attorney was appointed to represent him. The waiver was not in fact signed by him, and no plea of guilty was entered at the trial. He was 18 years old at that time and had been in this country only two years. He did not understand the English language and it is doubtful that he understood American trial court procedure. The arresting officer served as an interpreter for petitioner at the original trial.

The State of Illinois speaking through the Attorney General admits the foregoing facts, confesses error, and consents to a reversal of the judgment below. He states that the writ of habeas corpus is a proper remedy in Illinois in this case because the facts, which he concedes to be a denial of due process of law under the decisions of this Court, were known to the court at the time of the original trial, though they were not a matter of record at the trial. Whether or not on this showing habeas corpus is an appropriate remedy in the court to correct a denial of due process is a question of state law as to which we accept the concession of the State's Attorney General.

In light of the confession of error (see *Young* v. *United States,* 315 U. S. 257; *Bozza* v. *United States,* 330 U. S. 160; cf. *Baltzer* v. *United States,* 248 U. S. 593) and the undisputed facts, we conclude that petitioner was denied the due process of law which the Fourteenth Amendment requires.

Permission to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted and the judgment below is vacated and remanded to the Circuit Court.

So ordered.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY join, concurring.

This case sharply points up a much larger problem, of growing concern to this Court, than merely the disposition to be made of Marino's petition in view of the state's confession of error. I agree that relief is due him, and I join in the Court's opinion. But I do not find his case different, except in one respect, from many others which have come regularly to this Court from Illinois in recent years, in which relief has been as regularly denied. The only substantial difference, in my judgment, is that here the state has confessed error. That confession raises, in my opinion, the question of the course this Court should follow in the future concerning the disposition of similar petitions from Illinois.

During the last three terms we have been flooded with petitions from Illinois alleging deprivations of due process and other constitutional rights. Thus in the 1944 term, out of a total of 339 petitions filed *in forma pauperis,* almost all by prisoners, 141 came from Illinois; in the 1945 term, 175 out of 393 were from Illinois; and in the 1946 term, 322 out of 528 came from that state.[1] With mechanical regularity petitions for certiorari to review

[1] This increasing volume no doubt is due in part to the assiduity with which prisoners seek relief either from prison or from the tedium of prison life. But that not all of it can be attributed to that factor seems clear from the fact that no other state presents anything approaching such a volume of petitions or so complicated a procedure for finally disposing of the questions raised.

Illinois' refusals to grant relief, often even to grant a hearing, have been denied.[2] We have adhered consistently to the practice of not entertaining such a petition when it seemed to appear that the applicant had not sought the appropriate state remedy. *Woods* v. *Nierstheimer,* 328 U. S. 211. And, as a corollary of this practice, we have insisted that the federal courts deny a hearing to an applicant for *habeas corpus* who has not exhausted his state remedies. *Ex parte Hawk,* 321 U. S. 114; *Ex parte Abernathy,* 320 U. S. 219 and cases cited.

This rule, requiring exhaustion of state remedies as a condition precedent to federal relief, has been firmly established by repeated decisions of this Court. Even in extreme situations its application has been justified by sound administrative reasons. See *Mooney* v. *Holohan,* 294 U. S. 103, 115. But it has always been clear that the rule may be applied only on the assumption that an adequate state remedy is actually available. *Carter* v. *Illinois,* 329 U. S. 173, 176; *Woods* v. *Nierstheimer, supra* at 217; *Ex parte Hawk, supra* at 118. And it would be nothing less than abdication of our constitutional duty and function to rebuff petitioners with this mechanical formula whenever it may become clear that the alleged state remedy is nothing but a procedural morass offering no substantial hope of relief. Experience has convinced me that this is true of Illinois.

This case presents a flagrant example of deprivation of due process. In 1925 petitioner was convicted of murder and sentenced to life imprisonment. He was then eighteen years old and unable to speak English, having arrived in the United States from Italy less than two years before.

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[2] Of the 322 petitions filed in the 1946 term, only two were granted. In *Foster* v. *Illinois,* 332 U. S. 134, the narrow scope of review by writ of error in Illinois precluded relief here; in *McLaren* v. *Nierstheimer,* 329 U. S. 685, the judgment was vacated and the case remanded after the state confessed error.

The police officer who arrested him served as one of the two interpreters at his trial. He was not represented by counsel nor, as far as can be determined, was his right to counsel explained to him. See *Foster* v. *Illinois,* 332 U. S. 134, dissenting opinion 141. Although the record shows that petitioner signed a written waiver of jury trial, which stated that he had entered a plea of guilty, in fact he did not sign any such waiver, and no guilty plea appears to have been entered. His sentence was imposed one week after the indictment.

Twenty-two years later these facts were established at a hearing in the Circuit Court of Winnebago County, Illinois, on petitioner's application for *habeas corpus.* Nevertheless, the writ was denied without assignment of any ground.[3] Petitioner sought certiorari in this Court, and when called upon for a response, Illinois confessed error. While I concur in the Court's judgment, the light which the confession of error sheds on the Illinois procedural labyrinth confirms the growing conviction that Illinois offers no adequate remedy to prisoners situated as is the present petitioner.

The trouble with Illinois is not that it offers no procedure. It is that it offers too many, and makes them so intricate and ineffective that in practical effect they amount to none. The possibility of securing effective determination on the merits is substantially foreclosed by the probability, indeed the all but mathematical certainty, that the case will go off on the procedural ruling that the wrong one of several possible remedies has been followed.[4]

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[3] But for the state's confession of error, our usual practice in these cases would lead us to assume that the denial had been on the ground that *habeas corpus* was not the appropriate state remedy. See note 4.

[4] Since the petitions more often than otherwise are disposed of by mere denial without assignment of grounds, it is seldom possible

Thus, our understanding of Illinois law at the time of *Woods* v. *Nierstheimer, supra,* was that *habeas corpus* would not lie in such a case as this because petitioner neither challenged the jurisdiction of the court which convicted him, nor alleged any subsequent events having the effect of voiding that conviction. 328 U. S. 211, 215. Hence we assumed that *coram nobis* would be the appropriate remedy. But Illinois now suggests that we have oversimplified the situation. That *habeas corpus* is appropriate here is explained by the state's attorney general as follows:

> "In order to keep Illinois' position constant and consistent before this court, we venture to point out that although the present Attorney General has prevailed upon this court to recognize that *coram nobis* is a remedy in Illinois exclusive of *habeas corpus,* where the facts constituting denial of due process but *dehors* the record were not known to the trial court at the time of the imposition of sentence, we have always conceded that where, as in the instant case, those facts although not a matter of record at the trial were nevertheless known to the trial court, *habeas corpus* may be available in proper cases. We deem *habeas corpus* to be clearly appropriate under the Illinois law in this case. We do not concede, however, that there are no cases in which writ of error, as distinct from either *coram nobis* or *habeas corpus,* would be the proper remedy."

Notwithstanding the explanation, the extent of the applicability of this expanded scope of *habeas corpus* "in

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for this Court to know whether the Illinois court has acted on the merits or on the state ground that the wrong remedy has been followed. It is therefore always possible to assume here that the ruling was of the latter type and this would seem to be true, if not of every such determination, at least of all until the last conceivably possible route has been followed.

proper cases" is by no means clear. Perhaps it is limited to a case where over twenty years have elapsed since the conviction, and hence neither writ of error nor *coram nobis* is available; perhaps it would be available any time after the five-year statute of limitations on *coram nobis* had run.[5] Possibly the rule is general for cases of deprivation of constitutional rights whenever the judge responsible for the deprivation had knowledge of the facts. I can only indulge in speculation, because I am aware of nothing in the Illinois statutes or decisions which defines these novel limitations on the use of *habeas corpus* or supports the attorney general's position. Nor do I know whether the lower Illinois courts accept this position in view of the limited area to which the writ has been confined by the state supreme court decisions. See *e. g., Thompson* v. *Nierstheimer,* 395 Ill. 572; *Barrett* v. *Bradley,* 391 Ill. 169.

In short, the effect of the state's confession of error in this case is not to clarify, it is rather to confuse further, a situation already so muddled that only one rational conclusion may be drawn. It is that the Illinois procedural labyrinth is made up entirely of blind alleys, each of which is useful only as a means of convincing the federal courts that the state road which the petitioner has taken was the wrong one. If the only state remedy is the possibility that the attorney general will confess error when he determines that a flagrant case will not survive scrutiny by this Court,[6] it is hardly necessary to point out that the federal courts should be open to a petitioner even though he has not made his way through several

[5] Ill. Rev. Stat. (1947) c. 110, § 196. This five-year limitation period applies to "all *coram nobis* proceedings." *People* v. *Touhy,* 397 Ill. 19, 26; *People* v. *Rave,* 392 Ill. 435. Writ of error is governed by a common-law limitation period of twenty years. *People* v. *Chapman,* 392 Ill. 168; *People* v. *Murphy,* 296 Ill. 532.

[6] See *McLaren* v. *Nierstheimer,* 329 U. S. 685.

courts applying for *habeas corpus*, then writ of error, and finally *coram nobis*.[7]

Moreover, even though there may be an avenue of escape through the state courts in a rare case, the situation is no different as long as the technical distinctions between the various remedies are so fine that only an oracle could point out the proper procedural road. The exhaustion-of-state-remedies rule should not be stretched to the absurdity of requiring the exhaustion of three separate remedies when at the outset a petitioner cannot intelligently select the proper way, and in conclusion he may find only that none of the three is appropriate or effective. That each is severely restricted is clear.[8] That any one

[7] "Under present procedures, it is nearly impossible to secure adjudication of the merits of alleged constitutional defects in judgments of conviction in Illinois courts; yet petitioners must present their applications for consideration seven to twelve times in order to escape the procedural maze of the state courts and to secure their initial hearings on the truth of their allegations in the federal courts." Note, A Study of the Illinois Supreme Court, 15 U. of Chi. L. Rev. 107, 120.

[8] Review by writ of error in Illinois is limited to matters in the common-law record where no bill of exceptions is filed. *Carter* v. *Illinois*, 329 U. S. 173; *Foster* v. *Illinois*, 332 U. S. 134; *People* v. *Owens*, 397 Ill. 166. The bill of exceptions must be preserved within fifty days after judgment was entered unless an extension is granted during that time. Ill. Rev. Stat., c. 110, § 259.70A. *Habeas corpus* has been thought to be available only to challenge jurisdiction in the narrow sense of jurisdiction over the person or the subject matter, or to show events subsequent to the trial which render the original conviction void. *Woods* v. *Nierstheimer*, 328 U. S. 211; *Thompson* v. *Nierstheimer*, 395 Ill. 572; *Barrett* v. *Bradley*, 391 Ill. 169. *Coram nobis* is available only to present factual questions of a certain kind, *People* v. *Drysch*, 311 Ill. 342, 349, which were not known to the trial court, *People* v. *Schuedter*, 336 Ill. 244, which do not conflict with jury findings, and which petitioner failed to raise because of excusable mistake rather than negligence on his, or his attorney's part, see *People* v. *Rave*, 392 Ill. 435, 440. See Comment, Collateral Relief from Convictions in Violation of Due Process in Illinois, 42 Ill. L. Rev. 329.

is available as a matter of right is by no means clear.[9] And even if each has a limited function exclusive of the other two, it may well be that no one is adequate in a case where the petitioner must show a combination of facts to establish a violation of his constitutional rights.[10]

The Illinois scheme affords a theoretical system of remedies. In my judgment it is hardly more than theoretical. Experience has shown beyond all doubt that, in any practical sense, the remedies available there are inadequate.[11] Whether this is true because in fact no remedy

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[9] It is questionable whether Illinois affords a remedy for a man deprived of his right to counsel. See *Foster* v. *Illinois,* 332 U. S. 134, dissenting opinion 141; *People* v. *Evans,* 397 Ill. 430. The trial judge would surely know that he had refused to appoint counsel and would be presumed to be familiar with the record, see *People* v. *Rave,* 392 Ill. 435, 440; hence *coram nobis* would not lie. Assuming that the clerk makes the routine entry to the effect that the accused was apprised of his rights, which he promptly waived, see *People* v. *Green,* 355 Ill. 468, writ of error would afford inadequate review. See *Carter* v. *Illinois,* 329 U. S. 173. Only if the attorney general's view of *habeas corpus* would extend to such a case would a remedy be available. There may even be doubt whether an allegation that a confession was obtained by coercion would warrant review, see *People* v. *Drysch,* 311 Ill. 342; *People* v. *Schuedter,* 336 Ill. 244.

[10] For example, petitioner might allege that he had inadequate time to prepare his defense, that the trial court denied him counsel, and that a forced confession was used as evidence at the trial. The first allegation could be made only by writ of error because the crucial dates would be a matter of record; the second only by *habeas corpus,* if at all, because the trial court is presumed to know what is in the record and he would certainly know that he had refused to appoint counsel; and the third allegation only by *coram nobis* because the facts would be unknown to the trial court. Perhaps none of the allegations considered separately would establish a deprivation of due process, yet with the whole picture before the court a violation of constitutional rights would be apparent.

[11] See note 1 and text; also note 2. "[The] inevitable conclusion must be reached that the state of Illinois provides no satisfactory or adequate method for post-conviction hearings . . . ." Note, A Study of the Illinois Supreme Court, 15 U. of Chi. L. Rev. 107, 128.

exists, or because every remedy is so limited as to be inadequate, or because the procedural problem of selecting the proper one is so difficult, is beside the point. If the federal guarantee of due process in a criminal trial is to have real significance in Illinois, it is imperative that men convicted in violation of their constitutional rights have an adequate opportunity to be heard in court. This opportunity is not adequate so long as they are required to ride the Illinois merry-go-round of *habeas corpus, coram nobis,* and writ of error before getting a hearing in a federal court.

Consequently, as far as I am concerned, the Illinois remedies are exhausted here, apart from the state's confession of error. I also think that, until that state affords a reasonably clear and adequate means for presenting and disposing of such questions as Marino's case involves, this Court should no longer require exhaustion of its present scheme of ineffective and inadequate remedies before permitting resort to the federal district courts sitting in Illinois.[12] We should neither delay nor deny justice, nor clog its administration, with so useless and harmful a procedural strangling of federal constitutional rights.

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[12] This Court has frequently recognized that the policy underlying the exhaustion-of-remedies doctrine does not require the exhaustion of inadequate remedies. *Hillsborough Twp.* v. *Cromwell,* 326 U. S. 620; *White* v. *Ragen,* 324 U. S. 760; *Driscoll* v. *Edison Co.,* 307 U. S. 104; *Mountain States Co.* v. *Comm'n,* 299 U. S. 167; *Corporation Comm'n* v. *Cary,* 296 U. S. 452; *Pacific Tel. Co.* v. *Kuykendall,* 265 U. S. 196; *Okla. Gas Co.* v. *Russell,* 261 U. S. 290; *Moore* v. *Dempsey,* 261 U. S. 86; *Wallace* v. *Hines,* 253 U. S. 66.

Syllabus.

GLOBE LIQUOR CO., INC. *v.* SAN ROMAN ET AL., DOING BUSINESS AS INTERNATIONAL INDUSTRIES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 205. Argued December 17, 1947.—Decided January 5, 1948.

In a suit on a contract in a Federal District Court, each party moved for a directed verdict. One party's motion was granted and judgment was entered for him. The other party failed to move as authorized by Rule 50 (b) of the Federal Rules of Civil Procedure to have the judgment set aside and judgment entered in accordance with his own motion for a directed verdict. The Circuit Court of Appeals reversed and remanded with directions to enter judgment for the loser below. *Held:*

1. The Circuit Court of Appeals erred in directing entry of such a judgment. *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212. Pp. 572–574.

2. Since the question whether the District Court should have directed a verdict for petitioner depended upon a number of factors, including an interpretation of the law of the state where the contract was made, a proper interpretation of the pleadings, a determination whether a disputed deposition was admitted in evidence in whole or in part, and the effect of that evidence if admitted, the case should be remanded to the District Court for a new trial. P. 574.

160 F. 2d 800, affirmed in part and reversed in part.

The District Court directed a verdict and entered judgment for petitioner. The Circuit Court of Appeals reversed. 160 F. 2d 800. This Court granted certiorari. 332 U. S. 756. *Affirmed in part and reversed in part,* p. 574.

Benjamin W. Heineman argued the cause for petitioner. With him on the brief was *Joseph D. Block.*

Nat M. Kahn argued the cause and filed a brief for respondents.

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MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner, Globe Liquor Company, Inc., brought this action in Federal District Court against respondents, Frank and Dorothea San Roman, doing business under the name of International Industries. The complaint claimed damages for an alleged breach of warranty in the sale of certain liquors. An answer was filed; issues were appropriately joined. After all the evidence had been introduced, each party requested a directed verdict. The petitioner's motion was granted, verdict was returned in its favor, and judgment was accordingly entered. The respondents then moved for a new trial on the ground among others that there were many contested issues of fact which should have been submitted to the jury. They did not move for judgment under Rule 50 (b) of the Federal Rules of Civil Procedure, which provides in part: "Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; . . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed." On appeal the Circuit Court of Appeals not only set aside the judgment in favor of the petitioner but also remanded the case to the District Court with directions to enter judgment for the respondents. 160 F. 2d 800. We granted certiorari to consider the apparent inconsistency between this latter action of the Circuit Court of Appeals and our holding in *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212.

In the *Cone* case we held that the Circuit Court of Appeals was without power to order the entry of final judg-

ment for the loser of a jury verdict in the District Court where he had failed to follow his motion for directed verdict with a timely motion for judgment as required by Rule 50 (b). We pointed out in the *Cone* case that Rule 50 (b) vested district judges with a discretion, under the circumstances outlined in the rule, to choose between two alternatives: (1) reopening the judgment and granting a new trial, and (2) ordering the entry of judgment as if the losing party's request for directed verdict had been granted by the trial judge.

It is urged that the reasons which supported the *Cone* decision are not relevant here because, unlike the *Cone* case, the jury in this case returned its verdict under specific directions of the trial judge. However significant this variance between the two cases might be for some purposes, it is of no importance here. By its terms the rule applies equally to cases where the verdict returned by the jury was not directed, as in the *Cone* case, or was directed, as in this case.

Furthermore, the very circumstances which arose in this case emphasize the importance of having the District Court first pass upon whether its error should result in a new trial or in a judgment finally ending the controversy. For there is here a dispute between the parties whether all or certain parts of a deposition containing important evidence were properly introduced in the trial court. Both parties took the position in the Circuit Court of Appeals that some, though different portions of the deposition, were properly presented in evidence. The Circuit Court of Appeals decided the case on the assumption that no part of the deposition was ever admitted as evidence. In this Court respondents argue that no part of the deposition was ever read to the jury and therefore no part of it can be considered as introduced in evidence. Whether this deposition or any part of it was properly before the court, and even if it were

not before the court, whether the ends of justice required that a new trial be granted in order that the evidence it contained might properly be offered, were questions which the petitioner was entitled under Rule 50 (b) to have passed upon in the first instance by the trial court. What we said in the *Cone* case is peculiarly appropriate here: "Determination of whether a new trial should be granted or a judgment entered under Rule 50 (b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." It was error therefore for the Circuit Court of Appeals to direct the District Court to enter judgment for the respondents.

Petitioner also strongly urges that the evidence in the District Court was such that the trial judge was justified in directing a verdict in its favor and that the judgment resting on that verdict should be reinstated. Whether a verdict should have been directed, however, depends upon a number of factors, including an interpretation of the law of Illinois where the contract was made, a proper interpretation of the pleadings, a determination whether the disputed deposition was admitted in evidence in whole or in part, and the effect of that evidence if admitted. Under these circumstances, the judgment of the Circuit Court of Appeals in reversing and remanding the cause to the District Court is affirmed. But since the respondents made no motion for judgment under Rule 50 (b), it was error to direct the District Court to enter a judgment in their favor. The case should go back to the District Court for a new trial.

It is so ordered.

SEALFON *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 174. Argued December 11, 1947.—Decided January 5, 1948.

1. Petitioner was tried and acquitted on a charge of conspiracy to defraud the United States by presenting false invoices and making false representations to a ration board to the effect that certain sales of sugar products were made to exempt agencies. Thereafter, he was tried and convicted for aiding and abetting the uttering and publishing of the false invoices introduced in the conspiracy trial. The crux of the prosecutor's case at the second trial was an alleged agreement necessarily found in the first trial to be nonexistent. *Held:* In the unique circumstances of this case, the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense; and *res judicata* was a valid defense to the second prosecution. Pp. 576–580.
2. The doctrine of *res judicata* is applicable to criminal as well as civil proceedings, and operates to conclude those matters in issue which have been determined by a previous verdict, even though the offenses be different. P. 578.

161 F. 2d 481, reversed.

After being acquitted on a conspiracy charge, petitioner was tried and convicted on substantially the same evidence for violating § 332 of the Criminal Code. The Circuit Court of Appeals affirmed. 161 F. 2d 481. This Court granted certiorari. 332 U. S. 754. *Reversed,* p. 580.

John J. Wilson argued the cause for petitioner. With him on the brief was *Roger Robb.*

W. Marvin Smith argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Beatrice Rosenberg.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case presents the question whether an acquittal of conspiracy to defraud the United States precludes a subsequent prosecution for commission of the substantive offense, on the particular facts here involved.

Two indictments were returned against petitioner and others. One charged a conspiracy to defraud the United States of its governmental function of conserving and rationing sugar by presenting false invoices and making false representations to a ration board to the effect that certain sales of sugar products were made to exempt agencies.[1] The other indictment charged petitioner and Greenberg with the commission of the substantive offense,[2] *viz.*, uttering and publishing as true the false invoices. The conspiracy indictment was tried first and the following facts were shown:

Defendant Greenberg manufactured syrup and approached Sanford Doctors, a salesman for a brokerage concern, to sell vanilla syrup. Doctors negotiated some sales to petitioner who did a wholesale business under the name of Sero Syrup Co. Thereafter Greenberg asked Doctors to get a list from petitioner showing the places where petitioner made sales and told him that if any sales were made to exempt agencies, Greenberg could sell to petitioner in larger quantities. Doctors so informed petitioner and some time thereafter petitioner wrote to Greenberg saying, "at the present time some of our syrups are being sold at the Brooklyn Navy Yard" and various defense plants. Petitioner did sell some of his syrup to a vending company which had machines at the Navy Yard but it was not vanilla syrup and no sales were made to

[1] See § 28 Criminal Code, 18 U. S. C. § 72.

[2] See § 332 Criminal Code, 18 U. S. C. § 550.

the Navy Yard as such. Greenberg thereafter presented a series of false invoices to the ration board purporting to show sales to petitioner for delivery to the Navy Yard. Petitioner's letter was never shown to the board. On the basis of these invoices Greenberg received replacement certificates for 21 million pounds of sugar, 10 million of which he sold to petitioner in the form of vanilla syrup, and which was by petitioner sold to non-exempt consumers, mostly the National Biscuit Company. Petitioner at first made payments to Greenberg by check but thereafter gave checks to his trucker which the latter cashed, deducted his trucking fee, and paid Greenberg.

The jury returned a verdict of not guilty as to petitioner.[3] Thereafter a trial was had on the other indictment which charged petitioner and Greenberg with uttering and publishing as true the false invoices introduced in the conspiracy trial. Greenberg pleaded guilty and the trial proceeded against petitioner on the theory that he aided and abetted Greenberg in the commission of the substantive offense. The false invoices, the letter from petitioner to Greenberg, and essentially the same testimony were again introduced against petitioner. In addition, it was brought out on cross-examination that petitioner had unsuccessfully sought replacement certificates from his ration board for sugar contained in syrups sold at the Navy Yard and defense plants. Greenberg

[3] The conspiracy indictment also named Leo and Murray Greenberg, Fresh Grown Preserves Corporation in which the Greenbergs were officers (all of whom we refer to simply as Greenberg), the S. J. Baron Corporation, the Royal Crown Bottling Co. of Baltimore, Inc., Royal Crown Bottling Co. of Washington, Inc., and William C. Franklin, president of the Royal Crown companies. Greenberg pleaded guilty, Baron Corporation pleaded *nolo contendere,* and verdicts were directed for Royal Crown and Franklin. It was charged that the Baron Corporation participated in the conspiracy by writing a letter similar to that written by petitioner, discussed hereafter.

gave testimony from which the jury could conclude that petitioner was a moving factor in the scheme to defraud which was constructed around petitioner's letter and that he was familiar with Greenberg's intention to submit false invoices. Greenberg further testified that petitioner received $500,000 in cash under the agreement as a rebate of two cents a pound on all replacement sugar which Greenberg received on Navy Yard invoices whether or not it was used in syrup sold to petitioner. This time the jury returned a verdict of guilty and petitioner was sentenced to five years' imprisonment and fined $12,000.

Petitioner moved to quash the second indictment on grounds of double jeopardy (abandoned in this Court) and *res judicata,* and also objected to the introduction of the evidence adduced at the first trial. The district judge ruled against petitioner, and the court below affirmed. 161 F. 2d 481. We granted the petition for a writ of certiorari because of the importance of the question to the administration of the criminal law.

It has long been recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. *Pinkerton* v. *United States,* 328 U. S. 640, 643. Thus, with some exceptions, one may be prosecuted for both crimes. *Ibid.* But *res judicata* may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings (*United States* v. *Oppenheimer,* 242 U. S. 85, 87; *United States* v. *De Angelo,* 138 F. 2d 466, 468: 147 A. L. R. 991; see *Frank* v. *Mangum,* 237 U. S. 309, 334) and operates to conclude those matters in issue which the verdict determined though the offenses be different. See *United States* v. *Adams,* 281 U. S. 202, 205.

Thus the only question in this case is whether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of

the substantive offense. This depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial.

Respondent argues that the basis of the jury's verdict cannot be known with certainty, that the conspiracy trial was predicated on the theory that petitioner was a party to an over-all conspiracy ultimately involving petitioner, Greenberg, and the Baron Corporation.[4] Thus it is said that the verdict established with certainty only that petitioner was not a member of such conspiracy, and that therefore the prosecution was not foreclosed from showing in the second trial that petitioner wrote the letter pursuant to an agreement with Greenberg to defraud the United States. The theory is that under the instructions given the jury might have found that petitioner conspired with Greenberg and yet refused to infer that he was a party to the over-all conspiracy.

The instructions under which the verdict was rendered, however, must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. We look to them only for such light as they shed on the issues determined by the verdict. Cf. *De Sollar* v. *Hanscome,* 158 U. S. 216, 222. Petitioner was the only one on trial under the conspiracy indictment. There was no evidence to connect him directly with anyone other than Greenberg. Only if an agreement with at least Greenberg was inferred by the jury could petitioner be convicted. And in the only instruction keyed to the particular facts of the case the jury was told that petitioner must be acquitted if there was reasonable doubt that he conspired with Greenberg. Nowhere was the jury told that to return a verdict of guilty it must be found that petitioner was a party to a conspiracy involving not only

[4] See note 3, *supra.*

Greenberg but the Baron Corporation as well.[5] Viewed in this setting, the verdict is a determination that petitioner, who concededly wrote and sent the letter, did not do so pursuant to an agreement with Greenberg to defraud.

So interpreted, the earlier verdict precludes a later conviction of the substantive offense. The basic facts in each trial were identical. As we read the records of the two trials, petitioner could be convicted of either offense only on proof that he wrote the letter pursuant to an agreement with Greenberg. Under the evidence introduced, petitioner could have aided and abetted Greenberg in no other way. Indeed, respondent does not urge that he could. Thus the core of the prosecutor's case was in each case the same: the letter, and the circumstances surrounding it and to be inferred from it, and the false invoices. There was, of course, additional evidence on the second trial adding detail to the circumstances leading up to the alleged agreement, petitioner's participation therein, and what he may have got out of it. But at most this evidence only made it more likely that petitioner had entered into the corrupt agreement. It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do.

Reversed.

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[5] That was the view of the judge who tried both cases. At the second trial he characterized as follows the charge and the verdict at the first: ". . . what was tried on the 11th of December was a charge of conspiracy and what the jury by its verdict determined was that Sealfon had not entered into common agreement with the Greenbergs and the Fresh Grown Company to violate the law."

Syllabus.

UNITED STATES *v.* DI RE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 61. Argued October 17, 1947.—Decided January 5, 1948.

1. Respondent and an informer were in an automobile, the driver of which was suspected of selling counterfeit gasoline ration coupons. When approached by federal and New York state officers, the informer had counterfeit gasoline ration coupons in his hand and stated that he had obtained them from the driver. Without previous information implicating respondent, and without a warrant, the state officer arrested respondent and the driver, but did not search the car or state the charge on which respondent was arrested. At the police station, respondent was searched and counterfeit gasoline ration coupons were found on his person. On the evidence thus obtained, respondent was convicted of possession of counterfeit gasoline ration coupons in violation of § 301 of the Second War Powers Act. *Held:* The search was unlawful and the conviction cannot be sustained. Pp. 583–595.

   (a) Assuming, *arguendo,* that there was reasonable cause for search of the automobile as a vehicle believed to be carrying contraband, this did not justify a search of the person of respondent. *Carroll* v. *United States,* 267 U. S. 132, distinguished. Pp. 583–587.

   (b) It was not justified as incident to a lawful arrest, since the arrest was not lawful under New York law, which is controlling in this case. Pp. 587–595.

2. By mere presence in a suspected automobile, a person does not lose immunities from search of his person to which he otherwise would be entitled. P. 587.

3. In the absence of an applicable federal statute, the law of the state where an arrest without warrant takes place determines its validity. P. 589.

4. No federal statute controls the validity of an arrest without warrant in a case such as this. Pp. 590–591.

5. In the circumstances of this case, the mere presence of respondent in the car did not authorize an inference of participation in a conspiracy violative of § 37 of the Criminal Code. Pp. 593–594.

6. Probable cause for arrest may not be inferred from the fact that the person arrested does not protest or resist arrest or assert his innocence to the arresting officer. It is the right of one placed under

arrest to submit to custody and reserve his defenses for the neutral tribunals erected by the law for the purpose of judging his case. Pp. 594–595.

7. A search is not made legal by what it turns up; in law it is good or bad when it starts and does not change character from its success. P. 595.

8. That law enforcement may be made more difficult is no justification for disregarding the constitutional prohibition against unreasonable searches and seizures. P. 595.

159 F. 2d 818, affirmed.

Respondent was convicted in a federal district court of possessing counterfeit gasoline ration coupons contrary to § 301 of the Second War Powers Act. The Circuit Court of Appeals reversed. 159 F. 2d 818. This Court granted certiorari. 331 U. S. 800. *Affirmed,* p. 595.

Frederick Bernays Wiener argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg.*

Charles J. McDonough argued the cause for respondent. With him on the brief was *John F. Connelly.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

Michael Di Re was convicted on a charge of knowingly possessing counterfeit gasoline ration coupons in violation of § 301 of the Second War Powers Act, 1942.[1] The decisive evidence was that obtained by search of his person, after he was arrested without a warrant of any kind. The Circuit Court of Appeals, Second Circuit, considered that any question as to the timeliness of his objection to this evidence was eliminated by its disposition on its merits by the District Court, and, one judge dissenting, it held both his search and arrest to have been illegal.

[1] 50 U. S. C. App. (Supp. V, 1946), § 633.

The Government was granted certiorari,[2] raising no question other than the correctness of the holding by the Court of Appeals that the evidence was the fruit of an illegal arrest and search.

An investigator for the Office of Price Administration was informed by one Reed that he was to buy counterfeit gasoline ration coupons from a certain Buttitta at a named place in the City of Buffalo, New York. The investigator and a detective from the Buffalo Police Department trailed Buttitta's car and finally came upon it parked at the appointed place. They went to the car and found the informer Reed, the only occupant of the rear seat, holding in his hand two gasoline ration coupons which later proved to be counterfeit. Reed, on being asked, said he obtained them from Buttitta, who was sitting in the driver's seat. Beside Buttitta sat Di Re. All three were taken into custody, "frisked" to make sure they had no weapons and were then taken to the police station. Here Di Re complied with a direction to put the contents of his pockets on a table. Two gasoline and several fuel oil ration coupons were laid out. He said he had found them in the street. About two hours later, after questioning, he was "booked" and thoroughly searched. One hundred inventory gasoline ration coupons were found in an envelope concealed between his shirt and underwear. These, as well as the gasoline coupons earlier disclosed, proved to be counterfeit. Their introduction as evidence, over the objection of the defendant, was held by the court below to require reversal of the conviction.[3]

I.

The Government now defends the search upon alternative grounds: 1, that search of Di Re was justified as

[2] 331 U. S. 800.

[3] 159 F. 2d 818.

incident to a lawful arrest; 2, that search of his person was justified as incident to search of a vehicle reasonably believed to be carrying contraband. We consider the second ground first.

The claim is that officers have the right, without a warrant, to search any car which they have reasonable cause to believe carries contraband, and incidentally may search any occupant of such car when the contraband sought is of a character that might be concealed on the person. This contention calls, first, for a determination as to whether the circumstances gave a right to search this car.

The belief that an automobile is more vulnerable to search without warrant than is other property has its source in the decision of *Carroll* v. *United States,* 267 U. S. 132. That search was made and its validity was upheld under the search and seizure provisions enacted for enforcement of the National Prohibition Act and of that Act alone. Transportation of liquor in violation of that Act subjected first the liquor, and then the vehicle in which it was found, to seizure and confiscation, and the person "in charge thereof" to arrest.[4] The Court reviewed

[4] Section 26, Title II of the National Prohibition Act provided in part as follows: "When . . . any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. . . ." In the *Carroll* case it was said (267 U. S. at 155) that this section was intended "to reach and destroy the forbidden liquor in transportation and the provisions for forfeiture of the vehicle and the arrest of the transporter were incidental"; and (267 U. S. at 158) "the right to search and the validity of the seizure are not dependent on the right to arrest. They are

the legislative history of enforcement legislation and concluded (at p. 147), "The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles in [5] the enforcement of the Prohibition Act is thus clearly established by the legislative history of the Stanley Amendment. Is such a distinction consistent with the Fourth Amendment? We think that it is. The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable." The progeny of the *Carroll* case likewise dealt with searches and seizures under this Act. *Husty* v. *United States*, 282 U. S. 694.

Obviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional. In view of the strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is "reasonable," the *Carroll* decision falls short of establishing a doctrine that, without such legislation, automobiles nonetheless are subject to search without warrant in enforcement of all federal statutes. This Court has never yet said so. The most that can be said is that some of the language by which the Court justified the search and seizure legislation in the *Carroll* case might be used to make a distinction between what is a reasonable search as applied to an automobile and as applied to a residence or fixed premises, even in absence of legislation.

We need not decide whether, without such Congressional authorization as was found controlling in the *Car-*

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dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. The seizure in such a proceeding comes before the arrest as Section 26 indicates . . . ."

[5] This word "in" is erroneously printed "is" in the case as reported.

roll case, any automobile is subject to search without warrant on reasonable cause to believe it contains contraband. In the case before us there appears to have been no search of the car itself. No one on the spot seems to have thought there was cause for searching it, or that it was subject to forfeiture. The nature of ration tickets, the contraband involved, was not such that a car would be necessary or advantageous in carrying them except as an incident of carrying the person. When the question of admissibility of this evidence arose in the trial court, counsel for the Government made no claim that there had been search or cause for search of the car. No question of fact concerning such a claim has been resolved by the trial court or the jury.

Assuming, however, without deciding, that there was reasonable cause for searching the car, did it confer an incidental right to search Di Re? It is admitted by the Government that there is no authority to that effect, either in the statute or in precedent decision of this Court, but we are asked to extend the assumed right of car search to include the person of occupants because "common sense demands that such right exist in a case such as this where the contraband sought is a small article which could easily be concealed on the person."

This argument points up the different relation of the automobile to the crime in the *Carroll* case than in the one before us. An automobile, as was there pointed out, was an almost indispensable instrumentality in large-scale violation of the National Prohibition Act, and the car itself therefore was treated somewhat as an offender and became contraband. But even the National Prohibition Act did not direct the arrest of all occupants but only of the person in charge of the offending vehicle, though there is better reason to assume that no passenger in a car loaded with liquor would remain innocent of knowledge

of the car's cargo than to assume that a passenger must know what pieces of paper are carried in the pockets of the driver.

The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued. By a parity of reasoning with that on which the Government disclaims the right to search occupants of a house, we suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?

We see no ground for expanding the ruling in the *Carroll* case to justify this arrest and search as incident to the search of a car. We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.

II.

The other ground on which the Government defended the search of Di Re, and the only one on which it relied at the trial, is that the officers justifiably arrested him and that this conferred a right to search his person. If he was lawfully arrested, it is not questioned that the ensuing search was permissible. Hence we must examine the circumstances and the law of arrest.

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Some members of this Court rest their conclusion that the arrest was invalid on § 180 of the New York Code of Criminal Procedure which requires an officer making an arrest without a warrant to inform the suspect of the cause of arrest, except when it is made during commission of the crime or when in pursuit after an escape.[6] This question was first raised from the Bench during argument in this Court. Di Re did not assert this ground of invalidity at the trial. Had he done so the Government might have met it with proof of circumstances which in themselves would show that Di Re had been effectively informed, even if the circumstances fell short of establishing the statutory exception. The proceedings below did not develop the facts concerning Di Re's arrest in connection with this requirement. Inasmuch as the issue would lead to exploration of the law as to waiver when the defense was not raised in either court below, or indeed by the petition here, and as to applicability of the statute if, as the Government contends, lack of express declaration was unnecessary because circumstances supplied the required information, we do not undertake to determine on this record whether Di Re's arrest satisfied this provision of the New York law.

The arrest was challenged in the courts below on the ground that it violated another provision of New York law which was considered to be controlling on the subject. The court below assumed that the arresting officer, a state officer, derived his authority to arrest Buttitta and Reed, although it was for a federal crime, from

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[6] Section 180 provides:

"When arresting a person without a warrant the officer must inform him of the authority of the officer and the cause of the arrest, except when the person arrested is in the actual commission of a crime, or is pursued immediately after an escape."

See also *People* v. *Marendi*, 213 N. Y. 600, 610, 107 N. E. 1058, 1061. Cf. *John Bad Elk* v. *United States*, 177 U. S. 529; *Christie* v. *Leachinsky*, [1947] 1 All Eng. 567.

§ 177 of the New York Code of Criminal Procedure, and also considered the legality of the arrest of Di Re under paragraph 3 thereof.[7] In this Court the Government originally argued that the arrest was authorized under both paragraphs 2 and 3 of the state law, but in a supplemental brief the Government withdraws the suggestion "that the arrest of respondent can be justified under subsection 2 of Section 177 of the New York Code of Criminal Procedure." Instead, it now urges that "the validity of an arrest without a warrant for a federal crime is a matter of federal law to be determined by a uniform rule applicable in all federal courts."

We believe, however, that in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity. By one of the earliest acts of Congress, the principle of which is still retained, the arrest by judicial process for a federal offense must be "agreeably to the usual mode of process against offenders in such state."[8] There is no reason to

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[7] Section 177 of the New York Code of Criminal Procedure provides:

"A peace officer may, without a warrant, arrest a person,

"1. For a crime, committed or attempted in his presence;

"2. When the person arrested has committed a felony, although not in his presence;

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it."

[8] The Act of September 24, 1789 (Ch. 20, § 33, 1 Stat. 91), concerning arrest with warrant, provided: "That for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offence." This provision has remained substantially similar to this day. 18 U. S. C. § 591. See also 1 Ops. Atty. Gen. 85, 86.

believe that state law is not an equally appropriate standard by which to test arrests without warrant, except in those cases where Congress has enacted a federal rule. Indeed the enactment of a federal rule in some specific cases seems to imply the absence of any general federal law of arrest.

Turning to the Acts of Congress to find a rule for arrest without warrant, we find none which controls such a case as we have here and none that purports to create a general rule on the subject. If we were to try to find or fashion a federal rule for arrest without warrant, it appears that the federal legislative materials are meager, inconsistent and inconclusive. Federal Bureau of Investigation officers are authorized only "to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer." [9] However, marshals and their deputies "shall have the power to make arrests without warrant for any offense against the laws of the United States committed in their presence or for any felony cognizable under the laws of the United States in cases where such felony has in fact been or is being committed and they have reasonable grounds to believe that the person to be arrested has committed or is committing it," [10] and they are also given the same powers as sheriffs in the same state may have, by law, in executing the laws thereof.[11]

In denouncing unlawful search by federal officers as a misdemeanor, Congress provided that it should not

[9] 48 Stat. 1008, 49 Stat. 77, 5 U. S. C. § 300 (a).

[10] 49 Stat. 378, 28 U. S. C. § 504 (a).

[11] 1 Stat. 425, 12 Stat. 282, 28 U. S. C. § 504.

apply to one "arresting or attempting to arrest any person committing or attempting to commit an offense in the presence of such officer, agent, or employee, or who has committed, or who is suspected on reasonable grounds of having committed, a felony." [12] Thus the legislative sources, while yielding some common provisions, also contain many inconsistencies. No act of Congress lays down a general federal rule for arrest without warrant for federal offenses. None purports to supersede state law. And none applies to this arrest which, while for a federal offense, was made by a state officer accompanied by federal officers who had no power of arrest. Therefore the New York statute provides the standard by which this arrest must stand or fall.

Since, under that law, any valid arrest of Di Re, if for a misdemeanor must be for one committed in the arresting officer's presence, and if for a felony must be for one which the officer had reasonable grounds to believe the suspect had committed, we seek to learn for what offense this man was taken into custody. The arresting officer testified that he did not tell Di Re what he was being arrested for. After he was taken to the station he was "booked," but the record does not show upon what charge. He was later indicted for the misdemeanor of knowingly possessing counterfeit gasoline ration coupons in violation of Ration Order No. 5 (c) of the Office of Price Administrator. But on appeal the Government suggested the arrest may be defended as one for a felony because probable grounds existed for believing him guilty of the felony of conspiracy under § 37 of the Criminal Code,[13] and in this Court for the first time it suggests that there were grounds for arrest on a charge of possessing a known counterfeit writing with intent to utter it as true for the

[12] 49 Stat. 877, 18 U. S. C. § 53 (a).

[13] 18 U. S. C. § 88.

purpose of defrauding the United States, a felony under § 28 of the Criminal Code.[14]

Assuming, without deciding, that an arrest without a warrant on a charge not communicated at the time may later be justified if the arresting officer's knowledge gave probable grounds to believe any felony found in the statute books had been committed, we are brought to the inquiry whether the circumstances at that time afforded such grounds.

The Government now concedes that the only person who committed a possible misdemeanor in the open presence of the officer was Reed, the Government informer who was found visibly possessing the coupons. Of course, as to Buttitta they had previous information that he was to sell such coupons to Reed, and Reed gave information that he had done so. But the officer had no such information as to Di Re. All they had was his presence, and if his presence was not enough to make a case for arrest for a misdemeanor, it is hard to see how it was enough for the felony of violating § 28 of the Criminal Code.

The relevant difference between Ration Order 5 (c) and § 28 of the Criminal Code is that the former declares mere possession of a counterfeit coupon an offense, while the latter defines a felony which consists not merely of possession but also of knowledge of the instrument's counterfeit character, and also of intent to utter it as true. It is admitted that at the time of the arrest the officers had no information implicating Di Re and no information pointing to possession of any coupons, unless his presence in the car warranted that inference. Of course they had no information hinting further at the knowledge and intent required as elements of the felony under the statute.

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[14] 18 U. S. C. § 72.

III.

The Government's defense of the arrest relies most heavily on the conspiracy ground. In view of Reed's character as an informer, it is questionable whether a conspiracy is shown. But if the presence of Di Re in the car did not authorize an inference of participation in the Buttitta-Reed sale, it fails to support the inference of any felony at all.

There is no evidence that it is a fact or that the officers had any information indicating that Di Re was in the car when Reed obtained ration coupons from Buttitta, and none that he heard or took part in any conversation on the subject. Reed, the informer, certainly knew it if any part of his transaction was in Di Re's presence. But he was not called as a witness by the Government, nor shown to be unavailable, and we must assume that his testimony would not have been helpful in bringing guilty knowledge home to Di Re.

An inference of participation in conspiracy does not seem to be sustained by the facts peculiar to this case. The argument that one who "accompanies a criminal to a crime rendezvous" cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passers-by, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. If Di Re had witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons, and if he saw that they were ration coupons, it would not follow that he would know them to be counterfeit. Indeed it appeared at the trial to require an expert to establish that fact. Presumptions of guilt are not lightly to be indulged from mere meetings.

Moreover, whatever suspicion might result from Di Re's mere presence seems diminished, if not destroyed, when Reed, present as the informer, pointed out Buttitta, and Buttitta only, as a guilty party. No reason appears to doubt that Reed willingly would involve Di Re if the nature of the transaction permitted. Yet he did not incriminate Di Re. Any inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person.

IV.

The Government also makes, and several times repeats, an argument to the effect that the officers could infer probable cause from the fact that Di Re did not protest his arrest, did not at once assert his innocence, and silently accepted the command to go along to the police station. One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases. But courts will hardly penalize failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law. A layman may not find it expedient to hazard resistance on his own judgment of the law at a time when he cannot know what information, correct or incorrect, the officers may be acting upon. It is likely to end in fruitless and unseemly controversy in a public street, if not in an additional charge of resisting an officer. If the officers believed they had probable cause for his arrest on a felony charge, it is not to be supposed that they would have been dissuaded by his profession of innocence.

It is the right of one placed under arrest to submit to custody and to reserve his defenses for the neutral tribunals erected by the law for the purpose of judging his case. An inference of probable cause from a failure to engage in discussion of the merits of the charge with arresting

officers is unwarranted. Probable cause cannot be found from submissiveness, and the presumption of innocence is not lost or impaired by neglect to argue with a policeman. It is the officer's responsibility to know what he is arresting for, and why, and one in the unhappy plight of being taken into custody is not required to test the legality of the arrest before the officer who is making it.

The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officer's knowledge at the time gave them grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up.[15] In law it is good or bad when it starts and does not change character from its success.

V.

We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand.

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE BLACK dissent.

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[15] See, for example, *Byars* v. *United States*, 273 U. S. 28, 29.

HALEY *v.* OHIO.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 51. Argued November 17, 1947.—Decided January 12, 1948.

1. A 15-year-old boy was arrested about midnight on a charge of murder and questioned by relays of police from shortly after midnight until about 5 a. m., without benefit of counsel or any friend to advise him. When confronted with alleged confessions of his alleged accomplices around 5 a. m., he signed a confession typed by the police. This confession was admitted in evidence over his protest and he was convicted. *Held:* The methods used in obtaining this confession violated the Due Process Clause of the Fourteenth Amendment and the conviction cannot be sustained. Pp. 597–601.
2. The ruling of the trial court admitting the confession in evidence and the finding of the jury that the confession was voluntary did not foreclose the independent examination which it is the duty of this Court to make in such a case. P. 599.
3. The fact that this 15-year-old boy was formally advised of his constitutional rights just before he signed the confession does not alter the result. Formulas of respect for constitutional safeguards may not become a cloak for inquisitorial practices and make an empty form of due process of law. P. 601.

147 Ohio St. 340, 70 N. E. 2d 905, reversed.

Petitioner's conviction for murder was sustained by the Court of Appeals of Ohio. 79 Ohio App. 237, 34 O. O. 568, 72 N. E. 2d 785. The Supreme Court of Ohio dismissed an appeal. 147 Ohio St. 340, 70 N. E. 2d 905. This Court granted certiorari. 331 U. S. 803. *Reversed,* p. 601.

Edgar W. Jones argued the cause for petitioner. With him on the brief was *E. L. Mills.* *D. Bruce Mansfield* was also of counsel.

D. Deane McLaughlin and *W. Bernard Rodgers* argued the cause for respondent. With them on the brief was *John Rossetti.*

MR. JUSTICE DOUGLAS announced the judgment of the Court and an opinion in which MR. JUSTICE BLACK, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE join.

Petitioner was convicted in an Ohio court of murder in the first degree and sentenced to life imprisonment. The Court of Appeals of Ohio sustained the judgment of conviction over the objection that the admission of petitioner's confession at the trial violated the Fourteenth Amendment of the Constitution. 79 Ohio App. 237. The Ohio Supreme Court, being of the view that no debatable constitutional question was presented, dismissed the appeal. 147 Ohio St. 340. The case is here on a petition for a writ of certiorari which we granted because we had doubts whether the ruling of the court below could be squared with *Chambers* v. *Florida,* 309 U. S. 227, *Malinski* v. *New York,* 324 U. S. 401, and like cases in this Court.

A confectionery store was robbed near midnight on October 14, 1945, and William Karam, its owner, was shot. It was the prosecutor's theory, supported by some evidence which it is unnecessary for us to relate, that petitioner, a Negro boy aged 15, and two others, Willie Lowder, aged 16, and Al Parks, aged 17, committed the crime, petitioner acting as a lookout. Five days later—around midnight October 19, 1945—petitioner was arrested at his home and taken to police headquarters.

There is some contrariety in the testimony as to what then transpired. There is evidence that he was beaten. He took the stand and so testified. His mother testified that the clothes he wore when arrested, which were exchanged two days later for clean ones she brought to the jail, were torn and blood-stained. She also testified that when she first saw him five days after his arrest he was bruised and skinned. The police testified to the contrary on this entire line of testimony. So we put to one side the

controverted evidence. Taking only the undisputed testimony (*Malinski* v. *New York, supra,* p. 404 and cases cited), we have the following sequence of events. Beginning shortly after midnight this 15-year-old lad was questioned by the police for about five hours. Five or six of the police questioned him in relays of one or two each. During this time no friend or counsel of the boy was present. Around 5 a. m.—after being shown alleged confessions of Lowder and Parks—the boy confessed. A confession was typed in question and answer form by the police. At no time was this boy advised of his right to counsel; but the written confession started off with the following statement:

> "we want to inform you of your constitutional rights, the law gives you the right to make this statement or not as you see fit. It is made with the understanding that it may be used at a trial in court either for or against you or anyone else involved in this crime with you, of your own free will and accord, you are under no force or duress or compulsion and no promises are being made to you at this time whatsoever.
>
> "Do you still desire to make this statement and tell the truth after having had the above clause read to you?
>
> "A. Yes."

He was put in jail about 6 or 6:30 a. m. on Saturday, the 20th, shortly after the confession was signed. Between then and Tuesday, the 23d, he was held incommunicado. A lawyer retained by his mother tried to see him twice but was refused admission by the police. His mother was not allowed to see him until Thursday, the 25th. But a newspaper photographer was allowed to see him and take his picture in the early morning hours of the 20th, right after he had confessed. He was not taken before a magistrate and formally charged with a crime

until the 23d—three days after the confession was signed.

The trial court, after a preliminary hearing on the voluntary character of the confession, allowed it to be admitted in evidence over petitioner's objection that it violated his rights under the Fourteenth Amendment. The court instructed the jury to disregard the confession if it found that he did not make the confession voluntarily and of his free will.

But the ruling of the trial court and the finding of the jury on the voluntary character of the confession do not foreclose the independent examination which it is our duty to make here. *Ashcraft* v. *Tennessee,* 322 U. S. 143, 147–148. If the undisputed evidence suggests that force or coercion was used to exact the confession, we will not permit the judgment of conviction to stand, even though without the confession there might have been sufficient evidence for submission to the jury. *Malinski* v. *New York, supra,* p. 404, and cases cited.

We do not think the methods used in obtaining this confession can be squared with that due process of law which the Fourteenth Amendment commands.

What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a. m. But we cannot believe that a lad of tender years is

a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him. No friend stood at the side of this 15-year-old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning. A photographer was admitted once this lad broke and confessed. But not even a gesture towards getting a lawyer for him was ever made.

This disregard of the standards of decency is underlined by the fact that he was kept incommunicado for over three days during which the lawyer retained to represent him twice tried to see him and twice was refused admission. A photographer was admitted at once; but his closest friend—his mother—was not allowed to see him for over five days after his arrest. It is said that these events are not germane to the present problem because they happened after the confession was made. But they show such a callous attitude of the police towards the safeguards which respect for ordinary standards of human relationships compels that we take with a grain of salt their present apologia that the five-hour grilling of this boy was conducted in a fair and dispassionate manner. When the police are so unmindful of these basic standards of conduct in their public dealings, their secret treatment of a 15-year-old boy behind closed doors in the dead of night becomes darkly suspicious.

The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of

the police towards his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction. Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.

But we are told that this boy was advised of his constitutional rights before he signed the confession and that, knowing them, he nevertheless confessed. That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. We cannot indulge those assumptions. Moreover, we cannot give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain.

The course we followed in *Chambers* v. *Florida, supra, White* v. *Texas,* 310 U. S. 530, *Ashcraft* v. *Tennessee, supra,* and *Malinski* v. *New York, supra,* must be followed here. The Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them.

Reversed.

MR. JUSTICE FRANKFURTER, joining in reversal of judgment.

In a recent series of cases, beginning with *Brown* v. *Mississippi,* 297 U. S. 278, the Court has set aside convictions coming here from State courts because they were based on confessions admitted under circumstances that offended the requirements of the "due process" exacted

from the States by the Fourteenth Amendment. If the rationale of those cases ruled this, we would dispose of it *per curiam* with the mere citation of the cases. They do not rule it. Since at best this Court's reversal of a State court's conviction for want of due process always involves a delicate exercise of power and since there is a sharp division as to the propriety of its exercise in this case, I deem it appropriate to state as explicitly as possible why, although I have doubts and difficulties, I cannot support affirmance of the conviction.

The doubts and difficulties derive from the very nature of the problem before us. They arise frequently when this Court is obliged to give definiteness to "the vague contours" of Due Process or, to change the figure, to spin judgment upon State action out of that gossamer concept. Subtle and even elusive as its criteria are, we cannot escape that duty of judicial review. The nature of the duty, however, makes it especially important to be humble in exercising it. Humility in this context means an alert self-scrutiny so as to avoid infusing into the vagueness of a Constitutional command one's merely private notions. Like other mortals, judges, though unaware, may be in the grip of prepossessions. The only way to relax such a grip, the only way to avoid finding in the Constitution the personal bias one has placed in it, is to explore the influences that have shaped one's unanalyzed views in order to lay bare prepossessions.

A lifetime's preoccupation with criminal justice, as prosecutor, defender of civil liberties, and scientific student, naturally leaves one with views. Thus, I disbelieve in capital punishment. But as a judge I could not impose the views of the very few States who through bitter experience have abolished capital punishment upon all the other States, by finding that "due process" proscribes it. Again, I do not believe that even capital offenses by boys of fifteen should be dealt with according

to the conventional criminal procedure. It would, however, be bald judicial usurpation to hold that States violate the Constitution in subjecting minors like Haley to such a procedure. If a State, consistently with the Fourteenth Amendment, may try a boy of fifteen charged with murder by the ordinary criminal procedure, I cannot say that such a youth is never capable of that free choice of action which, in the eyes of the law, makes a confession "voluntary." Again, it would hardly be a justifiable exercise of judicial power to dispose of this case by finding in the Due Process Clause Constitutional outlawry of the admissibility of all private statements made by an accused to a police officer, however much legislation to that effect might seem to me wise. See The Indian Evidence Act of 1872, § 25; cf. § 26.

But whether a confession of a lad of fifteen is "voluntary" and as such admissible, or "coerced" and thus wanting in due process, is not a matter of mathematical determination. Essentially it invites psychological judgment—a psychological judgment that reflects deep, even if inarticulate, feelings of our society. Judges must divine that feeling as best they can from all the relevant evidence and light which they can bring to bear for a confident judgment of such an issue, and with every endeavor to detach themselves from their merely private views. (It is noteworthy that while American experience has been drawn upon in the framing of constitutions for other democratic countries, the Due Process Clause has not been copied. See, also, the illuminating debate on the proposal to amend the Irish Home Rule Bill by incorporating our Due Process Clause. 42 H. C. Deb. 2082–2091, 2215–2267 (5th ser., Oct. 22, 23, 1912).)

While the issue thus formulated appears vague and impalpable, it cannot be too often repeated that the limitations which the Due Process Clause of the Fourteenth Amendment placed upon the methods by which the States

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may prosecute for crime cannot be more narrowly conceived. This Court must give the freest possible scope to States in the choice of their methods of criminal procedure. But these procedures cannot include methods that may fairly be deemed to be in conflict with deeply rooted feelings of the community. See concurring opinions in *Malinski* v. *New York,* 324 U. S. 401, 412, and *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459, 466. Of course this is a most difficult test to apply, but apply it we must, warily, and from case to case.

This brings me to the precise issue on the record before us. Suspecting a fifteen-year-old boy of complicity in murder resulting from attempted robbery, at about midnight the police took him from his home to police headquarters. There he was questioned for about five hours by at least five police officers who interrogated in relays of two or more. About five o'clock in the morning this procedure culminated in what the police regarded as a confession, whereupon it was formally reduced to writing. During the course of the interrogation the boy was not advised that he was not obliged to talk, that it was his right if he chose to say not a word, nor that he was entitled to have the benefit of counsel or the help of his family. Bearing upon the safeguards of these rights, the Chief of Police admitted that while he knew that the boy "had a right to remain mute and not answer any questions" he did not know that it was the duty of the police to apprise him of that fact. Unquestionably, during this whole period he was held incommunicado. Only after the night-long questioning had resulted in disclosures satisfactory to the police and as such to be documented, was there read to the boy a clause giving the conventional formula about his constitutional right to make or withhold a statement and stating that if he makes it, he makes it of his "own free will." Do these uncontested facts justify a State court in

finding that the boy's confession was "voluntary," or do the circumstances by their very nature preclude a finding that a deliberate and responsible choice was exercised by the boy in the confession that came at the end of five hours questioning?

The answer, as has already been intimated, depends on an evaluation of psychological factors, or, more accurately stated, upon the pervasive feeling of society regarding such psychological factors. Unfortunately, we cannot draw upon any formulated expression of the existence of such feeling. Nor are there available experts on such matters to guide the judicial judgment. Our Constitutional system makes it the Court's duty to interpret those feelings of society to which the Due Process Clause gives legal protection. Because of their inherent vagueness the tests by which we are to be guided are most unsatisfactory, but such as they are we must apply them.

The Ohio courts have in effect denied that the very nature of the circumstances of the boy's confession precludes a finding that it was voluntary. Their denial carries great weight, of course. It requires much to be overborne. But it does not end the matter. Against it we have the judgment that comes from judicial experience with the conduct of criminal trials as they pass in review before this Court. An impressive series of cases in this and other courts admonishes of the temptations to abuse of police endeavors to secure confessions from suspects, through protracted questioning, carried on in secrecy, with the inevitable disquietude and fears police interrogations naturally engender in individuals questioned while held incommunicado, without the aid of counsel and unprotected by the safeguards of a judicial inquiry. Disinterested zeal for the public good does not assure either wisdom or right in the methods it pursues. A report of President Hoover's National Commission on Law Ob-

servance and Enforcement gave proof of the fact, unfortunately, that these potentialities of abuse were not the imaginings of mawkish sentimentality, nor their tolerance desirable or necessary for a stern policy against crime. Legislation throughout the country reflects a similar belief that detention for purposes of eliciting confessions through secret, persistent, long-continued interrogation violates sentiments deeply embedded in the feelings of our people. See *McNabb* v. *United States,* 318 U. S. 332, 342–43.

It is suggested that Haley's guilt could easily have been established without the confession elicited by the sweating process of the night's secret interrogation. But this only affords one more proof that in guarding against misuse of the law enforcement process the effective detection of crime and the prosecution of criminals are furthered and not hampered. Such constitutional restraints of decency derive from reliance upon the resources of intelligence in dealing with crime and discourage the too easy temptations of unimaginative crude force, even when such force is not brutally employed.

It would disregard standards that we cherish as part of our faith in the strength and well-being of a rational, civilized society to hold that a confession is "voluntary" simply because the confession is the product of a sentient choice. "Conduct under duress involves a choice," *Union Pacific R. Co.* v. *Public Service Commission,* 248 U. S. 67, 70, and conduct devoid of physical pressure but not leaving a free exercise of choice is the product of duress as much so as choice reflecting physical constraint.

Unhappily we have neither physical nor intellectual weights and measures by which judicial judgment can determine when pressures in securing a confession reach the coercive intensity that calls for the exclusion of a statement so secured. Of course, the police meant to

exercise pressures upon Haley to make him talk. That was the very purpose of their procedure. In concluding that a statement is not voluntary which results from pressures such as were exerted in this case to make a lad of fifteen talk when the Constitution gave him the right to keep silent and when the situation was so contrived that appreciation of his rights and thereby the means of asserting them were effectively withheld from him by the police, I do not believe I express a merely personal bias against such a procedure. Such a finding, I believe, reflects those fundamental notions of fairness and justice in the determination of guilt or innocence which lie embedded in the feelings of the American people and are enshrined in the Due Process Clause of the Fourteenth Amendment. To remove the inducement to resort to such methods this Court has repeatedly denied use of the fruits of illicit methods.

Accordingly, I think Haley's confession should have been excluded and the conviction based upon it should not stand.

MR. JUSTICE BURTON, with whom THE CHIEF JUSTICE, MR. JUSTICE REED and MR. JUSTICE JACKSON concur, dissenting.

The issue here is a narrow one of fact turning largely upon the credibility of witnesses whose testimony on material points is in direct conflict with that of other witnesses. The judgment rendered today by this Court does not hold that the procedure authorized by the State of Ohio to determine the admissibility of the confession of a person accused of a capital offense violates *per se* the Due Process Clause of the Fourteenth Amendment. It holds merely that the application made of that procedure in this case amounted to a violation of due process under the Fourteenth Amendment in that, on this record,

it amounted to a refusal by the trial court to exclude from the jury this particular confession which this Court is convinced was an involuntary confession.

The following facts are not disputed:

About midnight, on October 14, 1945, a storekeeper in Canton, Ohio, was shot to death in his store by one of two boys, Alfred Parks, aged 16, or Willie Lowder, aged 17. The accused, John Harvey Haley, then about 15 years and 8 months old and a senior in high school, was with these boys before they went into the store and was waiting for them outside of it at the time when the shooting occurred. Haley testified "all of a sudden I heard a shot and a man hollered, and I was scared and I ran." The two other boys also ran away immediately after the shot was fired. The three soon met and Haley then went home. These boys had been together all that evening. Early in the evening, while Parks and Lowder waited outside of Haley's home, Haley went in to get a pistol for their joint use. Without the knowledge of William Mack, the owner of the pistol, Haley took from a trunk a .32 caliber automatic pistol which Haley had shot once on New Year's Day and, from another place in his home, a handful of ammunition for the pistol. The three boys took part in loading it. Haley then turned it over to Parks and Lowder, one or the other of whom thereafter retained possession of it throughout the evening. A day or two after the shooting, Haley asked the two boys what they had done with the gun. He testified that in answer "They said they got rid of it." This much of the story Haley testified to at the trial and has admitted substantially ever since his arrest and since abandoning his first, and admittedly false, statement that he and his two friends had gone to a show that evening. A .32 caliber automatic Colt pistol, the admission of which in evidence is not here in issue, was sent by the Canton police to the Federal Bureau of Investigation for iden-

tification, together with the bullet which killed the storekeeper and a cartridge shell found by the police at the scene of the crime. An uncontradicted expert witness from the F. B. I. fired three bullets from the pistol, compared the microscopic markings on them with those on the bullet which had killed the storekeeper and, on this basis, positively identified the pistol as the weapon which had fired the fatal shot. This fatal shot admittedly was fired while Parks and Lowder were in the store of the deceased and were in possession of the pistol with which Haley had supplied them. There is nothing in the record to suggest the presence in the store of any other pistol. Haley testified that this pistol "looked like" the one he had given to his companions.

After hearing the foregoing and other material evidence, including the disputed confession of Haley, the jury found him guilty of murder in the first degree while attempting to perpetrate robbery. The verdict carried a recommendation of mercy which automatically reduced the statutory penalty from death to life imprisonment. In considering the record as a whole, and particularly in reaching a conclusion of fact that the police officers who examined Haley coerced him into making his confession, it is appropriate to note that the foregoing undisputed facts left comparatively little need for such a confession as was signed by Haley. That confession, in substance, added only the express statement by Haley that he knew that Parks and Lowder went into the store to rob the storekeeper and that Haley remained outside to serve as a lookout and to warn Parks and Lowder by tapping on the window in case anyone approached.

The procedure followed by the police as soon as they had the information upon which they arrested Haley was substantially as follows:

On Friday, October 19, 1945, again at about midnight, and while Haley was still up and about his home, after

having returned from an evening football game, he was arrested by four policemen who came to his home in two cars. They were admitted to Haley's home by his mother and they took him with them to police headquarters, not using handcuffs. He was "booked" there at about 12:30 a. m. From then until between 3 and 4 a. m. he was in the record room of the detective bureau, usually with two officers. What took place there leading up to his oral, and later signed, confession is the subject of directly contradictory testimony given by the accused and the police. Haley testified that he was roughly handled in such a manner that if this testimony is believed the confession was not voluntary. On the other hand, the police and everyone else who was present or saw Haley during or after this examination testified in detail, and with positiveness, that Haley was not abused or roughly handled in any degree and that his person and clothes presented a normal appearance after the examination. Immediately after Haley had been shown alleged confessions by Parks and Lowder and had read at least that by Parks, Haley made an oral statement evidently similar to that made by Parks. Thereupon, Haley was taken to a front room where a sergeant of detectives typed Haley's confession in question and answer form during a period which consumed from one hour to an hour and a half. Before taking this confession the sergeant testified that he typed and read to Haley, clearly and distinctly, the preliminary statement, a part of which is quoted in this Court's opinion as being at the beginning of the written confession. The sergeant testified that Haley, after hearing this introduction, said that he still desired to make a statement and tell the truth. When completed, the statement, so prepared, was signed by Haley in the presence not only of some of the police officers who had questioned him but also of two civilian witnesses called in for that purpose from outside of police headquar-

ters. The Acting Chief of Police, who himself was a member of the Bar of Ohio, requested Haley to read the entire confession. When this had been done, the Acting Chief of Police, in the capacity of a notary public, administered the oath signed by Haley at the end of the confession, stating that the facts contained therein were true and correct as Haley verily bevieved. A newspaper photographer then took a picture of Haley in company with Parks and Lowder. Either then or on the following Monday, the date being disputed, Haley was taken back to his home where the police found the trunk described by him as that from which he had taken the pistol. After his confession he was placed in the city jail and, on the following Tuesday, October 23, he was removed to the county jail. On that day, a complaint was filed in the Court of Common Pleas of Stark County, Ohio, Division of Domestic Relations, Juvenile Department, by a sergeant of police, charging Haley with being a delinquent child.

On October 29, 1945, pursuant to a motion of the prosecuting attorney, the judge assigned to the above-mentioned Domestic Relations Division of the Court of Common Pleas appointed a doctor to make a physical and mental examination of the accused.

On November 1, 1945, the mental and physical examination was filed and, after hearing, the court found—

> "that the said child has committed an act which, if [it] had been committed by an adult, would be a felony; an examination having been made of the said John Haley by a competent physician, qualified to make such examination, it is ordered that the said John Haley shall personally be and appear before the Court of Common Pleas on the first day of the next term thereof to answer for such act."

On November 14, 1945, a transcript from the docket of the above-mentioned Juvenile Court was filed in the Court of Common Pleas. Thereafter, beginning with an in-

dictment for first degree murder which was returned on January 8, 1946, the case proceeded to arraignment on January 11, and to trial in the Court of Common Pleas March 25–April 3, when a verdict of guilty as charged was returned, with a recommendation of mercy. A motion for a new trial was overruled and the case was appealed to the Court of Appeals for Stark County, Ohio, and there was unanimously affirmed October 25, 1946. Appeal was made, both on a motion for leave to appeal and as a matter of right, to the Supreme Court of Ohio. The motion for leave to appeal was overruled and the appeal, as a matter of right, was dismissed by unanimous action of the five judges sitting in the case. The reason given for dismissal was that the court found that no debatable constitutional question was involved in the case.[1]

Beginning with the arraignment of the accused, the record shows that Haley has been represented by counsel. The case has proceeded in this Court *in forma pauperis*, the accused being represented by the same competent counsel who represented him in the state courts. It does not appear that the accused ever asked to have counsel appointed for him. It does not appear that, at any time before his arraignment, he employed counsel or asked for

[1] It appears from the opinion of the Court of Appeals for Stark County in this case that the three boys were separately indicted and tried. Lowder and Haley were tried by juries. Parks waived that right and was tried before three judges. Each was convicted of murder in the first degree, with a recommendation of mercy. Appeals from the three cases were heard together and the judgments were affirmed in each with a single opinion emphasizing the separate consideration that had been given to each. *Ohio* v. *Lowder, Ohio* v. *Haley, Ohio* v. *Parks,* 79 Ohio App. 237, 34 O. O. 568, 72 N. E. 2d 785. See also, *Ohio* v. *Haley,* 147 Ohio St. 340, 70 N. E. 2d 905; *Ohio* v. *Lowder,* 147 Ohio St. 530, 72 N. E. 2d 102; *Ohio* v. *Parks,* 147 Ohio St. 531, 72 N. E. 2d 81; where each appeal was dismissed for lack of a debatable constitutional question.

counsel to represent him. The nearest approach to such action is that disclosed by the testimony of Haley's mother and by a stipulation between the parties that Leroy Contie, an attorney, on Monday, October 22, was employed by Mrs. Haley to represent her son. Mr. Contie went to the city jail on two occasions *after* Haley's confession was signed, was unable to see him and was refused admission by the police authorities. Mr. Contie did not see Haley until after the latter had been transferred to the county jail, some days after that. He apparently did not become an attorney of record in the case.

It is not disputed on Haley's behalf that his arrest and uncoercive questioning after his arrest would have been proper under such circumstances. While the constitutional and statutory rights of the accused, under such circumstances, must be safeguarded carefully, it is equally clear that serious constitutional and statutory obligations rest upon law enforcement officers to discover promptly those guilty of such an unprovoked murder as had been committed. Likewise, the comparative youth of these three boys who now have been convicted of this murder is entitled to full recognition in considering the constitutionality of the process of law that has been applied to them. This has been done. Haley's youth was recognized expressly by the preliminary proceedings before the Juvenile Department of the Division of Domestic Relations of the local court. Those proceedings markedly differentiated the procedure from that ordinarily followed in the case of an adult. Undoubtedly the thought of Haley's youth was reflected in the jury's recommendation of mercy, and in the care which the sergeant and the Acting Chief of Police testified that they took in preparing his confession for signature and in seeing to it that Haley understood it and his rights in connection with it. It is necessary to recognize, on the other hand, that the offense here charged was not an ordinary juvenile offense. It

was a capital offense of the most serious kind. It involved the same fatal consequence to a law-abiding citizen of Canton as would have been the case if it had been committed by adult offenders. An obligation rests upon the police not only to discover the perpetrators of such a crime but also to determine, as promptly as possible, their guilt or innocence to a degree sufficient to justify their prosecution or release. It is common knowledge that many felonies are being committed currently by minors and an obligation attaches to law enforcement officials to punish, prevent and discourage such conduct by minors as well as by adults. If Haley's part in this crime had been reasonably suspected by the police immediately after its commission at midnight, October 14, the police would have deserved severe criticism if they had not arrested and questioned him that night. The same obligation rested on them, five days later, at midnight, October 19.

As admitted by the petitioner in this Court, the entire issue here resolves itself into a consideration of the methods used in obtaining the confession. This in turn resolves itself primarily into a question of the credibility of witnesses as a means of determining the contested question as to what methods in fact were used. A voluntary confession not only is valid but it is the usual, best and generally fairest kind of evidence. Often it is the only direct evidence obtainable as to the state of mind of the accused. The giving of such a confession promptly is to be encouraged in the interest of all concerned. The police are justified and under obligation to seek such confessions. At the same time, it is a primary part of their obligation to see to it that coercion, including intimidation, is not used to secure a confession. It should be evident to them not only that involuntary confessions are worthless as evidence, but that coercion applied in securing them itself constitutes a serious violation of duty.

The question in this case is the simple one—was the confession in fact voluntary? As in many other cases it is difficult, because of conflicting testimony, to determine this controlling fact. It may not be possible to become absolutely certain of it. Self-serving perjury, however, must not be the pass-key to a mandatory exclusion of the confession from use as evidence. It is for the trial judge and the jury, under the safeguards of constitutional due process of criminal law, to apply even-handed justice to the determination of the factual issues. To do this, they need every available lawful aid to help them test the credibility of the conflicting testimony.

Due process of law under the Fourteenth Amendment requires that the states use some fair means to determine the voluntary character of a confession like that in this case. The procedure may differ in each state. The form adopted by Ohio is not criticized by this Court. The sole question here is the validity of the application of the Ohio procedure to the facts of this case. That application can be tested in this Court only under the great handicap of attempting to appraise, by use of the printed record, the action of the trial court and jury taken in the light of the living record. In connection with every confession that is unaccompanied by testimony as to how it was secured, all sorts of conditions may be conjectured as to the methods used to secure it. To rely upon conjecture, either in favor of or against the accused, is not justice. It is not due process of law by any definition. Similarly, all sorts of conditions as to the methods which might have been used in obtaining such a confession may be conjectured by a witness and falsely testified to by him. Such action puts the true testimony into direct conflict with the false. In the present case, the conflict of testimony is so clear that it is evident that one or more of the witnesses must have committed perjury. The issue resolves itself, therefore, not into one of civil rights

but into one of the truth or falsity of the testimony as to the methods used in obtaining Haley's confession. This issue of credibility cannot be resolved here with nearly as good a chance of determining the truth as that which was enjoyed by the trial court and jury. They saw and heard the witnesses and they examined the exhibits. Furthermore, they and the State Appellate and Supreme Courts also were familiar with the general conditions and standards of law enforcement in effect in the long-established industrial civic center of over 100,000 people of Canton, Ohio, where this confession was made and used. The testimony of the witnesses as to the methods used should be read in the context of the community where such testimony was given in order for it to be fairly appraised. There is no suggestion that racial discrimination or prejudice existed in the attitude of any of the witnesses, or of the courts or of the community of Canton. The issue is the credibility of these particular police officers and other local witnesses. It cannot be determined on the basis of published reports, however authentic, of police methods in other communities in other years. "The mere fact that a confession was made while in the custody of the police does not render it inadmissible." *McNabb* v. *United States,* 318 U. S. 332, 346.

The present case, turning as it does upon the credibility of the testimony as to the existence of the coercion, if any, that was used to secure the confession, is readily distinguishable from cases relied upon by the accused. For example, in the present case, this Court does not rely on any claim that the confession was elicited by unreasonably delaying the arraignment of the accused or even by any alleged delay in charging him with delinquency in the Juvenile Court. The confession of the accused was given, transcribed and signed

by 5:30 a. m. on October 20, immediately following his arrest at about midnight. There is, accordingly, no basis for contending that there was unnecessary delay in taking the accused before a court or magistrate having jurisdiction of the offense insofar as such unnecessary delay, if any, had relation to the confession. Whatever delay there was occurred after the confession was made and it is obvious that it was not unreasonable to delay the taking of the accused before a court or magistrate at least until after 5:30 a. m. *United States* v. *Mitchell,* 322 U. S. 65. Cf. *Anderson* v. *United States,* 318 U. S. 350; *McNabb* v. *United States,* 318 U. S. 332.

If the unequivocal and consistent testimony of the several police officers is believed, including that of the Acting Chief of Police, the confession was clearly voluntary. The police officers were men of experience in the local detective service and, if inferences are to be indulged in, it may be inferred that they understood the necessity that the confession be uncoerced and voluntary if it was to be admissible in evidence. The principal examining officers were two detectives, one of nine and the other of eleven years' police service. The sergeant of detectives who typed the confession was a man of nine years' police service. Every policeman who took any part in the examination was called as a witness. Each testified that there was no use of force and no intimidation during the examination. Each testified that in fact the confession was uncoerced. The questioning of the accused was described as having been carried on while the parties to it were seated near a desk and not within arm's length of each other. It was conducted in the record room of the detective bureau, rather than in jail. The accused was not handcuffed nor subjected to indignities. The police, the newspaper reporter, and the iceman who was brought in to witness the accused's signature to the confession tes-

tified to the normal appearance of the clothing and person of the accused during or following the examination, including the time he was photographed. The witnesses testified only as to what they severally had observed during the respective periods that they were present but, together, they covered the entire period of the examination. If the confession was in fact voluntary, these witnesses could not have said more to prove it. If their testimony is true, it makes false much of the testimony of the accused. The testing of the credibility of this testimony is therefore important. This testimony, furthermore, should not be laid aside here merely because it is in conflict with opposing testimony. If the trial court and jury believed the police and disbelieved the accused on this testimony, there was no substantial ground left for any inference of coercion. If, on the contrary, they believed the accused and therefore concluded that the police and other witnesses agreeing with them were perjurers, the trial court could not fairly have admitted the confession in evidence.

The evidence in the record includes ample evidence to support the action taken by the trial judge and jury against the accused if this Court chooses to believe that evidence and to disbelieve the conflicting evidence. Furthermore, that evidence, if so believed, is strong and specific enough greatly to offset conflicting inferences which otherwise might be suggested to this Court by the undisputed evidence.

As a reviewing court, we have a major obligation to guard against reading into the printed record purely conjectural concepts. To conjecture from the printed record of this case that the accused, because of his known proximity to the scene of the crime and his known association that night with the boys, one of whom did the actual shooting, must have been a hardened, smart boy, whose

conduct and falsehoods necessarily made all of his testimony worthless *per se,* is as unjustifiable as it would be to assume, without seeing him or his mother as witnesses, that he was an impressionable, innocent lad, likely to be panic-stricken by police surroundings and that all his testimony must be accepted as true except where expressly admitted by him to have been false. To assume from the printed record that the policemen, including the Acting Chief, and the civilians who gave unequivocal testimony as to the absence of force and intimidation in securing the confession or as to the normal appearance of the accused and of his clothing at the time of making the confession, were callous as to the feelings of a boy 15 years of age or were guilty of deliberate perjury would be as unjustifiable as it would be to assume, without hearing and seeing the respective police officers, as witnesses, that each of them was as well-informed, tolerant and thoughtful as an ideal juvenile judge. In this case, this Court seems to have laid aside all the conflicting testimony and then, without seeing or hearing the witnesses, has attempted to draw, from the meager balance of the record, important inferences of callousness and coercion on the part of the examining officers. By disregarding the conflicting material testimony instead of choosing between the true and the false material testimony, the material record is reduced largely to isolated items of subsequent conduct on the part of certain police officers who are alleged to have hampered the boy's mother or an attorney in trying to see him several days after his confession. There is no likelihood that these officers were the same ones who conducted the examination.[2] It

[2] In a case which arose in the District of Columbia, this Court said:

"But the circumstances of legality attending the making of these oral statements are nullified, it is suggested, by what followed. For

is not enough for this Court to say in its opinion today that if "the undisputed evidence suggests that force or coercion was used to exact the confession, we will not permit the judgment of conviction to stand . . . ." Recognition must be given also to the right of the trial court to weigh the credibility of the material disputed evidence.

We are not in a position, on the basis of mere suspicion, to hold the trial court in error and to conclude "that this was a confession wrung from a child by means which the law should not sanction." While coercion and intimidation in securing a confession should be unequivocally condemned and punished and their product invalidated, nevertheless such coercion should not be presumed to exist because of a mere suggestion or suspicion, in the face of contrary findings by the triers of fact. On the basis of the undisputed testimony relied upon by this Court, it is not justified in making such a determination of "the callous attitude of the police" of Canton as thereby to override not only the sworn testimony of the State's public officials but also the conclusions of the triers of fact. The trial judge, with his first-hand knowledge, both of the credibility indicated by the testimony in open court and of the habitual "attitude of the police"

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not until eight days after the statements were made was Mitchell arraigned before a committing magistrate. Undoubtedly his detention during this period was illegal. . . . Illegality is illegality, and officers of the law should deem themselves special guardians of the law. But in any event, the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These, we have seen, were not elicited through illegality. Their admission, therefore, would not be use by the Government of the fruits of wrongdoing by its officers. Being relevant, they could be excluded only as a punitive measure against unrelated wrongdoing by the police. Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct." *United States* v. *Mitchell*, 322 U. S. 65, 70–71.

of Canton, if there be any such attitude, found to the contrary. That judge and the law enforcement officers of Canton have been entrusted by the State of Ohio with the enforcement of the constitutional obligations of the public to each individual and also of each individual to the public. In the absence of substantial proof to upset the findings of the trial court, these public officers should not be charged with callousness toward, or with violation of, their constitutional obligations.

The legal process governing the admission of confessions in evidence in jury trials in Ohio in a case like this takes these conditions into consideration. The Ohio procedure provides for a preliminary examination by the trial judge, out of the presence of the jury, to determine whether the confession should be excluded as involuntary. Such an examination was made at length in this case and the judge, in the absence of the jury, overruled the objection made to the confession upon such ground. The motion was renewed in the presence of the jury and again denied. The judge likewise refused to direct a verdict for Haley at the close of the State's case and again at the close of the entire case. The admissibility of the confession was fully argued in the trial court and, before its admission, the trial judge took the subject under advisement while he adjourned the hearing over a week end. Having decided that the confession was not to be excluded, it was his duty to submit it to the jury. He did this with ample instructions advising the jury of its responsibility in connection with the confession. Testimony then was given at length, in the presence of the jury, bearing upon the voluntariness of the confession as well as upon the probable truth or falsity of its contents. The final instructions of the court emphasized not only the obligation and opportunity of the jury to pass upon the voluntariness of the confession but also its obligation to give appropriate

weight to the confession in the light of all the testimony in the event that the confession was found by the jury to have been a voluntary one.[3]

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[3] The trial court included in its final instructions to the jury the following:

"You will recall that I have heretofore said to you that, in general, the judge determines the admissibility of evidence. But, you will recall I think that on Monday just before certain alleged statements or declarations claimed by the State to have been made by the defendant, in part oral and in part consisting of an alleged written or typed statement or declaration, identified as State's Exhibit D, were by the judge permitted to be introduced with the instruction that you the jury would in the end and finally, determine first, whether the defendant made said statements and declarations, and if he did make it, whether they were made by the defendant voluntarily and of his own free will; and further in the event you should find he did make them and made them voluntarily and of his free will, just what weight, if any, should be accorded them.

"I now again direct your attention to that evidence. The State claims the defendant made said statements and declarations and that he made them voluntarily and of his own free will. The defendant denies the State's said claims and asserts they were not made voluntarily and of free will. You will decide these questions from all the evidence in the case. Should you find from all the evidence that the defendant did not make them, or if he made them that he did not make them voluntarily and of his free will, you will in that event disregard them entirely and not consider them further. On the other hand, should you find defendant did make them and that he made them voluntarily and of his own free will, you will consider them as evidence and give them just such weight to which you find from all the evidence they are entitled. Should you find from the evidence that some of them were made by the defendant and by him made voluntarily and of his free will, and find others were not made by him, or if made by him, not made by him voluntarily and of his free will, you will consider only those you find were made by him voluntarily and of his free will and reject the others. You will consider the alleged oral statements or declarations, separate and apart from the said written or typed statements, and the circumstances incident to each.

"You are instructed further that statements of guilt or declarations of guilt as they are sometimes called, made through the influence of

The rule of law governing this case is stated in *Lisenba* v. *California,* 314 U. S. 219, 238:

> "There are cases, such as this one, where the evidence as to the methods employed to obtain a confession is conflicting, and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury, which involves an answer to the due process question. In such a case, *we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.*" (Italics supplied.)

This Court properly reserves to itself an opportunity to consider the record in a case like this independently from the consideration given to that record by the lower courts. However, when credibility plays as large a part in the record as it does in this case, this Court rarely

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hopes or fears, statements or declarations induced by promises of temporal benefit or threats of disadvantage, are to be weighed and not to be considered of any value. Statements and declarations which are not voluntary and of free will made, are excluded on the ground that they are probably not true. Another ground for the exclusion is that it is a violation of the constitutional provision that no man shall be required to give evidence against himself, for if he is compelled by threats or induced by hopes to make confession against himself, it is an indirect method of compelling him to give evidence against himself, when statements or declarations made under such circumstances are afterwards proven against him in court. On the other hand, a free will and voluntary statement or admission, made by a defendant against his interest, *against his interest,* is one of the most satisfactory proofs of guilt, for an innocent person will not voluntarily subject himself to infamy and liability to punishment by false statements against himself.

"The State having offered these statements or admissions, must prove that they were made; but the burden of proving that a particular statement or admission was obtained by improper inducements, in general, is upon the defendant."

can justify a reversal of the judgment of the trial court and the verdict of the jury. This is increasingly true where the judgment of the trial court has been affirmed, as here, by two State courts of review. In the preliminary examination as to the admissibility of the confession in this case, the trial court may have believed the police and disbelieved the accused. On that basis, there is more than ample evidence to support the trial court's conclusion in refusing to exclude the confession. A similar statement may be made as to the presentation of evidence to the jury. It is not justifiable for this Court, in testing the conclusions of the triers of fact, to rely on inferences drawn solely from those portions of the record which, when read separately, apparently were not disputed. The acceptance of one version or the other of the sharply conflicting testimony which was before the triers of fact could reasonably justify a conclusion of the trial court and jury to exclude or admit the confession without reference to, or even in spite of, implications which might be drawn from the comparatively colorless undisputed testimony if that undisputed testimony stood alone. This Court should include in its appraisal of the record not only the undisputed testimony, but it also should allow for a reasonable conclusion by the trial court and jury, based upon acceptance or rejection of the disputed testimony. On this basis, this Court is not justified, in this case, in holding that the determination by the trial judge that the confession was admissible, or that the holding by the trial jury that the confessor was guilty, "is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process." [4]

In testing due process this Court must first make sure of its facts. Until a better way is found for testing credibility than by the examination of witnesses in open court,

[4] See *Lisenba* v. *California, supra,* p. 238.

we must give trial courts and juries that wide discretion in this field to which a living record, as distinguished from a printed record, logically entitles them. In this living record there are many guideposts to the truth which are not in the printed record. Without seeing them ourselves, we will do well to give heed to those who have seen them.

CALLEN *v.* PENNSYLVANIA RAILROAD CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 331. Argued December 18, 1947.—Decided January 12, 1948.

1. Where plaintiff in a suit under the Federal Employers' Liability Act contended that a release relied upon by defendant was invalid because neither party knew at the time it was given that plaintiff's injury was permanent, and the permanence of the injury was disputed by defendant, defendant was entitled to have the issue as to the permanence of the injury passed upon by the jury; and it was error for the trial court to withdraw from the jury the question of the validity of the release. Pp. 626–629.
2. Where, in a case under the Federal Employers' Liability Act, a railroad pleads a release obtained from an injured employee and the employee admits giving the release but challenges its validity on the ground of fraud or mutual mistake, the burden is on the employee to show that the contract was invalid. Pp. 629–630.
3. Section 5 of the Federal Employers' Liability Act, providing that any contract to enable any common carrier to "exempt itself from any liability created by this chapter shall to that extent be void," does not prevent a railroad from compromising or settling claims and obtaining releases based upon such settlements. Pp. 630–631.

162 F. 2d 832, affirmed.

In a suit under the Federal Employers' Liability Act, the plaintiff obtained a judgment notwithstanding a release previously given. The Circuit Court of Appeals reversed and ordered a new trial. 162 F. 2d 832. This Court granted certiorari. 332 U. S. 807. *Affirmed,* p. 631.

B. Nathaniel Richter, by special leave of Court, *pro hac vice,* argued the cause for petitioner. With him on the brief was *John H. Hoffman. Edward J. Griffiths* was also of counsel.

Philip Price argued the cause for respondent. With him on the brief was *Hugh B. Cox.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

Plaintiff, a railroad brakeman, brought this action under the Federal Employers' Liability Act, 35 Stat. 65; 53 Stat. 1404; 45 U. S. C. § 51. He recovered a jury verdict of $24,990, but the Circuit Court of Appeals reversed because of errors in the charge by the District Judge and ordered a new trial. The plaintiff's claim as submitted to the jury was negligence on the part of an engineer in effecting a coupling operation at a speed which plaintiff thought would jolt him off the stirrup of the car he was riding. In jumping for safety, he claimed to have received a severe and permanent back injury. The defendant denied the occurrence, offered testimony that plaintiff did not work at the time in question and also evidence of his admission that he did not work on that day but instead shoveled snow to get his car out of the garage. It also was testified that he had told his conductor he hurt his back on a different occasion. But if the injury was sustained at the time and place alleged, the defendant denied negligence, claimed contributory negligence and pleaded a general release. The controversy here concerns the release.

It was proved and not denied that for a consideration of $250 the plaintiff executed a general release of "all claims and demands which I have or can or may have against the said Pennsylvania Railroad Company for or by reason of personal injuries sustained by me" at the

time and place involved in the suit. It also released claims for loss of time and expense, and recited that the payment was in compromise and not an admission of liability, that plaintiff read and understood the agreement and that the sum of money stated therein is all that he was to receive.

On the trial, the plaintiff testified that he read and understood the release, knew what he was doing and intended to waive any further claim, and that when he began talking settlement he said he should have between $300 and $350. No fraud was alleged, but the plaintiff testified that he executed the release in reliance on the claim agent's assurance that "there was nothing wrong" and that he "was all right to go back to the job."

At the trial, plaintiff offered evidence from which the jury might well find that he had a permanent and serious injury. The claim agent admitted that at the time of settlement he did not know the plaintiff was suffering the injury which the doctors at the trial described. The plaintiff had gone to a family physician who taped his back and to a chiropractor whose report plaintiff took with him to the claim agent. It did not diagnose permanent injury but did suggest a weakness making him more susceptible to recurrence. The Railroad procured no medical examination of plaintiff. The claim agent's testimony was that he determined the amount of the settlement on the basis of his belief that there was no liability.

Instructing the jury, the trial court stated:

> "Anyhow, they settled to the extent of $250.00, and the release has been offered in evidence and admitted, and both sides agree that that release was not in contemplation of any sort of permanent injury.
>
> . . . . . .
>
> "Now, I am going to consider that release as binding to the amount of $250.00, and if you find a verdict

for the plaintiff you will deduct that from any amount you would otherwise give him. The $250.00 he got for expenses and medical bills and services that he obtained up to that time; and if you find that he is entitled to a verdict at your hands I will ask you to deduct that $250.00 from any amount you otherwise would award him, because that is what he agreed to take toward that particular phase of his claim, and of course he would not and does not ask, as I understand it to be excused from that,—he admits that he got it, and there it is.

"The release, as I have told the attorneys for both sides, I do not consider binding insofar as it applies to his permanent injuries, because the Pennsylvania Railroad certainly didn't know he was permanently injured . . . ."

The Circuit Court of Appeals, quite rightly we think, construed the charge of the District Judge as withdrawing the question of validity of the release from the jury and said: "This was palpable error under the facts relating to the release and entirely aside from the Court's incorrect assumption that there was no dispute about the permanency of the injuries."

An examination of the record at the trial makes it clear that the issue was raised and sharply litigated as to whether the injury, if received by plaintiff in the manner alleged, was permanent in character. Only when and if this issue was resolved in favor of one party or the other could it be known whether there was a basis for finding a mutual mistake or any mistake of fact in executing the release. The court, however, resolved the issue of permanence of injury against the defendant, at least so far as the release was concerned, and on that basis withdrew consideration of that issue from the jury. Even if the issue of permanence were resolved against the defendant, an issue still existed as to validity of the release

since the defendant insists that it did not act from mistake as to the nature and extent of the injuries but entered into the release for the small consideration involved because, upon the evidence in its hands at the time, no liability was indicated. We think the defendant was entitled to argue these contentions to the jury and to have them submitted under proper instructions.

It is apparent that the jury accepted the instructions of the court on the subject of the release. Returning, they rendered a verdict "For the plaintiff, and assess the damages at $25,240, of which the railroad is to be reimbursed with $250.00." The court, saying he wanted to make the record right, asked the jury if they made a net finding of $24,990, which the foreman said they did. Under the instructions they had received, there was little else that the jury could do, for the court had withdrawn from them the issue as to the validity of the release and consequently had given them no instructions as to the law that should govern the determination of any such question.

While the trial court assumed a finding of permanency as a basis for his setting aside of the release, after challenge to his assumption as to the nature of the injuries he made every effort to correct the impression, insofar as it affected the issue of damages. But the trial court did not correct or in any way alter his determination that the release was not binding insofar as it rested on the assumption of permanent injury. The Court of Appeals was right in holding that failure to submit this latter question to the jury was reversible error.

We are urged, however, to decide in this case that the release was properly disregarded by the trial court upon the ground that the burden should not be on one who attacks a release, to show grounds of mutual mistake or fraud, but should rest upon the one who pleads such a contract, to prove the absence of those grounds. It

is not contended that this is or ever has been the law; rather, it is contended that it should be the law, at least as to railroad cases. The *amicus* brief* puts it that "We ask that the burden of establishing the validity of a release taken from a railroad employee under the Federal Employers' Liability Act be placed on the railroad, and that, where but a nominal sum has been paid, which is less than or even equal to only the wages lost, that fact of itself be held to be evidence of at least a mistake of fact, if not presumed fraud, since the railroad possesses superior facilities for determining the extent of the injuries. . . ." Considerable reliance is placed upon a concurring opinion in the Court of Appeals for the Second Circuit in *Ricketts* v. *Pennsylvania R. Co.*, 153 F. 2d 757, 760. However persuasive the arguments there stated may be that inequality of bargaining power might well justify a change in the law, they are also a frank recognition that the Congress has made no such change. An amendment of this character is for the Congress to consider rather than for the courts to introduce. If the Congress were to adopt a policy depriving settlements of litigation of their *prima facie* validity, it might also make compensation for injuries more certain and the amounts thereof less speculative. But until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.

The plaintiff has also contended that this release violates § 5 of the Federal Employers' Liability Act which provides that any contract to enable any common carrier to "exempt itself from any liability created by this chap-

*[In support of the petition for certiorari, see *post*, p. 807.]

ter, shall to that extent be void." 35 Stat. 66, 45 U. S. C. § 55. It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.

Since we believe the Court of Appeals was right in directing a new trial at which the jury shall be permitted to pass on all issues of fact, the judgment is

Affirmed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE, being of the view that releases under the Federal Employers' Liability Act should be governed by the same rule which applies to releases by seamen in admiralty (see the separate opinion of Judge Jerome Frank, *Ricketts* v. *Pennsylvania R. Co.*, 153 F. 2d 757, 767–770), dissent from an affirmance of the judgment.

SIPUEL *v.* BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA ET AL.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 369. Argued January 7–8, 1948.—Decided January 12, 1948.

A Negro, concededly qualified to receive professional legal education offered by a State, cannot be denied such education because of her color. The State must provide such education for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. Pp. 632–633.

199 Okla. 36, 180 P. 2d 135, reversed.

The Supreme Court of Oklahoma affirmed a denial by an inferior state court of a writ of mandamus to require

admission of a qualified Negro applicant to a state law school. 199 Okla. 36, 180 P. 2d 135. This Court granted certiorari. 332 U. S. 814. *Reversed,* p. 633.

Thurgood Marshall and *Amos T. Hall* argued the cause for petitioner. With them on the brief was *Frank D. Reeves.*

Fred Hansen, First Assistant Attorney General of Oklahoma, and *Maurice H. Merrill* argued the cause for respondents. With them on the brief was *Mac Q. Williamson,* Attorney General.

Briefs of *amici curiae* urging reversal were filed by *Robert W. Kenny, O. John Rogge,* and *Andrew D. Weinberger* for the National Lawyers Guild; and *Arthur Garfield Hays* and *Osmond K. Fraenkel* for the American Civil Liberties Union.

PER CURIAM.

On January 14, 1946, the petitioner, a Negro, concededly qualified to receive the professional legal education offered by the State, applied for admission to the School of Law of the University of Oklahoma, the only institution for legal education supported and maintained by the taxpayers of the State of Oklahoma. Petitioner's application for admission was denied, solely because of her color.

Petitioner then made application for a writ of mandamus in the District Court of Cleveland County, Oklahoma. The writ of mandamus was refused, and the Supreme Court of the State of Oklahoma affirmed the judgment of the District Court. 199 Okla. 36, 180 P. 2d 135. We brought the case here for review.

The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many

white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938).

The judgment of the Supreme Court of Oklahoma is reversed and the cause is remanded to that court for proceedings not inconsistent with this opinion.

The mandate shall issue forthwith.

Reversed.

OYAMA ET AL. *v.* CALIFORNIA.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 44. Argued October 22, 1947.—Decided January 19, 1948.

1. The California Alien Land Law, as applied in this case to effect an escheat to the State of certain agricultural lands recorded in the name of a minor American citizen because they had been paid for by his father, a Japanese alien ineligible for naturalization who was appointed the son's guardian, *held* to have deprived the son of the equal protection of the laws and of his privileges as an American citizen, contrary to the Fourteenth Amendment and R. S. § 1978. Pp. 640–647.
2. The Alien Land Law, as applied in this case, discriminated against the citizen son in the following respects:

   (a) By a statutory *prima facie* presumption that conveyances financed by his father and recorded in the son's name were not gifts to the son but that the land was held for the benefit of the father; whereas, for most minors, California applies the rule that where a parent pays for a conveyance to his child it is presumed that a gift was intended. Pp. 641–642, 644–645.

   (b) Because, under the laws of California as applied by its courts when the father is ineligible for citizenship, facts which would usually be considered indicia of the son's ownership are used to make that ownership suspect; whereas, if the father were not

an ineligible alien, the same facts would be evidence that a completed gift was intended. P. 642.

(c) By being required to counter evidence that his father was remiss in his duties as guardian; whereas no other California case has been called to this Court's attention in which the penalty for a guardian's derelictions has fallen on the ward. Pp. 642–644.

3. The sole basis for this discrimination, which resulted in a citizen losing the land irretrievably and without compensation, was the fact that his father was Japanese. *Cockrill* v. *California,* 268 U. S. 258, distinguished. Pp. 644–645.

4. Such discrimination against a citizen on the basis of his racial descent cannot be justified on the ground that it is necessary to prevent evasion of the State's laws prohibiting the ownership of agricultural land by aliens who are ineligible for citizenship. Pp. 646–647.

29 Cal. 2d 164, 173 P. 2d 794, reversed.

The Supreme Court of California affirmed a decision of a state trial court declaring escheated to the State under the California Alien Land Law, 1 Cal. Gen. Laws, Act 261, as amended, certain agricultural lands recorded in the name of a minor American citizen, which lands had been paid for by his father, a Japanese citizen ineligible for naturalization. 29 Cal. 2d 164, 173 P. 2d 794. This Court granted certiorari. 330 U. S. 818. *Reversed,* p. 647.

A. L. Wirin and *Dean G. Acheson* argued the cause for petitioners. With *Mr. Wirin* on the brief were *Charles A. Horsky, James C. Purcell, Guy C. Calden, Saburo Kido* and *Fred Okrand.*

Everett W. Mattoon, Deputy Attorney General of California, and *Duane J. Carnes* argued the cause for respondent. With them on the brief was *Fred N. Howser,* Attorney General.

Briefs of *amici curiae* urging reversal were filed by *James C. Purcell* for the Civil Rights Defense Union of

Northern California; and *Edwin Borchard, Edward J. Ennis, Osmond K. Fraenkel, Walter Gellhorn, Arthur Garfield Hays, Harold Evans* and *Benjamin Kizer* for the American Civil Liberties Union.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

Petitioners challenge the constitutionality of California's Alien Land Law [1] as it has been applied in this case to effect an escheat of two small parcels of agricultural land.[2] One of the petitioners is Fred Oyama, a minor American citizen in whose name title was taken. The other is his father and guardian, Kajiro Oyama, a Japanese citizen not eligible for naturalization,[3] who paid the purchase price.

Petitioners press three attacks on the Alien Land Law as it has been applied in this case: first, that it deprives Fred Oyama of the equal protection of the laws and of his privileges as an American citizen; secondly, that it denies Kajiro Oyama equal protection of the laws; and, thirdly, that it contravenes the due process clause by sanctioning a taking of property after expiration of the

[1] 1 Cal. Gen. Laws, Act 261 (Deering 1944, 1945 Supp.).

[2] 29 Cal. 2d 164, 173 P. 2d 794 (1946).

[3] At the time the Alien Land Law was adopted the right to be naturalized extended only to free white persons and persons of African nativity or descent. In 1940, descendants of races indigenous to the Western Hemisphere were also made eligible, 54 Stat. 1140; in 1943 Chinese were made eligible, 57 Stat. 601; and in 1946 Filipinos and persons of races indigenous to India were made eligible, 60 Stat. 416, 8 U. S. C. A. § 703 (1946 Supp.). While it is not altogether clear whether the statute should be interpreted to include or to exclude certain peoples, see Note, 54 Harv. L. Rev. 860, 864–5 (1941), it seems to be accepted that Japanese are among the few groups not eligible for citizenship.

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applicable limitations period. Proper foundation for these claims has been laid in the proceedings below.

In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled.[4]

In broad outline, the Alien Land Law forbids aliens ineligible for American citizenship to acquire, own, occupy, lease, or transfer agricultural land.[5] It also provides that any property acquired in violation of the statute shall escheat as of the date of acquisition [6] and that the same result shall follow any transfer made with "intent to prevent, evade or avoid" escheat.[7] In addition, that intent is presumed, *prima facie,* whenever an ineligible alien pays the consideration for a transfer to a citizen or eligible alien.[8]

The first of the two parcels in question, consisting of six acres of agricultural land in southern California, was purchased in 1934, when Fred Oyama was six years old. Kajiro Oyama paid the $4,000 consideration, and the seller executed a deed to Fred. The deed was duly recorded.

Some six months later, the father petitioned the Superior Court for San Diego County to be appointed Fred's guardian, stating that Fred owned the six acres. After a hearing, the court found the allegations of the petition

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[4] See *Patton* v. *Mississippi,* 332 U. S. 463 (1947); *Chambers* v. *Florida,* 309 U. S. 227, 228–9 (1940); *Norris* v. *Alabama,* 294 U. S. 587, 590 (1935).

[5] §§ 1 and 2.

[6] § 7.

[7] § 9.

[8] § 9 (a).

true and Kajiro Oyama "a competent and proper person" to be appointed Fred's guardian. The appointment was then ordered, and the father posted the necessary bond.

In 1936 and again in 1937, the father as guardian sought permission to borrow $4,000, payable in six months, for the purpose of financing the next season's crops and to mortgage the six-acre parcel as security. In each case notice of the petition and date for hearing was published in a newspaper, the court then approved the borrowing as advantageous to Fred Oyama's estate, and the father posted a bond for $8,000. So far as appears from the record, both loans were obtained, used for the benefit of the estate, and repaid on maturity.

The second parcel, an adjoining two acres, was acquired in 1937, when Fred was nine years old. It was sold by the guardian of another minor, and the court supervising that guardianship confirmed the sale "to Fred Oyama" as highest bidder at a publicly advertised sale. A copy of the court's order was recorded. Fred's father again paid the purchase price, $1,500.

From the time of the two transfers until the date of trial, however, Kajiro Oyama did not file the annual reports which the Alien Land Law requires of all guardians of agricultural land belonging to minor children of ineligible aliens.[9]

In 1942, Fred and his family were evacuated from the Pacific Coast along with all other persons of Japanese descent. And in 1944, when Fred was sixteen and still forbidden to return home, the State filed a petition to declare an escheat of the two parcels on the ground that the conveyances in 1934 and 1937 had been with intent to violate and evade the Alien Land Law.

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[9] §§ 4 and 5. This was the holding of the state courts. Petitioners argue that until 1943 there was some doubt as to whether reports were required. See note 23, *infra*.

At the trial the only witness, other than a court official testifying to records showing the facts set forth above, was one John Kurfurst, who had been left in charge of the land at the time of the evacuation. He testified that the Oyama family once lived on the land but had not occupied it for several years before the evacuation. After the evacuation, Kurfurst and those to whom he rented the property drew checks to Fred Oyama for the rentals (less expenses), and Kurfurst transmitted them to Fred Oyama through the War Relocation Authority. The canceled checks were returned endorsed "Fred Oyama," and no evidence was offered to prove that the signatures were not by the son. Moreover, the receipts issued by the War Relocation Authority for the funds transmitted by Kurfurst were for the account of Fred Oyama, and Kurfurst identified a letter signed "Fred Oyama" directing him to turn the property over to a local bank for management.

On direct examination by the State's Attorney, however, Kurfurst also testified that he knew the father as "Fred," but he added that he had never heard the father refer to himself by that name. In addition, he testified on cross-examination that he had once heard the father say, "Some day the boy will have a good piece of property because that is going to be valuable." He also admitted that he knew "the father was running the boy's business" and that "the property belonged to the boy and to June Kushino" (Fred's cousin, an American citizen). Kurfurst further acknowledged that in a letter he had written about the property and had headed "Re: Fred Yoshihiro Oyama and June Kushino" he meant by "Fred Yoshihiro Oyama" the boy, not the father. He also understood a letter written to him by the War Relocation Authority "Re: Fred Oyama" to refer to the boy.

From this evidence the trial court found as facts that the father had had the beneficial use of the land and that

the transfers were subterfuges effected with intent to prevent, evade or avoid escheat. Accordingly, the court entered its conclusion of law that the parcels had vested in the State as of the date of the attempted transfers in 1934 and 1937.

The trial court filed no written opinion but indicated orally that its findings were based primarily on four inferences: (1) the statutory presumption that any conveyance is with "intent to prevent, evade or avoid" escheat if an ineligible alien pays the consideration; [10] (2) an inference of similar intent from the mere fact that the conveyances ran to a minor child; [11] (3) an inference of lack of bona fides at the time of the original transactions from the fact that the father thereafter failed to file annual guardianship reports; and (4) an inference from the father's failure to testify that his testimony would have been adverse to his son's cause. No countervailing inference was warranted by the exhibits in Fred's name, the judge said, "because there are many instances where there is little in a name."

In holding the trial court's findings of intent fully justified by the evidence, the Supreme Court of California pointed to the same four inferences. It also ruled that California could constitutionally exclude ineligible aliens from any interest in agricultural land,[12] and that Fred Oyama was deprived of no constitutional guarantees since

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[10] § 9 (a) of the Alien Land Law.

[11] The judge stated that in the absence of a strong reason people just do not take title to real estate in the name of their seven-year-old children—thereby putting it beyond the power of the parents to deal with it directly, to deed it away, to borrow money on it and to make free disposition of it.

[12] This conclusion was based in large measure on a series of cases decided within a week of each other in 1923: *Terrace* v. *Thompson,* 263 U. S. 197; *Porterfield* v. *Webb,* 263 U. S. 225; *Webb* v. *O'Brien,* 263 U. S. 313; and *Frick* v. *Webb,* 263 U. S. 326.

the land had passed to the State without ever vesting in him.

We agree with petitioners' first contention, that the Alien Land Law, as applied in this case, deprives Fred Oyama of the equal protection of California's laws and of his privileges as an American citizen. In our view of the case, the State has discriminated against Fred Oyama; the discrimination is based solely on his parents' country of origin; and there is absent the compelling justification which would be needed to sustain discrimination of that nature.

By federal statute, enacted before the Fourteenth Amendment but vindicated by it, the states must accord to all citizens the right to take and hold real property.[13] California, of course, recognizes both this right and the fact that infancy does not incapacitate a minor from holding realty.[14] It is also established under California law that ineligible aliens may arrange gifts of agricultural land to their citizen children.[15] Likewise, when a minor citizen does become the owner of agricultural land, by gift or otherwise, his father may be appointed guardian of the estate, whether the father be a citizen, an eligible alien, or an ineligible alien.[16] And, once appointed, a guardian is

[13] "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." R. S. § 1978, 8 U. S. C. § 42.

[14] The State in its brief concedes that this is so. See also *Estate of Yano*, 188 Cal. 645, 649, 206 Pac. 995, 998 (1922); *People* v. *Fujita*, 215 Cal. 166, 169, 8 P. 2d 1011, 1012 (1932).

[15] The State also concedes the accuracy of this proposition. See also *People* v. *Fujita*, *supra* note 14.

[16] A statute of general applicability requires that parents be given preference in the appointment of a minor's guardian. Cal. Prob. Code Ann. § 1407.

Section 4 of the Alien Land Law, as enacted in 1920, prohibited an ineligible alien from becoming the guardian of that part of his

entitled to have custody of the estate and to manage and husband it for the ward's benefit.[17] To that extent Fred Oyama is ostensibly on a par with minors of different lineage.

At this point, however, the road forks. The California law points in one direction for minor citizens like Fred Oyama, whose parents cannot be naturalized, and in another for all other children—for minor citizens whose parents are either citizens or eligible aliens, and even for minors who are themselves aliens though eligible for naturalization.

In the first place, for most minors California has the customary rule that where a parent pays for a conveyance to his child there is a presumption that a gift is intended; there is no presumption of a resulting trust, no presumption that the minor takes the land for the benefit of his parent.[18] When a gift is thus presumed and the deed is recorded in the child's name, the recording suffices for delivery,[19] and, absent evidence that the gift is disadvantageous, acceptance is also presumed.[20] Thus the burden of proving that there was in fact no completed bona fide gift falls to him who would attack its validity.

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child's estate which consisted of agricultural land. Cal. Stats. 1921, p. lxxxiii. This section was held unconstitutional in *Estate of Yano, supra* note 14.

[17] See *DeGreayer* v. *Superior Court,* 117 Cal. 640, 49 Pac. 983 (1897).

[18] *Gomez* v. *Cecena,* 15 Cal. 2d 363, 101 P. 2d 477 (1940); *Quinn* v. *Reilly,* 198 Cal. 465, 245 Pac. 1091 (1926); *Russ* v. *Mebius,* 16 Cal. 350 (1860); *cf. Lezinsky* v. *Mason Malt Whiskey Distilling Co.,* 185 Cal. 240, 250, 196 Pac. 884, 889 (1921); *Hamilton* v. *Hubbard,* 134 Cal. 603, 605, 65 Pac. 321, 322 (1901).

[19] *People* v. *Fujita,* 215 Cal. 166, 169, 8 P. 2d 1011, 1012 (1932); *Estate of Yano,* 188 Cal. 645, 649, 206 Pac. 995, 998 (1922); *cf. Turner* v. *Turner,* 173 Cal. 782, 786, 161 Pac. 980, 982 (1916).

[20] *People* v. *Fujita* and *Estate of Yano,* both *supra* note 19; *DeLevillain* v. *Evans,* 39 Cal. 120, 123 (1870).

Fred Oyama, on the other hand, faced at the outset the necessity of overcoming a statutory presumption that conveyances financed by his father and recorded in Fred's name were not gifts at all. Something very akin to a resulting trust *was* presumed and, at least *prima facie,* Fred *was* presumed to hold title for the benefit of his parent.[21]

In the second place, when it came to rebutting this statutory presumption, Fred Oyama ran into other obstacles which, so far as we can ascertain, do not beset the path of most minor donees in California.

Thus the California courts said that the very fact that the transfer put the land beyond the father's power to deal with it directly—to deed it away, to borrow money on it, and to make free disposition of it in any other way—showed that the transfer was not complete, that it was merely colorable. The fact that the father attached no strings to the transfer was taken to indicate that he meant, in effect, to acquire the beneficial ownership himself. The California law purports to permit citizen sons to take gifts of agricultural land from their fathers, regardless of the fathers' nationality. Yet, as indicated by this case, if the father is ineligible for citizenship, facts which would usually be considered indicia of the son's ownership are used to make that ownership suspect; if the father is not an ineligible alien, however, the same facts would be evidence that a completed gift was intended.

Furthermore, Fred Oyama had to counter evidence that his father was remiss in his duties as guardian. Acts

[21] It is interesting to note that in two previous cases the California Supreme Court has explicitly stated that where aliens are prohibited from holding lands, an implied trust by operation of law will not arise in their favor. *Estate of Yano* and *People* v. *Fujita,* both *supra,* note 19. Both cases were decided before purchase of either of the parcels involved in this case and at the time of the purchase apparently represented the established State law.

subsequent to a transfer may, of course, be relevant to indicate a transferor's intent at the time of the transfer. In this case the trial court itself had reservations as to the evidentiary value of the father's omissions; [22] with these we agree, especially because there was some reason to believe reports were not required of him until 1943, [23] and he had been excluded from the state from 1942 on. More important to the issue of equal protection, however, our attention has been called to no other case in which the penalty for a guardian's derelictions has fallen on any one but the guardian. At any time the court supervising the guardianship could have demanded the annual accounts and, if appropriate, could have removed Kajiro Oyama as guardian; severe punishment could also have been meted out.[24] The whole theory of

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[22] While relying to some extent on this inference the trial court indicated that it did not consider it a strong one "because sometimes people who are not informed as to the requirements of the law in connection with those matters simply fail to do the thing that the law requires."

[23] Section 4 of the Alien Land Law, as amended in 1920, prohibited ineligible aliens from becoming guardians of agricultural land owned by their minor children, Cal. Stats. 1921, p. lxxxiii, while § 5 required certain reports of persons who could and did become guardians of such land—*i. e.*, persons other than the parents. Section 4 was held invalid in 1922 in *Estate of Yano, supra* note 21, and was not replaced until 1943, when there was enacted a new § 4 enunciating requirements for ineligible alien guardians. Section 5 has remained on the books continuously.

Petitioners argue that there may have been at least a justifiable belief on the part of ineligible aliens such as Kajiro Oyama that they were not required to file guardianship reports until 1943. As inferential corroboration of this view, they point to the failure of both the guardianship court and the district attorney to take action against Kajiro Oyama under § 5 between 1935 and 1943.

[24] If, as the State contends, § 5 of the Act required Kajiro Oyama to file annual reports, the same section set as the penalty for violation a fine up to $1,000 and imprisonment up to a year. Other statutes of general applicability subject guardians to the law of trusts and

guardianships is to protect the ward during his period of incapacity to protect himself. In Fred Oyama's case, however, the father's deeds were visited on the son; the ward became the guarantor of his guardian's conduct.

The cumulative effect, we believe, was clearly to discriminate against Fred Oyama. He was saddled with an onerous burden of proof which need not be borne by California children generally. The statutory presumption and the two ancillary inferences, which would not be used against most children, were given such probative value as to prevail in the face of a deed entered in the public records, four court orders recognizing Fred Oyama as the owner of the land, several newspaper notices to the same effect, and testimony that business transactions regarding the land were generally understood to be on his behalf. In short, Fred Oyama lost his gift, irretrievably and without compensation, solely because of the extraordinary obstacles which the State set before him.

The only basis for this discrimination against an American citizen, moreover, was the fact that his father was Japanese and not American, Russian, Chinese, or English. But for that fact alone, Fred Oyama, now a little over a year from majority, would be the undisputed owner of the eight acres in question.

The State argues that racial descent is not the basis for whatever discrimination has taken place. The argument is that the same statutory presumption of fraud would apply alike to any person taking agricultural land paid for by Kajiro Oyama, whether the recipient was Fred Oyama or a stranger of entirely different ancestry. We do not know how realistic it is to suppose that Kajiro

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authorize the court to remove a guardian for mismanagement or failure to render accounts. Cal. Prob. Code §§ 1400, 1580. Furthermore, since 1943 the statute has provided that breach of § 4 may subject the guardian to a maximum of 10 years' imprisonment and a $5,000 fine.

Oyama would attempt gifts of land to others than his close relatives. But in any event, the State's argument ignores the fact that the generally applicable California law treats conveyances to the transferor's children differently from conveyances to strangers. Whenever a Chinese or English parent, to take an example, pays a third party to deed land to a stranger, a resulting trust is presumed to arise, and the stranger is presumed to hold the land for the benefit of the person paying the consideration; [25] when the Alien Land Law applies a similar presumption to a like transfer by Kajiro Oyama to a stranger, it appears merely to reiterate the generally applicable law of resulting trusts. When, on the other hand, the same Chinese or English father uses his own funds to buy land in his citizen son's name, an indefeasible title is presumed to vest in the boy; [26] but when Kajiro Oyama arranges a similar transfer to Fred Oyama, the Alien Land Law interposes a presumption just to the contrary. Thus, as between the citizen children of a Chinese or English father and the citizen children of a Japanese father, there is discrimination; as between strangers taking from the same transferors, there appears to be none.

It is for this reason that *Cockrill* v. *California,* 268 U. S. 258 (1925), does not support the State's position. In that case an ineligible alien paid for land and had title put in a stranger's name, and this Court affirmed a decision upholding the statutory presumption of the Alien Land Law as there applied.[27]

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[25] Cal. Civil Code § 853.

[26] See note 18 *supra.*

[27] In the *Cockrill* case the ineligible alien, one Ikada, first attempted to purchase the land in his own name. When the seller questioned the legality of the transfer, it was arranged for title to be put in the name of Cockrill, Ikada's attorney. That was done, and immediately on execution of the contract of sale, Ikada himself entered into possession. There was some evidence that the land was purchased and was being held for Ikada's American-born children, but a jury found

There remains the question of whether discrimination between citizens on the basis of their racial descent, as revealed in this case, is justifiable. Here we start with the proposition that only the most exceptional circumstances can excuse discrimination on that basis in the face of the equal protection clause and a federal statute giving all citizens the right to own land.[28] In *Hirabayashi* v. *United States,* this Court sustained a war measure which involved restrictions against citizens of Japanese descent. But the Court recognized that, as a general rule, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." 320 U. S. 81, 100 (1943).

The only justification urged upon us by the State is that the discrimination is necessary to prevent evasion of the Alien Land Law's prohibition against the ownership of agricultural land by ineligible aliens. This reasoning presupposes the validity of that prohibition, a premise which we deem it unnecessary and therefore inappropriate to reexamine in this case. But assuming, for purposes of argument only, that the basic prohibition is constitutional, it does not follow that there is no consti-

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Ikada and Cockrill guilty of conspiracy to violate the Alien Land Law. In affirming, the California appellate court pointed out that no move had been made toward having a guardian appointed for the children. 62 Cal. App. 22, 45, 216 Pac. 78, 88. Before this Court Ikada and Cockrill argued that the statutory presumption denied equal protection to the Japanese, not to the donee as in the present case.

Since we do not reach petitioners' second argument, that it is unconstitutional for a state to forbid the ownership of land by an ineligible alien, we do not think it appropriate to reexamine either the cases cited in note 12, *supra,* or the necessary implication in the *Cockrill* case that the basic prohibition of the Alien Land Law is valid.

[28] See note 13 *supra.*

tutional limit to the means which may be used to enforce it. In the light most favorable to the State, this case presents a conflict between the State's right to formulate a policy of landholding within its bounds and the right of American citizens to own land anywhere in the United States. When these two rights clash, the rights of a citizen may not be subordinated merely because of his father's country of origin.

Since the view we take of petitioners' first contention requires reversal of the decision below, we do not reach their other contentions: that the Alien Land Law denies ineligible aliens the equal protection of the laws, and that failure to apply any limitations period to escheat actions under that law takes property without due process of law.

Reversed.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS agrees, concurring.

I concur in the Court's judgment and its opinion. But I should prefer to reverse the judgment on the broader grounds that the basic provisions of the California Alien Land Law violate the equal protection clause of the Fourteenth Amendment and conflict with federal laws and treaties governing the immigration of aliens and their rights after arrival in this country. The California law in actual effect singles out aliens of Japanese ancestry, requires the escheat of any real estate they own, and its language is broad enough to make it a criminal offense, punishable by imprisonment up to ten years, for them to acquire, enjoy, use, possess, cultivate, occupy, or transfer real property.[1] It would therefore appear to be a crime

[1] Section 10 (a) of the Alien Property Initiative Act provides: "Any person who violates any of the provisions of this act shall be punishable by imprisonment in the county jail not to exceed one

for an alien of Japanese ancestry to own a home in California, at least if the land around it is suitable for cultivation.[2] This is true although the statute does not name the Japanese as such, and although its terms also apply to a comparatively small number of aliens from other countries. That the effect and purpose of the law is to discriminate against Japanese because they are Japanese is too plain to call for more than a statement of that well-known fact.

We are told, however, that, despite the sweeping prohibition against Japanese ownership or occupancy, it is no violation of the law for a Japanese to work on land as a hired hand for American citizens or for foreign nationals permitted to own California lands. And a Japanese man or woman may also use or occupy land if acting only in the capacity of a servant. In other words, by this Alien Land Law California puts all Japanese aliens within its boundaries on the lowest possible economic level. And this Land Law has been followed by another which now bars Japanese from the fishing industry. Cal. Stats. 1945, c. 181; see *Takahashi* v. *Fish & Game Comm'n,* 30 Cal. 2d

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year or in the State penitentiary not exceeding 10 years, or by a fine not to exceed five thousand dollars ($5,000) or both." Section 2 of the Act provides that aliens ineligible for citizenship "may acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein" in California only to the extent allowed by treaty between the United States and the nation of which the alien is a citizen.

[2] The United States-Japanese Treaty of 1911, which guaranteed Japanese in this country the right to own and lease land "for residential and commercial purposes," 37 Stat. 1504, was abrogated effective January 26, 1940. Dept. of State Bull., July 29, 1939, p. 81. Since the abrogation of this treaty, it is doubtful whether Japanese aliens in California may own or rent a home or a business. We are told that a recent intermediate court decision upholding the right of Japanese aliens to rent a building for business purposes, *Palmero* v. *Stockton Theatres,* 172 P. 2d 103 (1946), has been appealed to the Supreme Court of California.

719, 185 P. 2d 805. If there is any one purpose of the Fourteenth Amendment that is wholly outside the realm of doubt, it is that the Amendment was designed to bar States from denying to some groups, on account of their race or color, any rights, privileges, and opportunities accorded to other groups. I would now overrule the previous decisions of this Court that sustained state land laws which discriminate against people of Japanese origin residing in this country.[3]

Congress has provided strict immigration tests and quotas. It has also enacted laws to regulate aliens after admission into the country. Other statutes provide for deportation of aliens. Although Japanese are not permitted to become citizens by the ordinary process of naturalization, still Congress permitted the admission of some Japanese into this country. All of this means that Congress, in the exercise of its exclusive power over immigration, *Truax* v. *Raich,* 239 U. S. 33, 42, decided that certain Japanese, subject to federal laws, might come to and live in any one of the States of the Union. The Supreme Court of California has said that one purpose of that State's Land Law is to "discourage the coming of Japanese into this state . . . ." *Estate of Yano,* 188 Cal. 645, 658, 206 P. 995, 1001. California should not be permitted to erect obstacles designed to prevent the immigration of people whom Congress has authorized to come into and remain in the country. See *Hines* v. *Davidowitz,* 312 U. S. 52, 68. There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to "promote . . . universal respect for, and observance of, human rights and fundamen-

[3] *Terrace* v. *Thompson,* 263 U. S. 197; *Porterfield* v. *Webb,* 263 U. S. 225; *Webb* v. *O'Brien,* 263 U. S. 313; *Frick* v. *Webb,* 263 U. S. 326.

tal freedoms for all without distinction as to race, sex, language, or religion."[4] How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?

MR. JUSTICE MURPHY, with whom MR. JUSTICE RUTLEDGE joins, concurring.

To me the controlling issue in this case is whether the California Alien Land Law on its face is consistent with the Constitution of the United States. Can a state prohibit all aliens ineligible for American citizenship from acquiring, owning, occupying, enjoying, leasing or transferring agricultural land? Does such a prohibition square with the language of the Fourteenth Amendment that no state shall "deny to any person within its jurisdiction the equal protection of the laws"?

The negative answer to those queries is dictated by the uncompromising opposition of the Constitution to racism, whatever cloak or disguise it may assume. The California statute in question, as I view it, is nothing more than an outright racial discrimination. As such, it deserves constitutional condemnation. And since the very core of the statute is so defective, I consider it necessary to give voice to that fact even though I join in the opinion of the Court.

In its argument before us, California has disclaimed any implication that the Alien Land Law is racist in its origin, purpose or effect. Reference is made to the fact that nowhere in the statute is there a single mention of race, color, creed or place of birth or allegiance as a determinant of who may not own or hold farm land. The discrimination established by the statute is said to

[4] United Nations Charter, Articles 55c and 56; 59 Stat. 1045, 1046 (1945).

be entirely innocent of the use of such factors, being grounded solely upon the reasonable distinctions created by Congress in its naturalization laws. However, an examination of the circumstances surrounding the original enactment of this law in 1913, its reenactment in 1920 and its subsequent application reveals quite a different story.[1]

The California Alien Land Law was spawned of the great anti-Oriental virus which, at an early date, infected many persons in that state. The history of this anti-Oriental agitation is not one that does credit to a nation that prides itself, at least historically, on being the friendly haven of the tired and the oppressed of other lands. Beginning in 1850, with the arrival of substantial numbers of Chinese immigrants, racial prejudices and discriminations began to mount. Much of the opposition to these Chinese came from trade unionists, who feared economic competition, and from politicians, who sought union support. Other groups also shared in this opposition. Various laws and ordinances were enacted for the purpose of discouraging the immigrants and dramatizing

[1] The story is a familiar one and has been told many times. See the following sources:

Treatises.—Millis, The Japanese Problem in the United States (1915); Ichihashi, Japanese in the United States (1932); Strong, The Second Generation Japanese Problem (1934); McWilliams, Prejudice (1944); Konvitz, The Alien and the Asiatic in American Law (1946), ch. 5.

Articles.—Buell, "The Development of Anti-Japanese Agitation in the United States," 37 Pol. Sci. Q. 605, 38 *id.* 57; Bailey, "California, Japan, and the Alien Land Legislation of 1913," 1 Pac. Hist. Rev. 36; McGovney, "The Anti-Japanese Land Laws of California and Ten Other States," 35 Calif. L. Rev. 7; Ferguson, "The California Alien Land Law and the Fourteenth Amendment," 35 Calif. L. Rev. 61; Comment, 56 Yale L. J. 1017.

Government Publications.—H. R. Rep. No. 2124, 77th Cong., 2d Sess.; U. S. Dept. of Interior, W. R. A., People in Motion: The Post-war Adjustment of the Evacuated Japanese Americans (1947).

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the native dissatisfaction. Individual Chinese were subjected to many acts of violence. Eventually, Congress responded to this popular agitation and adopted Chinese exclusion laws.

It was not until 1900 that Japanese began to arrive in California in large numbers. By that time the repressive measures directed at the Chinese had achieved much of their desired effect; the Chinese population had materially decreased and the antipathy of the Americans was on the decline. But the arrival of the Japanese fanned anew the flames of anti-Oriental prejudice. History then began to repeat itself. White workers resented the new influx, a resentment which readily lent itself to political exploitation. Demands were made that Japanese immigration be limited or prohibited entirely.[2] Numerous

[2] "In November of 1904 the American Federation of Labor, in annual convention in San Francisco, resolved to exclude Japanese and Korean, as well as Chinese laborers. The San Francisco Chronicle in February 1905 began the publication of a series of articles captioned: 'Crime and Poverty Go Hand in Hand with Asiatic Labor,' 'Brown Men an Evil in the Public Schools,' 'Japanese a Menace to American Women,' 'Japs Throttle Progress in the Rich Fruit Section.' The campaign was immediately effective. In early March the California Legislature, followed by the Nevada Legislature, passed a resolution demanding immediate action to limit the immigration of Japanese laborers. And in May 1905 the Asiatic Exclusion League, originally the Japanese and Korean Exclusion League, was organized in San Francisco . . . .

"The avowed purpose of the league was to preserve North America for Americans, by preventing or minimizing the immigration of Asiatics, who were said to be unassimilable, and ill-suited to complement the machine processes of American industrial life. The league declared itself in favor of segregation of Japanese in the schools and a boycott against Japanese workers and businessmen. In California alone, it was claimed that membership of the league was 110,000 in February of 1908. Of the 238 affiliated bodies composing the league, 202 were labor unions; the rest were fraternal, civic, benevolent, political, and military societies." H. R. Rep. No. 2124, 77th Cong., 2d Sess., pp. 72–73.

acts of violence were perpetrated against Japanese businessmen and workers, combined with private economic sanctions designed to drive them out of business. Charges of espionage, unassimilativeness, clannishness and corruption of young children were made against these "Mongolian invaders." Campaigns were organized to secure segregated schools and to preserve "America for the Americans."

Indeed, so loud did this anti-Japanese clamor become that the Japanese Government made formal protests to the United States. President Theodore Roosevelt thereupon investigated and intervened in the California situation. He was able to secure a slight amelioration. Further negotiations with the Japanese Government resulted in a so-called "gentlemen's agreement," whereby the Japanese Government agreed to limit passports to the United States to nonlaborers and to others who had already established certain business and personal interests in this country.[3]

But the agitation did not die and anti-Japanese measures continued to be proposed in wholesale fashion. The first anti-Japanese land bills were introduced in the California legislature in 1907, but the combined efforts of President Roosevelt and Governor Gillett prevented their passage. At least seventeen anti-Japanese bills were introduced in the 1909 session, including another land bill. President Roosevelt again intervened. This time he succeeded in having the land bill amended to apply to all aliens, as a result of which the bill was defeated;[4] he was also instrumental in preventing the

[3] See Ichihashi, Japanese in the United States (1932), ch. XVI.

[4] During the legislative debate on this bill, one of the assemblymen stated: "I would rather every foot of California was in its native wilderness than to be cursed by the foot of these yellow invaders, who are a curse to the country, a menace to our institutions, and destructive of every principle of Americanism. I want no aliens, white, red,

passage of a school segregation bill. The flood of anti-Japanese proposals continued in the 1911 session, at which more than twenty such measures were introduced. Among them, of course, was still another alien land bill. It provided that "no alien who is not eligible to citizenship" should hold real property in California. The prospects for the passage of this bill seemed good, for by this time all political parties in the state had anti-Japanese planks in their platforms. But Presidential intervention was once again successful and the bill died in committee.[5]

In 1913, however, nothing could stop the passage of the original version of what is now the Alien Land Law.[6] This measure, though limited to agricultural lands, represented the first official act of discrimination aimed at the Japanese. Many Japanese were engaged in agricultural pursuits in 1913 and they constituted a substantial segment of the California farm labor supply. From 1900 to 1910, Japanese-controlled farms in California had in-

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black or yellow, to own a foot of land in the State of California." Another assemblyman said that he intensely and unalterably hated the Japanese, whom he characterized as "a bandy-legged bagaboo, miserable craven Simian, degenerated rotten little devil." From the San Francisco Chronicle, February 3, 1909, quoted in Ichihashi, Japanese in the United States (1932), p. 262.

[5] Also opposing the bill at this time was the Panama Pacific Exposition Company and its supporters. They desired not to antagonize Japan and thus jeopardize the chances of Japan's participation in the exposition, which was soon to be held at San Francisco.

[6] "By 1913 the political situation was ripe for the passage of an anti-Japanese land law. The state administration in California remained Progressive Republican while the national administration became Democratic and exercised less influence over the state legislature. The Exposition had progressed to the point where the appeal for its success was no longer sufficiently effective. Opposition to the bill came only from a few relatively ineffective groups." Ferguson, "The California Alien Land Law and the Fourteenth Amendment," 35 Calif. L. Rev. 61, 66.

creased from 4,698 acres to 99,254 acres. The agricultural situation thus offered a fruitful target for the anti-Japanese forces, who had been balked in their attempts to secure a ban on all Japanese immigration and to outlaw Japanese acquisition and enjoyment of residential and commercial property. In this new endeavor they were eminently successful. Secretary of State Bryan, acting on behalf of President Wilson, made a personal appearance in California to plead for caution, but his request was ignored as the legislators voted overwhelmingly in favor of the bill. This 1913 law denied "aliens ineligible to citizenship" the privilege of buying land for agricultural purposes in California, and allowed them to lease land for such purposes for no more than three years. The measure was so drawn as not to be inconsistent with the Japanese-American treaty of 1911, which authorized Japanese in this country to lease and occupy land for residential and commercial purposes. But since the treaty made no mention of agricultural land, legislation on the matter by California did not present a square conflict.

The passage of the law was an international incident. The Japanese Government made an immediate protest on the ground that the statute was an indication of unfriendliness towards its people. Indeed, the resentment was so violent inside Japan that demands were made that war be declared against the United States. Anti-American agitation grew rapidly.[7] The question

[7] "The land act could not have been passed at a more inopportune time. Shortly prior to its adoption, this country had aroused considerable resentment in Japan by its recognition of the newly established Chinese Republic. . . . Furthermore the land act was passed, as Mr. A. M. Pooley has pointed out, 'shortly after the Tokio mob had succeeded in shattering the third Katsura Ministry.' Passage of the bill occasioned violent resentment in Japan. 'Revelling in the recent discovery of its power,' writes Mr. Pooley, 'the mob, inflamed by the opposition, endeavored to use the same methods to force a

was discussed at length on the diplomatic level. It was declared by the Japanese Minister of Foreign Affairs that the statute "is essentially unfair and invidiously discriminatory against my countrymen, and inconsistent as well with the sentiments of amity and good neighborhood which have presided over the relations between the two countries . . . ." [8] But the matter was allowed to lapse as both countries became increasingly occupied with the developments of World War I.

The intention of those responsible for the 1913 law was plain. The "Japanese menace" was to be dealt with on a racial basis. The immediate purpose, of course, was to restrict Japanese farm competition. As subsequently stated by Governor Stephens of California, "In 1913 the Legislature of this state passed a statute forbidding the ownership of agricultural lands by Japanese and limiting their tenure to three-year leaseholds. It was the hope at that time that the enactment of this statute might put a stop to the encroachments of the Japanese agriculturist." [9] Actually, however, the law had little effect on the

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settlement of the California question on the government' that it had used in ousting the Katsura Ministry. Throughout April and May, 1913, the Japanese press adopted a most threatening and truculent tone. California newspapers on April 18, 1913, carried a dispatch from Tokyo to the effect that 'a demand that Japan resort to arms was hysterically cheered at a mass meeting here tonight to protest against the alien land bill now pending before the California legislature. Twenty thousand persons assembled.'

" 'More unfortunate still,' observed Mr. Pooley, 'the wave of excitement grew under the stimulus of anti-American societies formed by men in responsible positions. The agitation of April and May, 1913, became a national movement and of such volume that the Government had to pay respect to it. The anti-American movement spread, associations sprang up like mushrooms to deal with the matter.' " McWilliams, Prejudice (1944), p. 46.

[8] Quoted in Ichihashi, Japanese in the United States (1932), p. 274.

[9] Report of California State Board of Control, California and the Oriental (1920), p. 11.

farm situation. It failed to prohibit the acquisition of farms in the future or to divest any existing holdings; and there was no limitation on the renewal of leases. The Japanese farm population remained largely intact.

The more basic purpose of the statute was to irritate the Japanese, to make economic life in California as uncomfortable and unprofitable for them as legally possible. It was thus but a step in the long campaign to discourage the Japanese from entering California and to drive out those who were already there. The Supreme Court of California admitted as much in its statement that the Alien Land Law was framed so as "to discourage the coming of Japanese into this state." *Estate of Tetsubumi Yano,* 188 Cal. 645, 658, 206 P. 995, 1001. Even more candid was the declaration in 1913 by Ulysses S. Webb, one of the authors of the law and an Attorney General of California. He stated: "The fundamental basis of all legislation upon this subject, State and Federal, has been, and is, race undesirability. It is unimportant and foreign to the question under discussion whether a particular race is inferior. The simple and single question is, is the race desirable . . . . It [the Alien Land Law] seeks to limit their presence by curtailing their privileges which they may enjoy here; for they will not come in large numbers and long abide with us if they may not acquire land. And it seeks to limit the numbers who will come by limiting the opportunities for their activity here when they arrive." [10]

[10] From a speech before the Commonwealth Club of San Francisco on August 9, 1913, quoted in Ichihashi, Japanese in the United States (1932), p. 275.

Apparently one factor which, in Mr. Webb's mind, made the Japanese an "undesirable" race was their efficiency in agricultural production. In a brief signed by him and submitted to this Court in *Porterfield* v. *Webb,* 263 U. S. 225 (No. 28, OT 1923), p. 25, he stated:

"The fundamental question is not one of race discrimination. It

Further evidence of the racial prejudice underlying the Alien Land Law is to be found in the events relating to the reenactment and strengthening of the statute by popular initiative in 1920. More severe and effective than the 1913 law, the initiative measure prohibited ineligible aliens from leasing land for agricultural purposes; and it plugged various other loopholes in the earlier provisions. A spirited campaign was waged to secure popular approval, a campaign with a bitter anti-Japanese flavor. All the propaganda devices then known—newspapers, speeches, films, pamphlets, leaflets, billboards, and the like—were utilized to spread the anti-Japanese poison.[11] The Japanese were depicted as

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is a question of recognizing the obvious fact that the American farm, with its historical associations of cultivation, environment, and including the home life of its occupants, can not exist in competition with a farm developed by Orientals with their totally different standards and ideas of cultivation of the soil, of living and social conditions.

"If the Oriental farmer is the more efficient, from the standpoint of soil production, there is just that much greater certainty of an economic conflict which it is the duty of statesmen to avoid.

"The conservative and intelligent statesmen of Japan have recognized this truth just as fully as have those of America. It is far better to have an occasional outburst from extremists who refuse to recognize the underlying reason for such legislation, than to permit of a condition that would lead to results far more serious from the standpoint of the friendly relations of the two nations."

[11] "In point of virulence, the 1920 agitation far exceeded any similar demonstration in California. In support of the initiative measures, the American Legion exhibited a motion picture throughout the state entitled 'Shadows of the West.' All the charges ever made against the Japanese were enacted in this film. The film showed a mysterious room fitted with wireless apparatus by which 'a head Japanese ticked out prices which controlled a state-wide vegetable market'; spies darted in and out of the scenes, Japanese were shown dumping vegetables into the harbor to maintain high prices; two white girls were abducted by a group of Japanese men only to be rescued, at the last moment, by a squad of American Legionnaires. When meetings were called to protest the exhibition of this scurrilous film, the meetings were broken up." McWilliams, Prejudice (1944), p. 60.

degenerate mongrels and the voters were urged to save "California—the White Man's Paradise" from the "yellow peril," which had somewhat lapsed in the public mind since 1913. Claims were made that the birth rate of the Japanese was so high that the white people would eventually be replaced and dire warnings were made that the low standard of living of the Japanese endangered the economic and social health of the community. Opponents of the initiative measure were labeled "Jap-lovers." The fires of racial animosity were thus rekindled and the flames rose to new heights.

In a pamphlet officially mailed to all voters prior to the election, they were told that the primary purpose of the new measure was "to prohibit Orientals who cannot become American citizens from controlling our rich agricultural lands . . . . Orientals, and more particularly Japanese, [have] commenced to secure control of agricultural lands in California . . . ." [12] The arguments in the pamphlet in support of the measure were repeatedly directed against the Japanese alone, without reference to other Orientals or to others who were ineligible for American citizenship. In this atmosphere heavy with race hatred, the voters gave decisive approval to the proposal, 668,483 to 222,086, though the majority constituted less than half of the total electorate. But so virulent had been the campaign and so deep had been the natural resentment in Japan that once again the threat of war appeared on the horizon, only to die in the rush of other events.

It is true that the Alien Land Law, in its original and amended form, fails to mention Japanese aliens by name. Some of the proposals preceding the adoption of the original measure in 1913 had in fact made specific refer-

[12] From the pamphlet, "Argument in Favor of Proposed Alien Land Law," quoted in McGovney, "The Anti-Japanese Land Laws of California and Ten Other States," 35 Calif. L. Rev. 7, 14.

ence to Japanese aliens. But the expansion of the discrimination to include all aliens ineligible for citizenship did not indicate any retreat from the avowed anti-Japanese purpose. Adoption of the Congressional standard of ineligibility for citizenship was only an indirect, but no less effective, means of achieving the desired end. The federal legislation at all pertinent times has been so drawn as to exclude Japanese aliens from American citizenship.[13] This Court has said, in referring to such legislation, that "a person of the Japanese race, if not born a citizen, is ineligible to become a citizen, i. e., to be naturalized." *Morrison* v. *California*, 291 U. S. 82, 85. The framers of the California law were therefore able to utilize the federal standard with full assurance that the result would be to exclude Japanese aliens from the ownership and use of farm land. Congress supplied a ready-made vehicle for discriminating against Japanese aliens, a vehicle which California was prompt to grasp and expand to purposes quite beyond the scope or object of the Congressional statute.

Moreover, there is nothing to indicate that the proponents of the California law were at any time concerned with the use or ownership of farm land by ineligible aliens other than those of Japanese origin. Among those ineligible for citizenship when the law was under consideration were Chinese aliens. But the Chinese in California were generally engaged in small commercial

[13] See 8 U. S. C. § 703, as last amended on July 2, 1946, 60 Stat. 416. This extends the right to become a naturalized citizen only to white persons, persons of African nativity or descent, persons who are descendants of races indigenous to the continents of North or South America or adjacent islands, Filipino persons, Chinese persons and persons of Chinese descent, and persons of races indigenous to India. But Chinese and Hindus were not eligible at the time the Alien Land Law was under consideration.

enterprises rather than in agricultural occupations and, in addition, were not considered a menace because of the Chinese exclusion acts.[14] No mention was made by the statute's proponents of the Hindus or the Malay and Polynesian aliens who were resident in California. Aliens of the latter types were so numerically insignificant as to arouse no interest or animosity.[15] Only the Japanese aliens presented the real problem. It was they, the "yellow horde," who were the object of the legislation.

That fact has been further demonstrated by the subsequent enforcement of the Alien Land Law. At least 79 escheat actions have been instituted by the state since the statute became effective. Of these 79 proceedings, 4 involved Hindus, 2 involved Chinese and the remaining 73 involved Japanese.[16] Curiously enough, 59 of the 73 Japanese cases were begun by the state subsequent to Pearl Harbor, during the period when the hysteria generated by World War II magnified the opportunities for

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[14] "The people of that state [California] did not object particularly to Chinese and negroes, who were racially different but who stayed in their place. But they did object to the Japanese because they were efficient, thrifty, ambitious, and, above all, unwilling to remain 'mudsillers.'" Bailey, "California, Japan, and the Alien Land Legislation of 1913," 1 Pac. Hist. Rev. 36, 57.

[15] The California State Board of Control collected statistics in 1920 as to city lots and farm lands occupied by Orientals, both American citizens and aliens. Of the total of 27,931,444 acres of farm land in the state, Japanese owned 74,769 acres, Chinese owned 12,076 acres and Hindus owned 2,099 acres. At the same time, Japanese held under lease or crop contract 383,287 acres, Chinese held 65,181 acres and Hindus held 86,340. There was no indication that any other aliens then ineligible for citizenship held any substantial amount of farm lands. Report, California and the Oriental (1920), p. 47.

[16] These statistics have been compiled by the petitioner (Appendix B of brief in this Court) from the biennial reports of the California Attorney General's Office from 1912–14 through 1944–46, as supplemented by the state's brief in this case (p. 47).

effective anti-Japanese propaganda.[17] Vigorous enforcement of the Alien Land Law has been but one of the cruel discriminatory actions which have marked this nation's treatment since 1941 of those residents who chanced to be of Japanese origin.

The Alien Land Law, in short, was designed to effectuate a purely racial discrimination, to prohibit a Japanese alien from owning or using agricultural land solely because he is a Japanese alien. It is rooted deeply in racial, economic and social antagonisms. The question confronting us is whether such a statute, viewed against the background of racism, can mount the hurdle of the equal protection clause of the Fourteenth Amendment. Can a state disregard in this manner the historic ideal that those within the borders of this nation are not to be denied rights and privileges because they are of a particular race? I say that it cannot.

The equal protection clause is too clear to admit of any other conclusion. It provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The words "any person" have

[17] In 1944 the Attorney General of California explained that the substantial non-enforcement of the law prior to World War II was "a reflection of the National policy to refrain from acts which might be regarded as unfriendly to the Japanese race and the Japanese empire." Proceedings, California Land Title Association (38th Ann. Conf. 1944), p. 97. Such was also the reason given by a California Senate Fact Finding Committee on Japanese Resettlement (Report of May 1, 1945), p. 3: "The Federal authorities since the beginning have not looked with favor upon the enforcement of the law just as they opposed its enactment in the beginning. The principal reason for this attitude appears to have been that expressed by William Jennings Bryan when, as Secretary of State, he came to California in opposition to the enactment of this law. He stated that the enactment of the law might turn a now friendly Nation into an unfriendly Nation. Undoubtedly the attitude of the Federal authorities on this matter has been an important influence."

sufficient scope to include resident aliens, whether eligible for citizenship or not. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Truax* v. *Raich,* 239 U. S. 33. Hence Japanese aliens ineligible for citizenship must be accorded equal protection. And the laws as to which equal protection must be given certainly include those protecting the right to engage in common occupations like farming, *Yick Wo* v. *Hopkins, supra,* and those pertaining to the use and ownership of agricultural lands, *Buchanan* v. *Warley,* 245 U. S. 60. The concept of equal protection, however, may in rare cases permit a state to single out a class of persons, such as ineligible aliens, for distinctive treatment. The crucial test in these exceptional instances is whether there is a rational basis for the particular kind of discrimination involved. Are the characteristics of the class such as to provide a rational justification for the difference in treatment?

Such a rational basis is completely lacking where, as here, the discrimination stems directly from racial hatred and intolerance. The Constitution of the United States, as I read it, embodies the highest political ideals of which man is capable. It insists that our government, whether state or federal, shall respect and observe the dignity of each individual, whatever may be the name of his race, the color of his skin or the nature of his beliefs. It thus renders irrational, as a justification for discrimination, those factors which reflect racial animosity. Yet the history of the Alien Land Law shows beyond all doubt that factors of that nature make up the foundation upon which rests the discrimination established therein. And such factors are at once evident when the legal, social and economic considerations advanced in support of the discrimination are subjected to rigid scrutiny.

First. It is said that the rule established by Congress for determining those classes of aliens who may become

citizens furnishes in and of itself a reasonable basis for the discrimination involved in the Alien Land Law.

The proposition that the "plenary" power of Congress over naturalization is uninhibited, even by the constitutional prohibition of racism, is one that is open to grave doubts in my mind.[18] Racism has no justifiable place whatever in our way of life, even when it appears under the guise of "plenary" power. Cf. concurring opinion in *Bridges* v. *Wixon,* 326 U. S. 135, 161–162. But the fact remains that Congress has made racial distinctions in establishing naturalization standards. And those distinctions in large part have grown out of the demands of racially intolerant groups, including many of those who were among the foremost proponents of the Alien Land Law. Yet it does not follow, even if we assume that Congress was justified in adopting such racial distinctions, that California can blindly adopt those distinctions for the purpose of determining who may own and enjoy agricultural land. What may be reasonable and constitutional for Congress for one purpose may not be reasonable or constitutional for a state legislature for another and wholly distinct purpose. Otherwise there would be few practical limitations to the power of a state to discriminate among those within its jurisdiction, there being a plethora of federal classifications which could be copied.[19]

In other words, if a state wishes to borrow a federal classification, it must seek to rationalize the adopted distinction in the new setting. Is the distinction a reasonable one for the purposes for which the state desires to

[18] See Gordon, "The Racial Barrier to American Citizenship," 93 U. of Pa. L. Rev. 237.

[19] See *Arrowsmith* v. *Voorhies,* 55 F. 2d 310, holding invalid a Michigan statute which prohibited "undesirable aliens," as defined by the laws of the United States, from establishing or maintaining legal residence in that state or from securing employment in that state. See also *Hines* v. *Davidowitz,* 312 U. S. 52.

use it? To that question it is no answer that the distinction was taken from a federal statute or that the distinction may be rationalized for the purpose for which Congress used it. The state's use of the distinction must stand or fall on its own merits. And if it appears that the equal protection clause forbids the state from using the distinction for the desired purpose, the fact that Congress is free to adopt the distinction in some other connection gives the state no additional power to act upon it. Thus the state acquires no power whatever to impose racial discriminations upon resident aliens from the Congressional power to exclude some or all aliens on a racial basis.

Second. It is said that eligibility for American citizenship is inherently related to loyal allegiance and desire to work for the success and welfare of the state, which has a vital interest in the farm lands within its borders. Hence it may limit the ownership and use of farms to those who are or who may become citizens.

Such a claim is outlawed by reality. In 1940 there were 4,741,971 aliens residing in the continental United States, of whom 48,158 were ineligible for naturalization.[20] Many of these ineligible aliens have long been domiciled in this country. They have gone into various businesses and professions. They have established homes and reared children, who have the status of American citizens by virtue of their birth in this country. And they have entered into the social and religious fabrics of their communities. Such ineligible aliens thus have a vital interest in the economic, social and political well-being of the states in which they reside and their loyalty has been

[20] Of the 48,158 aliens ineligible for naturalization, 47,305 were Japanese, 749 were Korean, 9 were Polynesian, and 95 belonged to other Asiatic groups. 16th Census of the United States: 1940, Characteristics of the Nonwhite Population, p. 2.

proved many times.[21] The fact that they are ineligible for citizenship does not, by itself, make them incapable of forming these ties and interests. Nor does their ineligibility necessarily preclude them from possessing the loyalty and allegiance which the state rightly desires.

Loyalty and the desire to work for the welfare of the state, in short, are individual rather than group characteristics. An ineligible alien may or may not be loyal; he may or may not wish to work for the success and welfare of the state or nation. But the same can be said of an eligible alien or a natural born citizen. It is the essence of naïveté to insist that these desirable characteristics are always lacking in a racially ineligible alien, whose ineligibility may be remedied tomorrow by Congress.[22] These are matters which depend upon factors far more subtle and penetrating than the prevailing naturalization standards. As this Court has said, "Loyalty is a matter of the heart and mind, not of race, creed, or color." *Ex parte Endo,* 323 U. S. 283, 302. And so racial eligibility for citizenship is an irrational basis for determining who is loyal or who desires to work for the welfare of the state.

Third. It has been said that if ineligible aliens could lease or own farms, it is within the realm of possibility that they might acquire every foot of land in California which is fit for agriculture.

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[21] There was no indication of any sabotage or other subversive activities in the period surrounding Pearl Harbor on the part of Japanese aliens long resident in this country.

[22] Thus see the recent amendment to the Naturalization Act, 56 Stat. 182, 8 U. S. C. § 1001, permitting the naturalization of every person who honorably served in the armed forces of the United States during World War II without regard to what would otherwise be racial ineligibility. Presumably a Japanese alien could own or use farm land in California if he meets the requirements of this provision.

If we assume that it is wrong for ineligible aliens to own or use all the farm land in California, such a contention is statistically absurd.[23] The Japanese population in California, both citizen and alien, has increased from 41,356 (more than one-tenth of them citizens) in 1910 to 71,952 (about one-third of them citizens) in 1920 to 93,717 (about two-thirds of them citizens) in 1940. Of the total farms in California in 1920, Japanese citizens and aliens controlled 4.4%, comprising 1.2% of the total acreage. In 1930 they controlled 2.9% of the farms, or 0.6% of the acreage. And in 1940 they controlled 3.9% of the farms, or 0.7% of the acreage. Since we are concerned here only with the Japanese aliens, the percentage of the farms and acreage controlled by them is materially less than the foregoing figures. Thus the possibility of all the California farm land falling under the control of Japanese aliens is quite remote, to say the least.

Moreover, the nature of the Japanese alien segment of the California population is significant. In 1940 there were 33,569 Japanese aliens in that state, but the number is now smaller, the best estimate being about 25,000.[24] The 33,569 figure represents those who entered before 1924, when Congress prohibited further immigration of aliens ineligible for citizenship.[25] By 1940, all but 2,760 of these individuals were 35 years of age or older. More than half of them were 50 years or more in age. These age figures have risen to 43 and 58 during the past eight years and death is beginning to take a more rapid toll. Deportation, voluntary return to Japan and departure

[23] The statistics which follow are taken from the 16th Census of the United States: 1940, Characteristics of the Nonwhite Population. See also McGovney, "The Anti-Japanese Land Laws of California and Ten Other States," 35 Calif. L. Rev. 7, 15–16.

[24] McGovney, "The Anti-Japanese Land Laws of California and Ten Other States," 35 Calif. L. Rev. 7, 14.

[25] 43 Stat. 161, 8 U. S. C. § 213 (c).

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to other states have also contributed to the decline. The number of these aliens decreased 42% between 1920 and 1940 and an ever-increasing loss is inevitable.

Further deductions from this declining total of Japanese aliens must be made, for our purposes, for men and women who are engaged in non-agricultural activities. In 1940 about 58% of them resided in urban centers of 2,500 population or more. Out of 23,208 alien Japanese, fourteen years of age or older, only 10,512 were reported as engaged in farming occupations. While the Alien Land Law has undoubtedly discouraged some from becoming farmers, the number who would normally be non-farmers remains relatively substantial. The farmers, actual and potential, among this declining group are numerically minute.

One other fact should be mentioned in this connection. "Many of these aged and aging Japanese aliens suffered heavy pecuniary losses incident to their evacuation during the war. Suddenly ordered to abandon their properties and their homes, many felt compelled to sell at sacrificial prices. Others lost through unfaithful custodianship of their properties during their absence. Confined to so-called relocation centers, they were cut off for nearly three years from any gainful employment. The result is that many of the well-to-do among them returned to California broken in fortune, with very few years of life left for financial recuperation." [26]

Such is the nature of the group to whom California would deny the right to own and occupy agricultural land. These elderly individuals, who have resided in this country for at least twenty-three years and who are constantly shrinking in number, are said to constitute a menace, a "yellow peril," to the welfare of California.

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[26] McGovney, "The Anti-Japanese Land Laws of California and Ten Other States," 35 Calif. L. Rev. 7, 16–17.

They are said to be encroaching on the agricultural interests of American citizens. They are said to threaten to take over all the rich farm land of California. They are said to be so efficient that Americans cannot compete with them. They are said to be so disloyal and so undesirous of working for the welfare of the state that they must be denied the right to earn a living by farming. The mere statement of these contentions in the context of the actual situation is enough to demonstrate their shallowness and unreality. The existence of a few thousand aging residents, possessing no racial characteristic dangerous to the legitimate interests of California, can hardly justify a racial discrimination of the type here involved.

Fourth. It is stated that Japanese aliens are so efficient in their farming operations and that their living standard is so low that American farmers cannot compete successfully with them. Their right to own and use farm lands must therefore be denied if economic conflicts are to be avoided.

That Japanese immigrants brought with them highly developed techniques of cultivation is not to be denied. In Japan they had learned to obtain the highest possible yield from each narrow strip of soil. And they possessed the willingness and ability to perform the great amount of labor necessary for intensive farming. When they came to California they put their efficient methods into operation. There they pioneered in the production of various crops and reclaimed large areas, developing some of the richest agricultural regions in the state. In performing these tasks, however, the Japanese caused no substantial displacement of American farmers. The areas which they cultivated were, for the most part, deserted or undesired by others.[27]

[27] McWilliams, Prejudice (1944), pp. 79–80.

But eventually, the Japanese concentrated all of their agricultural efforts in the production of vegetables, small fruits and greenhouse products, experience having shown that they could not compete successfully in larger farming endeavors. Within this truck-farm sphere, the Japanese achieved a near-monopoly by their diligence and efficiency. While they had, as we have seen, an infinitesimal proportion of the total farm acreage in California, their 1941 truck crops covered 42% of the state's acreage devoted to such production.[28] In Los Angeles County alone, they raised 64% of the truck crops for processing and 87% of the vegetables for fresh marketing.[29] This concentration of effort by the Japanese, many of whom were not aliens, naturally gave strong competition to other producers and forced some of them out of the field.

The success thus achieved through diligence and efficiency, however, does not justify prohibiting the Japanese from owning or using farm lands. Free competition and the survival of the fittest are supposedly vital elements in the American economic structure. And those who are injured by the fair operation of such elements can make no legitimate objection. It would indeed be strange if efficiency in agricultural production were to be considered a rational basis for denying one the right to engage in that production. Certainly from a constitutional standpoint, superiority in efficiency and productivity has never been thought to justify discrimination.

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[28] H. R. Rep. No. 2124, 77th Cong., 2d Sess., pp. 117–118. In 1941 the Japanese produced 90% or more of California's snap beans for marketing, spring and summer celery, peppers and strawberries; 50% to 90% of the artichokes, snap beans for canning, cauliflower, fall and winter celery, cucumbers, fall peas, spinach and tomatoes; 25% to 50% of the asparagus, cabbage, cantaloupes, carrots, lettuce, onions, and watermelons.

[29] *Id.*, p. 118.

Comparatively speaking, the standard of living of the Japanese immigrants may have been low at first. But they have worked to raise their standard despite such obstacles as the Alien Land Law. Like many other first-generation immigrants, the Japanese were often forced to work long hours for low pay. Yet nothing has indicated that, given a fair opportunity, they are incapable of improving their economic status. At the very least, a low standard of living is hardly a justification for a statute which operates to keep that standard low. Something more than its own bootstraps is needed to pull such a law up to the constitutional level.

Fifth. Closely knit with the foregoing are a host of other contentions which make no pretense at concealing racial bigotry and which have been used so successfully by proponents and supporters of the Alien Land Law. These relate to the alleged disloyalty, clannishness, inability to assimilate, racial inferiority and racial undesirability of the Japanese, whether citizens or aliens. The misrepresentations, half-truths and distortions which mark such contentions have been exposed many times and need not be repeated here. See dissenting opinion in *Korematsu* v. *United States,* 323 U. S. 214, 236–240. Suffice it to say that factors of this type form no rational basis for a statutory discrimination.

Unquestionably there were and are cultural, linguistic and racial differences between Japanese aliens and native Americans not of Japanese origin or ancestry.[30] The physical characteristics of the Japanese, their different customs and habits, their past connections with Japan, their unique family relationships, their Oriental religion, and their extreme efficiency all contributed to the social and economic conflicts which unfortunately developed. But the crucial mistake that was made, the mistake

[30] See McWilliams, Prejudice (1944), ch. III.

that made the attitude of many Americans one of intolerance and bigotry, was the quick assumption that these differences were all racial and unchangeable. From that mistake it was an easy step to charge that the Japanese race was undesirable and that all Japanese persons were unassimilable. And from that mistake flowed the many proposals to deal with the social and economic conflicts on a group or racial basis. It was just such a proposal that became the Alien Land Law.

Hence the basic vice, the constitutional infirmity, of the Alien Land Law is that its discrimination rests upon an unreal racial foundation. It assumes that there is some racial characteristic, common to all Japanese aliens, that makes them unfit to own or use agricultural land in California. There is no such characteristic. None has even been suggested. The arguments in support of the statute make no attempt whatever to discover any true racial factor. They merely represent social and economic antagonisms which have been translated into false racial terms. As such, they cannot form the rationalization necessary to conform the statute to the requirements of the equal protection clause of the Fourteenth Amendment. Accordingly, I believe that the prior decisions of this Court giving sanction to this attempt to legalize racism should be overruled.[31]

Added to this constitutional defect, of course, is the fact that the Alien Land Law from its inception has proved an embarrassment to the United States Government. This statute has been more than a local regulation of internal affairs. It has overflowed into the realm of foreign policy; it has had direct and unfortunate conse-

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[31] *Terrace* v. *Thompson*, 263 U. S. 197; *Porterfield* v. *Webb*, 263 U. S. 225; *Webb* v. *O'Brien*, 263 U. S. 313; *Frick* v. *Webb*, 263 U. S. 326.

quences on this country's relations with Japan. Drawn on a background of racial animosity, the law was so patent in its discrimination against Japanese aliens as to cause serious antagonism in Japan, even to the point of demands for war against the United States. The situation was so fraught with danger that three Presidents of the United States were forced to intervene in an effort to prevent the Alien Land Law from coming into existence. A Secretary of State made a personal plea that the passage of the law might turn Japan into an unfriendly nation. Even after the law became effective, federal authorities feared that enforcement of its provisions might jeopardize our relations with Japan. That fear was in large part responsible for the substantial non-enforcement of the statute prior to World War II. But the very existence of the law undoubtedly has caused many in Japan to bear ill-feeling toward this country, thus making friendly relations between the two nations that much more difficult.

Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.

And so in origin, purpose, administration and effect, the Alien Land Law does violence to the high ideals of the Constitution of the United States and the Charter of the United Nations. It is an unhappy facsimile, a disheartening reminder, of the racial policy pursued by those forces of evil whose destruction recently necessitated a devastating war. It is racism in one of its most malignant forms. Fortunately, the majority of the inhabitants of the United

States, and the majority of those in California,[32] reject racism and all of its implications. They recognize that under our Constitution all persons are entitled to the equal protection of the laws without regard to their racial ancestry. Human liberty is in too great a peril today to warrant ignoring that principle in this case. For that reason I believe that the penalty of unconstitutionality should be imposed upon the Alien Land Law.

MR. JUSTICE REED, with whom MR. JUSTICE BURTON joins, dissenting.

The Court's opinion assumes *arguendo* that the California Alien Land Laws are constitutional. As we read the opinion, it holds that the Alien Land Laws of California, as here applied, discriminate in an unconstitutional manner against an American citizen—a son born in the United States to resident parents of Japanese nationality. From this holding we dissent.

California, through an exercise of the police power, which has been repeatedly approved by us,[1] has prohibited ownership of land within the state by aliens ineligible for citizenship.[2] Recognizing that the benefits flowing from ownership can be enjoyed through subter-

[32] On November 5, 1946, the voters of California rejected by 1,143,780 to 797,067 an attempt to "close loopholes in legislative enactments [the Alien Land Laws] based on constitutional grounds." The rejected amendment validated various additions to the Alien Land Law which had been made by the legislature to prevent circumvention of that law. U. S. Dept. of Interior, W. R. A., People in Motion: The Postwar Adjustment of the Evacuated Japanese Americans (1947), pp. 41–45.

[1] See footnote 12 of the majority opinion.

[2] SEC. 1: "All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, use, cultivate, occupy, transfer, transmit and inherit real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof,

fuges by persons not the holders of legal or equitable title, California has proscribed as to the state every "conveyance . . . made with intent to prevent, evade or avoid escheat . . . ." [3] Transfers of real property made with

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in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of this state."

SEC. 2: "All aliens other than those mentioned in section one of this act may acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the manner and to the extent, and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

SEC. 7: "Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in Section 2 of this act, or by any company, association or corporation mentioned in Section 3 of this act, shall escheat as of the date of such acquiring, to, and become and remain the property of the State of California. . . ."

[3] SEC. 9: "Every transfer of real property, or of an interest therein, though colorable in form, shall be void as to the State and the interest thereby conveyed or sought to be conveyed shall escheat to the State as of the date of such transfer, if the property interest involved is of such a character that an alien mentioned in Section 2 hereof is inhibited from acquiring, possessing, enjoying, using, cultivating, occupying, transferring, transmitting or inheriting it, and if the conveyance is made with intent to prevent, evade or avoid escheat as provided for herein.

"A prima facie presumption that the conveyance is made with such intent shall arise upon proof of any of the following group of facts:

"(a) The taking of the property in the name of a person other than the persons mentioned in Section 2 hereof if the consideration is paid or agreed or understood to be paid by an alien mentioned in Section 2 hereof;

"(b) The taking of the property in the name of a company, association or corporation if the memberships or shares of stock therein held by aliens mentioned in Section 2 hereof, together with the memberships or shares of stock held by others but paid for or agreed or

this intent "shall be void as to the state and the interest thereby conveyed or sought to be conveyed shall escheat to the state as of the date of such transfer . . . ." To assist in the proof of "intent to prevent, evade or avoid escheat," the state was given the benefit of a "prima facie presumption that the conveyance is made with such intent . . ." where the state proves: "The taking of the property in the name of a person other than [an alien who cannot hold land] . . . if the consideration is paid or agreed or understood to be paid by an alien [who cannot hold land] . . . ." Thus the state has made void as to it, two substantive acts: (1) ownership of land by ineligible aliens and (2) transfers made to avoid by indirection the prohibition against ownership of land by ineligible aliens. The statutory scheme recognizes that the purpose of the Alien Land Laws cannot be achieved unless attempts to avoid the basic prohibition of the law are penalized. Any law aimed at the prevention of own-

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understood to be paid for by such aliens, would amount to a majority of the membership or issued capital stock of such company, association or corporation;

"(c) The execution of a mortgage in favor of an alien mentioned in Section 2 hereof if such mortgagee is given possession, control or management of the property.

"In each of the foregoing instances the burden of proof shall be upon the defendant to show that the conveyance was not made with intent to prevent, evade or avoid escheat.

. . . . . .

"The enumeration in this section of certain presumptions shall not be so construed as to preclude other presumptions or inferences that reasonably may be made as to the existence of intent to prevent, evade or avoid escheat as provided for herein."

Presumption (a) has not been challenged on due process grounds. Such an attack would be futile as there is a "rational connection between the fact[s] proved and the ultimate fact presumed." *Tot* v. *United States*, 319 U. S. 463, 467. In *Cockrill* v. *California*, 268 U. S. 258, this Court held that presumption (a) did not violate due process.

ership by ineligible aliens, which did not penalize both the act of owning and the act of attempting to enjoy the rights of ownership through a cloak, would be defective and readily avoided.

The trial court found that the transfers challenged by California in this case were made with an "intent to prevent, evade or avoid escheat"; in so finding the court considered the statutory presumption together with the other evidence detailed in the Court's opinion and concluded that the defendants had not met the statutory burden of proof imposed by § 9. The Supreme Court of California affirmed.

We do not have in this review a balancing of constitutional rights; on one hand, the right of California to exclude ineligible aliens from land ownership and, on the other, the right of their citizen sons to hold land. California does not deny the right to own land in California to a citizen son of an ineligible alien. If that citizen obtains the land in any way not made void as a violation of law, he may hold it. Under § 9 the land escheats because of the father's violation of law before it reaches the son. The denial to the father by California of the privilege of land ownership is not challenged. Neither is the right to protect that denial by an escheat of the land on the father's attempt to avoid the limitations of the California land law. Actually, the only problem is whether the presumption arising from the payment of money for land by the ineligible father denies equal protection of the law to the son. We understand the majority opinion to hold that presumption (a) of § 9, with its so-called ancillary inferences because of the son's minority and the father's failure to file guardianship reports or testify, as here applied, discriminates unconstitutionally against Fred Oyama. If that presumption, with the inferences, had been held constitutional, apparently the Court would have affirmed the opinion below because the issue then remain-

ing would have been the correctness of the findings of fact by the trial judge. No one would suggest that the correctness of those findings could be challenged here; the resolution of disputed issues of fact in non-constitutional matters is for the state judicial system. This Court does not intimate that it disagrees with California's factual conclusion. Its ruling is based on the "cumulative effect" of the "statutory presumption" and "two ancillary inferences." On remand to the courts of California, the case may be tried again. On that retrial all of the evidence admitted at the first trial may be submitted to the triers of fact for no one says that the items of evidence, including the father's payment of consideration, introduced by the state are inadmissible. A major vice of the state's application of the law apparently was the reliance upon a presumption and inferences that this Court holds deny equal protection. If an intent to "prevent, evade or avoid escheat" is found on the same evidence, an escheat will again take place.

Presumption (a) of § 9 has been construed by the California Supreme Court: "That if the consideration for the purchase of the real property is paid by an ineligible alien and the title is taken in the name of a third person, it will be presumed, in the absence of other evidence to the contrary, that it was the intent of both the alien and the grantee to 'prevent, evade or avoid' the escheat at law. . . . But the presumption is recognized as disputable and as disappearing in the face of contrary evidence of sufficient strength to meet our rule on conflict of testimony." [4] We do not interpret the opinion of our Brethren to say that the presumption, if valid, is irrebut-

[4] *People* v. *Fujita*, 215 Cal. 166, 170–71, 8 P. 2d 1011–12; see *Takeuchi* v. *Schmuck*, 206 Cal. 782, 276 P. 345. Indeed, a holding that this presumption was conclusive might open it to a serious attack based upon due process grounds. See *Heiner* v. *Donnan*, 285 U. S. 312.

table; or, to put the matter differently, that the effect of the presumption, if valid, is to make it inevitable that all gifts of real property by an alien-Japanese father to his child can be successfully escheated by the state. As the cases prove, an alien-Japanese father can give California lands to his son in spite of the presumption.[5] The effect of the presumption, if valid, is rather to place a burden, an "onerous burden" to adopt the phrase of the majority opinion, upon all grantees who take land under those conditions set forth in § 9.

The issue in this case, therefore, is neither the validity of the California prohibition against the ownership of agricultural land by a person ineligible to become an American citizen, nor the validity of a law, § 9, that an attempt to evade that prohibition shall be penalized by escheat. The validity of both of these provisions is unchallenged by this Court's opinion. The issue here is the validity of the presumption that when an ineligible person pays the consideration for land conveyed to an eligible person, there is a prima facie presumption that the conveyance is made to avoid the prohibited ownership. The essence of the argument in the opinion is this: When an alien-English father purchases land from a third party and puts title in his child, acceptance by the child and delivery of the deed are presumed; however, if an alien-Japanese father engages in the same transaction, his child must meet the "onerous burden" of the presumption; therefore, Fred Johnson and Fred Oyama are not treated equally by the laws of California and Fred Oyama is denied equal protection by those laws. These facts are accurate; the flaw is that the conclusion does not follow. California has, as against the state, made illegal a particular class of transactions: transfers made with the intent to evade escheat of lands. Anyone, no matter

[5] *People* v. *Fujita*, 215 Cal. 166, 8 P. 2d 1011; see *Estate of Yano*, 188 Cal. 645, 206 P. 995.

what his racial origin may be, who as a grantee is a party to a sale of land which the state attacks as being within the proscribed class must overcome the presumption of § 9 to establish the legality of the transfer. This presumption operates with a mechanical impartiality. Whoever the grantee in a transfer questioned by the state is, be he Fred Johnson or Fred Oyama, he must bear the "onerous burden"; he must bear it not because of descent or nationality but because he has been a party to a transaction which the state challenges as illegal under an admittedly valid law.

As we see the Court's argument, it focuses attention upon what it contends are two parallel situations: the gift of an English father to a citizen son and the gift of a Japanese father to a citizen son. Upon examination of the relevant state laws, it concludes that the son of the Japanese father is placed in a position less advantageous than that of the son of an English father. That is so, but for our purposes it is the reason for the result, and not the result itself, that is important. The legal positions of the two sons are different only because the situations are not parallel. The Japanese father and his citizen son are parties to an illegal transaction if the land was transferred with the "intent to prevent, evade or avoid escheat"; as an English father is not prevented from holding real property, his gift cannot be challenged on that ground by the state. The capacities of the donors are different and it is this difference, and nothing else, which raises in one case and fails to raise in the other, the presumption complained of by Oyama.[6] It is not a denial of equal protection for a state to classify transac-

[6] *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35, 42–43:

"Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, National and state, dealing with such methods of proof in both civil

tions readily leading to law evasions differently from those without such a possibility. Such classification is permissible.

Let us test the Court's reasoning by applying it to a different set of facts. For purposes of illustration, we put these cases: (1) a solvent father purchases land from a third party and puts the title in his son; and (2) an insolvent father purchases land from a third party and puts the title in his son. In example (2), the creditors of the father in an action against the son to subject the land to the satisfaction of their claims against the father, can raise a prima facie presumption that the transfer was fraudulent as to them by proving that the transaction took place during the period of the father's insolvency.[7] Here the son of the insolvent father bears an "onerous burden" to which the son of a solvent father is not subjected; he bears this burden because he has been a party to a transaction which creditors challenge as void-

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and criminal cases abound, and the decisions upholding them are numerous. . . .

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed."

Seaboard Air Line R. Co. v. *Watson,* 287 U. S. 86, 90; *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 18–19; *United States ex rel. St. Louis S. R. Co.* v. *I. C. C.,* 264 U. S. 64, 77.

[7] *Bailey* v. *Blackmon,* 3 F. 2d 252, 253, aff'd on rehearing, 14 F. 2d 16; *Hedrick* v. *Hockfield,* 283 F. 574, 576–77; *Ryan* v. *Wohl, South & Co.,* 241 Ala. 123, 124–25, 1 So. 2d 292, 293; *Judson* v. *Lyford,* 84 Cal. 505, 509, 24 P. 286, 287–288; *Swartz* v. *Hazlett,* 8 Cal. 118, 128; *Chrisman* v. *Greer,* 239 Ky. 378, 380, 39 S. W. 2d 678, 679; *Pruyn* v. *Young,* 51 La. Ann. 320, 322, 25 So. 125, 126; *Lusk* v. *Riggs,* 65 Neb. 258, 261, 91 N. W. 243, 244; *Grambling, Spalding & Co.* v.

able. The disability of the father taints the son's right and, therefore, he is placed in a position less advantageous than that of the son of a solvent father. Would it be reasonable to say that the son of the insolvent father has been denied "equal protection" and, consequently, the presumption is unconstitutional? No one would so contend. The inequality between the sons of eligible and ineligible landowners does not seem to us to differ.

As we understand petitioners' argument in briefs and before this Court, the petitioners in their discussion of the denial of equal protection to the citizen son depended solely upon the invalidity of the presumption arising from the payment of the money by the father. This Court's opinion recognizes that petitioners' argument includes discrimination, amounting to a lack of equal protection, arising (1) from the requirement of § 9 that the son must take the burden of proving affirmatively the bona fides of the gift from the father; (2) because the gift to the infant son of a Japanese is presumed invalid while the gift to an infant son of an eligible alien is presumed valid; (3) because the Court took into consideration the father's omission to file guardian reports after the transfer. Normally, the Court says, a guardian's subsequent improper conduct would not affect the validity of a gift to a child. Because of what is deemed additional burdens thus placed upon the son, the Court concludes that:

> "The cumulative effect, we believe, was clearly to discriminate against Fred Oyama. . . .

Dickey, 118 N. C. 986, 988, 24 S. E. 671, 672; *Willamette Grocery Co.* v. *Skiff,* 118 Ore. 685, 689, 248 P. 143, 144.

This analogy is exact because in most jurisdictions the fact of a blood relationship alone raises no presumption of fraud. *Gottlieb* v. *Thatcher,* 151 U. S. 271, 279; *Gray* v. *Galpin,* 98 Cal. 633, 635, 33 P. 725, 726. See cases collected in 27 C. J. 827, note 99; 37 C. J. S. 1084, note 9.

> "The only basis for this discrimination against an American citizen, moreover, was the fact that his father was Japanese and not American, Russian, Chinese, or English."

These discriminations, if such they are, seem to us mere elaborations of the central theory that the challenged presumption of § 9 is unconstitutional as a denial of equal protection. It is of course true that the son of a citizen of Japan cannot receive a gift from an ineligible father as readily as a son of an alien entitled to naturalization but again such a classification is entirely reasonable when we once assume that the State of California has a right to prohibit the ownership of California land directly or indirectly by a Japanese.

Discrimination in the sense of placing more burdens upon some than upon others is not in itself unconstitutional. If all types of discrimination were unconstitutional, our society would be incapable of legislation upon many important and vital questions. All reasonable classification puts its subjects into different categories where they may have advantages or disadvantages that flow from their positions.[8] The grouping of all those who take land

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[8] *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78–79:

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classifi-

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as grantees, in a transaction in which an ineligible alien pays the consideration, in a class subject to the statutory presumption of § 9 and other inferences which are reasonably related to the transfer, should not be struck down as unconstitutional. Unless the California Land Laws are to be held unconstitutional, we think the presumption and its resulting effects must be accepted as legal.

MR. JUSTICE JACKSON, dissenting.

I am unable to see how this Court logically can set aside this judgment unless it is prepared to invalidate the California Alien Land Laws, on which it is based. If this judgment of escheat seems harsh as to the Oyamas, it is only because it faithfully carries out a legislative policy, the validity of which this Court does not question.

The State's argument is as simple as this: If California has power to forbid certain aliens to own its lands, it must have incidental power to prevent evasion of that prohibition by use of an infant's name to cloak a forbidden ownership. If it has the right to protect itself against such evasion, its courts must have the right to decide the question of fact whether a given transaction constitutes an evasion. And if its courts have to apply the Act, the State has power to aid them by creating reasonable presumptions. I cannot find that this reasoning is defective or that it fails to support the judgment below, however little I like the result.

In this case the elder Oyama arranged to acquire some six acres of agricultural lands. He could not take title in his own name because of his classification as an ineligible alien, and hence one forbidden to acquire such lands.

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cation in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Finley v. *California*, 222 U. S. 28.

Title was taken in the name of Fred, his son. When this was happening Fred was six years old. He had no funds and the entire consideration was paid by the father. We can hardly criticize the state court for concluding, especially in absence of any proof to the contrary, that a 6-year-old child did not decide for himself to go into agriculture, or that these particular lands would be suitable for him if he did. The lands would require continuous cultivation if they were not to revert to a state of nature and it was not unreasonable to doubt that the 6-year-old son could supply either the manual labor or the oversight necessary to preserve the investment or to make it yield a return. Moreover, the return from the lands, even if applied to the support of young Oyama, operated to reduce the parental obligation. In short, there is no proof that this 6-year-old child contributed to the purchase of these lands either funds, judgment or desire. The California court considered that his name was used in the transaction without the infant's understanding consent. Even if there were no presumption created by statute, I should find it difficult to say that this conclusion is an unreasonable one.

Nor do I think we could say that it would offend the Federal Constitution if the State, to make admittedly constitutional legislation effective, should go so far as to create a presumption that where the consideration is paid by an ineligible father and the title is taken in the name of his infant son, it is to be deemed the father's purchase. I do not understand the Court to say that this is a far-fetched or unreasonable inference from such facts. It seems to say, however, that a presumption, which it construes in this way, is invalid because it operates only against sons of persons ineligible for citizenship. If even such a presumption strikes only a limited class, it is because the basic prohibitions of the Act strike only a lim-

ited class. If the State can validly classify certain Asiatics as a separate class for exclusion from land ownership, I do not see why it could not do so for purposes of a presumption.

But the California statute has not made a presumption applicable only against sons of the excluded Asiatics. The statutory presumption, so far as it applies here, is cast in this language:

"A prima facie presumption that the conveyance is made with such intent shall arise upon proof of any of the following group of facts:

"(a) The taking of the property in the name of a person other than the persons mentioned in Section 2 hereof [the excluded alien] if the consideration is paid or agreed or understood to be paid by an alien mentioned in Section 2 hereof . . . ."

The same presumption would be raised by the statute against any American citizen or any alien or any person whatsoever if he received the title and any ineligible alien paid the consideration. The Court's decision is that the presumption denies Fred Oyama the equal protection of the laws because grantees are treated differently if they are sons of ineligible aliens than if they are the sons of others. This Act makes no such classification. The presumption does not apply to him because he is the son of an ineligible father—it applies because he is a grantee of lands paid for by an ineligible alien. The Court itself reads this father and son classification into the Act, quite unjustified by its words. It is true that in this case the relationship of father and son also exists, but that is not the relationship that calls the presumption into operation.

The Act classifies grantees only as those whose lands have been paid for by an ineligible alien and those whose lands have not. Every member of the class whose lands have been paid for by such an alien must overcome the

presumption. Every grantee similarly situated is saddled by the identical burden imposed on Fred Oyama whether he is the son of a Japanese, the son of an American citizen or the son of an eligible alien. Thus there is no discrimination apparent on its face in the provision of the statute which the Court strikes down.

But it is said that a discrimination is latent in this presumption from the fact that other fathers may give land to their sons and no presumption would apply. That there is a discrimination in this situation no one will deny; it is the fundamental one, which the Court does not touch, by which the elder Oyama could not, directly or indirectly, acquire this land while many other fathers could. The presumption, of course, would not apply if the consideration were paid by a person to whom the statute does not apply. But Fred Oyama, the son, is in no different position as to the presumption than the son of any other person whatsoever. If a citizen's son received this land from Oyama, Senior under the same conditions, he would be confronted with the same presumption and escheat. If the Oyama lad, on the other hand, received this land from a citizen, he would take it as free of presumption and escheat as any California lad could do. The only discrimination which prejudices young Oyama is the one which makes his father ineligible to own land or be a donor of it. That discrimination is passed by as valid, and one that seems to me wholly fictitious is first erected by this Court and then struck down.

I do not find anything in the Federal Constitution which authorizes us to strip a State of its power to enact reasonable presumptions which put the burden of producing evidence upon the only person who possesses it. This presumption is not made conclusive and the California courts have sometimes held it to be overcome by evidence. In this case, if there is any explanation of this transaction other than that Oyama used his son's

name to acquire beneficial interests for himself which he was forbidden to acquire in his own name, no one knows those facts better than the senior Oyama. He did not take the witness stand. He left unrebutted both the presumption of the statute and the inference that most reasonable persons, even in the absence of a statute, would draw from the facts.

This Court also says that California used the default of the father, in failing to file accountings as trustee for the infant, as evidence against the infant and seems to imply this was an unconstitutional procedure. As we have seen, this infant was of such tender years that he had neither ideas nor will nor understanding about the purchase. The only person's intention which would stamp this transaction as one in good faith or as an evasion of the statute was the intention of the father. He was the only actor; he gave the land to the son and accepted on his behalf, so we are told. Certainly it was competent for the California courts, as bearing on his intentions and good faith, to receive evidence of the fact that the sole actor did not consider himself under an obligation to account as the law would require him to do if the property really belonged to an infant and he were a trustee.

While I think that California has pursued a policy of unnecessary severity by which the Oyamas lose both land and investment, I do not see how this Court, while conceding the State's right to keep the policy on its books, can strip the State of the right to make its Act effective. What we seem to be holding is that while the State has power to exclude the alien from land ownership, the alien has the constitutional right to nullify the policy by a device we would be prompt to condemn if it were used to evade a federal statute.

A majority of the Court agrees that the ground assigned by the Court's opinion is sufficient to decide this litigation.

It does not therefore seem necessary or helpful to enter into a discussion of the constitutionality of the Alien Land Laws themselves.

UNITED STATES v. SULLIVAN, TRADING AS SULLIVAN'S PHARMACY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 121. Argued December 9, 1947.—Decided January 19, 1948.

1. It is a violation of § 301 (k) of the Federal Food, Drug, and Cosmetic Act of 1938 for a retail druggist who has purchased sulfathiazole tablets from a wholesaler in the same State (who had obtained them by way of an interstate shipment) to remove a dozen of them from a properly labeled bulk container in which they were shipped in interstate commerce and in which they were being held for resale, place them in a pill box labeled "sulfathiazole" but not containing the statutorily required directions for use or warnings of danger, and sell them locally to a retail purchaser. Pp. 695–697.

   (a) The removal of drugs from a container labeled in accordance with the requirements of the Act to one not so labeled is the doing of an act which results in their being "misbranded" within the meaning of § 301 (k). P. 695.

   (b) Although a previous intrastate sale had occurred following the interstate shipment and although the retail sale in question occurred over six months after completion of the shipment in interstate commerce, the sulfathiazole tablets in this case were "held for sale after shipment in interstate commerce" within the meaning of § 301 (k). Pp. 695–696.

   (c) The purpose of the Act is to safeguard the consumer by applying its requirements to articles from the moment of their introduction into interstate commerce all the way to the moment of their delivery to the ultimate consumer. Pp. 696–697.

2. As thus construed, the Act does not exceed the constitutional power of Congress under the Commerce Clause or invade the powers reserved to the states. *McDermott* v. *Wisconsin*, 228 U. S. 115. Pp. 697–698.

3. A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom or because

giving effect to the express language employed by Congress might require a court to face a constitutional question. Pp. 692–694.

4. The scope of the offense which Congress defined in § 301 (k) of the Act is not to be judicially narrowed as applied to drugs by envisioning extreme possible applications of its provisions relating to food and cosmetics, especially in view of the broad discretion given the Administrator to excuse minor violations with a warning and to issue regulations exempting many articles from the labeling requirements when compliance is impractical. Pp. 694–695.

161 F. 2d 629, reversed.

Respondent was convicted in a Federal District Court of violating § 301 (k) of the Federal Food, Drug, and Cosmetic Act of 1938. 67 F. Supp. 192. The Circuit Court of Appeals reversed. 161 F. 2d 629. This Court granted certiorari. 332 U. S. 753. *Reversed,* p. 698.

Robert L. Stern argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Irving S. Shapiro.*

R. M. Arnold and *J. Madden Hatcher* argued the cause and filed a brief for respondent.

Mr. Justice Black delivered the opinion of the Court.

Respondent, a retail druggist in Columbus, Georgia, was charged in two counts of an information with a violation of § 301 (k) of the Federal Food, Drug, and Cosmetic Act of 1938. That section prohibits "the doing of any . . . act with respect to, a . . . drug . . . if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded." [1] Section 502 (f) of the Act declares a drug

[1] "Sec. 301. The following acts and the causing thereof are hereby prohibited:

. . . . . .

"(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of

"to be misbranded . . . unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use . . . dangerous to health, or against unsafe dosage . . . as are necessary for the protection of users." The information charged specifically that the respondent had performed certain acts which resulted in sulfathiazole being "misbranded" while "held for sale after shipment in interstate commerce."

The facts alleged were these: A laboratory had shipped in interstate commerce from Chicago, Illinois, to a consignee at Atlanta, Georgia, a number of bottles, each containing 1,000 sulfathiazole tablets. These bottles had labels affixed to them, which, as required by § 502 (f) (1) and (2) of the Act, set out adequate directions for the use of the tablets and adequate warnings to protect ultimate consumers from dangers incident to this use.[2] Respondent bought one of these properly labeled bottles of sulfathiazole tablets from the Atlanta consignee, transferred it to his Columbus, Georgia, drugstore, and there held the tablets for resale. On two separate occasions

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any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded." 52 Stat. 1042, 21 U. S. C. § 331 (k).

[2] The following inscription appeared on the bottle labels as a compliance with § 502 (f) (1) which requires directions as to use: "Caution.—To be used only by or on the prescription of a physician." This would appear to constitute adequate directions since it is required by regulation issued by the Administrator pursuant to authority of the Act. 21 C. F. R. Cum. Supp. § 2.106 (b) (3). The following appeared on the label of the bottles as a compliance with § 502 (f) (2) which requires warnings of danger: "Warning.—In some individuals Sulfathiazole may cause severe toxic reactions. Daily blood counts for evidence of anemia or leukopenia and urine examinations for hematuria are recommended.

"Physicians should familiarize themselves with the use of this product before it is administered. A circular giving full directions and contraindications will be furnished upon request."

twelve tablets were removed from the properly labeled and branded bottle, placed in pill boxes, and sold to customers. These boxes were labeled "sulfathiazole." They did not contain the statutorily required adequate directions for use or warnings of danger.

Respondent's motion to dismiss the information was overruled, a jury was waived, evidence was heard, and respondent was convicted under both counts. 67 F. Supp. 192.

The Circuit Court of Appeals reversed. 161 F. 2d 629. The court thought that as a result of respondent's action the sulfathiazole became "misbranded" within the meaning of the Federal Act, and that in its "broadest possible sense" the Act's language "may include what happened." However, it was also of the opinion that the Act ought not to be taken so broadly "but held to apply only to the holding for the first sale by the importer after interstate shipment." Thus the Circuit Court of Appeals interpreted the statutory language of § 301 (k) "while such article is held for sale after shipment in interstate commerce" as though Congress had said "while such article is held for sale by a person who had himself received it by way of a shipment in interstate commerce." We granted certiorari to review this important question concerning the Act's coverage. 332 U. S. 753.

First. The narrow construction given § 301 (k) rested not so much upon its language as upon the Circuit Court's view of the consequences that might result from the broader interpretation urged by the Government. The court pointed out that the retail sales here involved were made in Columbus nine months after this sulfathiazole had been shipped from Chicago to Atlanta. It was impressed by the fact that, if the statutory language "while such article is held for sale after shipment in interstate commerce" should be given its literal meaning, the criminal provisions relied on would "apply to all intra-

state sales of imported drugs after any number of intermediate sales within the State and after any lapse of time; and not only to such sales of drugs, but also to similar retail sales of foods, devices and cosmetics, for all these are equally covered by these provisions of the Act." The court emphasized that such consequences would result in far-reaching inroads upon customary control by local authorities of traditionally local activities, and that a purpose to afford local retail purchasers federal protection from harmful foods, drugs and cosmetics should not be ascribed to Congress in the absence of an exceptionally clear mandate, citing *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349. Another reason of the court for refraining from construing the Act as applicable to articles misbranded while held for retail sale, even though the articles had previously been shipped in interstate commerce, was its opinion that such a construction would raise grave doubts as to the Act's constitutionality. In support of this position the court cited *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30, and *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495.

A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom or because giving effect to the express language employed by Congress might require a court to face a constitutional question. And none of the foregoing cases, nor any other on which they relied, authorizes a court in interpreting a statute to depart from its clear meaning. When it is reasonably plain that Congress meant its Act to prohibit certain conduct, no one of the above references justifies a distortion of the congressional purpose, not even if the clearly correct purpose makes marked deviations from custom or leads inevitably to a holding of constitutional invalidity. Although criminal statutes must be so precise and unambiguous that the ordinary person can know how to avoid unlawful conduct, see *Kraus & Bros.*,

Inc. v. *United States,* 327 U. S. 614, 621–622, even in determining whether such statutes meet that test, they should be given their fair meaning in accord with the evident intent of Congress. *United States* v. *Raynor,* 302 U. S. 540, 552.

Second. Another consideration that moved the Circuit Court of Appeals to give the statute a narrow construction was its belief that the holding in this case with reference to misbranding of drugs by a retail druggist would necessarily apply also to "similar retail sales of foods, devices and cosmetics, for all of these," the court said, "are equally covered by the same provisions of the Act." And in this Court the effect of such a possible coverage of the Act is graphically magnified. We are told that its application to these local sales of sulfathiazole would logically require all retail grocers and beauty parlor operators to reproduce the bulk container labels on each individual item when it is taken from the container to sell to a purchaser. It is even prophesied that, if § 301 (k) is given the interpretation urged by the Government, it will later be applied so as to require retail merchants to label sticks of candy and sardines when removed from their containers for sale.

The scope of the offense which Congress defined is not to be judicially narrowed as applied to drugs by envisioning extreme possible applications of its different misbranding provisions which relate to food, cosmetics, and the like. There will be opportunity enough to consider such contingencies should they ever arise. It may now be noted, however, that the Administrator of the Act is given rather broad discretion—broad enough undoubtedly to enable him to perform his duties fairly without wasting his efforts on what may be no more than technical infractions of law. As an illustration of the Administrator's discretion, § 306 permits him to excuse minor violations with a warning if he believes that the public interest will thereby be ade-

quately served. And the Administrator is given extensive authority under §§ 405, 503 and 603 to issue regulations exempting from the labeling requirements many articles that otherwise would fall within this portion of the Act. The provisions of § 405 with regard to food apparently are broad enough to permit the relaxation of some of the labeling requirements which might otherwise impose a burden on retailers out of proportion to their value to the consumer.

Third. When we seek the meaning of § 301 (k) from its language we find that the offense it creates and which is here charged requires the doing of some act with respect to a drug (1) which results in its being misbranded, (2) while the article is held for sale "after shipment in interstate commerce." Respondent has not seriously contended that the "misbranded" portion of § 301 (k) is ambiguous. Section 502 (f), as has been seen, provides that a drug is misbranded unless the labeling contains adequate directions and adequate warnings. The labeling here did not contain the information which § 502 (f) requires. There is a suggestion here that, although alteration, mutilation, destruction, or obliteration of the bottle label would have been a "misbranding," transferring the pills to non-branded boxes would not have been, so long as the labeling on the empty bottle was not disturbed. Such an argument cannot be sustained. For the chief purpose of forbidding the destruction of the label is to keep it intact for the information and protection of the consumer. That purpose would be frustrated when the pills the consumer buys are not labeled as required, whether the label has been torn from the original container or the pills have been transferred from it to a non-labeled one. We find no ambiguity in the misbranding language of the Act.

Furthermore, it would require great ingenuity to discover ambiguity in the additional requirement of § 301 (k)

that the misbranding occur "while such article is held for sale after shipment in interstate commerce." The words accurately describe respondent's conduct here. He held the drugs for sale after they had been shipped in interstate commerce from Chicago to Atlanta. It is true that respondent bought them over six months after the interstate shipment had been completed by their delivery to another consignee. But the language used by Congress broadly and unqualifiedly prohibits misbranding articles held for sale after shipment in interstate commerce, without regard to how long after the shipment the misbranding occurred, how many intrastate sales had intervened, or who had received the articles at the end of the interstate shipment. Accordingly we find that the conduct of the respondent falls within the literal language of § 301 (k).

Fourth. Given the meaning that we have found the literal language of § 301 (k) to have, it is thoroughly consistent with the general aims and purposes of the Act. For the Act as a whole was designed primarily to protect consumers from dangerous products. This Court so recognized in *United States* v. *Dotterweich,* 320 U. S. 277, 282, after reviewing the House and Senate Committee Reports on the bill that became law. Its purpose was to safeguard the consumer by applying the Act to articles from the moment of their introduction into interstate commerce all the way to the moment of their delivery to the ultimate consumer. Section 301 (a) forbids the "introduction or delivery for introduction into interstate commerce" of misbranded or adulterated drugs; § 301 (b) forbids the misbranding or adulteration of drugs while "in interstate commerce"; and § 301 (c) prohibits the "receipt in interstate commerce" of any misbranded or adulterated drug, and "the delivery or proffered delivery thereof for pay or otherwise." But these three paragraphs alone would not supply protection all the way to the consumer. The words of paragraph (k) "while

such article is held for sale after shipment in interstate commerce" apparently were designed to fill this gap and to extend the Act's coverage to every article that had gone through interstate commerce until it finally reached the ultimate consumer. Doubtless it was this purpose to insure federal protection until the very moment the articles passed into the hands of the consumer by way of an intrastate transaction that moved the House Committee on Interstate and Foreign Commerce to report on this section of the Act as follows: "In order to extend the protection of consumers contemplated by the law to the full extent constitutionally possible, paragraph (k) has been inserted prohibiting the changing of labels so as to misbrand articles held for sale after interstate shipment." [3] We hold that § 301 (k) prohibits the misbranding charged in the information.

Fifth. It is contended that the Act as we have construed it is beyond any authority granted Congress by the Constitution and that it invades the powers reserved to the States. A similar challenge was made against the Pure Food and Drugs Act of 1906, 34 Stat. 768, and rejected, in *McDermott* v. *Wisconsin,* 228 U. S. 115. That Act did not contain § 301 (k), but it did prohibit misbranding and authorized seizure of misbranded articles after they were shipped from one State to another, so long as they remained "unsold." The authority of Congress to make this requirement was upheld as a proper exercise of its powers under the commerce clause. There are two variants between the circumstances of that case and this one. In the *McDermott* case the labels involved were on the original containers; here the labels are required to be put on other than the original containers—the boxes to which the tablets were transferred. Also, in the *McDermott* case the possessor of the labeled cans held for sale had

[3] H. R. Rep. 2139, 75th Cong., 3d Sess., 3.

himself received them by way of an interstate sale and shipment; here, while the petitioner had received the sulfathiazole by way of an intrastate sale and shipment, he bought it from a wholesaler who had received it as the direct consignee of an interstate shipment. These variants are not sufficient we think to detract from the applicability of the *McDermott* holding to the present decision. In both cases alike the question relates to the constitutional power of Congress under the commerce clause to regulate the branding of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce. The reasons given for the *McDermott* holding therefore are equally applicable and persuasive here. And many cases decided since the *McDermott* decision lend support to the validity of § 301 (k). See, *e. g., United States* v. *Walsh,* 331 U. S. 432; *Wickard* v. *Filburn,* 317 U. S. 111; *United States* v. *Wrightwood Dairy Co.,* 315 U. S. 110; *United States* v. *Darby,* 312 U. S. 100; see *United States* v. *Olsen,* 161 F. 2d 669.

Reversed.

MR. JUSTICE RUTLEDGE, concurring.

This case has been presented as if the Federal Food, Drug, and Cosmetic Act of 1938 had posed an inescapable dilemma. It is said that we must either (1) ignore Congress' obvious intention to protect ultimate consumers of drugs through labeling requirements literally and plainly made applicable to the sales in this case or (2) make criminal every corner grocer who takes a stick of candy from a properly labeled container and sells it to a child without wrapping it in a similar label.

The trouble-making factor is not found in the statute's provisions relating specifically to drugs. Those provisions taken by themselves are clear and unequivocal in

the expressed purpose to protect the ultimate consumer by the labeling requirements. So is the legislative history. Standing alone, therefore, the drug provisions would cover this case without room for serious question.

However, those provisions do not stand entirely separate and independent in the Act's structure. In some respects, particularly in § 301 (k), they are interlaced with provisions affecting food and cosmetics. And from this fact is drawn the conclusion that this decision necessarily will control future decisions concerning those very different commodities.

If the statute as written required this, furnishing no substantial basis for differentiating such cases, the decision here would be more difficult than I conceive it to be. But I do not think the statute has laid the trap with which we are said to be faced. Only an oversimplified view of its terms and effects could produce that result.

The Act is long and complicated. Its numerous provisions treat the very different subjects of drugs, food and cosmetics alike in some respects, differently in others. The differences are as important as the similarities, and cannot be ignored. More is necessary for construction of the statute than looking merely to the terms of §§ 301 (k) and 502 (f).

It is true that § 301 (k) deals indiscriminately with food, drugs, devices and cosmetics, on the surface of its terms alone. Hence it is said that the transfer of sulfathiazole, a highly dangerous drug, from a bulk container to a small box for retail sale, could not be "any other act" unless a similar transfer of candies, usually harmless, also would be "any other act." From this hypothesis it is then concluded that the phrase must be interpreted with reference to the particularities which precede it, namely, "alteration, mutilation, destruction, obliteration

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or removal" of any part of the label, and must be limited by those particularities.

That construction almost, if not quite, removes "any other act" from the section. And by doing so it goes far to emasculate the section's effective enforcement, especially in relation to drugs. Any dealer holding drugs for sale after shipment in interstate commerce could avoid the statute's effect simply by leaving the label intact, removing the contents from the bulk container, and selling them, however deadly, in broken parcels without label or warning.

I do not think Congress meant the phrase to be so disastrously limited. For the "doing of any other act with respect to, a food, drug, device, or cosmetic" is prohibited by § 301 (k) only "if such act . . . results in such article being misbranded." And the statute provides, not a single common definition of misbranding for foods, drugs and cosmetics, but separate and differing sections on misbranded foods, misbranded drugs and devices, and misbranded cosmetics. §§ 403, 502, 602.

The term "misbranded" as used in § 301 (k) therefore is not one of uniform connotation. On the contrary, its meaning is variable in relation to the different commodities and the sections defining their misbranding. So also necessarily is the meaning of "any other act," which produces those misbranding consequences. Each of the three sections therefore must be taken into account in determining the meaning and intended scope of application for § 301 (k) in relation to the specific type of commodity involved in the particular sale, if Congress' will is not to be overridden by broadside generalization glossed upon the statute. As might have been expected, Congress did not lump food, drugs and cosmetics in one indiscriminate hopper for the purpose of applying § 301 (k), either in respect to misbranding or as to "any other

act" which produces that consequence. Brief reference to the several misbranding sections incorporated by reference in § 301 (k) substantiates this conclusion.

The three sections contain some common provisions.[1] But the fact that each section is also different from the other two in important respects indicates that each broad subdivision of the Act presents different problems of interpretation. Neither the misbranded foods section nor the misbranded cosmetics section contains any provision directly comparable to § 502 (f), which the respondent here has violated. That section, however, is to be contrasted with § 403 (k), one of the subsections dealing with misbranded foods. Comparison of the two provisions indicates that the doing of a particular act with respect to a drug may result in misbranding, whereas the same method of selling food would be proper.

Section 502 (f) provides that a drug shall be deemed to be misbranded:

> "Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: *Provided,* That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Administrator shall promulgate regulations exempting such drug or device from such requirement."

This provision, dealing with directions for use and warnings against improper use, in terms is designed "for the protection of users." To be effective, this protection

[1] *E. g.*, §§ 403 (a), 502 (a) and 602 (a) are in identical language.

requires regulation of the label which the container bears when the drug reaches the ultimate consumer.[2] The legislative history leaves no doubt that the draftsmen and sponsors realized the importance of having dangerous drugs properly labeled at the time of use, not just at the time of sale.[3] The intent to protect the public health is further emphasized by the limited scope of the proviso, which directs the Administrator to make exemptions only when compliance with clause (1) "is not necessary for the protection of the public health."

Section 403 (k), which contains the principal basis for "making every retail grocer a criminal," is very different. By its terms food is deemed to be misbranded:

> "If it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact: *Provided,* That to the extent that compliance with the requirements of this paragraph is impracticable, exemptions shall be established by regulations promulgated by the Administrator. The provisions of this paragraph and paragraphs (g) and (i) with respect to artificial coloring shall not apply in the case of butter, cheese, or ice cream."

The section, in contrast to § 502 (f)'s comprehensive coverage of drugs, applies not to all foods shipped interstate, but only to the restricted classes containing artificial flavoring, or coloring, or chemical preservatives. The labeling requirement is much simpler. And the proviso confers a much broader power of exemption upon the Administrator than does the proviso of § 502 (f). Under the latter he is given no power to exempt on the ground that compliance is impracticable. He cannot weigh busi-

[2] See S. Rep. No. 361, 74th Cong., 1st Sess. 19.

[3] See H. R. Rep. No. 2139, 75th Cong., 3d Sess. 8.

ness convenience against protection of the public health. Only where he finds that labeling is not necessary to that protection is he authorized to create an exemption for drugs and devices. Health security is not only the first, it is the exclusive criterion.

Under § 403 (k), however, in dealing with foods the Administrator can dispense with labels much more broadly. In terms the criterion for his action becomes "the extent that compliance . . . is impracticable" rather than, as under § 502 (f), "where any requirement of clause (1) [adequate directions for use] . . . is not necessary for the protection of the public health." Practical considerations affecting the burden of compliance by manufacturers and retailers, irrelevant under § 502 (f), become controlling under § 403 (k). Thus under the statute's intent a much more rigid and invariable compliance with the labeling requirements for drugs is contemplated than for those with foods, apart from its greatly narrower coverage of the latter. And the difficulty of compliance with those requirements for such articles as candies explains the difference in the two provisos.[4]

These differences, and particularly the differences in the provisos, have a direct and an intended relation to the

[4] "The proviso of this paragraph likewise requires the establishment of regulations exempting packages of assorted foods from the naming of ingredients or from their appearance in the order of predominance by weight where, under good manufacturing practice, label declaration of such information is impracticable. This provision will be particularly applicable, for example, to assorted confections, which under normal manufacturing practices may vary from package to package not only with respect to identity of ingredients but also in regard to the relative proportions of such ingredients as are common to all packages." S. Rep. No. 493, 73d Cong., 2d Sess. 12. The proviso discussed is in § 403 (i), not in § 403 (k); but the discussion brings out the sort of considerations which require exemption when compliance is impracticable.

problem of enforcement. The labeling requirements for foods are given much narrower and more selective scope for application than those for drugs, a difference magnified by the conversely differing room allowed for exemptions. What is perhaps equally important, the provisos are relevant to enforcement beyond specific action taken by the Administrator to create exemptions.

His duty under both sections is cast in mandatory terms. Whether or not he can be forced by mandamus to act in certain situations, his failure to act in some would seem to be clearly in violation of his duty. Obviously there must be many more instances where compliance with the labeling requirements for foods will be "impracticable" than where compliance with the very different requirements for drugs will not be "necessary for the protection of the public health." That difference is obviously important for enforcement, particularly by criminal prosecution. I think it is one which courts are entitled to take into account when called upon to punish violations. The authors of the legislation recognized expressly that "technical, innocent violations . . . will frequently arise." S. Rep. No. 152, 75th Cong., 1st Sess. 4. In other words, there will be conduct which may be prohibited by the Act's literal wording, but which nevertheless should be immune to prosecution.

When that situation arises, as it often may with reference to foods, by virtue of the Administrator's failure to discharge his duty to create exemptions before the dealer's questioned action takes place, that failure in my judgment is a matter for the court's consideration in determining whether prosecution should proceed. Whenever it is made to appear that the violation is a "technical, innocent" one, an act for which the Administrator should have made exemption as required by § 403 (k), the prosecution should be stopped. This Court has not hesi-

tated to direct retroactive administrative determination of private rights when that unusual course seemed to it the appropriate solution for their determination. *Addison* v. *Holly Hill Fruit Products,* 322 U. S. 607. If that is permissible in civil litigation, there is much greater reason for the analogous step of taking into account in a criminal prosecution an administrative officer's failure to act when the commanded action, if taken, would have made prosecution impossible.

It is clear therefore that the corner grocer occupies no such position of jeopardy under this legislation as the druggist, and that the meaning of § 301 (k) is not identical for the two, either as to what amounts to misbranding or as to what is "the doing of any . . . act" creating that result. The supposed dilemma is false. Congress had power to impose the drug restrictions, they are clearly applicable to this case, the decision does not rule the corner grocer selling candy, and the judgment should be reversed. I therefore join in the Court's judgment and opinion to that effect.

MR. JUSTICE FRANKFURTER, dissenting.

If it takes nine pages to determine the scope of a statute, its meaning can hardly be so clear that he who runs may read, or that even he who reads may read. Generalities regarding the effect to be given to the "clear meaning" of a statute do not make the meaning of a particular statute "clear." The Court's opinion barely faces what, on the balance of considerations, seems to me to be the controlling difficulty in its rendering of § 301 (k) of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 1042; 21 U. S. C. § 331 (k). That section no doubt relates to articles "held for sale after shipment in interstate commerce and results in such article being misbranded." But an article is "misbranded"

only if there is "alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic." Here there was no "alteration, mutilation, destruction, obliteration, or removal" of any part of the label. The decisive question is whether taking a unit from a container and putting it in a bag, whether it be food, drug or cosmetic, is doing "any other act" in the context in which that phrase is used in the setting of the Federal Food, Drug, and Cosmetic Act and particularly of § 301 (k).[1]

As bearing upon the appropriate answer to this question, it cannot be that a transfer from a jar, the bulk container, to a small paper bag, without transferring the label of the jar to the paper bag, is "any other act" when applied to a drug, but not "any other act" when applied to candies or cosmetics. Before we reach the possible discretion that may be exercised in prosecuting a certain conduct, it must be determined whether there is anything to prosecute. Therefore, it cannot be put off to some other day to determine whether "any other act" in § 301 (k) applies to the ordinary retail sale of candies or cosmetics in every drug store or grocery throughout the land, and so places every corner grocery and drug store under the hazard that the Administrator may report such conduct for prosecution. That question is now here. It is part of this very case, for the simple reason that the prohibited conduct of § 301 (k) applies with equal force, through the same phrase, to food, drugs and cosmetics insofar as they are required to be labeled. See §§ 403, 502, and 602 of the Act.

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[1] "The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded."

It is this inescapable conjunction of food, drugs and cosmetics in the prohibition of § 301 (k) that calls for a consideration of the phrase "or the doing of any other act," in the context of the rest of the sentence and with due regard for the important fact that the States are also deeply concerned with the protection of the health and welfare of their citizens on transactions peculiarly within local enforcing powers. So considered, "the doing of any other act" should be read with the meaning which radiates to that loose phrase from the particularities that precede it, namely "alteration, mutilation, destruction, obliteration, or removal" of any part of the label. To disregard all these considerations and then find a "clear meaning" is to reach a sum by omitting figures to be added. There is nothing in the legislative history of the Act, including the excerpt from the Committee Report on which reliance is placed, to give the slightest basis for inferring that Congress contemplated what the Court now finds in the statute. The statute in its entirety was of course intended to protect the ultimate consumer. This is no more true in regard to the requirements pertaining to drugs than of those pertaining to food. As to the reach of the statute—the means by which its ultimate purpose is to be achieved—the legislative history sheds precisely the same light on the provisions pertaining to food as on the provisions pertaining to drugs. If differentiations are to be made in the enforcement of the Act and in the meaning which the ordinary person is to derive from the Act, such differentiations are interpolations of construction. They are not expressions by Congress.

In the light of this approach to the problem of construction presented by this Act, I would affirm the judgment below.

MR. JUSTICE REED and MR. JUSTICE JACKSON join in this dissent.

VON MOLTKE *v.* GILLIES, SUPERINTENDENT OF THE DETROIT HOUSE OF CORRECTION.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 73. Argued November 20, 1947.—Decided January 19, 1948.

Upon an indictment for conspiracy to violate the Espionage Act of 1917, the penalty for which may be death or imprisonment for as long as 30 years, petitioner signed a paper purporting to waive her right to counsel and pleaded guilty. She was sentenced to imprisonment for four years. In a subsequent habeas corpus proceeding challenging the validity of the sentence, she alleged (1) that the plea was entered because of coercion, intimidation, and deception by federal officers in violation of the due process clause of the Fifth Amendment, and (2) that she neither understandingly waived the benefit of the advice of counsel nor was provided with the assistance of counsel as required by the Sixth Amendment. The District Court heard the conflicting evidence offered by petitioner and the Government, found that petitioner had failed to prove either contention, and dismissed the writ. The Circuit Court of Appeals affirmed. *Held:*

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is set aside. The cause is remanded to the District Court so that it may hold further hearings and give consideration to, and make explicit findings upon, the question whether the petitioner pleaded guilty in reliance upon the erroneous legal advice of a Government agent. If upon such further hearings and consideration the District Court finds that the petitioner did not competently, intelligently, and with full understanding of the implications waive her constitutional right to counsel, an order should be entered directing that she be released from further custody under the judgment based on her plea. Pp. 709–710, 727.

161 F. 2d 113, reversed.

In a habeas corpus proceeding in which the petitioner sought release from imprisonment under a sentence upon her plea of guilty to an indictment for conspiracy to violate the Espionage Act of 1917, the District Court dis-

missed the writ. The Circuit Court of Appeals affirmed. 161 F. 2d 113. This Court granted certiorari. 331 U. S. 800. *Reversed and remanded,* p. 727.

G. Leslie Field argued the cause and filed a brief for petitioner.

Frederick Bernays Wiener argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan.*

MR. JUSTICE BLACK announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE concur.

The petitioner was indicted for conspiracy to violate the Espionage Act of 1917.[1] The specific charge was that, in order to injure the United States and to aid the German Reich, she and twenty-three others had conspired during the second World War to collect and deliver vital military information to German agents.

With no money to hire a lawyer and without the benefit of counsel the petitioner appeared before a federal district judge, told him that the indictment had been explained to her, signed a paper stating that she waived the "right to be represented by counsel at the trial of this cause," and then pleaded guilty. Under her plea she could have been sentenced to death or to imprisonment for not more than thirty years. After thirteen months in jail following her plea, the court sentenced her to four years in prison.

In this habeas corpus proceeding she charged that the sentence, resting as it did solely on her plea of guilty,

[1] Section 32 defines the substantive crime of espionage. Section 34 declares conspiracies to violate § 32 to be unlawful. 40 Stat. 217, 50 U. S. C. §§ 32, 34.

was invalid for two reasons: First, she alleged that the plea was entered by reason of the coercion, intimidation, and deception of federal officers in violation of the due process clause of the Fifth Amendment. Second, she alleged that she neither understandingly waived the benefit of the advice of counsel nor was provided with the assistance of counsel as required by the Sixth Amendment. As the Government concedes, these charges entitle the petitioner to have the issues heard and determined in a habeas corpus proceeding, and, if true, invalidate the plea and sentence.[2] The District Court heard evidence offered by both the petitioner and the Government, and then found that she had failed to prove either contention. 72 F. Supp. 994. The Sixth Circuit Court of Appeals affirmed, with one judge dissenting. 161 F. 2d 113.

On the basis of what he designated as "the undisputed evidence," the dissenting judge concluded that petitioner had pleaded guilty because of her reliance upon the legal advice of a Federal Bureau of Investigation (FBI) lawyer-agent, which advice "was, though honestly given, false." Neither the District Court nor the majority of the Circuit Court of Appeals controverted this conclusion of the dissenting judge. A challenge to a plea of guilty made by an indigent defendant, for whom no lawyer has been provided, on the ground that the plea was entered in reliance upon advice given by a government lawyer-agent, raises serious constitutional questions. Under these circumstances we granted certiorari in this case. 331 U. S. 800.

It thus becomes apparent that determination of the questions presented depends upon what the evidence showed. There was conflicting testimony on many points

[2] *Waley* v. *Johnston*, 316 U. S. 101; *Walker* v. *Johnston*, 312 U. S. 275, 286; *Johnson* v. *Zerbst*, 304 U. S. 458, 467; cf. *Sunal* v. *Large*, 332 U. S. 174, 177.

in this case. We do not attempt to resolve these conflicts. Our conclusion is reached from the following facts shown by the testimony of government agents or by undisputed evidence offered by petitioner.

The petitioner was born in Germany. In that country she bore the title of countess. She and her husband came to the United States in December, 1926. Since 1930 they have lived in Detroit where the petitioner has been a housewife and her husband an instructor in German at Wayne University. Her husband is a naturalized citizen of the United States; her own naturalization papers have been pending for some time. They have four children, three of whom were born in this country as American citizens.

August 24, 1943, between 6 and 7 a. m., six FBI agents came to their home. The petitioner was in bed. She was informed that she must get up and go with them. The home was searched with her husband's permission. She was taken to the local office of the FBI, fingerprinted, photographed, and examined by a physician. From there she was taken to the Immigration Detention Home, placed in solitary confinement, and, with one exception noted below, not permitted to see or communicate with anyone outside for the next four days. Two FBI agents persistently but courteously examined her every day from about 10 a. m. until about 9 p. m. She knew nothing about her arrest and detention except that she was being held indefinitely on a presidential warrant "as a dangerous enemy alien." She was informed "that the FBI is an investigating agency, and not a prosecuting, and as an enemy alien I [she] was not allowed to see an attorney." During this first period of questioning, the only relaxation of petitioner's incommunicado status was a single permission to relay instructions through an FBI agent to her husband who was told how to look after their nine-year-old diabetic child. This child, for whom the mother had

specially cared since his infancy, required a strict diet and injections twice daily.

September 1, eight days after her early morning arrest, petitioner was taken before an Enemy Alien Hearing Board. She was not then informed of any specific charges against her, but she was told that she could not be "represented by a legal attorney" at the hearing. The results of this hearing were not made known to her. At its conclusion she was returned to the detention home.

September 18 the petitioner was handed the indictment against her. In our printed record this document covers a little more than fourteen pages. It charges generally, in the language of the statute, that the twenty-four defendants conspired to violate the statute. It also enumerates 47 overt acts alleged to have been performed in pursuance of the objects of the conspiracy, five of which acts specifically refer to the petitioner. Four out of the five merely allege that the petitioner "met and conferred with" one or more of the other defendants; the fifth alleges that she "introduced" someone to one of the defendants.

September 21, almost a month after her arrest, the petitioner and a co-defendant, Mrs. Leonhardt, were taken to the courthouse for arraignment. Upon being told that the two defendants had no attorney and no means to obtain one, the judge said he would appoint counsel right away and would not arraign them until they had seen an attorney. They were then led "to the bull pen to wait for the attorney." Before any attorney arrived they were taken back into the courtroom. Court was in session. As explained by petitioner and corroborated by others, "Judge Moinet was on the bench, and there seemed to be a trial going on, because Judge Moinet appointed a lawyer in the courtroom. He said, 'Come here, "so-and-so", and help these two women out,' and the young lawyer objected to that; he said he didn't want to have anything to do with

that. But then he consented just for the arraignment, to help out, and he came over to us—we were sitting on the side bench—and he asked me, 'How do you want to plead?' I said, 'Not guilty.' And he asked Mrs. Leonhardt, and she said the same thing. So he told us that, he whispered to us, in fact, he went over it, whispered that it would not be advisable, but I do not know even now why, but he suggested it would be proper to stand mute." In this two to five minute whispered conversation (the lawyer said "a couple of minutes") the lawyer asked both defendants if they "understood what this was all about." They indicated that they did. He did not even see the indictment, did not inform the petitioner as to the nature of the charge against her or as to her possible defenses, and did not inquire if she knew the punishment that could be imposed for her alleged offense. The case on trial was then interrupted, the charge was made against the defendants, who stood mute, and a plea of not guilty was entered. With reference to their future representation by an attorney, the petitioner's uncontradicted testimony was that the judge "said he would appoint an attorney right away, and I understood that the gentleman was to be expected to come right away."

The two women, unable to get out on bond, were then immediately taken from the courthouse to the Wayne County jail. The matron there informed the petitioner that she had strict orders to hold the petitioner and Mrs. Leonhardt "incommunicado." Notwithstanding this order, however, the FBI agents continued to visit and talk with both of them and a third defendant, Mrs. Behrens, every day except Sunday. During this period all three of them were allowed to read and discuss among themselves the unfavorable newspaper reports which their arrest and indictment had occasioned. They talked also with the FBI agents about this adverse publicity and about how they should plead to the charges.

September 25, one month and one day after Mrs. von Moltke's arrest, two lawyers came to the jail to see her. They had been sent by her husband. One of them appears to have taken the husband's language course at Wayne University. These lawyers' message was the first communication she had been permitted to receive from her husband since her removal to the county jail. She had been so well shut off from the outside world that she thought he did not even know where she was then confined. These lawyers informed her that, although they had come at her husband's request, they would not represent her as counsel. Furthermore, they warned her that they would not even hold what she said in confidence, and that they would feel free to disclose anything she told them to the Government. Only one of the lawyers appeared at the trial. He testified that the petitioner was concerned during their visit for her children and her husband, whom the university had removed from his $4,000 position the day after her arrest. She particularly inquired whether it would help her husband to get his university position back if she pleaded guilty, but received no counsel on the subject one way or another. In fact, the lawyers emphasized a number of times that they could not and would not advise her what she should do. Although they gave her a form of cross-examination regarding the charges against her in the indictment, they did not attempt to explain to her the implications of these charges, or to advise her as to any possible defenses to them, or to inform her of the permissible punishments under the indictment.

September 28, three days after the lawyers' visit, the petitioner and Mrs. Leonhardt were taken by FBI agents to the marshal's office where they talked with the assistant district attorney about what plea they should enter. Mrs. Leonhardt announced there that she would plead guilty, which plea she later entered, but the petitioner first

asked for the opportunity of discussing the matter with her husband. He came to the marshal's office, was allowed to talk with his wife in the "bull pen," and advised her not to do anything before she saw a lawyer. She then declined to plead guilty and was taken back to jail.

October 7, nine days later, she did plead guilty without having talked to any lawyer in the meantime except the FBI agent-attorneys, although she had seen her husband several more times. A few days before the 7th, Mrs. Behrens had entered a plea of guilty, and rumors reached the petitioner that other defendants named in the indictment would also plead guilty. During the interval between the 28th of September and petitioner's plea of guilty on the 7th of October, the FBI men had talked to her daily. She had particularly asked them whether under United States law she would have the right to a trial if all her co-defendants pleaded guilty. The agent's reply, as he remembered it, was "that the question of the trial would be up to the United States Attorney's Office." She also repeatedly plied the agents with questions as to what plea she should enter in order to reduce as much as possible the injurious publicity of the affair, and what would be the least harmful course to make it possible for her husband to recover his old position. She was also vitally interested in whether she would be deported, and whether, if she did plead guilty, her sentence could be served close to her family. All of these subjects the agents talked over with her in their daily conversations and one of them offered to, and did, discuss them with the assistant district attorney on her behalf. Following this discussion, the agent brought back word to the petitioner that the assistant district attorney could not control deportation, publicity, or the place of her imprisonment, but that if she pleaded guilty he would write a letter to the controlling authorities and recommend that she be imprisoned close to her family.

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About this time one of the lawyer-agents of the FBI discussed the petitioner's legal problems with her at great length. According to his testimony he did his best to explain the implications of the indictment. She told this agent-attorney about a statement she had heard while in jail that unless she pleaded guilty her husband would be involved, and she asked the agent if this were true. He replied that he could not answer this question. She also asked one of the lawyer-agents whether mere association with people guilty of a crime—such association as that with which she was charged in the five overt acts—was sufficient in itself to bring about her conviction under the indictment. This agent, according to the petitioner, then explained the indictment to her by the use of a "Rum Runners" plot as an example. She testified that he said: "That if there is a group of people in a 'Rum' plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still it seemed after two years this plan is carried out, in the law the man who was present becomes . . . the person nevertheless is guilty of conspiracy. . . ." The FBI agent did not deny that he had given her the rum runner illustration. In fact, the agent said that it was quite possible that the conversation had occurred.[3]

During the ten days prior to her plea of guilty, petitioner had many conversations with FBI agents about how she should plead to the indictment. In resolving her doubts she had no legal counsel upon whom to rely

[3] "Q. And did you during that discussion use a [*sic*] illustration about a rum runner?

"A. Well, I heard Mrs. von Moltke say that, and since she did I have been trying to recall, and I cannot remember such an illustration.

"Q. I see.

"A. But it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration."

except the government lawyer-agents, since neither she nor her husband could afford a lawyer, and the counsel promised by Judge Moinet never appeared. Her chief concern in trying to decide whether to plead guilty was not the indictment, or possible imprisonment; as was testified by government agents, "She was concerned about her husband and his job," and "she was hoping to do whatever would be best for her husband and her child." That her troubled state of mind was recognized by the prosecuting attorney is shown by these leading questions he asked her on cross-examination:

> "Q. Now, isn't it true that up until the time you plead guilty you repeatedly asked the agents for advice as to whether you should plead guilty or not? Isn't that true?
>
> "A. There was nobody else I could ask.
>
> "Q. Well, just say yes or no.
>
> "A. Yes."

October 7, having reached a temporary decision, she went with two of the agents to the assistant district attorney and told him that she wanted to plead guilty. Since Judge Moinet was not available, she was taken before another judge who was unfamiliar with the case. At first he would not accept the plea of guilty because she then had no lawyer, and the record before him indicated that she had previously pleaded not guilty under the advice of counsel. But in response to the judge's questions, she said that she understood the indictment and was voluntarily entering a plea of guilty. The judge then permitted petitioner to sign a written waiver of counsel. The whole matter appears to have been disposed of by routine questioning within five minutes during an interlude in another trial. If any explanation of the implications of the indictment or of the consequences of her plea was then mentioned by the judge, or by anyone in his presence, the record does not show it. Nor is there

anything to indicate she was informed that a sentence of death could be imposed under the charges. The judge appears not to have asked petitioner whether she was able to hire a lawyer, why she did not want one, or who had given her advice in connection with her plea. Apparently he was not informed that the petitioner's only legal counsel had come from FBI agents.

Petitioner continued thereafter to worry about whether she had acted wisely in changing her plea to guilty. On learning in January, 1944, from an FBI agent that she could request permission to withdraw the plea, she sent messages to the district attorney, seeking such permission. Some months later Judge Moinet appointed counsel solely for the purpose of filing a motion for leave to withdraw her plea. Counsel did file such a motion, but its dismissal as tardy [4] was required by the Criminal Ap-

[4] Rule II (4) of the Criminal Appeals Rules, effective September 1, 1934, then required such motions to be filed within ten days after entry of the plea and before imposition of sentence. *Swift* v. *United States,* 79 U. S. App. D. C. 387, 148 F. 2d 361; see *Hood* v. *United States,* 152 F. 2d 431, 435; *United States* v. *Achtner,* 144 F. 2d 49, 52. It has since been liberalized by Rule 32 (d) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

Petitioner's brief states that the court denied her motion to withdraw the plea of guilty "without taking any testimony or permitting petitioner to take the stand . . . ." The Government has not challenged that statement. There is nothing in the record which indicates that the judge allowed any witnesses to testify on the motion. Nevertheless the judge, "after consideration of said motion and of the arguments presented," made purported findings of fact to the effect that she had pleaded guilty "after due and careful deliberation" and that at the time she entered the plea she "thoroughly understood the nature of the charge contained in the indictment." Neither the majority nor the minority opinion of the Circuit Court of Appeals referred to these so-called "findings" as a support for denial of the motion to withdraw the plea of guilty. The Circuit Court of Appeals simply justified the denial on the ground that the motion was filed "far too late."

peals Rules, even if the motion had been made when petitioner first learned of her rights. Had the motion to withdraw the plea of guilty not been tardy, the court would have been required to consider it in the light of what this Court declared in *Kercheval* v. *United States*, 274 U. S. 220, 223: "A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. . . . Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." [5]

It is suggested that some adverse inference should be drawn against the petitioner because she failed to try to appeal from her conviction and sentence following the denial of her motion. In view of her counsel's appointment solely for "the purpose of moving that she be allowed to withdraw her plea" of guilty, it is questionable whether he had authority to prosecute an appeal from her conviction and sentence. At least the appointed counsel did not take an appeal and he was the only lawyer petitioner had. Furthermore, the futility of an appeal based

[5] On this same subject see Orfield, Criminal Procedure from Arrest to Appeal (1947) at 300: "Since a plea of guilty is a confession in open court and a waiver of trial, it has always been received with great caution. It is the duty of the court to see that the defendant thoroughly understands the situation and acts voluntarily before receiving it." See also 4 Blackstone, Commentaries at *329: "Upon a simple and plain confession, the court hath nothing to do but to award judgment; but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it and plead to the indictment," and Bowyer, Commentaries on the Constitutional Law of England (1846) at 355: "The civil law will not allow a man to be convicted on his bare confession, not corroborated by evidence of his guilt, because there may be circumstances which may induce an innocent man to accuse himself."

upon the trial court's refusal to permit the withdrawal of her plea was obvious, in view of her failure to meet the strict requirements of Rule II (4). It seems pretty plain that the petitioner has raised the question here in the only proper way—by habeas corpus proceedings.

We accept the government's contention that the petitioner is an intelligent, mentally acute woman. It is not now necessary to determine whether, as the Government argues, the District Court might reasonably have rejected much of petitioner's testimony. Nor need we pass upon the government's contention that the evidence might have supported a finding that the FBI lawyer-agent did not actually give her the erroneous advice that mere association with criminal conspirators was sufficient in and of itself to make a person guilty of criminal conspiracy. For, assuming the correctness of the two latter contentions, we are of the opinion that the undisputed testimony previously summarized shows that when petitioner pleaded guilty, she did not have that full understanding and comprehension of her legal rights indispensable to a valid waiver of the assistance of counsel.

First. The Sixth Amendment guarantees that an accused, unable to hire a lawyer, shall be provided with the assistance of counsel for his defense in all criminal prosecutions in the federal courts. *Walker* v. *Johnston,* 312 U. S. 275, 286; see *Foster* v. *Illinois,* 332 U. S. 134, 136–137. This Court has been particularly solicitous to see that this right was carefully preserved where the accused was ignorant and uneducated, was kept under close surveillance, and was the object of widespread public hostility. *Powell* v. *Alabama,* 287 U. S. 45. The petitioner's case bristled with factors that made it all the more essential that, before accepting a waiver of her constitutional right to counsel, the court be satisfied that she fully comprehended her perilous position. We were waging total war with Germany. She had a Ger-

man name. She was a German. She had been a German countess. The war atmosphere was saturated at that time with a suspicion and fear of Germans. The indictment charged that while this country was at war with Germany and Japan the petitioner had conspired with others to betray our military secrets to Germany. She had been kept in close confinement since her arrest. Many of her alleged co-conspirators had already pleaded guilty. If found guilty, she could have been, and many people might think should have been, legally put to death as punishment for violation of the Espionage Act. If not executed, she could have been imprisoned for thirty years or for such shorter period as the judge in his discretion might fix. Even when the trial court was about to impose sentence on this petitioner following her plea of guilty, a lawyer might have rendered her invaluable aid in calling to the court's attention any mitigating circumstances that might have inclined him to fix a lighter penalty for her. Anyone charged with espionage in wartime under the statute in question would have sorely needed a lawyer; Mrs. von Moltke, in particular, desperately needed the best she could get.

Second. A waiver of the constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial. See *Williams* v. *Kaiser,* 323 U. S. 471, 475. Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman, even though acutely intelligent. Conspiracy charges frequently are of broad and confusing scope, and that is particularly true of conspiracies under the Espionage Act. See, *e. g., Gorin* v.

United States, 312 U. S. 19; *United States* v. *Heine*, 151 F. 2d 813. And especially misleading to a layman are the overt act allegations of a conspiracy. Such charges are often, as in this indictment, mere statements of past associations or conferences with other persons, which activities apparently are entirely harmless standing alone. A layman reading the overt act charges of this indictment might reasonably think that one could be convicted under the indictment simply because he had, in perfect innocence, associated with some criminal at the time and place alleged. The undisputed evidence in this case that petitioner was concerned about many of these legal questions—such as the significance of the overt act charges, and her possibilities of defense should all her co-defendants plead guilty—emphasizes her need for the aid of counsel at this stage.

Third. It is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings. *Johnson* v. *Zerbst*, 304 U. S. 458, 463; *Hawk* v. *Olson*, 326 U. S. 271, 278. This duty cannot be discharged as though it were a mere procedural formality. In *Powell* v. *Alabama*, 287 U. S. 45, the trial court, instead of appointing counsel particularly charged with the specific duty of representing the defendants, appointed the entire local bar. This Court treated such a cavalier designation of counsel as a mere gesture, and declined to recognize it as a compliance with the constitutional mandate relied on in that case. It is in this light that we view the appointment of counsel for petitioner when she was arraigned. This lawyer, apparently reluctant to accept the case at all, agreed to represent her only when promised by the judge that it would take only two or three minutes to perform his duty. And it seems to have taken no longer. Even

though we assume that this attorney did the very best he could under the circumstances, we cannot accept this designation of counsel by the trial court as anything more than token obedience to his constitutionally required duty to appoint counsel for petitioner. Arraignment is too important a step in a criminal proceeding to give such wholly inadequate representation to one charged with a crime. The hollow compliance with the mandate of the Constitution at a stage so important as arraignment might be enough in itself to convince one like petitioner, who previously had never set foot in an American courtroom, that a waiver of this right to counsel was no great loss—just another legalistic formality. We are unable to agree with the government's argument that the momentary appointment of the lawyer for arraignment purposes supports the contention that the petitioner intelligently waived her right to counsel. In fact, that court episode points in the other direction, for the judge then told the petitioner that he would appoint another lawyer "right away" for her—which he never did until long after she had pleaded guilty, too late to do her any good.

Fourth. We have said: "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." [6] To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel,[7] a judge must investigate as long and as thoroughly as the circumstances of the case before

[6] *Johnson* v. *Zerbst,* 304 U. S. 458, 465; see also *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 270.

[7] *Johnson* v. *Zerbst,* 304 U. S. 458, 464; *Glasser* v. *United States,* 315 U. S. 60, 70.

him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

This case graphically illustrates that a mere routine inquiry—the asking of several standard questions followed by the signing of a standard written waiver of counsel—may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel. And this case shows that such routine inquiries may be inadequate although the Constitution "does not require that under all circumstances counsel be forced upon a defendant." *Carter* v. *Illinois,* 329 U. S. 173, 174–175. For the record demonstrates that the petitioner welcomed legal aid from all possible sources; there would have been no necessity for forcing counsel on her.

Twice the court did designate counsel for petitioner. The first occasion was upon her arraignment. Petitioner appears willingly to have cooperated with this appointed counsel for the two or three minutes he was called upon to act. The second occasion was when counsel was named for the sole purpose of moving to withdraw her plea of guilty. Notwithstanding her unfortunate first encounter with court-appointed counsel and despite the fact that counsel was not designated the second time until it was obviously months too late to submit this

motion under the procedural rules, there is no complaint that the petitioner failed to cooperate with him. And the record is filled with evidence from many witnesses that the petitioner persistently sought legal advice from all of the very limited number of people she was permitted to see during the period of her close incarceration before her plea of guilty was entered. It is apparent from the record that when she did plead guilty the slightest deviation from the court's routine procedure would have revealed the petitioner's perplexity and doubt. For the testimony of all the witnesses points unerringly to the existence of the uncertainty which was obviously just below the surface of the petitioner's statements to the judge.

Fifth. The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. *Glasser* v. *United States,* 315 U. S. 60, 70. Before pleading guilty this petitioner undoubtedly received advice and counsel about the indictment against her, the legal questions involved in a trial under it, and many other matters concerning her case. This counsel came solely from government representatives, some of whom were lawyers. The record shows that these representatives were uniformly courteous to her, although there is no indication that they ever deviated in the slightest from the course dictated by their loyalty to the Government as its agents. In the course of her association with these agents, she appears to have developed a great confidence in them. Some of their evidence indicates a like confidence in her.[8]

The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be. Undivided allegiance and faithful, devoted service to a client are prized traditions of the Ameri-

[8] See note 3, *supra.*

can lawyer.[9] It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent.

The admitted circumstances here cannot support a holding that petitioner intelligently and understandingly waived her right to counsel. She was entitled to counsel other than that given her by Government agents. She is still entitled to that counsel before her life or her liberty can be taken from her.

What has been said represents the views of MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE. They would therefore reverse the judgment of the Circuit Court of Appeals, set aside the prior judgment of the District Court and direct that court to grant the petitioner's prayer for release from further imprisonment under the judgment based on her plea of guilty. MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON, for the reasons stated in a separate opinion, agree that the judgment of the Circuit Court of Appeals

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[9] American Bar Association, Canons of Professional and Judicial Ethics, Canon 15: "The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense."

Canon 4: "A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf."

should be reversed, and that the District Court's prior judgment should be set aside, but they are of the opinion that, after setting aside its judgment, the District Court should further consider, and make explicit findings on, the questions of fact discussed in the separate opinion.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is set aside. The cause is remanded to the District Court so that it may hold further hearings and give consideration to, and make explicit findings on, the questions of fact discussed in the separate opinion. If upon such further hearings and consideration the District Court finds that the petitioner did not competently, intelligently, and with full understanding of the implications, waive her constitutional right to counsel, an order should be entered directing that she be released from further custody under the judgment based on her plea.

It is so ordered.

Separate opinion of MR. JUSTICE FRANKFURTER, in which MR. JUSTICE JACKSON joins.

The appropriate disposition of this case turns for me on the truth of petitioner's allegation that she was advised by an F. B. I. agent, active in the case, that one who merely associated, however innocently, with persons who were parties to a criminal conspiracy was equally guilty.

We are dealing, no doubt, with a person of intellectual acuteness. But it would be very rare, indeed, even for an extremely intelligent layman to have the understanding necessary to decide what course was best calculated to serve her interests when charged with participation in a conspiracy. The too easy abuses to which a charge of conspiracy may be put have occasioned weighty animadversion by the Conference of Senior Circuit Judges. Re-

port of the Attorney General, 1925, pp. 5–6; and see also the observations of Judge Learned Hand in *United States* v. *Falcone,* 109 F. 2d 579, 581; affirmed in 311 U. S. 205. The subtleties of refined distinctions to which a charge of conspiracy may give rise are reflected in this Court's decisions. See, *e. g., Kotteakos* v. *United States,* 328 U. S. 750. Because of its complexity, the law of criminal conspiracy, as it has unfolded, is more difficult of comprehension by the laity than that which defines other types of crimes. Thus, as may have been true of petitioner, an accused might be found in the net of a conspiracy by reason of the relation of her acts to acts of others, the significance of which she may not have appreciated, and which may result from the application of criteria more delicate than those which determine guilt as to the usual substantive offenses. Accordingly, if an F. B. I. agent, acting as a member of the prosecution, gave her, however honestly, clearly erroneous legal advice [1] which might well have induced her to believe that she was guilty under the law as expounded to her by one who for her represented the Government, a person in the petitioner's situation might well have thought a defense futile and the mercy of the court her best hope. Such might have been her conclusion, however innocent she may have deemed herself to be. I could not regard a plea of guilty made under such circumstances, made without either the advice of counsel exclusively representing her or after a searching inquiry by the court into the under-

[1] This is the precise testimony: "That if there is a group of people in a 'Rum' plan who violate the law, and another person is there and the person doesn't know the people who are planning the violation and doesn't know what is going on, but still it seemed after two years this plan is carried out, in the law the man who was present becomes . . . the person nevertheless is guilty of conspiracy." The law, of course, is precisely to the contrary. *United States* v. *Falcone,* 311 U. S. 205, 210.

standing that lay behind it, as having been made on the necessary basis of informed, self-determined choice.

Of course an accused "in the exercise of a free and intelligent choice, and with the considered approval of the court . . . may . . . competently and intelligently waive" his right to the assistance of counsel guaranteed by the Sixth Amendment. *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 275; and see *Patton* v. *United States,* 281 U. S. 276, and *Johnson* v. *Zerbst,* 304 U. S. 458. There must be both the capacity to make an understanding choice and an absence of subverting factors so that the choice is clearly free and responsible. If the choice is beclouded, whether by duress or by misleading advice, however honestly offered by a member of the prosecution, a plea of guilty accepted without more than what this record discloses can hardly be called a refusal to put the inner feeling of innocence to the fair test of the law with intelligent awareness of consequences. Therefore, if the F. B. I. agent had admitted that the petitioner accurately stated his advice to her, or if the District Court upon a conflict of testimony had found that memory or truth lay with the petitioner, I could not escape the conclusion that the circumstances under which the petitioner's plea of guilty was accepted did not measure up to the safeguards heretofore enunciated by this Court for accepting a plea of guilty, especially where a sentence of death was at hazard.

On the record as we have it, however, I cannot tell whether the advice which, if given, would have colored the plea of guilty was actually given. If the unrevealing words of the cold record spoke to me with the clarity which they convey to four of my brethren, I should agree that the petitioner must be discharged. Conversely, if the District Court's opinion conveyed to me the findings which it radiates to my other brethren, I too would conclude that the judgment should be affirmed.

Unfortunately, the record does not give me a firm basis for judgment regarding the crucial issue of the F. B. I. agent's advice to the petitioner. It is not disputed that the agent, who was also a lawyer, did talk with her and did discuss legal issues with her. But he neither admitted nor denied whether, in the course of his discussions with her, he expounded the law so as hardly to leave her escape, however innocent under a correct view of the law she may have been. He did not even suggest that even though he did not remember, he was confident that he could not have given her the kind of misleading legal information she attributed to him. On the contrary, he added that "it is quite possible that Mrs. von Moltke's memory is better than mine." [2] From the dead page, in connection with the rest of the agent's testimony, this suggests a scrupulous witness. But I cannot now recreate his tone of voice or the gloss that personality puts upon speech. Therefore I am unable to determine whether the petitioner pleaded guilty in reliance on the palpably erroneous advice of an F. B. I. lawyer-agent who, as the symbol of the prosecution, owed it to an accused in petitioner's position to give her accurate guidance, if he gave any.

Nor does the District Judge's opinion resolve these difficulties for me. From what he wrote it would be the most tenuous guessing whether he rejected the petitioner's account of the F. B. I. agent's counselling or whether he did not attach to that issue the legal significance which

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[2] "Q. And did you [the F. B. I. agent] during that discussion use a [*sic*] illustration about a rum runner?

"A. Well, I heard Mrs. von Moltke say that, and since she did I have been trying to recall, and I cannot remember such an illustration.

"Q. I see.

"A. But it is quite possible that Mrs. von Moltke's memory is better than mine, and I may have used such an illustration."

I deem controlling.[3] Since the record affords neither resolving evidence nor the District Court's finding on what I deem to be the circumstance of controlling importance, I would send the cause back to the District Court for further proceedings with a view to a specific finding of fact regarding the conversation between petitioner and the F. B. I. agent, with as close a recreation of the incident as is now possible.

MR. JUSTICE BURTON, with whom THE CHIEF JUSTICE and MR. JUSTICE REED concur, dissenting.

As the issues in this case are factual and deal largely with the credibility of witnesses, the binding force of this decision as a precedent is narrow. However, to guard against undue extension of its influence, a recorded dissent seems justified.

The Government does not contest the release of the petitioner if she establishes, as a matter of fact, that either her long considered and unequivocal plea of guilty

[3] The District Judge indicated abandonment of the charges that the "agents of the Federal Bureau of Investigation mislead [*sic*] her or made promises to her that, which at least [in] some degree, influenced her action in pleading guilty to the charge," but "for the purpose of the record" he stated "most vigorously that there was absolutely nothing in the testimony sustaining such charges or implications." While it does appear, from the record, that petitioner abandoned her charge of coercion, there is nothing to buttress the suggestion that she abandoned the charge that she had been misled by the agent, and I therefore read the statement as referring to threats or promises to induce confession by the petitioner. The District Judge gave no intimation whatever that in his view the plea of guilty in connection with all the other circumstances could not be deemed to have been intelligently tendered, if in fact it was influenced by the F. B. I. agent's exposition of the law, as asserted by the petitioner. Nowhere is there a suggestion that although the agent was not prepared to say her memory of the interview was false or incorrect, the District Judge rejected her account.

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in the original proceedings against her for violation of the Espionage Act or her written and otherwise clearly stated waiver of counsel in those proceedings was not freely, intelligently and knowingly made. The Government vigorously contends that she has failed in this proceeding to establish either of those facts. We agree with the Government. She has failed to do so and, having so failed, she is not entitled to release. The printed record does not require reversal of the judgment. The uniform findings of fact against her by the three trial judges who separately saw and heard her are amply sustainable.

The petitioner made her plea of guilty and filed her waiver of counsel in open court before District Judge Arthur F. Lederle on October 7, 1943. In November, 1944, after consideration and denial of her motion for leave to withdraw her plea of guilty, she was sentenced by District Judge Edward J. Moinet. She has made no direct attack on the judgment against her. Accordingly, before considering the exceptional burden of proof which she must bear in making a collateral attack upon that judgment more than a year after it was entered, it is well to examine the process of law which led up to this judgment.

At her arraignment, September 21, 1943, before District Judge Edward J. Moinet, she was assigned counsel to assist her during the arraignment. Such counsel advised her to stand mute. She did so. This conduct preserved her full rights and it has not prejudiced her position. A plea of not guilty was entered for her. This left her free to stand by it or to change it to a plea of guilty as she later did. There is no indication that other counsel could have done more for her than was done. She thus was made aware that the court would assign counsel to assist her. In fact she testified that, after the arraignment, "Judge Moinet said he would appoint an

attorney right away, and I understood that the gentleman was to be expected to come right away." This referred to the period after her arraignment.

In addition to this contact with the attitude of the court on the subject of counsel, she frequently discussed the subject of counsel with her husband. He himself had some legal education. She also talked with two lawyer friends of her husband who came to see her as friends, although not professionally. She likewise discussed her situation on many occasions with the representatives of the Federal Bureau of Investigation and occasionally with representatives of the United States Attorney. She repeatedly was urged by her husband not to do anything until she had consulted with an attorney. On the basis of this advice, she decided not to plead guilty on September 28, although several other defendants in the same proceeding had done so. She testified as follows about her husband's advice and about her decision of September 28:

"Q. He told you to get a lawyer?

"A. Yes; he said I should not [plead guilty] before I have seen an attorney; on such a question I should talk to an attorney first about the whole thing.

. . . . .

"A. My husband said to wait until a lawyer comes out.

"Q. And you decided not to plead guilty because of that?

"A. Because of that, yes."

Several days later she finally determined to plead guilty. On October 7, 1943, she expressly waived counsel, both in open court and in writing. As to this she later was asked on the stand:

"Q. So, during the week you decided to disregard the advice that your husband had given you?

"A. Yes, sir.

. . . . . .

"Q. You made that decision; yes or no?

"A. Yes."

In other words, she had discussed her situation to her own satisfaction to the point where she had reached a conclusion both as to her plea of guilty and as to her wish to waive counsel. There is no constitutional provision that required or permitted counsel to be thrust upon her against her wishes. She had a right to decide that she did not want to discuss her case further with anyone. The issue was not then and is not now whether she might have been benefited by having counsel. She was an "intelligent, mentally acute woman" and, for reasons of her own, she made up her mind that she wished to plead guilty and to waive counsel. If she did this freely, intelligently and knowingly, that was her right and that action should be final, subject only to a motion to withdraw her plea in regular course by due process of law or to appeal from the judgment rendered on her plea. Under the rules of the court, any withdrawal of her plea had to be made within ten days after entry of such plea and before sentence was imposed. Rules for Criminal Appeals, Rule II (4), 292 U. S. 662. This was not done. Judge Lederle, to guard against any misunderstanding, on October 7, 1943, specially inquired if she desired the assistance of counsel. She answered in the negative. He then inquired as to what her plea was. She answered guilty. In addition, she submitted a written waiver of counsel. The court then deferred sentence and referred the case to the United States Probation Officer for investigation and report. Ample time was taken for this.

In June, 1944, she was taken before Judge Moinet before whom she originally had been arraigned. She then advised him that she wished to change her plea. The judge informed her that she was entitled to representation by counsel and that an attorney ought to make a motion for permission to withdraw her plea and that, if she had a preference as to counsel, he would appoint such counsel as she desired him to appoint. The matter was left in abeyance while she tried to select counsel. On July 3, 1944, she wrote to Judge Moinet, advising him that she had no preference and the court soon thereafter appointed counsel for the purpose of making her motion. The assistance rendered by such counsel is not criticized. He secured from Judge Moinet not merely a ruling upon the procedural point as to the untimeliness of her motion, but also specific findings bearing upon its merits. This order made by Judge Moinet, about a year after her arraignment before him, is significant because of its direct relation to the issue now before the Court. His order read as follows:

"This cause having come on for hearing upon the motion of the defendant Grafin Marianna von Moltke for leave to withdraw her plea of guilty, heretofore entered, and for leave to enter a plea of Not Guilty to the indictment filed herein, the matter after hearing, having been submitted, the Court, after consideration of said motion and of the arguments presented on behalf of the respective parties hereto, specifically finds:

"1. That the defendant Grafin Marianna von Moltke was properly advised of her constitutional rights by the Court, both prior to and at the time she entered her plea of Guilty to the indictment;

"2. That the plea of Guilty, entered several weeks after the filing of the indictment and her arraign-

ment thereon, was submitted after due and careful deliberation;

"3. That the defendant was advised of and thoroughly understood the nature of the charge contained in the indictment filed in this cause;

"4. That no promises or inducements or threats were made for the purpose of obtaining the plea of Guilty, and that the entry of the plea of Guilty was not due to any misrepresentations;

"5. That the motion praying for leave to withdraw the plea of Guilty was not filed within the period fixed by Rule II (4) adopted by the Supreme Court of the United States of America;

"Wherefore, It Is Ordered that the said motion to withdraw the plea of guilty entered by the defendant Graffin [Grafin] Marianna von Moltke in the above entitled cause, be and the same is hereby denied."

This was in November, 1944. Judge Moinet asked the defendant whether she had anything to say why judgment should not be pronounced against her, and, no sufficient reason to the contrary being shown or appearing to the judge, he sentenced her to imprisonment for four years. She began serving her sentence. However, after a determination had been made by the Government in 1945, looking toward her removal and repatriation to Germany, she, in 1946, filed a petition for *habeas corpus* making the present collateral attack on the original proceedings. We, therefore, are asked to review here the factual findings of the District Court made in April, 1946, through District Judge Ernest A. O'Brien in this *habeas corpus* proceeding and, by way of collateral attack, to review the action of the same District Court, taken in the original proceeding through Judge Lederle in October, 1943, and through Judge Moinet in November, 1944. While such proceedings by *habeas corpus,* based on constitutional grounds, are vital to the preservation of individual rights,

the protection of our judicial process against the making, in this way, of unjustified attacks upon such process is equally important to the preservation of the rights of the people as a whole. Each attempted attack calls for the careful weighing not only of the claims made, but also of the proof submitted to sustain each claim.

In now attacking collaterally the unappealed and deliberate judicial proceedings of 1944, a heavy burden of proof rests upon the petitioner to establish the invalidity of her original plea and waiver. The essential presumption of regularity which attaches to judicial proceedings is not lightly to be rebutted. *Johnson* v. *Zerbst,* 304 U. S. 458, 468–469; *Hawk* v. *Olson,* 326 U. S. 271, 279. Judge O'Brien recognized the strength of this presumption and the heavy burden of proof to be borne by the petitioner. He therefore held extended hearings at which the petitioner and many others appeared as witnesses. The evidence included a substantial showing that the trial judge in accepting the petitioner's plea of guilty in the original proceeding had done so only after satisfying himself, by careful questioning, that the plea was not the result of threats or promises and that, with knowledge of her right to counsel, the petitioner had voluntarily waived that right.[1] At the conclusion of these hearings Judge O'Brien found not only that the petitioner had failed to sustain the burden resting upon her, but that the overwhelming weight of the evidence in these proceedings was against her.

His statement as the trial judge in the *habeas corpus* proceedings is impressive and entitled to great weight here:

> "In the petition filed in this cause the petitioner directly or by implication charges that the District

[1] See *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 276–277.

Attorney having the case in charge and agents of the Federal Bureau of Investigation mislead [misled] her or made promises to her that which at least [in] some degree, influenced her action in pleading guilty to the charge. I am of the opinion that these charges have now been abandoned by the petitioner but for the purposes of the record I wish to state most vigorously that there was absolutely nothing in the testimony sustaining such charges or implications. The conduct of both the officials of the District Attorney's office and the agents of the Federal Bureau of Investigation were meticulous in safeguarding the rights of the petitioner and that the record is utterly bare of any support of petitioner's contentions.

"The petitioner is a woman obviously of good education and above the average in intelligence. Her knowledge of English was fluent and ample. She had discussed the case with various people before the plea of guilty was entered. In fact, at her own request, she had a conference with the chief assistant district attorney wherein she endeavored to secure from him some promises of leniency and convenience as an inducement to a plea of guilty. These advancements by the petitioner were, of course, repudiated by the district attorney and she was informed of the officials who had jurisdiction over the matter in advent [the event] of her plea of guilty.

"The chief contention of the petitioner was that her waiver of her right to counsel was not competently and intelligently made. The plea was taken before Judge Arthur Lederle of this District. The evidence showed that the Judge inquired of her if she understood the charges made in the indictment. She answered in the affirmative. The Judge inquired if she desired the assistance of counsel. She answered in

the negative. The Judge then inquired what was her plea. She answered guilty. In addition to this she submitted a signed waiver stating that she did not desire counsel.

. . . . .

"The only substantial question in this case is whether the petitioner intelligently and knowingly waived her constitutional rights. It was her obligation to sustain the allegations of her petition by a preponderance of evidence. Not only has she failed in this, but I believe that the evidence is overwhelming against her contentions. The petitioner is an intelligent, mentally acute woman. She understood the charge and the proceedings. She freely, intelligently and knowingly waived her constitutional rights. I conclude, therefore, that there is no merit in her petition and that it shall be dismissed together with the writ." [72 F. Supp. 994, 995, 997.]

The Circuit Court of Appeals affirmed the judgment dismissing the petition for the writ of *habeas corpus*. That judgment is now brought here and we are called upon to make a further review of the factual conclusions of the District Court in the *habeas corpus* proceedings.

Due process of law calls for an equal regard by us for the interests of the Government and of the petitioner in seeking the nearest possible approximation to the truth. Necessarily we have only the printed record here. On the other hand, the trial judge, faced by the same issues, heard spoken the words we now read. He saw the original instruments that we now see reproduced. He observed the conduct and expressions of the petitioner and of the other witnesses whereas we cannot make an informed independent conjecture as to such conduct or expressions. From the living record he found the factual issues overwhelmingly against the petitioner.

There is nothing in the printed record sufficient to convince us that, if we had seen the witnesses and heard the testimony, we would not have reached the same conclusion. Much less is there anything in it that convinces us that, not having seen or heard it made, we are justified in reversing his findings which were based upon more than can be before us. Under the circumstances, we believe that the truth is more nearly approximated and justice is more surely served by reading the printed record in the strong light of the trial judge's factual conclusions than by attempting to interpret that record without giving large effect to his conclusions as to its credibility and to the inferences he has drawn from it. The aid to the ascertainment of the truth to be derived from the trial court's impartial observation of the witnesses should not be dissipated in the process of review. His appraisal of the living record is entitled to proportionately more. rather than less, reliance the further the reviewing court is removed from the scene of the trial. See *District of Columbia* v. *Pace,* 320 U. S. 698, 701; *United States* v. *Johnson,* 319 U. S. 503, 518; *Williams Mfg. Co.* v. *United Shoe Machinery Corp.,* 316 U. S. 364, 367; *Delaney* v. *United States,* 263 U. S. 586, 589–590.

Her status as an enemy alien does not, in itself, affect her right to counsel or the informed character of her plea of guilty and her waiver of counsel. The fact that the charge against her was under the Espionage Act and therefore carried a technical possibility of the death penalty did not at any time introduce a practical consideration that she was in actual danger of suffering capital punishment. She accurately forecast the general character of her sentence and was concerned primarily with the wish that her sentence be served near her family. An assistant district attorney stated that he would write a letter recommending that she be imprisoned close to her family.

While a conspiracy is exceptionally difficult to define in all its legal and factual complexities, there is nothing in the Constitution that prevents an accused from freely, intelligently and knowingly choosing to plead guilty to that, as well as to other complex charges, for reasons best known to the accused, as an alternative to standing trial on that charge. This was her right. Having thus positively decided not to stand trial she did not require counsel in order freely, intelligently and knowingly to waive counsel.

Our Constitution, Bill of Rights and fundamental principles of government call for careful and sympathetic observance of the due process of law that is guaranteed to all accused persons, including enemy aliens like the petitioner. The Constitution, however, was adopted also in order to establish justice, insure domestic tranquility, promote the general welfare and secure the blessings of liberty to the people of the United States as a whole. To that end, it is equally important to review with sympathetic understanding the judicial process as constitutionally administered by our courts. While the majority of this Court are not ready to affirm the judgment below on the record as it stands, their decision to remand the case for further findings does not mean that established and salutary general presumptions in favor of the validity of judicial proceedings and in favor of a trial court's conclusions as to the credibility of witnesses are to be relaxed.

LEE *v.* MISSISSIPPI.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

No. 91. Argued November 21, 1947.—Decided January 19, 1948.

1. A defendant in a criminal prosecution in a state court, who testified that he had not in fact confessed, is not thereby precluded from raising the issue that an alleged confession offered as evidence was coerced and that a conviction obtained by the use thereof denied him due process of law in violation of the Fourteenth Amendment of the Federal Constitution. Pp. 742–746.
2. The due process clause of the Fourteenth Amendment invalidates a state court conviction grounded in whole or in part upon a confession which is the product of other than reasoned and voluntary choice. P. 745.
3. Foreclosing the right to complain of the use of an allegedly coerced confession because of inconsistent testimony as to the confession would itself be a denial of due process of law. Pp. 745–746.

201 Miss. 423, 30 So. 2d 74, reversed.

Petitioner's conviction in a criminal prosecution in a state court, claimed to have denied his rights under the Fourteenth Amendment, was affirmed by the State Supreme Court. 201 Miss. 423, 30 So. 2d 74. This Court granted certiorari. 331 U. S. 795. *Reversed,* p. 746.

Forrest B. Jackson argued the cause and filed a brief for petitioner.

Richard Olney Arrington, Assistant Attorney General of Mississippi, argued the cause for respondent. With him on the brief was *Greek L. Rice,* Attorney General.

MR. JUSTICE MURPHY delivered the opinion of the Court.

This case involves a question of procedure under the due process clause of the Fourteenth Amendment of the United States Constitution. Does a defendant in a

state criminal proceeding lose the right to contend that a confession was coerced because of his testimony that the confession was in fact never made?

Petitioner, a 17-year-old Negro, was indicted by a grand jury in Mississippi on a charge of assault with intent to ravish a female of previous chaste character. During the course of the trial, the state offered the testimony of two city detectives as to an alleged oral confession obtained by them from petitioner. Objection was made that this confession had been secured as the result of duress, threats and violence inflicted upon petitioner by two unidentified police officers several hours prior to the confession. The jury retired and a preliminary hearing was held before the trial judge as to the voluntariness of this confession. After various witnesses appeared, including the petitioner himself, the judge concluded that the confession was voluntary and that the testimony in relation thereto was admissible. This testimony proved to be the crucial element leading to the jury's conviction of petitioner. His sentence was fixed at 18 years in prison.

The Mississippi Supreme Court affirmed the conviction on appeal, rejecting petitioner's contention that the introduction of the testimony in question contravened his rights under the Fourteenth Amendment. It stated that the conduct of the two unidentified officers alleged to have struck and threatened petitioner was, if true, indefensible and warranted condemnation. But it felt that "the issue of fact as well as credibility was for the trial judge upon such preliminary qualification, and we are not willing to disturb his conclusion." 201 Miss. 423, 432, 29 So. 2d 211, 212.

This constitutional contention was treated quite differently by the court on the filing of a suggestion of error. It found that petitioner's testimony at the preliminary hearing that he had been threatened prior to making the

confession was entirely undisputed in the record. But it also found that petitioner had steadfastly testified, both at the preliminary hearing and at the trial on the merits before the jury, that he did not in fact admit to the city detectives that he had committed the crime. The court then stated: "If the accused had not denied having made any confession at all, we would feel constrained to reverse the conviction herein because of the fact that his testimony as to the threat made to him during the forenoon by the plain clothes men is wholly undisputed, the jailer not having been asked about this threat, and having testified only that he was not struck by anyone in his presence after his arrest for this crime. But, we think that one accused of crime cannot be heard to say that he did not make a confession at all, and at the same time contend that an alleged confession was made under the inducement of fear." 201 Miss. 423, 435, 30 So. 2d 74, 75. The suggestion of error was accordingly overruled.

The incomplete record before us precludes our determination of whether petitioner did deny in the trial court that he had confessed the crime.[1] But assuming that he did so testify, we cannot agree with the court below that he was thereby estopped from asserting his constitutional right to due process of law. The important fact is that the oral confession was introduced, admitted and used as evidence of petitioner's guilt. Not

[1] The transcript of the trial on the merits is not before us. At the preliminary hearing on the voluntariness of the confession, the transcript of which is before us, petitioner stated in regard to the alleged confession: "I don't know what all he asked and all I said, but I didn't admit I did it." He also denied having confessed various details of the crime. Such testimony, however, might be construed as nothing more than a layman's inexact way of stating that his answers did not amount to a voluntary confession. But in the absence of the complete record, we express no opinion on the matter.

only may this confession have been influential in inducing the jury's verdict, but it formed an essential part of the evidentiary basis of the conviction now under review. His alleged denial of the confession went only to the original issue of whether he actually made the confession, an issue that is no longer open. That question was at most a disputed one; but the jury resolved the matter against petitioner and, like the court below, we accept that determination. The sole concern now is with the validity of the conviction based upon the use of the oral confession.

The due process clause of the Fourteenth Amendment invalidates a state court conviction grounded in whole or in part upon a confession which is the product of other than reasoned and voluntary choice.[2] A conviction resulting from such use of a coerced confession, however, is no less void because the accused testified at some point in the proceeding that he had never in fact confessed, voluntarily or involuntarily. Testimony of that nature can hardly legalize a procedure which conflicts with the accepted principles of due process. And since our constitutional system permits a conviction to be sanctioned only if in conformity with those principles, inconsistent testimony as to the confession should not and cannot preclude the accused from raising the due process issue in an appropriate manner. *White* v. *Texas,* 310 U. S. 530, 531–532. Indeed, such a foreclosure of the right to complain "of a

[2] *Brown* v. *Mississippi,* 297 U. S. 278; *Chambers* v. *Florida,* 309 U. S. 227; *Canty* v. *Alabama,* 309 U. S. 629; *White* v. *Texas,* 309 U. S. 631, 310 U. S. 530; *Lomax* v. *Texas,* 313 U. S. 544; *Vernon* v. *Alabama,* 313 U. S. 547; *Lisenba* v. *California,* 314 U. S. 219; *Ward* v. *Texas,* 316 U. S. 547; *Ashcraft* v. *Tennessee,* 322 U. S. 143, 327 U. S. 274; *Lyons* v. *Oklahoma,* 322 U. S. 596; *Malinski* v. *New York,* 324 U. S. 401; *Haley* v. *Ohio,* 332 U. S. 596.

See, in general, Boskey and Pickering, "Federal Restrictions on State Criminal Procedure," 13 U. of Chi. L. Rev. 266, 282–295.

wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void," *Brown* v. *Mississippi*, 297 U. S. 278, 286, would itself be a denial of due process of law.

The judgment below must be reversed. Since the Mississippi Supreme Court upheld the conviction solely because it thought petitioner was not entitled to raise the constitutional issue, we remand the case to that court so that it may definitively express its views on that issue.

Reversed.

DECISIONS PER CURIAM AND ORDERS FROM JUNE 24, 1947, THROUGH JANUARY 19, 1948.

Cases Dismissed in Vacation.

No. 62. United States *v.* International Salt Co., Inc. Appeal from the District Court of the United States for the Southern District of New York. August 19, 1947. Dismissed in vacation pursuant to Rule 35 of the Rules of this Court. *Acting Solicitor General Washington* for the United States. *Henry B. Twombly* for appellee. Reported below: 6 F. R. D. 302.

No. 246. Continental Distilling Sales Co. *v.* Texas Liquor Control Board. Appeal from the Court of Civil Appeals, 5th Supreme Judicial District, of Texas. September 26, 1947. Dismissed in vacation pursuant to Rule 35 of the Rules of this Court. *O. O. Touchstone* and *Lloyd N. Cutler* for appellant. *Price Daniel,* Attorney General of Texas, for appellee. Reported below: 199 S. W. 2d 1009.

October 6, 1947.

Miscellaneous Orders.

No. 81, October Term, 1946. Securities & Exchange Commission *v.* Chenery Corporation et al.; and

No. 82, October Term, 1946. Securities & Exchange Commission *v.* Federal Water & Gas Corp. Mr. Justice Jackson announced that he has filed an opinion, in which Mr. Justice Frankfurter joins, setting forth the detailed grounds for his dissent from the opinion and judgment of the Court entered June 23, 1947 in these cases. Opinion of the Court and dissenting opinion of Mr. Justice Jackson reported at 332 U. S. 194, 209.

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October 6, 13, 1947. 332 U. S.

No. 306. CONNELL *v.* BOARD OF SCHOOL DIRECTORS OF THE TOWNSHIP OF KENNETT ET AL. Appeal from the Supreme Court of Pennsylvania. Dismissed on motion of counsel for the appellant. *Walter Schachtel* for appellant. *Robert T. McCracken* for appellees. Reported below: 356 Pa. 585, 52 A. 2d 645.

OCTOBER 13, 1947.

Per Curiam Decisions.

No. 21. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, LOCAL LODGE No. 926, ET AL. *v.* TOLEDO, PEORIA & WESTERN RAILROAD ET AL.; and

No. 42. FARMERS GRAIN CO. ET AL. *v.* BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, LOCAL LODGE No. 926, ET AL. Certiorari, 330 U. S. 816, to the Circuit Court of Appeals for the Seventh Circuit. *Per Curiam:* The judgment of the Circuit Court of Appeals is vacated and the cases are remanded to the District Court with directions to dismiss the complaint as moot, on motion of the respondent, Toledo, Peoria & Western Railroad, it appearing that counsel for the Brotherhood of Locomotive Firemen and Enginemen et al. agree that the cause is moot. *Louis F. Knoblock, Harold C. Heiss* and *Russell B. Day* for petitioners in No. 21. *John E. Cassidy* for the Farmers Grain Co. et al., petitioners in No. 42 and respondents in No. 21. *Guy A. Gladson, George W. Ott* and *Donald A. Morgan* for the Toledo, P. & W. R. Co., respondent in Nos. 21 and 42. Reported below: 158 F. 2d 109.

No. 76. GRENZ *v.* STATE OF WASHINGTON. Appeal from the Supreme Court of Washington. *Per Curiam:* The appeal is dismissed for failure to comply with Rule 12 of the Rules of this Court. Reported below: 26 Wash. 2d 764, 175 P. 2d 633.

No. 132. NESBITT *v.* GILL, COMMISSIONER OF REVENUE. Appeal from the Supreme Court of North Carolina. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Bacon & Sons* v. *Martin,* 305 U. S. 380; *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472. *Silas G. Bernard* for appellant. *Harry McMullan,* Attorney General of North Carolina, for appellee. Reported below: 227 N. C. 174, 41 S. E. 2d 646.

No. 173. MESTER ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Eastern District of New York. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Federal Communications Comm'n* v. *WOKO,* 329 U. S. 223. MR. JUSTICE BLACK took no part in the consideration or decision of this case. *Philip J. Hennessey, Jr., Paul M. Segal, Bernard Noskin* and *Harry P. Warner* for appellants. *Acting Solicitor General Washington* for the United States and the Federal Communications Commission; *Sanford H. Cohen* for Bulova et al.; and *Lynne A. Warren* for O'Dea, appellees. Reported below: 70 F. Supp. 118.

Nos. 165 and 166. TAMPA TIMES CO. ET AL. *v.* CITY OF TAMPA. Appeals from the Supreme Court of Florida. *Per Curiam:* The appeals are dismissed for want of a substantial federal question. *Chester H. Ferguson* and *John Henry Lewin* for appellants. Reported below: 158 Fla. 595, 29 So. 2d 368, 371.

No. 267. ALLEN *v.* GLENN L. MARTIN CO. ET AL.;

No. 268. HYMAN *v.* TYLER ET AL.; and

No. 269. BENONI *v.* BETHLEHEM FAIRFIELD SHIPYARD, INC. ET AL. Appeals from the Court of Appeals of Maryland. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for want of a sub-

stantial federal question. *Paul Berman, Sigmund Levin* and *Theodore B. Berman* for appellants. *Daniel E. Klein* for appellees in No. 267. *William R. Semans* for appellees in No. 268. *Robert E. Coughlan, Jr.* for appellees in No. 269. Reported below: No. 267, —— Md. ——, 52 A. 2d 605; No. 268, —— Md. ——, 52 A. 2d 610; No. 269, —— Md. ——, 52 A. 2d 613.

No. 197. TEXAS & NEW ORLEANS RAILROAD CO. *v.* V. RIVERA S. EN C. Appeal from the Supreme Court of Louisiana. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C. § 344 (c), certiorari is denied. *Harry McCall* for appellant. *Eberhard P. Deutsch* and *R. Emmett Kerrigan* for appellee. Reported below: 211 La. 969, 31 So. 2d 180.

No. 201. MCNAMARA ET AL. *v.* SALVATION ARMY, INC. Appeal from the Supreme Court of Kansas; and

No. 226. HART *v.* STATE OF WASHINGTON. Appeal from the Supreme Court of Washington. *Per Curiam:* The appeals are dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a). Treating the papers whereon the appeals were allowed as petitions for writs of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C. § 344 (c), certiorari is denied. *William Robert Koerner* for appellant in No. 226. Reported below: No. 201, 162 Kan. 278, 176 P. 2d 265; No. 226, 26 Wash. 2d 776, 175 P. 2d 944.

No. 257. FLORIDA EX REL. MCKEIGHAN *v.* SULLIVAN, SHERIFF. Appeal from the Supreme Court of Florida.

Per Curiam: The motion to dismiss is granted and the appeal is dismissed for the reason that the judgment of the court below is based upon a nonfederal ground adequate to support it. MR. JUSTICE MURPHY took no part in the consideration or decision of this case. *Neville Miller* for appellant. *Eugene F. Black,* Attorney General of Michigan, and *J. Velma Keen* for appellee. Reported below: 30 So. 2d 106.

No. 231. THIBAUT ET AL. *v.* CAR & GENERAL INSURANCE CORP., LTD. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for a writ of certiorari is granted. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court. *Fred G. Benton* for petitioners. Reported below: 161 F. 2d 657.

Miscellaneous Orders.

AMENDMENT TO RULE 33. For order entered this day amending Rule 33 of the Rules of this Court, see *post,* p. 857.

No. 1366, October Term, 1946. MCDONALD *v.* HUNTER, WARDEN. The motion to extend the time to file petition for rehearing is denied. *Howard F. McCue* for petitioner. See 331 U. S. 853.

No. 89, October Term, 1946. UNITED STATES *v.* NATIONAL LEAD CO. ET AL.;

No. 90, October Term, 1946. NATIONAL LEAD CO. ET AL. *v.* UNITED STATES; and

No. 91, October Term, 1946. E. I. DU PONT DE NEMOURS & CO. *v.* UNITED STATES. Order entered amending opinion. Opinion reported as amended, 332 U. S. 319.

No. 95, October Term, 1946. AIRCRAFT & DIESEL EQUIPMENT CORP. *v.* HIRSCH ET AL. Order entered amending opinion. Opinion reported as amended, 331 U. S. 752.

No. 287, October Term, 1946. BAZLEY *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 209, October Term, 1946. ADAMS *v.* COMMISSIONER OF INTERNAL REVENUE. Order entered amending opinion. Opinion reported as amended, 331 U. S. 737. Rehearing denied.

No. 5, Misc. GAPINSKI *v.* WHAM, U. S. DISTRICT JUDGE; and

No. 98, Misc. DOCKERY *v.* HUTCHESON, U. S. DISTRICT JUDGE. The motions for leave to file petitions for writs of mandamus are denied.

No. 10, Misc. EX PARTE DAVIS;

No. 57, Misc. ROLLO *v.* MICHIGAN;

No. 60, Misc. MILLER *v.* WELTMER, SUPERINTENDENT;

No. 67, Misc. KAMROWSKI *v.* RAGEN, WARDEN; and

No. 88, Misc. EDWARDS *v.* CLEMMER, DIRECTOR, ET AL. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 12, Misc. LANE *v.* C. S. SMITH METROPOLITAN MARKET CO. ET AL.; and

No. 82, Misc. MAXWELL *v.* HUDSPETH, WARDEN. The motions for leave to file petitions for writs of certiorari are denied.

No. 72, Misc. WILLIAMS *v.* PORTERIE, U. S. DISTRICT JUDGE. The motion for leave to file petition for writ of quo warranto is denied.

No. 127. UNITED STATES ET AL. *v.* SHORT LINE, INC.; and

No. 128. NEW ENGLAND GREYHOUND LINES, INC. *v.* SHORT LINE, INC. Appeals from the District Court of the United States for the District of Connecticut. Appeals dismissed on joint motions of counsel for the parties and mandates ordered to issue forthwith. *Solicitor General Perlman* and *Gordon C. Locke* for petitioners in No. 127. *John R. Turney* and *Homer S. Carpenter* for petitioner in No. 128.

Nos. 239 and 240. GUARANTY TRUST CO. *v.* UNITED STATES;

Nos. 313 and 314. UNITED STATES *v.* GUARANTY TRUST CO.; and

No. 315. UNITED STATES *v.* STEINGUT ET AL., RECEIVERS, ET AL. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit dismissed on motions of counsel for the petitioners. *John W. Davis* and *Ralph M. Carson* for the Guaranty Trust Co., petitioner in Nos. 239 and 240 and respondent in Nos. 313, 314 and 315, and *William C. Cannon* and *Francis W. Phillips* were of counsel for petitioner in Nos. 239 and 240. *Solicitor General Perlman* for the United States in Nos. 239, 240, 313, 314 and 315, and with him on the brief in Nos. 239 and 240 were *Assistant Attorney General Ford, Paul A. Sweeney* and *Oscar H. Davis.* Reported below: 161 F. 2d 571.

Certiorari Granted. (*See also No. 231, supra.*)

No. 121. UNITED STATES *v.* SULLIVAN, TRADING AS SULLIVAN'S PHARMACY. C. C. A. 5th. Certiorari granted. *Acting Solicitor General Washington* for the United States. *Robert M. Arnold* for respondent. Reported below: 161 F. 2d 629.

No. 130. MITCHELL ET AL., MEMBERS OF THE CIVIL SERVICE COMMISSION, *v.* COHEN; and

No. 131. MITCHELL ET AL., MEMBERS OF THE CIVIL SERVICE COMMISSION, *v.* HUBICKEY. United States Court of Appeals for the District of Columbia. Certiorari granted. *Acting Solicitor General Washington* for petitioners. *Gerhard A. Gesell* for respondents. Reported below: 160 F. 2d 915.

No. 138. JOHNSON *v.* UNITED STATES. C. C. A. 9th. Certiorari granted. *Silas Blake Axtell* and *Myron Scott* for petitioner. *Solicitor General Perlman, Assistant Attorney General Ford, Samuel D. Slade* and *Melvin Richter* for the United States. Reported below: 160 F. 2d 789.

No. 157. MASSACHUSETTS ET AL. *v.* UNITED STATES. C. C. A. 1st. Certiorari granted. *Clarence A. Barnes,* Attorney General of Massachusetts, and *Nathan B. Bidwell,* Assistant Attorney General, for petitioners. *Acting Solicitor General Washington, Sewall Key, Lee A. Jackson* and *Helen Goodner* for the United States. *George F. Barrett,* Attorney General, and *Albert E. Hallett,* Assistant Attorney General, filed a brief for the State of Illinois, as *amicus curiae,* in support of the petition. Reported below: 160 F. 2d 614.

No. 171. KING *v.* ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA. C. C. A. 4th. Certiorari granted. *Jesse W. Boyd* for petitioner. *E. W. Dillon* for respondent. Reported below: 161 F. 2d 108.

No. 174. SEALFON *v.* UNITED STATES. C. C. A. 3d. Certiorari granted. *Robert T. McCracken, Lemuel B. Schofield* and *Thomas D. McBride* for petitioner. *Solicitor General Perlman, W. Marvin Smith, Robert S. Erdahl*

and *Philip R. Monahan* for the United States. Reported below: 161 F. 2d 481.

No. 214. SUTTLE, ADMINISTRATRIX, *v.* REICH BROS. CONSTRUCTION CO. ET AL. C. C. A. 5th. Certiorari granted. *John D. Miller, Henry G. Bloch, C. F. Engle* and *S. B. Laub* for petitioner. Reported below: 161 F. 2d 289.

No. 215. IN RE OLIVER. Supreme Court of Michigan. Certiorari granted. *Louis M. Hopping, Osmond K. Fraenkel, Elmer H. Groefsema* and *Wm. Henry Gallagher* for petitioner. *Eugene F. Black,* Attorney General, *Edmund E. Shepherd,* Solicitor General, and *H. H. Warner,* Assistant Attorney General, for the State of Michigan, respondent. Reported below: 318 Mich. 7, 27 N. W. 2d 323.

No. 280. FUNK BROTHERS SEED CO. *v.* KALO INOCULANT CO. C. C. A. 7th. Certiorari granted. *H. A. Toulmin, Jr.* and *D. C. Staley* for petitioner. *J. Bernhard Thiess, Sidney Neuman* and *M. Hudson Rathburn* for respondent. Reported below: 161 F. 2d 981.

No. 100. UNITED STATES *v.* BROWN. C. C. A. 8th. Certiorari granted. *Acting Solicitor General Washington* for the United States. *Elmo B. Hunter* for respondent. Reported below: 160 F. 2d 310.

No. 101. ECCLES ET AL. *v.* PEOPLES BANK OF LAKEWOOD VILLAGE, CALIFORNIA. United States Court of Appeals for the District of Columbia. Certiorari granted. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Acting Solicitor General Washington* and *George B. Vest* for petitioners. *Samuel B. Stewart, Jr.* and *Luther E. Birdzell* for respondent. Reported below: 161 F. 2d 636.

No. 205. GLOBE LIQUOR CO., INC. *v.* SAN ROMAN ET AL., DOING BUSINESS AS INTERNATIONAL INDUSTRIES. C. C. A. 7th. Certiorari granted. *Ben W. Heineman* for petitioner. *Nat M. Kahn* for respondents. Reported below: 160 F. 2d 800.

No. 225. BAKERY SALES DRIVERS LOCAL UNION No. 33 ET AL. *v.* WAGSHAL, TRADING AS WAGSHAL'S DELICATESSEN. United States Court of Appeals for the District of Columbia. Certiorari granted. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *Joseph A. Padway, Herbert S. Thatcher* and *Jacqueline Wemple* for petitioners. *William E. Leahy* for respondent. Reported below: 82 U. S. App. D. C. 138, 161 F. 2d 380.

No. 227. COMMISSIONER OF INTERNAL REVENUE *v.* SUNNEN. C. C. A. 8th. Certiorari granted. *Acting Solicitor General Washington* for petitioner. *C. P. Fordyce* for respondent. Reported below: 161 F. 2d 171.

No. 17, Misc. BUTE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari granted. Reported below: 396 Ill. 588, 72 N. E. 2d 813.

Certiorari Denied. (*See also Nos. 197, 201, 226, supra.*)

No. 65. MCCALLUM & ROBINSON, INC. *v.* HENWOOD, TRUSTEE. Court of Appeals of Tennessee. Certiorari denied. *A. Longstreet Heiskell* for petitioner. Reported below: — Tenn. App. —, 208 S. W. 2d 546.

No. 99. ROBICHAUD *v.* BRENNAN, JUDGE, ET AL. Court of Errors and Appeals of New Jersey. Certiorari denied. *Thomas McNulty* for petitioner. *Eugene F. Black,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, *H. H. Warner,* Assistant Attorney General,

and *John W. Griggs,* Deputy Attorney General, for respondents. Reported below: 135 N. J. L. 472, 52 A. 2d 697.

No. 102. SOUTHERN PACIFIC CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Lawrence Cake* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Ford, Paul A. Sweeney* and *Oscar H. Davis* for the United States. Reported below: 107 Ct. Cl. 513, 69 F. Supp. 211.

No. 103. CONN ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Frederick Schwertner* for petitioners. *Acting Solicitor General Washington, Assistant Attorney General Ford* and *Samuel D. Slade* for the United States. Reported below: 107 Ct. Cl. 422, 68 F. Supp. 966.

No. 106. UNION PAVING CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Walter Biddle Saul* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Ford* and *Samuel D. Slade* for the United States. Reported below: 107 Ct. Cl. 405.

No. 107. SEVEN-UP BOTTLING CO. OF LOS ANGELES, INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Roger Robb* and *Burr Tracy Ansell* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Ford* and *Samuel D. Slade* for the United States. Reported below: 107 Ct. Cl. 402, 68 F. Supp. 735.

No. 108. CENTAUR CONSTRUCTION CO., INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Josephus C. Trimble* and *Harry S. Hall* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Ford, Paul A. Sweeney* and *Oscar H. Davis* for the

United States. Reported below: 107 Ct. Cl. 498, 69 F. Supp. 217.

No. 110. POPE *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Ford* and *Samuel D. Slade* for the United States. Reported below: 107 Ct. Cl. 463.

No. 112. WEBER ET AL. *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 120. SEMI-STEEL CASTING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. C. A. 8th. Certiorari denied. *John W. Giesecke* for petitioners in No. 112. *Joseph T. Davis* for petitioner in No. 120. *Acting Solicitor General Washington, Gerhard P. Van Arkel, Morris P. Glushien, Ruth Weyand* and *Robert E. Mullin* for respondent. Reported below: 160 F. 2d 388.

No. 113. SLIFKA ET AL., EXECUTORS, *v.* JOHNSON, COLLECTOR OF INTERNAL REVENUE. C. C. A. 2d. Certiorari denied. *Alexander Pfeiffer* for petitioners. *Acting Solicitor General Washington, Sewall Key, Lee A. Jackson* and *Louise Foster* for respondent. Reported below: 161 F. 2d 467.

No. 114. CIOCARLAN *v.* MICHIGAN;

No. 115. FOX *v.* MICHIGAN; and

No. 116. PEEL *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *Hayden C. Covington* for petitioners. Reported below: 317 Mich. 349, 26 N. W. 2d 904.

No. 118. HOME BENEFICIAL LIFE INSURANCE CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. C. A. 4th. Certiorari denied. *T. Justin Moore* for petitioner. *Act-*

ing Solicitor General Washington, Gerhard P. Van Arkel, Morris P. Glushien and *Ruth Weyand* for respondent. Reported below: 159 F. 2d 280.

No. 119. FORD, TRUSTEE IN BANKRUPTCY, *v.* MAGEE. C. C. A. 2d. Certiorari denied. *I. Jonas Speciner* for petitioner. *Harold R. Korey* and *Emanuel Tacker* for respondent. Reported below: 160 F. 2d 457.

No. 123. PISTOLESI *v.* MASSACHUSETTS MUTUAL LIFE INSURANCE CO. C. C. A. 9th. Certiorari denied. *Herbert W. Erskine* for petitioner. *David Livingston* for respondent. Reported below: 160 F. 2d 668.

No. 124. BUILDERS TRUST CO. *v.* BUTLER ET AL. Supreme Court of Minnesota. Certiorari denied. *Louis P. Sheahan* and *Samuel Lipschultz* for petitioner. *Patrick J. Ryan* for respondents. Reported below: 223 Minn. 196, 26 N. W. 2d 204.

No. 125. ALABAMA DRY DOCK & SHIPBUILDING CO. *v.* CALDWELL ET AL.; and

No. 126. ALABAMA DRY DOCK & SHIPBUILDING CO. *v.* ANDREWS ET AL. C. C. A. 5th. Certiorari denied. *Harry H. Smith* for petitioner. *Sam M. Johnston* for respondents. Reported below: 161 F. 2d 83.

No. 129. RABIN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *Walter M. Nelson* and *George Stone* for petitioner. *Edmund E. Shepherd,* Solicitor General of Michigan, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent. Reported below: 317 Mich. 654, 27 N. W. 2d 126.

No. 133. ZELLAN *v.* GIDDINGS. United States Court of Appeals for the District of Columbia. Certiorari de-

nied. *Harry Friedman* for petitioner. *Paul J. Sedgwick* for respondent. Reported below: 82 U. S. App. D. C. 92, 160 F. 2d 585.

No. 135. JACKSON SECURITIES & INVESTMENT CO. *v.* PRUDENTIAL INSURANCE CO. C. C. A. 5th. Certiorari denied. *Crampton Harris* for petitioner. *Francis H. Hare* for respondent. Reported below: 159 F. 2d 678.

No. 136. TEXAS & PACIFIC RAILWAY CO. ET AL. *v.* BROTHERHOOD OF RAILROAD TRAINMEN ET AL.; and

No. 137. ADAMS ET AL. *v.* BROTHERHOOD OF RAILROAD TRAINMEN ET AL. C. C. A. 5th. Certiorari denied. *J. T. Suggs, M. E. Clinton, Esmond Phelps, Frank H. Peterman, H. Payne Breazeale, Thomas T. Railey, Murray Hudson* and *Fred G. Hudson, Jr.* for Thompson, Trustee, petitioner in No. 136. *Fred G. Benton* for petitioners in No. 137. *Kemble K. Kennedy* for respondents. Reported below: 159 F. 2d 822.

No. 139. ESTIN *v.* ESTIN. Court of Appeals of New York. Certiorari denied. *James G. Purdy* and *Abraham J. Nydick* for petitioner. *Joseph N. Schultz* for respondent. Reported below: 296 N. Y. 308, 73 N. E. 2d 113.

No. 140. DISTRICT OF COLUMBIA *v.* JOHNSON & WIMSATT, INC. United States Court of Appeals for the District of Columbia. Certiorari denied. *Vernon E. West, Chester H. Gray* and *Harry L. Walker* for petitioner. *Jo V. Morgan* for respondent. Reported below: 82 U. S. App. D. C. 81, 160 F. 2d 913.

No. 141. DISTRICT OF COLUMBIA *v.* H. D. LEE CO. United States Court of Appeals for the District of Columbia. Certiorari denied. *Vernon E. West, Chester H. Gray* and *George C. Updegraff* for petitioner. Reported below: 82 U. S. App. D. C. 136, 161 F. 2d 646.

No. 142. MADDEN *v.* QUEENS COUNTY JOCKEY CLUB, INC. Supreme Court of New York, Queens County. Certiorari denied. *Raphael H. Weissman* for petitioner. *Joseph B. Cavallaro* for respondent. *Martin A. Schenck, Harold C. McCollom* and *Kenneth W. Greenawalt* filed a brief for the Westchester Racing Assn. et al., as *amici curiae,* opposing the petition. Reported below: See 296 N. Y. 249, 72 N. E. 2d 697.

No. 143. MORRIS, ADMINISTRATOR, *v.* FIRST NATIONAL BANK OF ATLANTA ET AL. Supreme Court of Georgia. Certiorari denied. *Chas. W. Anderson* for petitioner. Reported below: 202 Ga. 51, 42 S. E. 2d 215.

No. 144. SEIFING *v.* BARCLAY WHITE CO. ET AL. Supreme Court of Pennsylvania. Certiorari denied. *Frank B. Murdoch* for petitioner. *Albert Smith Faught* for the Barclay White Co. et al., respondents. Reported below: 356 Pa. 43, 50 A. 2d 336.

No. 145. TITLE INSURANCE & GUARANTY CO. ET AL. *v.* HART, TRUSTEE. C. C. A. 9th. Certiorari denied. *Edward F. Treadwell* and *Arthur J. Edwards* for petitioners. *David H. Cannon* and *James T. Boyd* for respondent. Reported below: 160 F. 2d 961.

No. 146. SCHULTE ET AL., TRUSTEES, *v.* PARK & TILFORD, INC. ET AL. C. C. A. 2d. Certiorari denied. *Edwin A. Falk* and *Murray C. Bernays* for petitioners. *Max L. Rothenberg* for Park & Tilford, Inc., respondent. *Nathan B. Kogan* for Kogan, respondent. *Acting Solicitor General Washington, Roger S. Foster* and *W. Victor Rodin* filed a brief for the United States, respondent, and the Securities & Exchange Commission, as *amicus curiae,* opposing the petition. Reported below: 160 F. 2d 984.

No. 147. PANHANDLE EASTERN PIPE LINE CO. *v.* FEDERAL POWER COMMISSION. United States Court of Appeals for the District of Columbia. Certiorari denied. *Ira Lloyd Letts, D. H. Culton, John S. L. Yost, Edward H. Lange, John W. Scott* and *Harry S. Littman* for petitioner. *Acting Solicitor General Washington, Robert L. Stern, Charles E. McGee* and *Louis W. McKernan* for respondent.

No. 148. HUMBLE OIL & REFINING CO. ET AL. *v.* UNITED STATES. C. C. A. 5th. Certiorari denied. *M. G. Eckhardt, R. E. Seagler* and *Rex G. Baker* for petitioners. *Acting Solicitor General Washington, Assistant Attorney General Vanech, Roger P. Marquis* and *Wilma C. Martin* for the United States. Reported below: 160 F. 2d 182.

No. 149. CONRAD *v.* PENNSYLVANIA RAILROAD CO.; and

No. 150. DAMIANO *v.* PENNSYLVANIA RAILROAD CO. C. C. A. 3d. Certiorari denied. *Lee Pressman* and *Frank Donner* for petitioners. *Philip Price, Hugh B. Cox* and *John R. Wall* for respondent. Reported below: 161 F. 2d 534.

No. 152. KALAMAZOO STATIONERY CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. C. A. 6th. Certiorari denied. *Alexis J. Rogoski* for petitioner. *Acting Solicitor General Washington, Gerhard P. Van Arkel, Morris P. Glushien, Ruth Weyand* and *Mozart G. Ratner* for respondent. Reported below: 160 F. 2d 465.

No. 154. AKERMAN *v.* UNITED STATES; and

No. 155. BOURQUIN *v.* UNITED STATES. Court of Claims. Certiorari denied. *Robert H. Anderson* and *John J. Carmody* for petitioner in No. 154. Petitioner *pro se* in No. 155. *Solicitor General Perlman, Assistant*

Attorney General Ford, Frederick Bernays Wiener, Paul A. Sweeney and *Melvin Richter* for the United States. Reported below: 108 Ct. Cl. 700, 72 F. Supp. 76.

No. 158. KAY ET AL. *v.* MACCORMACK ET AL., EXECUTORS AND TRUSTEES, ET AL. Surrogate's Court, New York County, New York. Certiorari denied. *John M. Harlan* for petitioners. *Robert S. MacCormack, Jr.*, respondent, *pro se*. Reported below: See 296 N. Y. 915, 73 N. E. 2d 37.

No. 159. WHEELING & LAKE ERIE RAILWAY CO. ET AL. *v.* KEITH. C. C. A. 6th. Certiorari denied. *George H. P. Lacey* and *John J. Adams* for petitioners. *Marvin C. Harrison* for respondent. Reported below: 160 F. 2d 654.

No. 160. DI BENEDETTO *v.* UNITED STATES; and

No. 161. DORRANCE *v.* UNITED STATES. Court of Claims. Certiorari denied. *Charles A. Horsky* and *Amy Ruth Mahin* for petitioners. *Solicitor General Perlman, Assistant Attorney General Ford, Paul A. Sweeney* and *Harry I. Rand* for the United States. Reported below: 108 Ct. Cl. 18, 29.

No. 162. WILCOX *v.* DEWITT. C. C. A. 9th. Certiorari denied. *A. L. Wirin, Arthur Garfield Hays, Osmond K. Fraenkel, Walter Gellhorn* and *Charles A. Horsky* for petitioner. *Solicitor General Perlman, Assistant Attorney General Ford, Frederick Bernays Wiener, Paul A. Sweeney* and *Ray B. Houston* for respondent. Reported below: 161 F. 2d 785.

No. 163. MOORE *v.* OREGON. Supreme Court of Oregon. Certiorari denied. *John P. Hannon* for petitioner. Reported below: 180 Ore. 502, 177 P. 2d 413.

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No. 164. MADOKORO ET AL. *v.* DEL GUERCIO, DISTRICT DIRECTOR, IMMIGRATION & NATURALIZATION SERVICE. C. C. A. 9th. Certiorari denied. *A. L. Wirin* for petitioners. *Solicitor General Perlman, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 160 F. 2d 164.

No. 167. JORGENSEN *v.* YORK ICE MACHINERY CORP. C. C. A. 2d. Certiorari denied. *Louis Phillips* for petitioner. *Edward Ash* for respondent. Reported below: 160 F. 2d 432.

No. 168. BELL *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *Raymond Kyle Hayes* for petitioner. *Harry McMullan,* Attorney General of North Carolina, and *Hughes J. Rhodes,* Assistant Attorney General, for respondent. Reported below: 227 N. C. 527, 43 S. E. 2d 84.

No. 169. WAIN *v.* UNITED STATES. C. C. A. 2d. Certiorari denied. *Henry G. Singer* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 162 F. 2d 60.

No. 170. DIXON *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. C. A. 2d. Certiorari denied. Petitioner *pro se. Homer H. Breland, Bruce Bromley* and *Benjamin R. Shute* for the American Telephone & Telegraph Co. et al., and *James J. Kennedy* for Philipp, Sawyer, Rice & Kennedy et al., respondents. Reported below: 159 F. 2d 863.

No. 175. CALIFORNIA ET AL. *v.* MICHIGAN STATE BOARD OF ESCHEATS ET AL. Supreme Court of Michigan. Certiorari denied. *Fred N. Howser,* Attorney General of California, *Everett W. Mattoon,* Deputy Attorney Gen-

eral, and *Lloyd T. Chockley* for petitioners. *Eugene F. Black,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondents. Reported below: 317 Mich. 291, 26 N. W. 2d 777.

No. 176. PEARCE *v.* PENNSYLVANIA RAILROAD CO. ET AL. C. C. A. 3d. Certiorari denied. *Lee Pressman* and *Frank Donner* for petitioner. *Thomas Raeburn White* for respondents. Reported below: 162 F. 2d 524.

No. 177. CHERETON *v.* UNITED STATES. C. C. A. 6th. Certiorari denied. *William G. Fitzpatrick* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 161 F. 2d 808.

No. 194. DEBARTOLO *v.* VILLAGE OF OAK PARK. Supreme Court of Illinois. Certiorari denied. *Ode L. Rankin* for petitioner. *Amos M. Mathews* for respondent. Reported below: 396 Ill. 404, 71 N. E. 2d 693.

No. 195. CARON CORPORATION *v.* OLLENDORFF. C. C. A. 2d. Certiorari denied. *Maurice Léon, Joseph H. Choate, Jr.* and *William Byrd* for petitioner. *Samuel Conrad Cohen* and *Abraham J. Nydick* for respondent. Reported below: 160 F. 2d 444.

No. 199. CENTRAL NEBRASKA PUBLIC POWER & IRRIGATION DISTRICT *v.* FEDERAL POWER COMMISSION. C. C. A. 8th. Certiorari denied. *Wendell Berge, P. E. Boslaugh* and *Robert Flory* for petitioner. *Solicitor General Perlman, Assistant Attorney General Ford, Paul A. Sweeney, Melvin Richter, Willard W. Gatchell* and *Joseph B. Hobbs* for respondent. Reported below: 160 F. 2d 782.

No. 202. SOY FOOD MILLS, INC. *v.* PILLSBURY MILLS, INC. C. C. A. 7th. Certiorari denied. *Truman A. Herron* for petitioner. *Bradshaw Mintener* and *Ralph E. Williamson* for respondent. Reported below: 161 F. 2d 22.

No. 204. BOONE *v.* BOONE, TRUSTEE. United States Court of Appeals for the District of Columbia. Certiorari denied. *Thomas H. Patterson* for petitioner. *Louis M. Denit* and *M. Ryan McCown* for respondent. Reported below: 82 U. S. App. D. C. 38, 160 F. 2d 13.

No. 207. PHILADELPHIA RECORD CO. *v.* O'DONNELL. Supreme Court of Pennsylvania. Certiorari denied. *Jerome J. Rothschild, Lemuel B. Schofield, Thomas D. McBride, Laurence H. Eldredge* and *W. Bradley Ward* for petitioner. *John D. M. Hamilton* for respondent. Reported below: 356 Pa. 307, 51 A. 2d 775.

No. 209. CROWELL-COLLIER PUBLISHING CO. *v.* CALDWELL. C. C. A. 5th. Certiorari denied. *Chester H. Ferguson* for petitioner. *Leo L. Foster* for respondent. Reported below: 161 F. 2d 333.

No. 208. TRAVELERS INSURANCE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 2d. Certiorari denied. *Lillian L. Malley* for petitioner. *Solicitor General Perlman, Sewall Key, Lee A. Jackson* and *Helen Goodner* for respondent. Reported below: 161 F. 2d 93.

No. 213. E. J. STANTON & SON *v.* COUNTY OF LOS ANGELES ET AL. District Court of Appeal, 2d Appellate District, of California. Certiorari denied. *Albert E. Conradis* for petitioner. *Harold W. Kennedy, Ray L. Chesebro* and *Hugh H. MacDonald* for respondents. Reported below: 78 Cal. App. 2d 181, 177 P. 2d 804.

No. 216. AUSTIN *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 6th. Certiorari denied. *Ashley M. Van Duzer* and *Thomas V. Koykka* for petitioner. *Solicitor General Perlman, Sewall Key, Robert N. Anderson* and *Irving I. Axelrad* for respondent. Reported below: 161 F. 2d 666.

No. 218. BERRY, ADMINISTRATRIX, *v.* FRANKLIN PLATE GLASS CORP. C. C. A. 3d. Certiorari denied. *John D. Meyer* and *Charles V. Halley, Jr.* for petitioner. *Frank W. Stonecipher* for respondent. Reported below: 161 F. 2d 184.

No. 219. MONTAGUE *v.* SMITH ET AL. Supreme Court of Appeals of Virginia. Certiorari denied. *Samuel B. Brown* for petitioner.

No. 220. WEISS *v.* UNITED STATES. C. C. A. 2d. Certiorari denied. *I. Maurice Wormser* and *Francis J. Quillinan* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 162 F. 2d 447.

No. 221. EISENBERG *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 222. SCHAEFFER *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 3d. Certiorari denied. *Hirsh W. Stalberg* for petitioners. *Solicitor General Perlman, Sewall Key, Lee A. Jackson* and *Carlton Fox* for respondent. Reported below: 161 F. 2d 506.

No. 224. JAMES F. WATERS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 9th. Certiorari denied. *Everett S. Layman* for petitioner. *Solicitor General Perlman, Sewall Key, Lee A. Jackson* and *Austin Hoyt* for respondent. Reported below: 160 F. 2d 596.

No. 228. THOMSON *v.* UNITED STATES. C. C. A. 9th. Certiorari denied. *A. L. Wirin* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 161 F. 2d 761.

No. 229. SPEARS ET AL. *v.* SPEARS, SPECIAL ADMINISTRATRIX, ET AL. C. C. A. 6th. Certiorari denied. *I. H. Spears* and *George M. Johnson* for petitioners. *Elmer W. Beasley* and *George A. Sutton* for respondents. Reported below: 162 F. 2d 345.

No. 230. OLSEN *v.* UNITED STATES. C. C. A. 9th. Certiorari denied. *Barnett H. Goldstein* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 161 F. 2d 669.

No. 232. KJAR *v.* UNITED STATES. Court of Claims. Certiorari denied. *Henry H. Taylor, Jr.* for petitioner. *Solicitor General Perlman, Sewall Key* and *A. F. Prescott* for the United States. Reported below: 108 Ct. Cl. 119, 69 F. Supp. 406.

No. 233. RICE BROS. *v.* BIRMINGHAM. Supreme Court of Iowa. Certiorari denied. *Clarence G. Myers, Herbert W. Brackney* and *Charles M. Stilwill* for petitioner. *Darrel N. Hanna* for respondent. Reported below: 238 Iowa 410, 26 N. W. 2d 39.

No. 234. KORITZ ET AL. *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *I. Duke Avnet* for petitioners. *Harry McMullan,* Attorney General of North Carolina, and *James E. Tucker,* Assistant Attorney General, for respondent. Reported below: 227 N. C. 552, 43 S. E. 2d 77.

No. 235. WILSON *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 4th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Sewall Key, A. F. Prescott* and *Fred E. Youngman* for respondent. Reported below: 161 F. 2d 556.

No. 236. KORACH BROS. *v.* CLARK, DIRECTOR OF THE DIVISION OF LIQUIDATION, DEPARTMENT OF COMMERCE. United States Emergency Court of Appeals. Certiorari denied. *Samuel E. Hirsch* and *Julian H. Levi* for petitioner. *Solicitor General Perlman, Harry H. Schneider* and *Israel Convisser* for respondent. Reported below: 162 F. 2d 1020.

No. 237. BRANDENBURG *v.* UNITED STATES. C. C. A. 3d. Certiorari denied. *Frederic M. P. Pearse* and *Charles M. Trammell* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 162 F. 2d 980.

No. 241. WATTS *v.* UNITED STATES. C. C. A. 5th. Certiorari denied. *Bernard A. Golding* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 161 F. 2d 511.

No. 242. DANZIGER *v.* UNITED STATES. C. C. A. 9th. Certiorari denied. *R. M. J. Armstrong* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 161 F. 2d 299.

No. 243. BRUCE ET UX. *v.* KING. Supreme Court of Texas. Certiorari denied. *Homer L. Bruce* for petitioners. *R. K. Hanger* for respondent. Reported below: 145 Tex. 647, 201 S. W. 2d 803.

No. 244. CAFFEY, U. S. DISTRICT JUDGE, *v.* BERESLAVSKY. C. C. A. 2d. Certiorari denied. *Herbert C. Smyth, Jr.* and *Frank S. Busser* for petitioner. *W. B. Morton* for respondent. Reported below: 161 F. 2d 499.

No. 248. MISSISSIPPI POWER & LIGHT CO. *v.* MEMPHIS NATURAL GAS CO. C. C. A. 5th. Certiorari denied. *Garner W. Green, Sr.* and *E. R. Holmes, Jr.* for petitioner. Reported below: 162 F. 2d 388.

No. 249. DELAWARE, LACKAWANNA & WESTERN RAILROAD CO. *v.* MOSTYN ET AL. C. C. A. 2d. Certiorari denied. *John H. Hughes* for petitioner. *Victor Levine* for Mostyn, and *Tracy H. Ferguson* for the S. H. Golden Co., respondents. Reported below: 160 F. 2d 15.

No. 250. PUBLICKER INDUSTRIES, INC. *v.* CLARK, DIRECTOR OF THE DIVISION OF LIQUIDATION, DEPARTMENT OF COMMERCE. United States Emergency Court of Appeals. Certiorari denied. *Robert W. Lishman, Oscar S. Cox, William H. Matthews, Jr.* and *Lloyd N. Cutler* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Harry H. Schneider* for respondent. Reported below: 162 F. 2d 742.

No. 252. YOUNG ET AL. *v.* UNITED STATES. C. C. A. 10th. Certiorari denied. *Austin M. Cowan* for petitioners. *Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 163 F. 2d 187.

No. 253. GRAFF *v.* PRIEST, PRESIDENT OF THE BOARD OF POLICE COMMISSIONERS OF ST. LOUIS, ET AL. Supreme Court of Missouri. Certiorari denied. *Roberts P. Elam*

for petitioner. *J. E. Taylor,* Attorney General of Missouri, for respondents. Reported below: 356 Mo. 401, 201 S. W. 2d 945.

No. 254. KLOPP *v.* OVERLADE, WARDEN. C. C. A. 7th. Certiorari denied. *Hayden C. Covington* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 162 F. 2d 343.

No. 259. BERNSTEIN *v.* N. V. NEDERLANDSCHE-AMERIKAANSCHE STOOMVAART-MAATSCHAPPIJ. C. C. A. 2d. Certiorari denied. *William S. Bennet* and *Victor House* for petitioner. *Roscoe H. Hupper* for respondent. Reported below: 161 F. 2d 733.

No 261. BRAMER *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 3d. Certiorari denied. *Samuel Kaufman, Frank R. S. Kaplan* and *Maurice J. Mahoney* for petitioner. *Solicitor General Perlman, Helen R. Carloss* and *L. W. Post* for respondent. Reported below: 161 F. 2d 185.

No. 263. DOSSETT, DOING BUSINESS AS THE J. A. DOSSETT LUMBER CO., *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. C. C. A. 6th. Certiorari denied. *James G. Wheeler* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 161 F. 2d 839.

No. 264. WALKER-HILL CO. *v.* UNITED STATES. C. C. A. 7th. Certiorari denied. *Albert I. Kegan* and *Esther O. Kegan* for petitioner. *Solicitor General Perlman, Stanley M. Silverberg, Sewall Key, Robert N. Anderson* and *Benjamin H. Pester* for the United States. Reported below: 162 F. 2d 259.

No. 265. SWICK *v.* GLENN L. MARTIN CO. C. C. A. 4th. Certiorari denied. *Jacob W. Friedman* for petitioner. *William L. Marbury* for respondent. Reported below: 160 F. 2d 483.

No. 271. SMITH *v.* GEORGIA. Court of Appeals of Georgia. Certiorari denied. *George G. Finch* and *G. Seals Aiken* for petitioner. Reported below: 74 Ga. App. 777, 41 S. E. 2d 541.

No. 272. KIRBY ET AL. *v.* HOUSTON OIL CO. ET AL. Court of Civil Appeals, 9th Supreme Judicial District, of Texas. Certiorari denied. *William D. Gordon* for petitioners. *William Hamlet Blades* for respondents. Reported below: 200 S. W. 2d 246.

No. 273. SOUTH TEXAS COMMERCIAL NATIONAL BANK *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 5th. Certiorari denied. *Homer L. Bruce* for petitioner. *Solicitor General Perlman, Sewall Key* and *Helen Goodner* for respondent. Reported below: 162 F. 2d 462.

No. 274. FREDERICK *v.* FIRST LIQUIDATING CORP. ET AL. Supreme Court of Michigan. Certiorari denied. *Don Mahone Harlan* for petitioner. *Henry I. Armstrong, Jr.* for respondents. Reported below: 317 Mich. 637, 27 N. W. 2d 117.

No. 277. BERNSTEIN *v.* VAN HEYGHEN FRÈRES SOCIÉTÉ ANONYME. C. C. A. 2d. Certiorari denied. *William S. Bennet, Victor House* and *Earl G. Harrison* for petitioner. *Louis Connick* for respondent. *William Maslow, Shad Polier* and *Joseph B. Robison* filed a brief for the American Jewish Congress, as *amicus curiae,* in support of the petition. Reported below: 163 F. 2d 246.

No. 281. WOLFE, ADMINISTRATRIX, *v.* HENWOOD, TRUSTEE. C. C. A. 8th. Certiorari denied. *Arthur L. Adams* for petitioner. *Joe C. Barrett* and *Archer Wheatley* for respondent. Reported below: 162 F. 2d 998.

No. 284. FIELDS *v.* HANNEGAN, POSTMASTER GENERAL. United States Court of Appeals for the District of Columbia. Certiorari denied. *W. Theophilus Jones* for petitioner. *Solicitor General Perlman, Assistant Attorney General Ford, Samuel D. Slade* and *Harry I. Rand* for respondent. Reported below: 82 U. S. App. D. C. 234, 162 F. 2d 17.

No. 286. E. ANTHONY & SONS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia. Certiorari denied. *Elisha Hanson, William K. Van Allen, Letitia Armistead* and *Arthur B. Hanson* for petitioner. *Solicitor General Perlman, Robert N. Denham, David Findling, Ruth Weyand* and *Mozart G. Ratner* for respondent. Reported below: 82 U. S. App. D. C. 249, 163 F. 2d 22.

No. 289. LIBERTY MUTUAL INSURANCE CO. *v.* SINDELAR, EXECUTOR, ET AL. C. C. A. 7th. Certiorari denied. *Howard Boyd* and *George D. Horning, Jr.* for petitioner. *Vincent O'Brien* for respondents. Reported below: 161 F. 2d 712.

No. 298. FENERTY *v.* PHILADELPHIA BAR ASSOCIATION. Supreme Court of Pennsylvania. Certiorari denied. *John Boyle* for petitioner. *Henry R. Heebner* for respondent. Reported below: 356 Pa. 614, 52 A. 2d 576.

No. 109. O'NEILL, ADMINISTRATRIX, *v.* CUNARD WHITE STAR, LTD. C. C. A. 2d. Certiorari denied. *Silas Blake Axtell* for petitioner. *George deForest Lord* and *William J. Brennan* for respondent. *Arthur Dunn, B. A.*

Green and *Alexander Howard* filed a brief for the Friends of Furuseth Legislative Association, as *amicus curiae*, supporting the petition. Reported below: 160 F. 2d 446.

No. 151. HALSTEAD *v.* INDUSTRIAL ACCIDENT COMMISSION. Supreme Court of California. Certiorari denied.

No. 156. YATES *v.* BALL. Supreme Court of Florida. Certiorari denied. *Robert H. Anderson, Harry T. Gray* and *Edward F. Prichard, Jr.* for petitioner. *Henry P. Adair* and *Wm. H. Rogers* for respondent. Reported below: 158 Fla. 521, 29 So. 2d 729.

No. 172. MILLER *v.* SANFORD, WARDEN. C. C. A. 5th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent. Reported below: 161 F. 2d 291.

No. 200. KRUGER *v.* WHITEHEAD, DOING BUSINESS AS THE WHITEHEAD CO. C. C. A. 9th. Certiorari denied. Petitioner *pro se*. *Frederick S. Lyon* for respondent. Reported below: 153 F. 2d 238.

No. 203. GREGORY *v.* UNITED STATES. Court of Claims. Certiorari denied.

No. 210. GORDONS TRANSPORTS, INC. *v.* WALLING, WAGE & HOUR ADMINISTRATOR. C. C. A. 6th. McComb, present Wage & Hour Administrator, substituted for Walling. Certiorari denied. *James W. Wrape* for petitioner. *Solicitor General Perlman, William S. Tyson* and *Morton Liftin* for respondent. Reported below: 162 F. 2d 203.

No. 251. HOLLINGSWORTH ET AL. *v.* CITIES SERVICE OIL CO. Court of Civil Appeals, 9th Supreme Judicial

District, of Texas. Certiorari denied. *Gilbert T. Adams* for petitioners. Reported below: 199 S. W. 2d 266.

No. 262. HUDSON ET AL. *v.* GULF REFINING CO. ET AL. Supreme Court of Mississippi. Certiorari denied. *Ben F. Cameron* for petitioners. *John E. Green, Jr., W. H. Watkins, Sr., P. H. Eager, Jr.* and *Garner W. Green* for the Gulf Refining Co. et al., and *J. Morgan Stevens* and *Ellis B. Cooper* for Lewis et al., respondents. Reported below: 202 Miss. —, 30 So. 2d 66, 421.

No. 276. FREDRICK ET AL. *v.* UNITED STATES. C. C. A. 9th. Certiorari denied. *Abraham Gottfried* for petitioners. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 163 F. 2d 536.

No. 279. LUSTIG ET AL. *v.* UNITED STATES. C. C. A. 2d. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Nathan L. Miller* and *J. Bertram Wegman* for petitioners. *Solicitor General Perlman, Frederick Bernays Wiener* and *Ellis N. Slack* for the United States. Reported below: 163 F. 2d 85.

No. 43. WINSTON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se. George F. Barrett,* Attorney General of Illinois, *William C. Wines* and *James C. Murray,* Assistant Attorneys General, for respondent. Reported below: 395 Ill. 624, 71 N. E. 2d 1.

No. 104. HAWTHORNE *v.* SANFORD, WARDEN. C. C. A. 5th. Certiorari denied. Petitioner *pro se. Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 161 F. 2d 934.

No. 1, Misc. MONTANYE *v.* NEW YORK. Supreme Court of New York, Lewis County. Certiorari denied. Reported below: 70 N. Y. S. 2d 582.

No. 2, Misc. LUCADAMA *v.* NEW YORK. County Court of Kings County, New York. Certiorari denied.

No. 3, Misc. SEREN *v.* RAGEN, WARDEN. Criminal Court of Cook County, Circuit Court of Will County, and Supreme Court of Illinois. Certiorari denied.

No. 4, Misc. TAYLOR *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 6, Misc. PICKING ET AL. *v.* PENNSYLVANIA RAILROAD CO. ET AL. C. C. A. 3d. Certiorari denied. Petitioners *pro se*. *John Dickinson* and *John B. Prizer* for the Pennsylvania Railroad Co., respondent. Reported below: 160 F. 2d 106.

No. 7, Misc. HARRIS *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: 225 Ind. 115, 73 N. E. 2d 51.

No. 8, Misc. ARNOLD *v.* NIERSTHEIMER, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 9, Misc. WAGNER *v.* HUNTER, WARDEN. C. C. A. 10th. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 161 F. 2d 601.

No. 11, Misc. REID *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 396 Ill. 592, 72 N. E. 2d 812.

No. 13, Misc. BOSALAVICH *v.* RAGEN, WARDEN. Supreme Court of Illinois and the Circuit Court, Macoupin County, Illinois. Certiorari denied.

No. 14, Misc. COURTWRIGHT *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 15, Misc. PROUTY *v.* NEW YORK. County Court of Saratoga County, New York. Certiorari denied. Petitioner *pro se*. *Walter A. Fullerton* for respondent.

No. 16, Misc. HOLLAND *v.* RAGEN, WARDEN. C. C. A. 7th. Certiorari denied.

No. 18, Misc. STARYAK *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 396 Ill. 573, 72 N. E. 2d 815.

No. 19, Misc. BUTLER *v.* BUSH, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 20, Misc. THOMPSON *v.* NIERSTHEIMER, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 21, Misc. SHIFLETT *v.* WELCH, SUPERINTENDENT. C. C. A. 4th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent. Reported below: 161 F. 2d 933.

No. 22, Misc. LOWE *v.* UNITED STATES. C. C. A. 2d. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 162 F. 2d 709.

No. 23, Misc. GEDDES *v.* ILLINOIS. Circuit Court of Macon County, Illinois. Certiorari denied.

No. 24, Misc. KEMP *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 396 Ill. 578, 72 N. E. 2d 855.

No. 25, Misc. SHERIDAN *v.* UNITED STATES. C. C. A. 6th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent.

No. 26, Misc. FIFE *v.* GREAT ATLANTIC & PACIFIC TEA CO. ET AL. Supreme Court of Pennsylvania. Certiorari denied. *John D. Meyer* for petitioner. *Charles J. Margiotti* for respondents. Reported below: 356 Pa. 265, 52 A. 2d 24.

No. 28, Misc. COURTWRIGHT *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 29, Misc. POWELL *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 30, Misc. RISTICH *v.* RAGEN, WARDEN. C. C. A. 7th. Certiorari denied. Reported below: 162 F. 2d 180.

No. 31, Misc. PUTSCHER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 32, Misc. CANADA *v.* JONES, WARDEN. C. C. A. 8th. Certiorari denied. Reported below: 160 F. 2d 811.

No. 33, Misc. PHILLIPS *v.* JACKSON, WARDEN. C. C. A. 2d. Certiorari denied.

No. 34, Misc. SKINNER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 397 Ill. 273, 73 N. E. 2d 427.

No. 35, Misc. FINN *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 36, Misc. SCHRAY *v.* RAGEN, WARDEN. Circuit Court of Lake County, Illinois. Certiorari denied.

No. 37, Misc. HAWK *v.* JONES, WARDEN. C. C. A. 8th. Certiorari denied. Petitioner *pro se*. *Walter R. Johnson,* Attorney General of Nebraska, *C. S. Beck,* Deputy Attorney General, and *Robert A. Nelson,* Assistant Attorney General, for respondent. Reported below: 160 F. 2d 807.

No. 38, Misc. MURPHY *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. *Fred N. Howser,* Attorney General of California, and *Benjamin B. Knight,* Deputy Attorney General, for respondents.

No. 39, Misc. MORTON *v.* WELCH, SUPERINTENDENT. C. C. A. 4th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 162 F. 2d 840.

No. 40, Misc. JONES *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 397 Ill. 264, 73 N. E. 2d 278.

No. 41, Misc. BROWN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 397 Ill. 92, 72 N. E. 2d 859.

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No. 42, Misc. OWENS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 397 Ill. 166, 73 N. E. 2d 274.

No. 43, Misc. CAMPBELL *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. *L. Bryan Dabney* for petitioner. Reported below: 30 So. 2d 240.

No. 44, Misc. BERTRAND *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 45, Misc. HAMBY *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 46, Misc. FREDERICKS *v.* RAGEN, WARDEN. Circuit Court of Ogle County, Illinois. Certiorari denied.

No. 47, Misc. MILLS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 48, Misc. BISTANY *v.* NEW YORK STATE PAROLE BOARD. Supreme Court, Appellate Division, 4th Department, of New York. Certiorari denied.

No. 49, Misc. BARMORE *v.* NEW YORK. County Court of Chemung County, New York. Certiorari denied.

No. 51, Misc. BLEDSOE *v.* UNITED STATES. C. C. A. 5th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 161 F. 2d 732.

No. 54, Misc. RIOS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 56, Misc. THOMPSON *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 58, Misc. ROBARE *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 59, Misc. WHEELER *v.* RAGEN, WARDEN. Circuit Court of Livingston County, Illinois. Certiorari denied.

No. 61, Misc. RAWLS *v.* UNITED STATES. C. C. A. 10th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman* for the United States. Reported below: 162 F. 2d 798.

No. 62, Misc. BROWN *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 63, Misc. TELFIAN *v.* SANFORD, WARDEN. C. C. A. 5th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent. Reported below: 161 F. 2d 556.

No. 64, Misc. RHEIM *v.* NEW YORK. Supreme Court, Appellate Division, 1st Department, of New York. Certiorari denied.

No. 68, Misc. UPSHAW *v.* NEW YORK. Court of General Sessions, New York County, New York. Certiorari denied.

No. 69, Misc. GALLOWAY *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 70, Misc. FIELDS *v.* STEWART, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 71, Misc. SCHULTZ *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 73, Misc. PERRITANO *v.* NEW YORK. County Court of Erie County, New York. Certiorari denied.

No. 76, Misc. ALBANESE *v.* RICHTER. C. C. A. 3d. Certiorari denied. *Jacob W. Friedman* for petitioner. *Arthur T. Vanderbilt* for respondent. Reported below: 161 F. 2d 688.

No. 77, Misc. WILKERSON *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 79, Misc. MOSTELLER *v.* RAGEN, WARDEN. Circuit Court of Edgar County, Illinois. Certiorari denied.

No. 80, Misc. SANCHEZ *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 296 N. Y. 971, 73 N. E. 2d 558.

No. 83, Misc. BERNOVICH *v.* RAGEN, WARDEN. Circuit Court of Peoria County, Illinois. Certiorari denied.

No. 84, Misc. BARTLING *v.* NIERSTHEIMER, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 85, Misc. BROWN *v.* FAY, SUPERVISOR OF RECORDS. Supreme Court of Michigan. Certiorari denied.

No. 87, Misc. ALVIN *v.* MICHIGAN EX REL. GROAT, JUDGE. Supreme Court of Michigan. Certiorari denied.

No. 90, Misc. BAUGH *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 91, Misc. GRIFFIN *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 93, Misc. BARLAND *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 94, Misc. JABLONWSKI *v.* JACKSON, WARDEN. County Court of Clinton County, New York. Certiorari denied. Petitioner *pro se*. *Nathaniel L. Goldstein*, Attorney General of New York, and *Wendell P. Brown*, Solicitor General, for respondent.

No. 96, Misc. BOSALAVICH *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 97, Misc. ROSS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 99, Misc. RAPP *v.* NIERSTHEIMER, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 52, Misc. STERN *v.* COX ET AL., EXECUTORS. Supreme Court of Tennessee. The motion to strike the respondents' brief is denied. Certiorari denied. *John S. Ashworth* for petitioner. *Jas. H. Epps, Jr., Robert L. Taylor* and *Wm. E. Miller* for respondents.

No. 65, Misc. MCKAY *v.* FOSTER, SHERIFF. Supreme Court of Georgia. The petition for writ of certiorari is denied for the reason that the judgment of the court below is based upon a nonfederal ground adequate to support it. Reported below: 202 Ga. 121, 42 S. E. 2d 380.

Rehearing Denied. (*See also Nos. 209, 287, Oct. Term, 1946, supra.*)

No. 81, October Term, 1946. SECURITIES & EXCHANGE COMMISSION *v.* CHENERY CORPORATION ET AL., *ante*, p. 194; and

No. 82, October Term, 1946. SECURITIES & EXCHANGE COMMISSION *v.* FEDERAL WATER & GAS CORP. Rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS

took no part in the consideration or decision of these applications.

No. 377, October Term, 1946. FAY *v.* NEW YORK, *ante*, p. 261; and

No. 452, October Term, 1946. BOVE *v.* NEW YORK. Rehearing denied.

No. 625, October Term, 1946. CALDAROLA *v.* ECKERT ET AL., DOING BUSINESS AS THOR ECKERT & CO., *ante*, p. 155. Rehearing denied.

No. 793, October Term, 1946. UNITED STATES *v.* MICHENER, 331 U. S. 789. Petition for issuance of a supplementary opinion denied. Rehearing also denied.

No. 1220, October Term, 1946. JENSEN *v.* UNITED STATES, 331 U. S. 846. Rehearing denied.

No. 1322, October Term, 1946. MELLEN *v.* H. B. HIRSCH & SONS ET AL., 331 U. S. 845. Rehearing denied.

No. 102, October Term, 1946. ADAMSON *v.* CALIFORNIA, *ante*, p. 46. Rehearing denied.

No. 466, October Term, 1946. GREENBERG *v.* CALIFORNIA, 331 U. S. 796. Rehearing denied.

No. 405, October Term, 1946. GAYES *v.* NEW YORK, *ante*, p. 145. Rehearing denied.

No. 461, October Term, 1946. GREENOUGH ET AL., TRUSTEES, *v.* TAX ASSESSORS OF NEWPORT ET AL., 331 U. S. 486. Rehearing denied.

No. 498, October Term, 1946. UNITED STATES *v.* SMITH, U. S. DISTRICT JUDGE, ET AL., 331 U. S. 469. Rehearing denied.

No. 562, October Term, 1946. RUTHERFORD FOOD CORP. ET AL. *v.* MCCOMB, WAGE & HOUR ADMINISTRATOR, 331 U. S. 722. Rehearing denied.

No. 606, October Term, 1946. UNITED STATES *v.* BAYER ET AL., 331 U. S. 532. Rehearing denied.

No. 733, October Term, 1946. INTERSTATE NATURAL GAS CO. *v.* FEDERAL POWER COMMISSION ET AL., 331 U. S. 682. Rehearing denied.

No. 840, October Term, 1946. ALEXANDER, WARDEN, *v.* UNITED STATES EX REL. KULICK, *ante*, p. 174. Rehearing denied.

No. 535, October Term, 1946. SUNAL *v.* LARGE, SUPERINTENDENT, *ante*, p. 174. Rehearing denied.

No. 987, October Term, 1946. TWYEFFORT, INC. *v.* MCCOMB, WAGE & HOUR ADMINISTRATOR, 331 U. S. 851. Rehearing denied.

No. 1210, October Term, 1946. FUJIKAWA ET AL. *v.* SUNRISE SODA WORKS CO. ET AL., 331 U. S. 832. Rehearing denied.

No. 1222, October Term, 1946. LAGOW *v.* UNITED STATES, 331 U. S. 858. Rehearing denied.

No. 1228, October Term, 1946. MYERS *v.* HUNTER, WARDEN, 331 U. S. 852. Rehearing denied.

No. 1263, October Term, 1946. TINKOFF *v.* CAMPBELL, COLLECTOR OF INTERNAL REVENUE, 331 U. S. 845. Rehearing denied.

Nos. 1286 and 1370, October Term, 1946. SPEARS *v.* SPEARS, 331 U. S. 797. Rehearing denied.

No. 1297, October Term, 1946. MASTERS *v.* NEW YORK CENTRAL RAILROAD CO., 331 U. S. 836. Rehearing denied.

No. 1299, October Term, 1946. STANDARD OIL CO. *v.* UNITED STATES, 331 U. S. 836. Rehearing denied.

No. 1309, October Term, 1946. CORN PRODUCTS REFINING CO. *v.* UNITED STATES ET AL., 331 U. S. 790. Rehearing denied.

No. 1311, October Term, 1946. NELSON *v.* UNITED STATES, 331 U. S. 846. Rehearing denied.

No. 1320, October Term, 1946. CAVE *v.* UNITED STATES, 331 U. S. 847. Rehearing denied.

No. 1321, October Term, 1946. POTEET ET AL. *v.* ROGERS, 331 U. S. 847. Rehearing denied.

No. 1338, October Term, 1946. DE FILIPPIS *v.* CHRYSLER CORPORATION ET AL., 331 U. S. 848. Rehearing denied.

No. 1343, October Term, 1946. SHOTKIN *v.* POMEROY ET AL., 331 U. S. 841. Rehearing denied.

No. 1344, October Term, 1946. HUMBLE OIL & REFINING CO. *v.* RAILROAD COMMISSION OF TEXAS ET AL., 331 U. S. 791. Rehearing denied.

No. 1345, October Term, 1946. WILLIAMS ET AL. *v.* RAILROAD COMMISSION OF TEXAS ET AL., 331 U. S. 791. Rehearing denied.

No. 1364, October Term, 1946. ROBERTS *v.* RAGEN, WARDEN, 331 U. S. 841. Rehearing denied.

No. 1376, October Term, 1946. STOKES & SMITH CO. *v.* TRANSPARENT-WRAP MACHINE CORP., 331 U. S. 837. Rehearing denied.

No. 1394, October Term, 1946. LOWREY *v.* UNITED STATES, 331 U. S. 849. Rehearing denied.

No. 1432, October Term, 1946. AUERBACH *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, 331 U. S. 850. Rehearing denied.

No. 1455, October Term, 1946. FLAHERTY *v.* ILLINOIS, 331 U. S. 856. Rehearing denied.

No. 1462, October Term, 1946. CONSUMERS HOME EQUIPMENT CO. ET AL. *v.* UNITED STATES, 331 U. S. 860. Rehearing denied.

No. 1470, October Term, 1946. WILSON *v.* UNITED STATES, 331 U. S. 860. Rehearing denied.

No. 1498, October Term, 1946. WRIGHT *v.* RAGEN, WARDEN, 331 U. S. 862. Rehearing denied.

No. 1507, October Term, 1946. SMALL *v.* NEW YORK, 331 U. S. 863. Rehearing denied.

No. 10, Original. UNITED STATES *v.* WYOMING ET AL., 331 U. S. 440. Rehearing denied.

No. 12, Original. UNITED STATES *v.* CALIFORNIA, *ante*, p. 19. Rehearing denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

OCTOBER 20, 1947.

Per Curiam Decisions.

No. 1. SECURITIES & EXCHANGE COMMISSION *v.* ENGINEERS PUBLIC SERVICE CO. ET AL.; and

No. 2. ENGINEERS PUBLIC SERVICE CO. ET AL. *v.* SECURITIES & EXCHANGE COMMISSION. Certiorari, 322 U. S. 723, to the United States Court of Appeals for the District of Columbia. Argued November 15, 16, 1945. Decided October 20, 1947. *Per Curiam:* The judgment of the United States Court of Appeals for the District of Columbia is vacated and the cases are remanded to that court with directions to dismiss the petition for review as moot, on joint motion of counsel for the parties. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS took no part in the consideration or decision of these cases. *Milton V. Freeman* argued the cause for the Securities & Exchange Commission. With him on the brief were *J. Howard McGrath,* then Solicitor General, *Paul A. Freund, Roger S. Foster* and *Louis Loss. William E. Tucker* and *T. Justin Moore* argued the cause for respondents in No. 1 and petitioners in No. 2. With them on the brief were *Paul Duryea Miller* and *George D. Gibson. Allen E. Throop* and *Carlos L. Israels* filed a brief for Driscoll et al., as *amici curiae,* urging reversal. *Solicitor General Perlman* was also on the joint motion of counsel for the parties to vacate the judgment below. Reported below: 78 U. S. App. D. C. 199, 138 F. 2d 936.

Miscellaneous Orders.

No. 337. CONNECTICUT MUTUAL LIFE INSURANCE CO. ET AL. *v.* MOORE, COMPTROLLER OF THE STATE OF NEW YORK. Appeal from the Court of Appeals of New York. The motion of appellant, Union Labor Life Insurance Co., to dismiss the appeal as to it is granted. *Ganson*

J. Baldwin for the Union Labor Life Insurance Co., appellant. Reported below: 297 N. Y. 1, 74 N. E. 2d 24.

No. 117, Misc. ENGLE *v.* STEWART, WARDEN. Supreme Court of Missouri; and

No. 121, Misc. LANNAHAN *v.* BENSON, WARDEN. Supreme Court of Michigan. Certiorari denied. The motions for leave to file petitions for writs of habeas corpus are also denied.

No. 113, Misc. BATES *v.* NEW YORK. The application for the allowance of an appeal is denied.

No. 127, Misc. VIALVA *v.* SHAW, DIRECTOR. The motion for leave to file petition for writ of habeas corpus is denied.

No. 50, Misc. MILCH *v.* UNITED STATES. The motion for leave to file petition for writ of habeas corpus is denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE are of the opinion that the petition should be set for hearing on the question of the jurisdiction of this Court. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

Certiorari Granted.

No. 290. HURD ET AL. *v.* HODGE ET AL.; and

No. 291. URCIOLO ET AL. *v.* HODGE ET AL. United States Court of Appeals for the District of Columbia. Certiorari granted. *Charles H. Houston, Phineas Indritz* and *Morris P. Glushien* for petitioners. *Henry Gilligan* and *James A. Crooks* for respondents. Reported below: 82 U. S. App. D. C. 180, 162 F. 2d 233.

Certiorari Denied. (*See also No. 117, Misc. and No. 121, Misc., supra.*)

Nos. 211 and 212. ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* CENTRAL HANOVER BANK & TRUST CO. ET AL., TRUSTEES, ET AL. C. C. A. 8th. Certiorari denied. *William V. Hodges* and *Daniel Bartlett* for petitioner. *Leonard D. Adkins* and *George D. Gibson* for Stedman et al., respondents. Reported below: 162 F. 2d 719.

No. 217. BRACEY ET AL. *v.* LURAY, TRADING AS LURAY IRON & METAL CO. C. C. A. 4th. Certiorari denied. *Daniel E. Klein* for petitioners. *Lewis W. Lake* for respondent. Reported below: 161 F. 2d 128.

No. 238. G. H. LOVE, INC. *v.* FLEMING, ADMINISTRATOR, OFFICE OF TEMPORARY CONTROLS. C. C. A. 9th. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 161 F. 2d 726.

No. 255. COHEN ET AL. *v.* CAULDWELL WINGATE CO. ET AL. Court of Appeals of New York. Certiorari denied. *Harold Leventhal* for petitioners. *Solicitor General Perlman, Assistant Attorney General Ford* and *Samuel D. Slade* for respondents. Reported below: 297 N. Y. 471, 74 N. E. 2d 179.

No. 260. GLASSEY ET AL. *v.* CALIFORNIA. Superior Court in and for the County of Los Angeles, California. Certiorari denied. *A. L. Wirin* for petitioners. *Ray L. Chesebro* and *John L. Bland* for respondent.

No. 266. SCOTT *v.* CITY OF TAMPA. Supreme Court of Florida. Certiorari denied. *O. K. Reaves* for petitioner. *Harry B. Terrell* for respondent. Reported below: 158 Fla. 712, 30 So. 2d 300.

No. 278. TOUHY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Edgar B. Tolman* for petitioner. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 397 Ill. 19, 72 N. E. 2d 827.

No. 282. MAULSBY *v.* CONZEVOY, DOING BUSINESS AS GOLDEN STATE CASKET CO. C. C. A. 9th. Certiorari denied. *Fred H. Miller* for petitioner. *A. W. Boyken* and *Chas. M. Fryer* for respondent. Reported below: 161 F. 2d 165.

No. 285. FOGEL *v.* UNITED STATES. C. C. A. 5th. Certiorari denied. *Webster Atwell* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 162 F. 2d 54.

No. 288. REITER *v.* PALMER (IMPLEADED WITH ILLINOIS NATIONAL CASUALTY CO. ET AL.). Supreme Court of Illinois. Certiorari denied. *John A. Brown* for petitioner. *George F. Barrett,* Attorney General of Illinois, *William C. Wines,* Assistant Attorney General, and *John D. Black* for respondent. Reported below: 397 Ill. 141, 73 N. E. 2d 412.

No. 297. NIX *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *Leonard Lloyd Lockard* for petitioner. Reported below: 211 La. 865, 31 So. 2d 1.

No. 302. SWIFT & CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. C. A. 3d. Certiorari denied. *Wm. A. Schnader, Bernard G. Segal* and *Irving R. Segal* for petitioner. *Solicitor General Perlman, John R. Benney, Robert N. Denham, David P. Findling* and *Ruth Weyand* for respondent. Reported below: 162 F. 2d 575.

No. 303. MYERS ET AL., EXECUTORS, *v.* NEW YORK STATE TAX COMMISSION. Court of Appeals of New York. Certiorari denied. *Lee McCanliss* for petitioners. *Mortimer M. Kassell* for respondent. Reported below: 297 N. Y. 482, 74 N. E. 2d 187.

No. 305. BURNS *v.* SPILLER ET AL. United States Court of Appeals for the District of Columbia. Certiorari denied. *Walter W. Burns* for petitioner. *Solicitor General Perlman, Assistant Attorney General Ford, Paul A. Sweeney* and *Melvin Richter* for respondents. Reported below: 82 U. S. App. D. C. 91, 161 F. 2d 377.

No. 307. BERMAN ET AL., DOING BUSINESS AS DAVID H. BERMAN CO., *v.* LEVINE. C. C. A. 7th. Certiorari denied. *Henry S. Blum* for petitioners. *Solicitor General Perlman, Assistant Attorney General Ford, Paul A. Sweeney* and *Philip W. Yager* for respondent. Reported below: 161 F. 2d 386.

No. 308. BUNIN *v.* COHEN. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. *Samuel J. Cohen* for petitioner. *Henry Hofheimer* for respondent. Reported below: 271 App. Div. 774, 64 N. Y. S. 2d 924.

No. 310. BELL *v.* SCUDDER, REAL ESTATE COMMISSIONER. District Court of Appeal, 3d Appellate District, of California. Certiorari denied. *Sterling Carr* for petitioner. *Fred N. Howser,* Attorney General of California, and *Lenore D. Underwood,* Deputy Attorney General, for respondent. Reported below: 78 Cal. App. 2d 448, 177 P. 2d 796.

No. 311. MANNING *v.* UNITED STATES. C. C. A. 5th. Certiorari denied. *G. Ernest Jones* for petitioner. *So-*

licitor General Perlman, Robert S. Erdahl and *Sheldon E. Bernstein* for the United States. Reported below: 161 F. 2d 827.

No. 178. CHASE NATIONAL BANK, TRUSTEE, ET AL. *v.* CHESTON ET AL.;

No. 179. CHASE NATIONAL BANK, TRUSTEE, ET AL. *v.* METROPOLITAN LIFE INSURANCE CO.;

No. 180. CHASE NATIONAL BANK, TRUSTEE, ET AL. *v.* CENTRAL HANOVER BANK & TRUST CO. ET AL., TRUSTEES;

No. 181. CHASE NATIONAL BANK, TRUSTEE, ET AL. *v.* NATIONAL CITY BANK, TRUSTEE;

No. 182. CHASE NATIONAL BANK, TRUSTEE, ET AL. *v.* TRAPHAGEN ET AL.;

No. 183. CHASE NATIONAL BANK, TRUSTEE, ET AL. *v.* BLAINE ET AL.;

No. 184. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. *v.* METROPOLITAN LIFE INSURANCE CO.;

No. 185. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. *v.* CENTRAL HANOVER BANK & TRUST CO. ET AL., TRUSTEES;

No. 186. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. *v.* NATIONAL CITY BANK, TRUSTEE;

No. 187. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. *v.* CHESTON ET AL.;

No. 188. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. *v.* TRAPHAGEN ET AL.;

No. 189. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. *v.* BLAINE ET AL.;

Nos. 190, 191, 192 and 193. AXELROD ET AL. *v.* FLEMING ET AL., TRUSTEES, ET AL. C. C. A. 7th. Certiorari denied. *Loy N. McIntosh* for Harrison, Jr. et al., Protective Committee for the Chicago, Rock Island & Pacific Railway Co., petitioners in Nos. 178, 179, 180, 181, 182 and 183. *John Gerdes* and *Henry F. Tenney* for petitioner

in Nos. 184, 185, 186, 187, 188 and 189. *Harry Kirshbaum* for petitioners in Nos. 190, 191, 192 and 193. *Edward W. Bourne, Frank H. Towner, Jesse E. Waid, Wilkie Bushby, Joseph Schreiber, Alexander M. Lewis, Sanford H. E. Freund, Edward K. Hanlon* and *Daniel James* for respondents. Reported below: 160 F. 2d 942, 949.

MR. JUSTICE RUTLEDGE:

I join in the Court's denial of the petition for certiorari. But unusual circumstances in this case seem to call for explanation of my reasons for doing so.

The debtor has been in reorganization, pursuant to § 77 of the Bankruptcy Act, as amended, 11 U. S. C. § 205, since 1933. On May 1, 1944, the Interstate Commerce Commission approved the plan of reorganization involved in this proceeding. On June 15, 1945, the District Court also approved the plan. That action in turn was affirmed by the Circuit Court of Appeals, 157 F. 2d 241, and this Court denied certiorari. 329 U. S. 780, 811.

While the proceeding was pending in the Circuit Court of Appeals, however, the District Court directed the Commission to submit the plan for acceptance or rejection to eleven classes of creditors. On February 26, 1946, the Commission certified that the plan had been accepted by nine of those classes, rejected by two. Under the plan the claims of three accepting classes substantially were satisfied in full. The other six accepting classes, however, were to receive participations which would fail to satisfy their claims by nearly $106,000,000, if the new non-par common stock allotted to them were treated as worth $50 per share. Nevertheless the larger of the two rejecting groups, the holders of the Convertible Bonds, was allotted 160,078 of the total issue of 1,522,672 shares of new common stock, thus receiving an interest in the equity of the reorganized company in excess of ten per cent.

Objections to confirmation were filed on behalf of some members of the larger rejecting class and on their motion the District Court, notwithstanding its recent prior approval, found the plan inadequate to afford holders of the Convertible Bonds fair and equitable treatment; concluded that their rejection was reasonably justified; and referred the case back to the Commission for consideration of alleged changed conditions with a view to possible modifications or the proposal of new plans. The District Court's memorandum opinion rendered June 28, 1946, made no reference to this Court's opinion in *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, which was handed down on June 10, 1946.

The order of the District Court was reversed on appeal by the Circuit Court of Appeals and the cause was remanded to the District Court with instructions to confirm the plan. 160 F. 2d 942. It is this action which the present petitions seek to overturn.

The Court of Appeals examined the claims of alleged change in conditions, occurring between May 1, 1944, when the Commission approved the plan, and June 28, 1946, when the District Court's order was entered refusing confirmation and remanding the case to the Commission.[1] 160 F. 2d 942, 945. The examination was made in the light of our decisions in *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, and *Insurance Group* v. *Denver & R. G. W. R. Co.*, 329 U. S. 607. The Court found that factually the progress of the plan in this case had been comparable to that of the plan in the *Rio Grande* proceedings. And testing each of the alleged charges by the *Rio Grande* rulings, it concluded that none

[1] It may be noted that the period covered by the alleged changes includes only a little more than two years, and that the time expiring between the District Court's approval of the plan on June 15, 1945, and its subsequent refusal of confirmation was only about two weeks in excess of one year.

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of them was of a kind not "envisaged and considered by the Commission in its deliberations upon or explanations of the plan." *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 522; *Insurance Group* v. *Denver & R. G. W. R. Co.*, 329 U. S. 607, 613; see 160 F. 2d 942, 949.

The record in this case seems clearly to bear out those conclusions. Accordingly, but for one additional fact to be noticed, it would seem clear that certiorari should be denied, without more, on the authority of the *Rio Grande* decisions.[2]

This case however is embarrassed by an unusual circumstance not present in the *Rio Grande* proceedings. That circumstance is to be found in a letter submitted to this Court on October 9, 1947, while the cause was pending here on application for certiorari, by the chairman of the Commission and pursuant to its direction.

The letter is set forth in the margin,[3] copies having been made available to counsel by this Court's direction. And

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[2] This conclusion in my judgment would follow notwithstanding the plan involved in those cases had been confirmed, whereas here only approval has been given and confirmation is lacking. Absent any substantial difference in the facts presented as establishing changed conditions to justify upsetting the plan and sending it back to the Commission, the mere fact that such action is sought after approval but before confirmation in one case and after confirmation in another, should not be sufficient to dictate different results in the disposition of the plans.

[3] "Interstate Commerce Commission
Washington 25

October 9, 1947.

"Honorable Fred M. Vinson,
Chief Justice of the United States,
United States Supreme Court,
Washington, D. C.

"My dear Mr. Chief Justice:

"In connection with the petitions for the issuance of a writ of certiorari now pending before the Court, Nos. 184–9, In the Matter

the question which now seems to me perhaps most important, in connection with the disposition of this cause, is the effect which should be given to this communication.

The reasons for transmitting the letter at this late stage in the proceedings may be a matter of some conjecture, in view of the fact that, as we have been informed, on October 1, 1947, the Commission expressly refused to grant the request of an attorney that it file a brief *amicus curiae* in this cause indicating its views on the petition for certiorari, and ask that the case be referred by the Court back to it for consideration, investigation and possible revision of the plan. But, entirely apart from this, the

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of The Chicago, Rock Island and Pacific Railway Company, a reorganization proceeding, we direct attention, if we may properly do so, to certain matters which the Court may desire to consider in the exercise of its discretion in passing on the petition for the writ.

"As we understand it, the petitions for the writ seek to bring up to the Supreme Court by certiorari the order of the Circuit Court of Appeals for the Seventh Circuit, which reversed the order of the district judge whereby the district judge had ordered the plan of reorganization sent back to this Commission for further proceedings.

"Upon receiving notice of the action of the district court, the Interstate Commerce Commission set the plan for further hearing. The appeal to the Circuit Court of Appeals then intervened, and the hearing date was canceled, and the matter has remained in suspense upon the Commission's docket.

"Since the plan was sent to the district court by the Commission there have been material changes in the situation as it affects the condition of the debtor. The Commission, of course, does not attempt to appraise the effect of these changes so far as they may affect the provisions of the plan, which we understand are developed at length in the record in the courts.

"The object of this letter is to advise the Court that should certiorari be granted and the plan eventually be remanded to the Commission, the Commission is prepared to give full hearing on the facts and a report thereon as may be warranted.

"By the direction of the Commission.

Respectfully,

[s] Clyde B. Aitchison
Chairman."

question remains whether the Commission's communication furnishes sufficient cause for changing the disposition which, in my opinion, should be made of the case on the record presented but for the letter's effect.

Guardedly phrased, the letter's only positive assertion bearing upon the merits of our disposition is the statement: "Since the plan was sent to the district court by the Commission there have been material changes in the situation as it affects the condition of the debtor." The Commission, however, "does not attempt to appraise the effect of these changes so far as they may affect the provisions of the plan, which we understand are developed at length in the record in the courts."

The Commission does not suggest that it has examined the record in this cause, as made by the parties; that in the light of that record changes have occurred since its approval of the plan in May, 1944, of a character, unlike the changes in the *Rio Grande* cases, not "envisaged and considered" by it in its deliberation upon or explanation of the plan. Nor does it ask this Court either to be permitted to file a brief here or to be heard upon argument in the event certiorari is granted. There is indeed no suggestion that certiorari should be granted, but only one that if that should be done and the plan eventually remanded to the Commission, it "is prepared to give full hearing on the facts and a report thereon as may be warranted."

The letter comes down therefore to a statement that there have been material changes in the debtor's condition since the Commission's approval was given, and to the statement that if the Court finally should remand the case to it the Commission is prepared to do its duty by affording a further full hearing and rendering a further report. In addition the possible, though by no means certain, inference might be drawn that the Commission may

desire another opportunity to consider the plan before it goes to confirmation.

The tenuous character of the Commission's suggestion makes it a matter highly embarrassing for the discharge of our function, which under the law is to determine the rights of the parties as they appear from the record presented for our consideration and pursuant to the controlling authorities. If the Commission had knowledge of facts, appearing either from the record here or from other sources, which in its opinion would disclose or probably would disclose changed circumstances, since its approval of the plan, not "envisaged and considered" by it, within the rule of the *Rio Grande* cases, and of a character likely to require substantial modification or complete revision of the plan, it would seem that some representation to that effect would or should have been made, with some supporting factual discussion and conclusions concerning the alleged changes for our assistance. In view of the length of time the application for certiorari has been pending here, it seems hardly likely that such knowledge could have come to the Commission too late for its presentation for our consideration in the regular course of disposition of the petitions for certiorari. And, if the contrary was the fact, then a request for time in which to submit a brief upon the merits of the application for certiorari hardly could have been less appropriate or helpful than the suggestion which has been made.

But the Commission has not tendered its aid in the disposition of the Court's problem relating to what shall be done with the petitions for certiorari. Nor, in my opinion, is the suggestion which the Commission's letter makes a sufficient basis for causing the Court to dispose of those petitions otherwise than as would be done in the absence of that suggestion. At the very greatest the suggestion would merit an invitation by this Court for

the Commission to submit a brief, setting forth in some specific detail its views upon the merits of the applications for certiorari, in order that we might have the aid of those views for the performance of our office. Indeed, out of excess of caution rather than regard for the merit of the Commission's vague and general suggestion as made, that is the course my own preference would follow. Since, however, that course is not to be pursued, I do not find in the mere general suggestion that "there have been material changes in the situation as it affects the condition of the debtor" a sufficient basis for altering the conclusion I have reached on the basis presented by the parties in the record, namely, that none of the admitted and substantial changes is of a character which, within the rulings of the *Rio Grande* cases, would require reopening of this fourteen-year-old reorganization and starting down the long road to consummation again.

Our function in these cases is to apply the law as it has been written by Congress and interpreted in the prior decisions. That law, thus interpreted, seems to me clearly to require denial of the petitions in this cause. The Commission's letter does not afford any adequate basis for reaching a contrary conclusion, and in the absence of any more positive or helpful suggestion upon the merits of the applications as made on the record before us, I agree with the Court that the petitions should be denied.

MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON, dissenting:

Inasmuch as the Interstate Commerce Commission deems itself not free to file a memorandum of its views except on invitation of the Court, we believe, in view of all the circumstances, that final action on this petition should not be taken without asking the Commission to make a definite statement of its present position.

No. 299. HEMANS *v.* UNITED STATES. C. C. A. 6th. Certiorari denied. MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application. *O. R. McGuire* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 163 F. 2d 228.

No. 304. BROWN INSTRUMENT CO. *v.* WARNER, REGISTER OF COPYRIGHTS. United States Court of Appeals for the District of Columbia. Certiorari denied. *Samuel E. Darby, Jr., C. B. Spangenberg* and *E. H. Parry, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General Ford, Paul A. Sweeney, Harry I. Rand* and *H. L. Godfrey* for respondent. *Albert I. Kegan* and *Esther O. Kegan* filed a brief for the Fawley-Brost Company, as *amicus curiae,* opposing the petition. Reported below: 82 U. S. App. D. C. 232, 161 F. 2d 910.

No. 27, Misc. CHRISTAKOS *v.* HUNTER, WARDEN. C. C. A. 10th. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent. Reported below: 161 F. 2d 692.

No. 78, Misc. CONKLIN *v.* PESCOR, WARDEN. C. C. A. 5th. Certiorari denied. Reported below: 158 F. 2d 676.

No. 89, Misc. STREWL *v.* UNITED STATES. C. C. A. 2d. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent. Reported below: 162 F. 2d 819.

No. 100, Misc. ROBINSON *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 104, Misc. GOLLA *v.* BURKE, WARDEN. Supreme Court of Wisconsin. Certiorari denied.

No. 106, Misc. LILYROTH *v.* RAGEN, WARDEN. Circuit Court of Lee County, Illinois. Certiorari denied.

No. 107, Misc. CONWAY *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 108, Misc. MEYERS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 110, Misc. STEWART *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 114, Misc. GUNN *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *Howard F. Butler* for petitioner. *Nat Tipton,* Assistant Attorney General of Tennessee, for respondent.

No. 119, Misc. BOLDS *v.* RAGEN, WARDEN. Circuit Court of Rock Island County, Illinois. Certiorari denied.

No. 122, Misc. GASH *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 123, Misc. DWYER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 397 Ill. 599, 74 N. E. 2d 882.

No. 125, Misc. COURTWRIGHT *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 126, Misc. BUCHALTER *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied. Reported below: 397 Ill. 515, 74 N. E. 2d 868.

No. 128, Misc. CORDTS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 397 Ill. 624, 74 N. E. 2d 785.

Rehearing Denied.

No. 1273, October Term, 1946. REFRIGERATION PATENTS CORP. *v.* STEWART-WARNER CORP.; and

No. 1274, October Term, 1946. POTTER REFRIGERATOR CORP. *v.* STEWART-WARNER CORP., 331 U. S. 834. Rehearing denied.

No. 1368, October Term, 1946. PROTECTIVE COMMITTEE FOR BONDS OF OLD COLONY RAILROAD CO. *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL., 331 U. S. 858. Rehearing denied.

No. 1296, October Term, 1946. HOPKINS *v.* COMMISSIONER OF INTERNAL REVENUE, 331 U. S. 838. Rehearing denied. MR. JUSTICE BURTON took no part in the consideration or decision of these applications.

OCTOBER 27, 1947.

Per Curiam Decision.

No. 376. MIAMI TRANSPORTATION CO., INC. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Southern District of Indiana. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475. *Howell Ellis* for appellant. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission, appellees.

Order and Decree.

No. 12, Original. UNITED STATES *v.* CALIFORNIA. Decided June 23, 1947 (332 U. S. 19).

MR. CHIEF JUSTICE VINSON announced the entry of the following order and decree:

Since our opinion which was announced in this case June 23, 1947, two stipulations have been filed in this Court, signed by the Attorney General and Secretary of the Interior of the United States on the one hand and by the Attorney General of the State of California on the other hand. In these stipulations the Attorney General and the Secretary of the Interior purport to renounce and disclaim for the United States Government paramount governmental power over certain particularly described submerged lands in the California coastal area. In such stipulations the United States Attorney General and Secretary of the Interior furthermore purport to bind the United States to agreements which purport to authorize state lessees of California coastal submerged lands to continue to occupy and exploit those lands, and which agreements also purport to authorize California under conditions set out to execute leases for other submerged coastal lands.

Robert E. Lee Jordan has filed a petition in this Court praying that he be permitted to file a motion as *amicus curiae* or in the alternative as an intervenor to have the foregoing stipulations and agreements set aside and declared null and void on the ground among others that the Attorney General and the Secretary of the Interior are without authority to bind the United States by agreements which it is alleged would if valid alienate and surrender the Government's paramount power over the submerged lands concerning which the stipulations are made.

It is ordered that the petition of Robert E. Lee Jordan to file the motion here to declare the stipulations null and void be denied, without prejudice to the assertion of any right he may have in a proper district court.

It is further ordered that the stipulations between the United States Attorney General and the Secretary of the Interior on the one hand and the Attorney General of California on the other, which stipulations purport to bind the United States, be stricken as irrelevant to any issues now before us.

And for the purpose of carrying into effect the conclusions of this Court as stated in its opinion announced June 23, 1947, it is ORDERED, ADJUDGED, AND DECREED as follows:

1. The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California. The State of California has no title thereto or property interest therein.

2. The United States is entitled to the injunctive relief prayed for in the complaint.

3. Jurisdiction is reserved by this Court to enter such further orders and to issue such writs as may from time to time be deemed advisable or necessary to give full force and effect to this decree.

Inasmuch as the stipulations of July 26, 1947, have been stricken, MR. JUSTICE FRANKFURTER desires explicitly to note his understanding that insofar as the

meaning or scope or validity of the stipulations may give rise to any legal issue, no such issue has been before the Court or has here been considered.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

Miscellaneous Orders.

No. 12, Original. UNITED STATES *v.* CALIFORNIA. The motion of Lauren D. Cherry and Earl G. Sinclair for leave to file a motion to strike a portion of a stipulation entered into between the Attorney General of the United States and the Attorney General of California is denied without prejudice to the assertion of any right they may have in a proper district court. Inasmuch as the stipulations of July 26, 1947, have been stricken, MR. JUSTICE FRANKFURTER desires explicitly to note his understanding that insofar as the meaning or scope or validity of the stipulations may give rise to any legal issue, no such issue has been before the Court or has here been considered. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Kenneth E. Matot* for Lauren D. Cherry and Earl G. Sinclair, petitioners.

No. 63. DELGADILLO *v.* DEL GUERCIO, DISTRICT DIRECTOR, IMMIGRATION & NATURALIZATION SERVICE. Carmichael substituted as the party respondent. (Opinion reported, *ante*, p. 388.)

No. 105, Misc. HOLZWORTH *v.* CLEMMER, DIRECTOR;

No. 112, Misc. RUTHVEN *v.* OVERHOLSER, SUPERINTENDENT;

No. 116, Misc. HOBBS *v.* SWENSON, WARDEN; and

No. 120, Misc. WILSON *v.* RAGEN, WARDEN. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 98. UNITED STATES *v.* FRIED ET AL. Certiorari, 331 U. S. 804, to the Circuit Court of Appeals for the Second Circuit. Writ dismissed on motion of counsel for the petitioner. *Solicitor General Perlman* for the United States. Reported below: 161 F. 2d 453.

Certiorari Granted.

No. 331. CALLEN *v.* PENNSYLVANIA RAILROAD CO. C. C. A. 3d. Certiorari granted. *John H. Hoffman* and *Edward J. Griffiths* for petitioner. *Philip Price, Hugh B. Cox* and *John R. Wall* for respondent. *Lee Pressman* and *Frank J. Donner* filed a brief for the United Railroad Workers of America, C. I. O., as *amicus curiae,* supporting the petition. Reported below: 162 F. 2d 832.

No. 329. JOHNSON *v.* UNITED STATES. C. C. A. 9th. Certiorari granted limited to questions 1 and 2 presented by the petition for the writ. *John F. Garvin* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 162 F. 2d 562.

Certiorari Denied.

No. 245. STEINGUT ET AL., RECEIVERS, *v.* GUARANTY TRUST CO. ET AL.; and

No. 247. TILLMAN *v.* MILLARD ET AL. C. C. A. 2d. Certiorari denied. *Albert R. Connelly* and *Samson Selig* for petitioners in No. 245. *Borris M. Komar* and *David L. Sprung* for petitioner in No. 247. *Solicitor General Perlman* for the United States, respondent. *John W. Davis* and *Ralph M. Carson* for the Guaranty Trust Company of New York, respondent. Reported below: 161 F. 2d 571.

No. 309. CLARK, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* KIND ET AL., TRUSTEES; and

No. 326. KIND ET AL., TRUSTEES, *v.* CLARK, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. C. C. A. 2d. Certiorari denied. *Solicitor General Perlman* for petitioner in No. 309, with whom *Assistant Attorney General Bazelon, M. S. Isenbergh, Stanley M. Silverberg* and *Joseph W. Bishop, Jr.* were on the brief for respondent in No. 326. *Arnold T. Koch* for petitioners in No. 326. Reported below: 161 F. 2d 36.

No. 316. MAY DEPARTMENT STORES CO., DOING BUSINESS AS FAMOUS-BARR CO., *v.* NATIONAL LABOR RELATIONS BOARD. C. C. A. 8th. Certiorari denied. *Milton H. Tucker* and *Robert T. Burch* for petitioner. *Solicitor General Perlman, John R. Benney, Robert N. Denham, David P. Findling* and *Ruth Weyand* for respondent. Reported below: 162 F. 2d 247.

No. 317. DELIS *v.* PAPPAS ET AL., DOING BUSINESS AS PAPPAS & CO. District Court of Appeal, 4th Appellate District, of California. Certiorari denied. *James C. Purcell* for petitioner. *G. L. Aynesworth* and *L. Nelson Hayhurst* for respondents. Reported below: 79 Cal. App. 2d 392, 181 P. 2d 61.

No. 318. MISHAWAKA RUBBER & WOOLEN MANUFACTURING CO. *v.* S. S. KRESGE CO. C. C. A. 6th. Certiorari denied. *Henry M. Huxley, E. Manning Giles, Jr., Thomas S. Donnelly* and *George L. Wilkinson* for petitioner. *William B. Giles* for respondent.

No. 319. STEINBERG *v.* UNITED STATES. C. C. A. 5th. Certiorari denied. *W. B. Harrell* for petitioner. *Solicitor General Perlman, Helen R. Carloss, Ellis N. Slack* and

John H. Mitchell for the United States. *Clarence N. Goodwin* filed a brief, as *amicus curiae,* supporting the petition. Reported below: 162 F. 2d 120.

No. 328. ADAMSTON FLAT GLASS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 4th. Certiorari denied. *Charles W. Moxley* for petitioner. *Solicitor General Perlman, Helen R. Carloss* and *L. W. Post* for respondent. Reported below: 162 F. 2d 875.

No. 330. HOOKER *v.* NEW YORK LIFE INSURANCE CO. C. C. A. 7th. Certiorari denied. *Herbert M. Lautmann* and *Isaac E. Ferguson* for petitioner. *John E. MacLeish* for respondent. Reported below: 161 F. 2d 852.

No. 332. COCA-COLA CO. *v.* SNOW CREST BEVERAGES, INC. C. C. A. 1st. Certiorari denied. *Hugh D. McLellan* and *K. Wilson Corder* for petitioner. *Edward F. McClennen* for respondent. Reported below: 162 F. 2d 280.

No. 333. VON PATZOLL *v.* UNITED STATES;

No. 334. BRANDON *v.* UNITED STATES;

No. 335. FEEZELL *v.* UNITED STATES; and

No. 336. EVANS *v.* UNITED STATES. C. C. A. 10th. Certiorari denied. *Earl Pruet* for petitioners. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 163 F. 2d 216.

No. 339. KNOTT CORPORATION *v.* FURMAN. C. C. A. 4th. Certiorari denied. *F. M. Schlater* and *John W. Oast, Jr.* for petitioner. *Edward R. Baird* and *George M. Lanning* for respondent. Reported below: 163 F. 2d 199.

No. 341. SCHERF ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 5th. Certiorari denied. *D. M. Powell* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Helen R. Carloss* and *Harry Baum* for respondent. Reported below: 161 F. 2d 495.

No. 344. F. L. MENDEZ & CO. *v.* GENERAL MOTORS CORP. C. C. A. 7th. Certiorari denied. *Arthur Lucius Hubbard* for petitioner. *Ernest S. Ballard* for respondent. Reported below: 161 F. 2d 695.

No. 345. GARFORD TRUCKING CORP. ET AL. *v.* MANN. C. C. A. 1st. Certiorari denied. *Herbert S. Avery* for petitioners. *Paul A. Barron* for respondent. Reported below: 163 F. 2d 71.

No. 347. GENERAL MOTORS ACCEPTANCE CORP. *v.* HIGGINS, COLLECTOR OF INTERNAL REVENUE. C. C. A. 2d. Certiorari denied. *John Thomas Smith* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Helen R. Carloss* and *Morton K. Rothschild* for respondent. Reported below: 161 F. 2d 593.

No. 348. BLOOMBERG *v.* RADICH. Court of Errors and Appeals of New Jersey. Certiorari denied. *Jacob W. Friedman* for petitioner. *Milton T. Lasher* for respondent. Reported below: 140 N. J. Eq. 289, 54 A. 2d 247.

No. 349. GARDNER, TRUSTEE, *v.* NEW JERSEY. C. C. A. 3d. Certiorari denied. *James D. Carpenter, Jr., Alexander H. Elder* and *Samuel M. Coombs, Jr.* for petitioner. *Benjamin C. Van Tine* for respondent. *Charles A. Rooney, Charles Hershenstein* and *Milton B. Conford* filed a brief for the City of Jersey City, as *amicus curiae*, opposing the petition. Reported below: 163 F. 2d 44.

No. 350. PELLEY *v.* MATTHEWS, U. S. MARSHAL. United States Court of Appeals for the District of Columbia. Certiorari denied. *T. Emmett McKenzie* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent. Reported below: 82 U. S. App. D. C. 264, 163 F. 2d 700.

Nos. 354 and 355. WEISENBACH, EXECUTRIX, *v.* KISTNER, ANCILLARY ADMINISTRATOR, ET AL. Supreme Court of Ohio. Certiorari denied. *Robert Merkle* for petitioner. *John R. Kistner* for respondents. Reported below: 148 Ohio St. 126, 73 N. E. 2d 377.

No. 312. HINLEY *v.* BURFORD, WARDEN. Supreme Court of Oklahoma. Certiorari denied. Reported below: — Okla. Cr. —, 183 P. 2d 602.

No. 322. BORCHERS *v.* UNITED STATES;

No. 323. FENTZKE *v.* UNITED STATES; and

No. 324. KNUPFER *v.* UNITED STATES. C. C. A. 2d. Certiorari denied. *George C. Dix* for petitioners. *Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 163 F. 2d 347.

No. 346. WATCHTOWER BIBLE & TRACT SOCIETY, INC. *v.* COUNTY OF LOS ANGELES ET AL. Supreme Court of California. Certiorari denied. MR. JUSTICE MURPHY is of the opinion that the petition should be granted. *Hayden C. Covington* for petitioner. *Harold W. Kennedy* for respondents. Reported below: 30 Cal. 2d 426, 182 P. 2d 178.

No. 115, Misc. CHAVIS *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. Petitioner *pro se*. *Colbert McClain* and *John H. Maurer* for respondent. Reported below: 357 Pa. 158, 53 A. 2d 96.

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No. 129, Misc. BERTRAND *v.* RAGEN, WARDEN. Circuit Court of Kankakee County, Illinois. Certiorari denied.

No. 130, Misc. TIDMORE *v.* RAGEN, WARDEN. Circuit Court of Will County and the Supreme Court of Illinois. Certiorari denied.

Rehearing Denied.

No. 104. HAWTHORNE *v.* SANFORD, WARDEN, *ante*, p. 775. Rehearing denied.

No. 200. KRUGER *v.* WHITEHEAD, DOING BUSINESS AS WHITEHEAD CO., *ante*, p. 774. Rehearing denied.

No. 234. KORITZ ET AL. *v.* NORTH CAROLINA, *ante*, p. 768. Rehearing denied.

No. 22, Misc. LOWE *v.* UNITED STATES, *ante*, p. 777. Rehearing denied.

No. 279. LUSTIG ET AL. *v.* UNITED STATES, *ante*, p. 775. Rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

OCTOBER 30, 1947.

Miscellaneous Order.

No. 156, Misc. HAWKINS *v.* CLEMMER, DIRECTOR. The Court met in Special Term pursuant to a call by THE CHIEF JUSTICE having the approval of all the Associate Justices present. The motion for leave to file petition for writ of habeas corpus is granted. The petition for a writ of habeas corpus is denied, and the application for stay of execution is also denied. MR. JUSTICE DOUGLAS took no part in the consideration of this order.

NOVEMBER 10, 1947.

Miscellaneous Orders.

Nos. 352 and 353. UNIVERSAL OIL PRODUCTS CO. *v.* ROOT REFINING CO. ET AL.;

No. 102, Misc. UNIVERSAL OIL PRODUCTS CO. *v.* ROOT REFINING CO. ET AL.; and

No. 103, Misc. UNIVERSAL OIL PRODUCTS CO. *v.* BIGGS ET AL. In Nos. 352 and 353, the petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit is denied. In No. 102, Misc., the motion for leave to file petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit is denied. In No. 103, Misc., the motion for leave to file petition for writs of prohibition and mandamus is denied. *Ralph S. Harris, John R. McCullough* and *Frederick W. P. Lorenzen* for petitioner. *Solicitor General Perlman* filed a brief for the United States, as *amicus curiae*. *Leslie Nichols* filed a brief, as *amicus curiae*.

No. 139, Misc. SHOTKIN ET AL. *v.* THOMAS A. EDISON, INC. C. C. A. 10th. Certiorari denied. The application for allowance of an appeal is also denied. Petitioners *pro se*. *Edward S. Rogers, Wm. T. Woodson* and *Elmer L. Brock* for respondent. Reported below: 163 F. 2d 1020.

No. 133, Misc. GIBSON *v.* SHUTTLEWORTH, WARDEN;

No. 137, Misc. PATTON *v.* CLEMMER, DIRECTOR; and

No. 149, Misc. WHEELER *v.* CLEMMER. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 138, Misc. EX PARTE HORNUNG. Application denied.

No. 142, Misc. SMITH *v.* HOWARD, WARDEN. The motion for leave to file petition for writ of certiorari is denied.

Certiorari Granted.

No. 362. LE MAISTRE *v.* LEFFERS ET AL. Supreme Court of Florida. Certiorari granted. *W. B. Shelby Crichlow* and *Dewey A. Dye* for petitioner. *R. A. Henderson, Jr.* for the Real Estate Exchange, Inc., respondent. Reported below: 159 Fla. 122, 31 So. 2d 155.

No. 369. SIPUEL *v.* BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA ET AL. Supreme Court of Oklahoma. Certiorari granted. *Amos T. Hall* and *Thurgood Marshall* for petitioner. *Mac Q. Williamson,* Attorney General of Oklahoma, and *Fred Hansen,* First Assistant Attorney General, for respondents. Reported below: 199 Okla. 36, 180 P. 2d 135.

No. 370. FONG HAW TAN *v.* PHELAN, ACTING DISTRICT DIRECTOR, IMMIGRATION & NATURALIZATION SERVICE. C. C. A. 9th. Certiorari granted. *Lambert O'Donnell* and *William J. Chow* for petitioner. *Solicitor General Perlman, W. Marvin Smith, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 162 F. 2d 663.

No. 366. BAY RIDGE OPERATING CO., INC. *v.* AARON ET AL.; and

No. 367. HURON STEVEDORING CORP. *v.* BLUE ET AL. C. C. A. 2d. Certiorari granted. *Solicitor General Perlman* for petitioners. *Monroe Goldwater, Max R. Simon* and *James L. Goldwater* for respondents. *Louis Waldman* filed a brief for the International Longshoremens Association (A. F. L.), as *amicus curiae,* supporting the petition. Reported below: 162 F. 2d 665.

Certiorari Denied. (*See also Nos. 352 and 353; and Nos. 102, 103, 139, and 142, Misc., supra.*)

No. 325. UNITED STATES *v.* LANDMAN, SUPERINTENDENT OF THE FIVE CIVILIZED TRIBES; and

No. 327. LANDMAN, SUPERINTENDENT OF THE FIVE CIVILIZED TRIBES, *v.* UNITED STATES. Court of Claims. Certiorari denied. *Solicitor General Perlman* for the United States, petitioner in No. 325 and respondent in No. 327. With him on the brief in No. 327 were *Assistant Attorney General Caudle, Helen R. Carloss* and *Lee A. Jackson. Huston Thompson* and *Oscar P. Mast* for petitioner in No. 327. Reported below: 109 Ct. Cl. 1, 71 F. Supp. 640.

No. 342. UNITED STATES *v.* SWISS CONFEDERATION; and

No. 343. UNITED STATES *v.* SOCIETY OF CHEMICAL INDUSTRY, BASLE, SWITZERLAND. Court of Claims. Certiorari denied. *Solicitor General Perlman* for the United States. *John J. Wilson* for respondents. Reported below: No. 342, 108 Ct. Cl. 388, 70 F. Supp. 235; No. 343, 108 Ct. Cl. 401.

No. 356. SANCHEZ *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 2d. Certiorari denied. *Milton R. Wexler* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Helen R. Carloss* and *Hilbert P. Zarky* for respondent. Reported below: 162 F. 2d 58.

No. 357. ATLANTIC GREYHOUND CORP. *v.* HUNT, ADMINISTRATOR, ET AL. C. C. A. 4th. Certiorari denied. *Roy L. Deal* for petitioner. *Raymond Kyle Hayes* for respondents. Reported below: 163 F. 2d 117.

No. 358. ENGLERT *v.* S. BIRCH & SONS CONSTRUCTION CO. ET AL. C. C. A. 9th. Certiorari denied. *Oscar A. Zabel* for petitioner. *Solicitor General Perlman, Herbert A. Bergson* and *Samuel D. Slade* for respondents. Reported below: 163 F. 2d 34.

No. 359. SODERBERG ET AL. *v.* S. BIRCH & SONS CONSTRUCTION CO. ET AL. C. C. A. 9th. Certiorari denied. *Oscar A. Zabel* for petitioners. *Solicitor General Perlman, Herbert A. Bergson, Samuel D. Slade* and *John R. Benney* for respondents. Reported below: 163 F. 2d 37.

No. 360. BALLESTER HERMANOS *v.* BUSCAGLIA, TREASURER OF PUERTO RICO. C. C. A. 1st. Certiorari denied. *Fred W. Llewellyn* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Helen R. Carloss* and *I. Henry Kutz* for respondent. Reported below: 162 F. 2d 805.

No. 363. PRYOR *v.* CRAFT ET AL. Supreme Court of Oklahoma. Certiorari denied. *Wesley E. Disney* and *William S. Hamilton* for petitioner. *Chas. R. Gray* and *G. K. Sutherland* for respondents. Reported below: 199 Okla. 17, 181 P. 2d 979.

No. 364. BARKMAN *v.* SANFORD, WARDEN. C. C. A. 5th. Certiorari denied. *David B. Alford* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 162 F. 2d 592.

No. 368. KLOEB, U. S. DISTRICT JUDGE, *v.* BERESLAVSKY. C. C. A. 6th. Certiorari denied. *Frank S. Busser* and *LeRoy E. Eastman* for petitioner. *W. Brown Morton* for respondent. Reported below: 162 F. 2d 862.

No. 378. CALIFORNIA APPAREL CREATORS ET AL. *v.* WIEDER OF CALIFORNIA, INC. ET AL. C. C. A. 2d. Certi-

orari denied. *Max Feingold* for petitioners. *Leon Lauterstein* for respondents. Reported below: 162 F. 2d 893.

No. 380. HUMPHREY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 5th. Certiorari denied. *R. B. Cannon* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Helen R. Carloss, Lee A. Jackson* and *Harry Marselli* for respondent. Reported below: 162 F. 2d 853.

No. 381. ESTATE OF HUMPHREY *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 5th. Certiorari denied. *R. B. Cannon* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Helen R. Carloss* and *Maryhelen Wigle* for respondent. Reported below: 162 F. 2d 1.

No. 382. O'DANIEL *v.* PENNSYLVANIA RAILROAD CO.; and

No. 383. O'DANIEL, EXECUTRIX, *v.* PENNSYLVANIA RAILROAD CO. C. C. A. 3d. Certiorari denied. *Ruby R. Vale* for petitioner. *Philip Price, Hugh B. Cox* and *John R. Wall* for respondent. Reported below: 162 F. 2d 414.

No. 391. OHIO EX REL. WILLIAMS *v.* GLANDER, TAX COMMISSIONER. Supreme Court of Ohio. Certiorari denied. *Meyer A. Cook* for petitioner. *Aubrey A. Wendt,* Assistant Attorney General of Ohio, for respondent. Reported below: 148 Ohio St. 188, 74 N. E. 2d 82.

No. 393. JOHNSTON *v.* ARROW PETROLEUM CO. C. C. A. 7th. Certiorari denied. *Joseph B. Fleming* and *J. N. Saye* for petitioner. *Stephen A. Mitchell* for respondent. Reported below: 162 F. 2d 269.

No. 394. RKO RADIO PICTURES, INC. ET AL. *v.* BIGELOW ET AL. C. C. A. 7th. Certiorari denied. *Miles G.*

Seeley, Edward R. Johnston, Edmund D. Adcock and *Vincent O'Brien* for petitioners. *Thomas C. McConnell* for respondents. Reported below: 162 F. 2d 520.

No. 365. DOWNING *v.* HOWARD ET AL. C. C. A. 3d. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *James R. Morford* for petitioner. *William S. Potter* for Howard et al.; *Caleb S. Layton* and *Neal M. Welch* for Caspary, Executor; *Ralph M. Carson* for Hopkinson, Jr.; and *Caleb S. Layton* and *Allen T. Klots* for Thorne et al., respondents. Reported below: 162 F. 2d 654.

No. 372. STATE LODGE OF MICHIGAN, FRATERNAL ORDER OF POLICE, ET AL. *v.* CITY OF DETROIT ET AL. Supreme Court of Michigan. Certiorari denied. *Edward N. Barnard* for petitioners. *William E. Dowling* for respondents. Reported below: 318 Mich. 182, 27 N. W. 2d 612.

No. 74, Misc. EVANS *v.* HUNTER, WARDEN. C. C. A. 10th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 162 F. 2d 800.

No. 95, Misc. TARAS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 296 N. Y. 983, 73 N. E. 2d 564.

No. 109, Misc. WALEY *v.* JOHNSTON, WARDEN. C. C. A. 9th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 163 F. 2d 556.

No. 134, Misc. MATTIO *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *Maurice R. Woulfe* for petitioner. Reported below: 212 La. 284, 31 So. 2d 801.

No. 135, Misc. McGregor *v.* Ragen, Warden. Circuit Court of Cook County, Illinois. Certiorari denied.

No. 136, Misc. Holderfield *v.* Illinois. Supreme Court of Illinois. Certiorari denied. Reported below: 393 Ill. 138, 65 N. E. 2d 443.

No. 143, Misc. Canada *v.* Jones, Warden. Supreme Court of Nebraska. Certiorari denied.

No. 146, Misc. Price *v.* Nierstheimer, Warden. Supreme Court of Illinois. Certiorari denied.

No. 148, Misc. Seely *v.* Heinze, Warden. Supreme Court of California. Certiorari denied. Reported below: 75 Cal. App. 2d 525, 171 P. 2d 529.

Rehearing Denied.

No. 1455, October Term, 1946. Flaherty *v.* Illinois, 331 U. S. 856. Second petition for rehearing denied.

No. 99. Robichaud *v.* Brennan, Judge, et al., *ante*, p. 756. Rehearing denied.

No. 103. Conn et al. *v.* United States, *ante*, p. 757. Rehearing denied.

No. 124. Builders Trust Co. *v.* Butler et al., *ante*, p. 759. Rehearing denied.

No. 137. Adams et al. *v.* Brotherhood of Railroad Trainmen et al., *ante*, p. 760. Rehearing denied.

No. 151. Halstead *v.* Industrial Accident Commission of California, *ante*, p. 774. Rehearing denied.

No. 172. MILLER *v.* SANFORD, WARDEN, *ante*, p. 774. Rehearing denied.

No. 203. GREGORY *v.* UNITED STATES, *ante*, p. 774. Rehearing denied.

No. 210. GORDONS TRANSPORTS, INC. *v.* MCCOMB, WAGE & HOUR ADMINISTRATOR, *ante*, p. 774. Rehearing denied.

No. 243. BRUCE ET UX. *v.* KING, *ante*, p. 769. Rehearing denied.

No. 272. KIRBY ET AL. *v.* HOUSTON OIL CO. ET AL., *ante*, p. 772. Rehearing denied.

No. 136. TEXAS & PACIFIC RAILWAY CO. ET AL. *v.* BROTHERHOOD OF RAILROAD TRAINMEN ET AL., *ante*, p. 760. Rehearing denied.

No. 173. MESTER ET AL. *v.* UNITED STATES ET AL., *ante*, p. 749. Rehearing denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application.

No. 233. RICE BROS. *v.* BIRMINGHAM, *ante*, p. 768. Rehearing denied.

No. 257. FLORIDA EX REL. MCKEIGHAN *v.* SULLIVAN, SHERIFF, *ante*, p. 750. Rehearing denied. MR. JUSTICE MURPHY took no part in the consideration or decision of this application.

No. 259. BERNSTEIN *v.* N. V. NEDERLANDSCHE-AMERIKAANSCHE STOOMVAART-MAATSCHAPPIJ, *ante*, p. 771. Rehearing denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 299. HEMANS *v.* UNITED STATES, *ante*, p. 801. Rehearing denied. MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this application.

No. 1, Misc. MONTANYE *v.* NEW YORK, *ante*, p. 776. Rehearing denied.

No. 6, Misc. PICKING ET AL. *v.* PENNSYLVANIA RAILROAD CO. ET AL., *ante*, p. 776. Rehearing denied.

No. 25, Misc. SHERIDAN *v.* UNITED STATES, *ante*, p. 778. Rehearing denied.

No. 26, Misc. FIFE *v.* GREAT ATLANTIC & PACIFIC TEA CO. ET AL., *ante*, p. 778. Rehearing denied.

No. 33, Misc. PHILLIPS *v.* JACKSON, WARDEN, *ante*, p. 778. Rehearing denied.

No. 48, Misc. BISTANY *v.* NEW YORK STATE PAROLE BOARD, *ante*, p. 780. Rehearing denied.

No. 64, Misc. RHEIM *v.* NEW YORK, *ante*, p. 781. Rehearing denied.

No. 82, Misc. MAXWELL *v.* HUDSPETH, WARDEN, *ante*, p. 752. Rehearing denied.

NOVEMBER 17, 1947.

Miscellaneous Orders.

IT IS ORDERED that Judge Sam M. Driver, of Spokane, Washington, be, and he hereby is, appointed a member of the Advisory Committee, appointed by the order of June 3, 1935, and designated as a continuing Committee to

advise the Court with respect to amendments or additions to the Rules of Civil Procedure for the District Courts of the United States, by the order of January 5, 1942, in the place of George Donworth, deceased.

No. 9, Original. ILLINOIS *v.* INDIANA ET AL. The Second Special Report of the Special Master is approved. The amended bill of complaint is dismissed as to (1) American Bridge Company pursuant to the stipulation entered into by and among the State of Illinois and the State of Indiana, the City of Gary and American Bridge Company; (2) Carbide and Carbon Chemicals Corporation pursuant to the stipulation entered into by and among the State of Illinois and the State of Indiana, City of Whiting and Carbide and Carbon Chemicals Corporation; (3) E. I. du Pont de Nemours and Company pursuant to the stipulation entered into by and among the State of Illinois and the State of Indiana, the City of East Chicago and E. I. du Pont de Nemours and Company; (4) Fruit Growers Express Company pursuant to the stipulation entered into by and among the State of Illinois and the State of Indiana, City of East Chicago and Fruit Growers Express Company; (5) Universal Atlas Cement Company pursuant to the stipulation entered into by and among the State of Illinois and the State of Indiana, the City of Gary and Universal Atlas Cement Company. Costs against these defendants are to be taxed in accordance with the recommendations of the Special Master.

No. 9, Original. ILLINOIS *v.* INDIANA ET AL. It is ordered that Bates Expanded Steel Corporation (a corporation of Indiana) be substituted as a party defendant herein in the place and stead of Bates Expanded Steel Corporation (a Delaware Corporation) now known as East Chicago Expanded Steel Company.

No. 9, Original. ILLINOIS *v.* INDIANA ET AL. The Second Interim Report of the Special Master, dated September 7, 1947, is approved. The Court orders and directs the Special Master to continue the proceedings in accordance with the order of this Court dated February 17, 1947. The Court further orders that the recommendation of the Special Master as to the apportionment of costs be adopted and costs for the period from September 8, 1946, to September 7, 1947, inclusive, shall be taxed as recommended in the Second Interim Report. The objections of the State of Illinois to the proposed apportionment of costs are overruled.

No. 340, October Term, 1946. MCCANN *v.* CLARK, ATTORNEY GENERAL;

No. 841, October Term, 1946. MCCANN *v.* ADAMS, WARDEN, ET AL.; and

No. 1040, October Term, 1946. MCCANN *v.* CLARK, ATTORNEY GENERAL, ET AL. The application of the petitioner for the return of certain documents is denied.

No. 418, October Term, 1946. NATIONAL LABOR RELATIONS BOARD *v.* JONES & LAUGHLIN STEEL CORP. The motion of the respondent for amendment of the mandate or for alternative relief is denied without prejudice to an application to the Circuit Court of Appeals.

No. 154, Misc. DIDATO *v.* SHAW, DIRECTOR. The motion for leave to file petition for writ of habeas corpus is denied.

Certiorari Denied.

No. 338. MCCLELLAND *v.* BOARD OF SUPERVISORS OF LOS ANGELES COUNTY ET AL. Supreme Court of California. Certiorari denied. *John W. Preston* for peti-

tioner. *Harold W. Kennedy* for respondents. Reported below: 30 Cal. 2d 124, 180 P. 2d 676.

No. 351. CONSOLIDATED MACHINE TOOL CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. C. A. 2d. Certiorari denied. *Percival D. Oviatt* and *Arthur L. Stern* for petitioner. *Solicitor General Perlman, David P. Findling* and *Ruth Weyand* for respondent. Reported below: 163 F. 2d 376.

No. 361. POFE *v.* CONTINENTAL INSURANCE CO. C. C. A. 7th. Certiorari denied. *Meyer Abrams* for petitioner. *Hayes McKinney* for respondent. Reported below: 161 F. 2d 912.

No. 375. TOMBIGBEE MILL & LUMBER CO. ET AL. *v.* HOLLINGSWORTH ET AL. C. C. A. 5th. Certiorari denied. *T. C. Hannah* for petitioners. *Jas. A. Cunningham* for respondents. Reported below: 162 F. 2d 763.

No. 377. BELCHER *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 5th. Certiorari denied. *J. Kirkman Jackson* and *Al G. Rives* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Helen R. Carloss* and *Harry Baum* for respondent. Reported below: 162 F. 2d 974.

No. 386. CARNEY ET AL. *v.* UNITED STATES. C. C. A. 9th. Certiorari denied. *Morris Lavine* for petitioners. *Solicitor General Perlman, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 163 F. 2d 784.

No. 395. STIMSON MILL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 9th. Certiorari denied. *Bert L. Klooster* for petitioner. *Solicitor General Perlman,*

Assistant Attorney General Caudle, Helen R. Carloss, Lee A. Jackson and *Carlton Fox* for respondent. Reported below: 163 F. 2d 269.

No. 399. National Pressure Cooker Co. *v.* Aluminum Goods Manufacturing Co. C. C. A. 7th. Certiorari denied. *George I. Haight* for petitioner. *Charles L. Byron* and *Howard W. Hodgkins* for respondent. Reported below: 162 F. 2d 26.

No. 401. Bomar *v.* Keyes et al. C. C. A. 2d. Certiorari denied. Petitioner *pro se*. *W. Bernard Richland* for respondents. Reported below: 162 F. 2d 136.

No. 425. Gishwiller et al. *v.* Connolly, Receiver. C. C. A. 7th. Certiorari denied. *Otis F. Glenn* and *Raymond G. Real* for petitioners. Reported below: 162 F. 2d 428.

No. 417. District of Columbia *v.* Beckham et al. United States Court of Appeals for the District of Columbia. Certiorari denied. Mr. Justice Jackson took no part in the consideration or decision of this application. *Vernon E. West, Chester H. Gray, George C. Updegraff* and *Harry L. Walker* for petitioner. *Leslie C. Garnett* and *Samuel F. Beach* for respondents. Reported below: 82 U. S. App. D. C. 296, 163 F. 2d 701.

No. 140, Misc. Rice *v.* Hudspeth, Warden. C. C. A. 10th. Certiorari denied.

No. 151, Misc. Bailey *v.* McMullen, Warden. C. C. A. 8th. Certiorari denied.

No. 162, Misc. Patton *v.* Baldwin Locomotive Works. C. C. A. 3d. Certiorari denied.

Rehearing Denied.

No. 1280, October Term, 1946. VAIL MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD, 331 U. S. 835. Rehearing denied.

No. 178. CHASE NATIONAL BANK, TRUSTEE, ET AL. *v.* CHESTON ET AL.;

No. 179. CHASE NATIONAL BANK, TRUSTEE, ET AL. *v.* METROPOLITAN LIFE INSURANCE CO.;

No. 180. CHASE NATIONAL BANK, TRUSTEE, ET AL. *v.* CENTRAL HANOVER BANK & TRUST CO. ET AL., TRUSTEES;

No. 181. CHASE NATIONAL BANK, TRUSTEE, ET AL. *v.* NATIONAL CITY BANK, TRUSTEE;

No. 182. CHASE NATIONAL BANK, TRUSTEE, ET AL. *v.* TRAPHAGEN ET AL.;

No. 183. CHASE NATIONAL BANK, TRUSTEE, ET AL. *v.* BLAINE ET AL.;

No. 184. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. *v.* METROPOLITAN LIFE INSURANCE CO.;

No. 185. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. *v.* CENTRAL HANOVER BANK & TRUST CO. ET AL., TRUSTEES;

No. 186. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. *v.* NATIONAL CITY BANK, TRUSTEE;

No. 187. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. *v.* CHESTON ET AL.;

No. 188. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. *v.* TRAPHAGEN ET AL.; and

No. 189. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. *v.* BLAINE ET AL., *ante*, p. 793. Rehearing denied.

No. 330. HOOKER *v.* NEW YORK LIFE INSURANCE CO., *ante*, p. 809. Rehearing denied.

No. 339. KNOTT CORPORATION *v.* FURMAN, *ante*, p. 809. Rehearing denied.

NOVEMBER 24, 1947.

Per Curiam Decisions.

No. 4. PAN AMERICAN AIRWAYS CORP. ET AL. *v.* W. R. GRACE & CO. ET AL.; and

No. 5. EASTERN AIR LINES, INC. *v.* W. R. GRACE & CO. ET AL. Certiorari, 328 U. S. 832, to the Circuit Court of Appeals for the Second Circuit. *Per Curiam:* The motion to dismiss is granted and the writs are dismissed on the ground that the cause is moot. *Henry J. Friendly* for petitioners in No. 4. *E. Smythe Gambrell* for petitioner in No. 5. *John T. Cahill* and *Fred J. Knauer* for W. R. Grace & Co., and *W. F. Cogswell* and *H. Preston Morris* for the Pan American-Grace Airways, Inc., respondents. Reported below: 154 F. 2d 271.

No. 18. HUNTER *v.* TEXAS ELECTRIC RAILWAY CO. Certiorari, 330 U. S. 817, to the Court of Civil Appeals, 3d Supreme Judicial District, of Texas. Argued October 15, 1947. Decided November 24, 1947. *Per Curiam:* The judgment is affirmed. Dissenting: MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE. *Ralph Elliott* argued the cause for petitioner. *Spearman Webb* and *F. Neilson Rogers* filed a brief for petitioner. *Alexander Gullett* argued the cause for respondent. *Joseph A. Keith* filed a brief for respondent. Reported below: 194 S. W. 2d 281.

No. 423. TEXAS COMPANY *v.* MONTGOMERY, COMMISSIONER OF WILD LIFE & FISHERIES, ET AL. Appeal from the District Court of the United States for the Eastern District of Louisiana. *Per Curiam:* The judgment is affirmed. *Chas. H. Blish* and *Robert C. Milling* for appellant. Reported below: 73 F. Supp. 527.

No. 426. OHIO EX REL. VAAD HACHINUCH HACHAREDI (TRADITIONAL EDUCATION COUNCIL) *v.* BAXTER ET AL.,

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MEMBERS OF THE CITY PLANNING COMMISSION OF CLEVELAND HEIGHTS. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a). Treating the papers whereon the appeal was allowed as a petition for a writ of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C. § 344 (c), certiorari is denied. *Ezra Shapiro* for appellant. *Howell Leuck* for appellees. Reported below: 148 Ohio St. 221, 74 N. E. 2d 242.

No. 436. ITEM COMPANY, INC. *v.* MULINA ET AL. Appeal from the Supreme Court of Louisiana. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Eberhard P. Deutsch* and *R. Emmett Kerrigan* for appellant.

Miscellaneous Orders.

No. 12, Original. UNITED STATES *v.* CALIFORNIA. The petition of Robert E. Lee Jordan for leave to submit, as *amicus curiae,* certain additions to the final decree is denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 559, October Term, 1942. LARGENT *v.* TEXAS. The motion of the appellant for leave to withdraw the petition to compel payment of costs is granted.

No. 231. THIBAUT ET AL. *v.* CAR & GENERAL INSURANCE CORP., LTD. C. C. A. 5th. The petition for rehearing is granted. MR. JUSTICE BLACK and MR. JUSTICE BURTON are of the opinion the petition for rehearing should be denied. The order granting certiorari and the judgment entered October 13, 1947, 332 U. S. 751, are

vacated. Dissenting: MR. JUSTICE BLACK and MR. JUSTICE BURTON. Certiorari denied. *Fred G. Benton* for petitioners. Reported below: 161 F. 2d 657.

No. 170, Misc. PAVILIOTIS *v.* RAGEN, WARDEN. The motion for leave to file petition for writ of certiorari is denied.

Certiorari Granted. (*See also No. 206, ante, p. 459; and No. 231, supra.*)

No. 371. KREIGER *v.* KREIGER. Court of Appeals of New York. Certiorari granted. *George S. Wing* and *Abraham J. Nydick* for petitioner. Reported below: 297 N. Y. 530, 74 N. E. 2d 468.

No. 384. COMMISSIONER OF INTERNAL REVENUE *v.* SOUTH TEXAS LUMBER CO. C. C. A. 5th. Certiorari granted. *Solicitor General Perlman* for petitioner. *J. Arthur Platt* for respondent. Reported below: 162 F. 2d 866.

Certiorari Denied. (*See also Nos. 231 and 426, and No. 170, Misc., supra.*)

No. 283. LASAGNA *v.* MCCARTHY ET AL., TRUSTEES. Supreme Court of Utah. Certiorari denied. *Parnell Black* for petitioner. *P. T. Farnsworth, Jr., W. Q. Van Cott* and *Dennis McCarthy* for respondents. Reported below: 111 Utah ——, 177 P. 2d 734.

No. 300. HOOD ET AL. *v.* TEXAS COMPANY. C. C. A. 5th. Certiorari denied. *W. F. Moore* and *Owen Benton Fisher* for petitioners. *Wm. A. Blakley* and *Hoyet A. Armstrong* for respondent. Reported below: 161 F. 2d 618.

No. 321. BENSON, ADMINISTRATRIX, *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. Court of Civil Appeals, 5th Supreme Judicial District, of Texas. Certiorari denied. *J. W. Hassell* and *Charles K. Bullard* for petitioner. *M. E. Clinton* and *O. O. Touchstone* for respondent. Reported below: 200 S. W. 2d 233.

No. 389. CANISTER COMPANY *v.* UNITED STATES. Court of Claims. Certiorari denied. *Weston Vernon, Jr.* and *Clarence E. Dawson* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Helen R. Carloss* for the United States. Reported below: 108 Ct. Cl. 558, 70 F. Supp. 904.

No. 396. PENNSYLVANIA RAILROAD CO. *v.* ROTH. C. C. A. 6th. Certiorari denied. *George H. P. Lacey* and *John J. Adams* for petitioner. *Marvin C. Harrison* for respondent. Reported below: 163 F. 2d 161.

No. 403. ANGLIN ET AL. *v.* KARES. Supreme Court of Florida. Certiorari denied. *W. D. Bell* for petitioners. Reported below: 159 Fla. 556, 31 So. 2d 64.

No. 408. TRUST OF ANDRUS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 2d. Certiorari denied. *J. S. Seidman* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Helen R. Carloss* and *Hilbert P. Zarky* for respondent. Reported below: 163 F. 2d 208.

No. 410. DICKIE, EXECUTRIX, *v.* HUTCHINSON. C. C. A. 6th. Certiorari denied. *Silas B. Axtell* and *Myron Scott* for petitioner. *Gilbert R. Johnson* for respondent. Reported below: 162 F. 2d 103.

No. 411. GORDON *v.* SCUDDER, SUPERINTENDENT. C. C. A. 9th. Certiorari denied. *David W. Louisell* for pe-

titioner. *Fred N. Howser,* Attorney General of California, and *Frank W. Richards,* Deputy Attorney General, for respondent. Reported below: 163 F. 2d 518.

No. 131, Misc. NOVAK *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 150, Misc. MAX *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 152, Misc. BAILEY *v.* SCHULER. District Court of the United States for the Eastern District of Missouri. Certiorari denied.

No. 155, Misc. LILYROTH *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 158, Misc. BAKER *v.* UTECHT, WARDEN. C. C. A. 8th. Certiorari denied. Reported below: 161 F. 2d 304.

No. 159, Misc. REYNOLDS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 160, Misc. SCHULTZ *v.* RAGEN, WARDEN. Criminal Court of Cook County, Circuit Court of Will County, and Supreme Court of Illinois. Certiorari denied.

No. 161, Misc. ADAMS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 165, Misc. EVANS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 168, Misc. CHALMERS *v.* FOSTER, WARDEN. Court of Appeals of New York. Reported below: See 272 App. Div. 960, 72 N. Y. S. 2d 678.

No. 171, Misc. HOLDERFIELD *v.* RAGEN, WARDEN. Circuit Court of Franklin County, Illinois. Certiorari denied.

No. 132, Misc. MORRIS *v.* PEACOCK, SHERIFF, ET AL. Supreme Court of Georgia. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that the petition for certiorari should be granted. *W. O. Cooper* for petitioner. *Eugene Cook,* Attorney General of Georgia, for respondents. Reported below: 202 Ga. 524, 43 S. E. 2d 531.

Rehearing Granted. (*See No. 231, supra.*)

Rehearing Denied.

No. 278. TOUHY *v.* ILLINOIS, *ante,* p. 791; and

No. 350. PELLEY *v.* MATTHEWS, U. S. MARSHAL, *ante,* p. 811. Rehearing denied.

No. 332. COCA-COLA CO. *v.* SNOW CREST BEVERAGES, INC., *ante,* p. 809. Rehearing denied.

DECEMBER 8, 1947.

Per Curiam Decisions.

No. 413. HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION ET AL. *v.* TOWNSHIP OF ROYAL OAK ET AL.; and

No. 424. CITY OF FERNDALE *v.* HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION ET AL. Appeals from the Supreme Court of Michigan. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for want of a substantial federal question. *Stanton G. Dondero* for appellants in No. 413. *Orph C. Holmes* and *Claude H. Stevens* for appellant in No. 424. *Glenn C. Gillespie* and *William C. Hudson* for Royal Oak,

appellee in Nos. 413 and 424. *Lee E. Joslyn, Jr.* and *Selden S. Dickinson* for Whitcomb et al., appellees in Nos. 413 and 424. Reported below: 317 Mich. 607, 27 N. W. 2d 249.

No. 438. TRAFFIC TELEPHONE WORKERS' FEDERATION ET AL. *v.* DRISCOLL, GOVERNOR, ET AL. Appeal from the District Court of the United States for the District of New Jersey. *Per Curiam:* The appeal is dismissed for want of jurisdiction. Judicial Code, § 266. Dissenting: MR. JUSTICE BLACK and MR. JUSTICE REED. *Israel B. Greene* for appellants. Reported below: 72 F. Supp. 499.

No. 9. NATIONAL LABOR RELATIONS BOARD *v.* KEYSTONE STEEL & WIRE CO. ET AL. Certiorari, 329 U. S. 705, to the Circuit Court of Appeals for the Seventh Circuit. *Per Curiam:* On consideration of the joint motion and stipulation of the parties that a mandate issue to the Circuit Court of Appeals directing that court to modify its judgment in the form agreed upon in the stipulation, the judgment of the Circuit Court of Appeals is vacated and the cause is remanded to that court for consideration of the stipulation. *Solicitor General Perlman* for petitioner. *Hugh Fulton* for the Keystone Steel & Wire Co., respondent. Reported below: 155 F. 2d 553.

Miscellaneous Orders.

No. 172, Misc. EX PARTE TRAFFIC TELEPHONE WORKERS' FEDERATION ET AL. The motion for leave to file petition for writ of mandamus or in the alternative a petition for writ of certiorari is denied. MR. JUSTICE BLACK and MR. JUSTICE REED are of the opinion the motion for leave to file should be granted. *Israel B. Greene* for petitioners. Reported below: 72 F. Supp. 499.

No. 510, October Term, 1945. KNAUER *v.* UNITED STATES. Petition for leave to file a petition in the nature of a Bill of Review in the District Court, or in the alternative in the Circuit Court of Appeals, denied. *Theodore W. Miller* for petitioner. Reported below: 149 F. 2d 519. (See also 328 U. S. 654.)

No. 111, Misc. HOUSE *v.* MAYO, CUSTODIAN OF FLORIDA STATE PRISON. Supreme Court of Florida. Certiorari denied. The motion for leave to file petition for writ of habeas corpus is also denied. Reported below: 159 Fla. 385, 31 So. 2d 633.

No. 101, Misc. LEMONS *v.* HUXMAN, DISTRICT JUDGE. The motion for leave to file petition for writ of quo warranto is denied.

No. 178, Misc. MORICONI *v.* BENSON, WARDEN. Application denied.

No. 181, Misc. HOLZWORTH *v.* CLEMMER, DIRECTOR; and

No. 187, Misc. CUMMINS *v.* NIERSTHEIMER, WARDEN. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 193, Misc. PILLSBURY *v.* ATTORNEY GENERAL OF THE UNITED STATES. The motion for leave to file petition for writ of mandamus is denied.

No. 197, Misc. THOMPSON *v.* PESCOR, WARDEN. The motion for leave to file petition for writ of certiorari is denied.

Certiorari Granted.

No. 373. COLE ET AL. *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari granted. *Lee Pressman, David*

Rein and *Joseph Forer* for petitioners. *Guy E. Williams,* Attorney General of Arkansas, and *Oscar E. Ellis,* Assistant Attorney General, for respondent. Reported below: 211 Ark. 836, 202 S. W. 2d 770.

No. 400. Francis et al. *v.* Southern Pacific Co. C. C. A. 10th. Certiorari granted. *Parnell Black, Calvin W. Rawlings* and *Harold E. Wallace* for petitioners. *Paul H. Ray* and *S. J. Quinney* for respondent. Reported below: 162 F. 2d 813.

No. 432. United States *v.* Zazove. C. C. A. 7th. Certiorari granted. *Solicitor General Perlman* for the United States. *Edward H. S. Martin* and *John B. King* for respondent. Reported below: 162 F. 2d 443.

No. 392. Creedon, Housing Expediter, *v.* Stone. C. C. A. 6th. Certiorari granted limited to the question as to the statute of limitations presented by the petition for the writ. *Solicitor General Perlman* for petitioner. *Carl M. Weideman* for respondent. Reported below: 163 F. 2d 393.

Certiorari Denied. (*See also Nos. 111, 172 and 197, Misc., supra.*)

No. 196. Biltchik et al. *v.* Green Bay & Western Railroad Co. et al. Supreme Court of Wisconsin. Certiorari denied. *A. Joseph Geist* and *Morris A. Marks* for petitioners. *Merrill M. Manning* and *Walter Bruchhausen* for respondents. Reported below: 250 Wis. 177, 26 N. W. 2d 633.

No. 287. Edmonson *v.* McWilliams, Trustee in Bankruptcy. C. C. A. 5th. Certiorari denied. *T. J. Wills, Horace C. Wilkinson* and *Thomas E. Skinner* for petitioner. *T. C. Hannah* and *M. M. Roberts* for re-

spondent. *William H. Watkins, P. H. Eager, Jr., Thomas H. Watkins* and *Elizabeth Hulen* filed a brief for the Maryland Casualty Co. et al., as *amici curiae,* opposing the petition. Reported below: 162 F. 2d 454.

No. 385. ADDISON MILLER, INC. ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Karl Michelet* and *Wm. J. Hogan, Jr.* for petitioners. *Solicitor General Perlman, Herbert A. Bergson, Paul A. Sweeney* and *Harry I. Rand* for the United States. Reported below: 108 Ct. Cl. 513, 70 F. Supp. 893.

No. 405. MANUFACTURERS TRUST CO., TRUSTEE, *v.* REALTY ASSOCIATES SECURITIES CORP. ET AL.;

No. 406. MEREDITH ET AL. *v.* REALTY ASSOCIATES SECURITIES CORP. ET AL.; and

No. 407. VANNECK REALTY CORP. *v.* REALTY ASSOCIATES SECURITIES CORP. ET AL. C. C. A. 2d. Certiorari denied. *Perry A. Hull* for petitioner in No. 405. *David Saperstein* and *Bernard D. Cahn* for petitioners in No. 406. *Percival E. Jackson* for petitioner in No. 407. *Roger S. Foster* for the Securities & Exchange Commission, and *James B. Alley* for Realty Associates Securities Corporation et al., respondents. Reported below: 163 F. 2d 387.

No. 409. EDDY ET AL. *v.* KELBY, EXECUTRIX, ET AL. C. C. A. 2d. Certiorari denied. *Samuel Silbiger* for petitioners. *Charles M. McCarty* and *George C. Wildermuth* for respondents. Reported below: 163 F. 2d 56.

No. 412. TURNER DAIRY CO. *v.* UNITED STATES. C. C. A. 7th. Certiorari denied. *George F. Callaghan* for petitioner. *Solicitor General Perlman, Assistant Attorney General Sonnett, Charles H. Weston, J. Stephen Doyle, Jr.* and *Lewis A. Sigler* for the United States. Reported below: 162 F. 2d 425.

No. 416. KUEHN *v.* UNITED STATES. C. C. A. 9th. Certiorari denied. *Casper A. Ornbaun* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 162 F. 2d 716.

No. 418. AVIATION CLUB OF UTAH *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 10th. Certiorari denied. *Paul H. Ray* and *S. J. Quinney* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Helen R. Carloss* for respondent. Reported below: 162 F. 2d 984.

No. 419. F. W. WOOLWORTH CO. ET AL. *v.* GUERLAIN, INC. Court of Appeals of New York. Certiorari denied. *Martin A. Schenck* and *Kenneth W. Greenawalt* for petitioners. *S. S. Baker* for respondent. Reported below: 297 N. Y. 11, 74 N. E. 2d 217.

No. 422. MARIO MERCADO E HIJOS *v.* ANDERSON, SECRETARY OF AGRICULTURE. C. C. A. 1st. Certiorari denied. *Montgomery B. Angell, Pedro M. Porrata* and *Edward J. McGratty, Jr.* for petitioner. *Solicitor General Perlman, John R. Benney, W. Carroll Hunter* and *David London* for respondent. Reported below: 163 F. 2d 303.

No. 434. ASBELL *v.* MUTUAL LIFE INSURANCE CO.; and

No. 435. ASBELL *v.* TRAVELERS PROTECTIVE ASSOCIATION. C. C. A. 4th. Certiorari denied. *Christie Benet, Jeff D. Griffith* and *J. B. S. Lyles* for petitioner. *Pinckney L. Cain* for respondents. Reported below: 163 F. 2d 121.

Nos. 387 and 388. WATSON ET AL. *v.* PORTLAND ELECTRIC POWER CO. ET AL. C. C. A. 9th. Certiorari denied. Reported below: 162 F. 2d 618, 624.

No. 414. UNITED STATES EX REL. KESSLER ET AL. *v.* WATKINS, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION. C. C. A. 2d. Certiorari denied. Relators *pro se*. *Solicitor General Perlman, Herbert A. Bergson* and *Samuel D. Slade* for respondent. Reported below: 163 F. 2d 140.

No. 92. COGER *v.* NEW YORK. County Court of Queens County, New York. Certiorari denied. Petitioner *pro se*. *J. Irwin Shapiro* for respondent.

No. 86, Misc. BOWERY *v.* HARTFORD ACCIDENT & INDEMNITY CO. Supreme Court of Missouri. Certiorari denied. *C. W. Prince* for petitioner. *William S. Hogsett* and *Hale Houts* for respondent. Reported below: 356 Mo. 545, 202 S. W. 2d 790.

No. 92, Misc. GREEN *v.* SCHILDER, WARDEN. C. C. A. 10th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Frederick Bernays Wiener, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 162 F. 2d 803.

No. 124, Misc. ANDERSON *v.* OFFICIAL SHORTHAND REPORTER OF THE CRIMINAL COURT OF COOK COUNTY, ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 144, Misc. LANE *v.* C. S. SMITH METROPOLITAN MARKET CO. C. C. A. 9th. Certiorari denied. Reported below: 162 F. 2d 907.

No. 173, Misc. MEYERS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 174, Misc. DODSON *v.* RAGEN, WARDEN. Circuit Court of Lake County, Illinois. Certiorari denied.

No. 177, Misc. KIRKRAND *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 397 Ill. 588, 74 N. E. 2d 813.

No. 179, Misc. STORY *v.* OKLAHOMA. Criminal Court of Appeals of Oklahoma. Certiorari denied.

No. 182, Misc. ROMANO *v.* NEW YORK. Supreme Court, Appellate Division, 2d Department, of New York. Certiorari denied. Reported below: 272 App. Div. 834, 71 N. Y. S. 2d 755.

No. 81, Misc. BAUER *v.* CLARK, ATTORNEY GENERAL, ET AL. C. C. A. 2d and 7th. Certiorari denied. *Frederick E. Bauer, pro se. Solicitor General Perlman, Assistant Attorney General Ford, Frederick Bernays Wiener* and *Paul A. Sweeney* for respondents. Reported below: 161 F. 2d 397, 729.

Rehearing Denied.

No. 170. DIXON *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL., *ante*, p. 764. Rehearing denied.

No. 395. STIMSON MILL CO. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 824. Rehearing denied.

No. 1455, October Term, 1946. FLAHERTY *v.* ILLINOIS, 331 U. S. 856. Third petition for rehearing denied.

No. 139, Misc. SHOTKIN ET AL. *v.* THOMAS A. EDISON, INC., *ante*, p. 813. Rehearing denied.

No. 142, Misc. SMITH *v.* HOWARD, WARDEN, *ante*, p. 814. Rehearing denied.

DECEMBER 15, 1947.

Per Curiam Decision.

No. 301. EDWARD G. BUDD MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. On petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. *Per Curiam:* The motion of the Foreman's Association of America for leave to intervene is granted. The petition for writ of certiorari is granted limited to the question of the validity of that part of the order of the National Labor Relations Board which directs the petitioner to cease and desist from discouraging membership in the Foreman's Association of America. The judgment of the Circuit Court of Appeals is vacated in that respect and the cause is remanded to that Court for consideration of the effect of the Labor Management Relations Act of 1947, 61 Stat. 136, on the question to which the grant of certiorari is limited. *Archibald Broomfield* for petitioner. *Solicitor General Perlman, David P. Findling* and *Ruth Weyand* for respondent. Reported below: 162 F. 2d 461.

Miscellaneous Orders.

No. 50. HANNEGAN, POSTMASTER GENERAL, *v.* READ MAGAZINE, INC. ET AL. Donaldson, Acting Postmaster General, substituted as the party petitioner herein. Reported below: 81 U. S. App. D. C. 339, 158 F. 2d 542.

No. 139. ESTIN *v.* ESTIN. The petition for rehearing is granted. The order entered October 13, 332 U. S. 760, denying the petition for certiorari is vacated and the petition for writ of certiorari to the Court of Appeals of New York is granted. *James G. Purdy* and *Abraham J. Nydick* for petitioner. *Joseph N. Schultz* for respondent. Reported below: 296 N. Y. 308, 73 N. E. 2d 113.

Certiorari Granted. (*See also Nos. 139 and 301, supra.*)

No. 292. BRUNSON *v.* NORTH CAROLINA;
No. 293. KING *v.* NORTH CAROLINA;
No. 294. JONES *v.* NORTH CAROLINA;
No. 295. JAMES ET AL. *v.* NORTH CAROLINA; and
No. 296. WATKINS ET AL. *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari granted. *Nathan Witt* for petitioners. *Harry McMullan,* Attorney General of North Carolina, and *James E. Tucker,* Assistant Attorney General, for respondent. Reported below: 227 N. C. 558, 559, 560, 561; 43 S. E. 2d 82, 83.

No. 427. TRUPIANO ET AL. *v.* UNITED STATES. C. C. A. 3d. Certiorari granted. *Frank G. Schlosser* for petitioners. *Solicitor General Perlman, Assistant Attorney General Quinn* and *Robert S. Erdahl* for the United States. Reported below: 163 F. 2d 828.

Certiorari Denied.

No. 379. GRAND RIVER DAM AUTHORITY *v.* GRAND-HYDRO, INC. Supreme Court of Oklahoma. Certiorari denied. *Robert Leander Davidson* for petitioner. *Samuel Frank Fowler* for respondent. *Solicitor General Perlman* filed a brief for the United States, as *amicus curiae,* supporting the petition. Reported below: 192 Okla. 693, 139 P. 2d 798.

No. 404. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, OCEAN LODGE NO. 76, ET AL. *v.* TUNSTALL ET AL. C. C. A. 4th. Certiorari denied. *Harold C. Heiss, Russell B. Day, William G. Maupin* and *Ralph M. Hoyt* for petitioners. *Charles H. Houston* and *Joseph C. Waddy* for respondents. *James B. McDonough, Jr., W. R. C. Cocke* and *Frank J. Wideman* filed a brief for the Seaboard Air Line Railroad Co., as *amicus curiae,* supporting the petition. Reported below: 163 F. 2d 289.

No. 420. COMMISSIONER OF INTERNAL REVENUE *v.* WILSON. C. C. A. 9th. Certiorari denied. *Solicitor General Perlman* for petitioner. Reported below: 163 F. 2d 680.

No. 421. COMMISSIONER OF INTERNAL REVENUE *v.* WIESLER. C. C. A. 6th. Certiorari denied. *Solicitor General Perlman* for petitioner. *R. M. O'Hara* for respondent. Reported below: 161 F. 2d 997.

No. 440. LAIRD *v.* UNITED SHIPYARDS, INC. ET AL. C. C. A. 2d. Certiorari denied. *Robert P. Weil* for petitioner. *John F. Condon, Jr.* for the United Shipyards, Inc.; *Henry Root Stern* for the Chase National Bank; and *Joseph M. Proskauer* for Powell et al., respondents. Reported below: 163 F. 2d 12.

No. 89. VAN GLAHN *v.* NEW YORK. County Court of Suffolk County, New York. Certiorari denied. Petitioner *pro se*. *Lindsay R. Henry* for respondent.

No. 117. LEWIS *v.* NEW YORK. Supreme Court of New York, Chemung County. Certiorari denied.

Rehearing Granted. (*See No. 139, supra.*)

Rehearing Denied.

No. 417. DISTRICT OF COLUMBIA *v.* BECKHAM ET AL., *ante*, p. 825. Rehearing denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

DECEMBER 18, 1947.

Miscellaneous Order.

No. 408. TRUST OF ANDRUS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. Motion for an extension of time within which to file a petition for rehearing denied.

DECEMBER 22, 1947.

Miscellaneous Orders.

No. 222, Misc. MOORE ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari granted. The motion for a stay is granted and execution of the sentence of death imposed on these petitioners is stayed pending the final disposition of the case by this Court. Petitioners *pro se*. *George Tilzer* for respondent.

No. 220, Misc. SEALS *v.* TAYLOR, DISTRICT JUDGE. The motion for leave to file petition for writ of habeas corpus is denied.

No. 224, Misc. SCOTT *v.* RAGEN, WARDEN. Application denied.

Certiorari Granted. (*See also No. 222, Misc., supra.*)

No. 431. ANDRES *v.* UNITED STATES. C. C. A. 9th. Certiorari granted. *O. P. Soares* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 163 F. 2d 468.

Certiorari Denied.

No. 441. STERNBERG, CO-TRUSTEE, ET AL. *v.* ST. LOUIS UNION TRUST CO., CO-TRUSTEE. C. C. A. 8th. Certiorari denied. *S. Mayner Wallace* for petitioners. Reported below: 163 F. 2d 714.

Nos. 443, 444 and 445. ATWOOD ET AL. *v.* KLEBERG ET AL. C. C. A. 5th. Certiorari denied. *Brady Cole* for petitioners. *Leroy G. Denman, Marcellus G. Eckhardt* and *Robert F. Campbell* for respondents. Reported below: 163 F. 2d 108.

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No. 450. GUTH *v.* TEXAS COMPANY. C. C. A. 7th. Certiorari denied. *Albert H. Fry* for petitioner. *Henry I. Green, Enos L. Phillips* and *Harold A. Smith* for respondent. Reported below: 163 F. 2d 893.

No. 433. SHYMAN, DOING BUSINESS AS ALASKA DISTRIBUTORS CO., *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. C. C. A. 9th. The motion of the Solicitor General to substitute the United States of America as the party respondent is granted. Certiorari denied. *Daniel B. Trefethen* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 163 F. 2d 461.

No. 439. PANTZER LUMBER CO. *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. C. C. A. 7th. The motion of the Solicitor General to substitute the United States of America as the party respondent is granted. The motion to strike respondent's brief is denied. Certiorari denied. *Irving R. M. Panzer, Henry G. Fischer* and *John W. Willis* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 162 F. 2d 276.

No. 442. PHILLIPS *v.* BALTIMORE & OHIO RAILROAD CO. District Court of the United States for the District of Maryland. Certiorari denied. *Joseph B. Hyman* for petitioner. *Edwin H. Burgess* and *Frederick E. Baukhages* for respondent.

No. 191, Misc. Ross *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 192, Misc. Ross *v.* ILLINOIS. Circuit Court of St. Clair County, Illinois. Certiorari denied.

No. 194, Misc. BANKS *v.* RAGEN, WARDEN. C. C. A. 7th. Certiorari denied.

No. 211, Misc. JONES *v.* RAGEN, WARDEN. Circuit Court of Will County, Criminal Court of Cook County, and Supreme Court of Illinois. Certiorari denied.

No. 212, Misc. CANNADY *v.* RAGEN, WARDEN. Circuit Court of Will County, and the Criminal Court of Cook County, Illinois. Certiorari denied.

Rehearing Denied.

No. 401. BOMAR *v.* KEYES ET AL., *ante,* p. 825. Rehearing denied.

No. 21, Misc. SHIFLETT *v.* WELCH, SUPERINTENDENT, *ante,* p. 777. Rehearing denied.

No. 158, Misc. BAKER *v.* UTECHT, WARDEN, *ante,* p. 831. Rehearing denied.

JANUARY 5, 1948.

Miscellaneous Orders.

No. 50. DONALDSON, ACTING POSTMASTER GENERAL, *v.* READ MAGAZINE, INC. ET AL. Donaldson, Postmaster General, substituted as the party petitioner. Reported below: 81 U. S. App. D. C. 339, 158 F. 2d 542.

No. 53. LOCAL 2880, LUMBER & SAWMILL WORKERS UNION, *v.* NATIONAL LABOR RELATIONS BOARD. Writ of certiorari, 331 U. S. 798, to the Circuit Court of Appeals for the Ninth Circuit dismissed on motion of counsel for the petitioner. *George E. Flood* and *James A. Glenn* for petitioner. Reported below: 158 F. 2d 365.

No. 166, Misc. McLean *v.* Michigan. Supreme Court of Michigan. Motion for a subpoena *duces tecum* denied. Certiorari denied. Motion for leave to file a petition for writ of habeas corpus denied.

No. 240, Misc. Sampson *v.* Ragen, Warden. Criminal Court of Cook County and the Supreme Court of Illinois. Certiorari denied. The motion for leave to file petition for writ of habeas corpus is also denied.

Certiorari Granted.

Nos. 270 and 428. Parker *v.* Illinois. Supreme Court of Illinois. The motion to strike respondent's brief in No. 270 is denied. Certiorari granted. Petitioner *pro se*. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 396 Ill. 583, 72 N. E. 2d 848; 397 Ill. 305, 74 N. E. 2d 523.

Certiorari Denied. (*See also Nos. 166 and 240, Misc., supra.*)

No. 447. Katz *v.* United States. C. C. A. 6th. Certiorari denied. *Edward N. Barnard* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn* and *Robert S. Erdahl* for the United States. Reported below: 161 F. 2d 869.

Nos. 455 and 456. Commissioner of Internal Revenue *v.* California & Hawaiian Sugar Refining Corp. C. C. A. 9th. Certiorari denied. *Solicitor General Perlman* for petitioner. *Henry J. Richardson* for respondent. Reported below: 163 F. 2d 531.

No. 465. Atlantic States Motor Lines, Inc. *v.* Virginia. Supreme Court of Appeals of Virginia. Certiorari denied. *S. W. Shelton* for petitioner. *Harvey B.*

Apperson, Attorney General of Virginia, for respondent. Reported below: 186 Va. 596, 43 S. E. 2d 868.

No. 469. FEINBERG *v.* RAILWAY EXPRESS AGENCY, INC. C. C. A. 7th. Certiorari denied. *Karl Edwin Seyfarth* for petitioner. *Harry S. Marx* and *Charles C. Evans* for respondent. Reported below: 163 F. 2d 998.

No. 473. ROOT ET AL., TRUSTEES, ET AL. *v.* GALMAN. C. C. A. 3d. Certiorari denied. *John E. Sheridan, Bertram Bennett* and *David Goff* for petitioners. *Abraham E. Freedman* for respondent. Reported below: 164 F. 2d 316.

No. 402. GREENWOOD ET AL. *v.* HOTEL & RESTAURANT EMPLOYEES INTERNATIONAL ALLIANCE & BARTENDERS INTERNATIONAL LEAGUE ET AL. Supreme Court of Alabama. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Horace C. Wilkinson* for petitioners. *Earl McBee* for respondents. Reported below: 249 Ala. 265, 30 So. 2d 696.

Nos. 462 and 463. TRANSAMERICA CORPORATION ET AL. *v.* SECURITIES & EXCHANGE COMMISSION. C. C. A. 3d. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Edwin D. Steel, Jr.* for petitioners. *Solicitor General Perlman* and *Roger S. Foster* for respondent. Reported below: 163 F. 2d 511.

No. 75, Misc. KRELL *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied. Petitioner *pro se. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 145, Misc. McMahan *v.* Johnston, Warden. C. C. A. 9th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 163 F. 2d 428.

No. 157, Misc. Jackson *v.* Sanford, Warden. C. C. A. 5th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent. Reported below: 163 F. 2d 875.

No. 185, Misc. Davis *v.* Illinois. Supreme Court of Illinois. Certiorari denied. Reported below: 396 Ill. 432, 72 N. E. 2d 193.

No. 189, Misc. O'Brien *v.* Ragen, Warden. Circuit Court of Will County, Illinois. Certiorari denied.

No. 190, Misc. Hicks *v.* Illinois;
No. 202, Misc. Barron *v.* Ragen, Warden; and
No. 203, Misc. Hamby *v.* Ragen, Warden. Supreme Court of Illinois. Certiorari denied. Reported below: No. 190, 398 Ill. 125, 75 N. E. 2d 343.

No. 204, Misc. Burnett *v.* Ragen, Warden. Circuit Court of Stephenson County, Illinois. Certiorari denied.

No. 207, Misc. Bastin *v.* Ragen, Warden. Circuit Court of Cook County, Illinois. Certiorari denied.

No. 209, Misc. Davis *v.* Ragen, Warden. Circuit Court of Will County, Illinois. Certiorari denied.

No. 214, Misc. Monsky et al. *v.* Warden of Clinton State Prison. C. C. A. 2d. Certiorari denied. Reported below: 163 F. 2d 978.

No. 217, Misc. GORDON *v.* RAGEN, WARDEN. Circuit Court of Fayette County, Illinois. Certiorari denied.

No. 218, Misc. STROEMPLE *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 355 Mo. 1147, 199 S. W. 2d 913.

No. 225, Misc. KILGORE *v.* TURNER, WARDEN. Court of Criminal Appeals of Texas. Certiorari denied.

No. 226, Misc. TAURISANO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 297 N. Y. 573, 74 N. E. 2d 552.

No. 239, Misc. LANE *v.* RAGEN, WARDEN. Circuit Court of Vermilion County, Illinois. Certiorari denied.

No. 241, Misc. OWENS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 246, Misc. PENLAND *v.* ASHE, WARDEN. C. C. A. 3d. Certiorari denied.

Rehearing Denied.

No. 1455, October Term, 1946. FLAHERTY *v.* ILLINOIS, 331 U. S. 856. Fourth petition for rehearing denied.

No. 450. GUTH *v.* TEXAS COMPANY, *ante*, p. 844. Rehearing denied.

No. 81, Misc. BAUER *v.* CLARK, ATTORNEY GENERAL, ET AL., *ante*, p. 839. Rehearing denied.

No. 86, Misc. BOWERY *v.* HARTFORD ACCIDENT & INDEMNITY CO., *ante*, p. 838. Rehearing denied.

No. 151, Misc. BAILEY *v.* MCMULLEN, WARDEN, *ante*, p. 825. Rehearing denied.

No. 152, Misc. BAILEY *v.* SCHULER, *ante*, p. 831. Rehearing denied.

No. 168, Misc. CHALMERS *v.* FOSTER, WARDEN, *ante*, p. 831. Rehearing denied.

JANUARY 12, 1948.

Per Curiam Decision.

No. 449. MARDEN & MURPHY, INC. *v.* CITY OF LOWELL. Appeal from and petition for writ of certiorari to the Land Court of Massachusetts. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. The petition for writ of certiorari is denied. *Burton E. Eames* for appellant-petitioner. *P. Harold Ready* and *Raymond D. O'Brien* for appellee-respondent. Reported below: 74 N. E. 2d 666.

Certiorari Granted.

No. 451. COMSTOCK *v.* GROUP OF INSTITUTIONAL INVESTORS ET AL.;

No. 452. NEW ORLEANS, TEXAS & MEXICO RAILWAY CO. *v.* GROUP OF INSTITUTIONAL INVESTORS ET AL.;

No. 453. THOMPSON, TRUSTEE, *v.* GROUP OF INSTITUTIONAL INVESTORS ET AL.; and

No. 454. COMSTOCK *v.* THOMPSON, TRUSTEE, ET AL. C. C. A. 8th. Certiorari granted. *William H. Biggs* for petitioners. *Charles W. McConaughy, Clair B. Hughes, Leonard P. Moore, Sanford H. E. Freund* and *Harry Kirshbaum* for respondents. Reported below: 163 F. 2d 350, 358.

No. 464. FEDERAL TRADE COMMISSION *v.* MORTON SALT CO. C. C. A. 7th. Certiorari granted. *Solicitor*

General Perlman and *W. T. Kelley* for petitioner. *L. M. McBride* for respondent. Reported below: 162 F. 2d 949.

Certiorari Denied. (*See also No. 449, supra.*)

No. 457. POLK *v.* UNITED STATES. C. C. A. 6th. Certiorari denied. *Albert Williams* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States.

No. 466. PARFAIT POWDER PUFF CO., INC. *v.* UNITED STATES. C. C. A. 7th. Certiorari denied. *Joseph Rosenbaum* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Vincent A. Kleinfeld* for the United States. Reported below: 163 F. 2d 1008.

No. 467. JUNGERSEN *v.* OSTBY & BARTON CO. ET AL. C. C. A. 3d. Certiorari denied. *Drury W. Cooper* for petitioner. Reported below: 163 F. 2d 312.

No. 471. GENERAL FINANCE LOAN CO. ET AL. *v.* GENERAL LOAN CO. C. C. A. 8th. Certiorari denied. *Mark D. Eagleton* and *Donald Gunn* for petitioners. Reported below: 163 F. 2d 709.

No. 484. JOHNSON ET AL. *v.* SELLERS ET AL. C. C. A. 8th. Certiorari denied. *J. O. Watson, Jr.* and *William B. Sloan* for petitioners. *Hayden C. Covington* for respondents. Reported below: 163 F. 2d 877.

No. 458. FIELDS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia. Certiorari denied. MR. JUSTICE BURTON took no part in the

consideration or decision of this application. *Alton S. Bradford* and *G. Lynn Woodruff* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn* and *Robert S. Erdahl* for the United States. Reported below: 82 U. S. App. D. C. 354, 164 F. 2d 97.

No. 459. JOHNSON *v.* UNITED STATES; and

No. 460. GREENES *v.* UNITED STATES. C. C. A. 3d. Certiorari denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of these applications. *Charles J. Margiotti* for petitioner in No. 459; and *Thos. D. Caldwell* for petitioner in No. 460. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for the United States.

No. 468. OSTBY & BARTON CO. ET AL. *v.* JUNGERSEN. C. C. A. 3d. Certiorari denied. MR. JUSTICE BLACK is of the opinion the petition should be granted. *Alexander C. Neave* for petitioners. Reported below: 163 F. 2d 312.

No. 118, Misc. CHRIST, ADMINISTRATRIX, *v.* UNITED STATES WAR SHIPPING ADMINISTRATION. C. C. A. 3d. Certiorari denied. *Abraham E. Freedman* for petitioner. *Solicitor General Perlman, Herbert A. Bergson, Paul A. Sweeney, Oscar H. Davis* and *John K. Benney* for respondent. Reported below: 163 F. 2d 145.

No. 208, Misc. EVANS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 397 Ill. 330, 74 N. E. 2d 537.

No. 242, Misc. BOWIE *v.* SWENSON, WARDEN. Court of Appeals of Maryland. Certiorari denied.

No. 250, Misc. LOTT *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 147, Misc. UNITED STATES EX REL. LUDECKE *v.* WATKINS, DISTRICT DIRECTOR OF IMMIGRATION. C. C. A. 2d. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE RUTLEDGE are of the opinion the petition should be granted. Relator *pro se*. *Solicitor General Perlman, Herbert A. Bergson* and *Samuel D. Slade* for respondent. Reported below: 163 F. 2d 143.

Rehearing Denied.

No. 1210, October Term, 1946. FUJIKAWA ET AL. *v.* SUNRISE SODA WORKS CO. ET AL., 331 U. S. 832. Motion for leave to file a second petition for rehearing denied.

No. 58, Misc. ROBARE *v.* MICHIGAN, *ante*, p. 781. Rehearing denied.

No. 142, Misc. SMITH *v.* HOWARD, WARDEN, *ante*, p. 814. Motion for leave to file a second petition for rehearing denied.

JANUARY 19, 1948.

Per Curiam Decision.

No. 501. FLORIDA EX REL. LEWIS *v.* KELLEY, CHIEF OF POLICE. Appeal from the Supreme Court of Florida. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Thomas M. Lockhart* for appellant. *Thomas O. Berryhill* for appellee. Reported below: 159 Fla. 562, 32 So. 2d 464.

Miscellaneous Orders.

No. 392. CREEDON, HOUSING EXPEDITER, *v.* STONE. Woods, present Housing Expediter, substituted as the party petitioner herein.

No. 437. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, *v.* HILLS. Woods, Housing Expediter, substituted for Fleming, Temporary Controls Administrator.

No. 232, Misc. WOODS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied. The motion for leave to file petition for writ of habeas corpus is also denied. Reported below: 393 Ill. 586, 66 N. E. 2d 881.

No. 265, Misc. MCMILLAN *v.* EAST, JUDGE; and

No. 274, Misc. WHITE *v.* RAGEN, WARDEN. Applications denied.

No. 264, Misc. RUTHVEN *v.* OVERHOLSER; and

No. 271, Misc. BLANTON *v.* NORTH CAROLINA. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 262, Misc. STEINBERG *v.* SPEAKMAN, JUDGE. The motion for leave to file petition for writ of mandamus is denied.

Certiorari Granted.

No. 53, Misc. GRYGER *v.* BURKE, WARDEN; and

No. 55, Misc. TOWNSEND *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari granted. Petitioners *pro se*. *John H. Maurer* for respondent.

Certiorari Denied. (*See also No. 232, Misc., supra.*)

No. 474. ORMONT, DOING BUSINESS AS ACME MEAT CO., *v.* CLARK, DIRECTOR OF THE DIVISION OF LIQUIDATION, DEPARTMENT OF COMMERCE. United States Emergency Court of Appeals. Certiorari denied. *William Katz* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Josephine H. Klein* for respondent. Reported below: 164 F. 2d 354.

No. 476. BLUE STAR AUTO STORES, INC. *v.* MCCOMB, WAGE & HOUR ADMINISTRATOR. C. C. A. 7th. Certiorari denied. *Samuel E. Hirsch* and *Julian H. Levi* for petitioner. *Solicitor General Perlman, John R. Benney, William S. Tyson* and *Bessie Margolin* for respondent. Reported below: 164 F. 2d 329.

No. 478. HANSON ET AL., DOING BUSINESS AS SEVENTEEN FOR THE JUNIOR TEENS, *v.* TRIANGLE PUBLICATIONS, INC. C. C. A. 8th. Certiorari denied. *Howard Elliott* for petitioners. *Frank B. Murdoch* and *Samuel H. Liberman* for respondent. Reported below: 163 F. 2d 74.

No. 488. GATELY *v.* HARITON ET AL. United States Court of Appeals for the District of Columbia. Certiorari denied. *James P. Burns* for petitioner. *Milton Strasburger* for respondents.

No. 200, Misc. HOLLER *v.* UNITED STATES. C. C. A. 8th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 164 F. 2d 697.

No. 230, Misc. BAILEY *v.* NIERSTHEIMER, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 238, Misc. BAXTER *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 247, Misc. HAMBY *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 267, Misc. CORDTS *v.* RAGEN, WARDEN. Circuit Court of St. Clair County, Illinois. Certiorari denied.

No. 268, Misc. ROSS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 269, Misc. ROBINSON *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 270, Misc. THOMPSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 398 Ill. 114, 75 N. E. 2d 345.

No. 275, Misc. HARPER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 278, Misc. BERNARD *v.* BRADY, WARDEN. C. C. A. 4th. Certiorari denied. Reported below: 164 F. 2d 881.

Rehearing Denied.

No. 55. GOLDSMITH *v.* UNITED STATES, *ante,* p. 539. Rehearing denied.

No. 56. WEISS *v.* UNITED STATES, *ante,* p. 539. Rehearing denied.

No. 57. FEIGENBAUM *v.* UNITED STATES, *ante,* p. 539. Rehearing denied.

No. 170. DIXON *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL., *ante,* p. 764. The motion for leave to file a second petition for rehearing is denied.

AMENDMENT OF RULES.

ORDER.

IT IS ORDERED that Rule 33 of the Rules of this Court be, and it hereby is, amended to read as follows:

"33

"REHEARING

"1. *Of judgments or decisions other than those denying or granting certiorari.*—A petition for rehearing may be filed with the clerk, in term time or in vacation, when accompanied by proof of service on the adverse party, within fifteen days after judgment or decision, unless the time is shortened or enlarged by the Court or a justice thereof. Such petition must be printed and forty copies thereof furnished. It must briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. A petition for rehearing is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment or decision desires it, and a majority of the Court so determines.

"(a) A response, if printed and forty copies thereof furnished, accompanied by proof of service, may be filed with the clerk within ten days after service of petition, unless the time is shortened or enlarged by the Court or a justice thereof. Such response is not required, and the Court will not delay its action upon a petition for rehearing to await a response thereto, unless a response is requested by the Court.

"2. *Of orders on petitions for writs of certiorari.*—A petition for rehearing may be filed with the clerk in term time or in vacation, subject to the requirements respecting

time, service, printing, and number of copies furnished as provided in paragraph 1 of this rule. Any petition filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect (e. g., *Sanitary Refrigerator Co.* v. *Winters,* 280 U. S. 30, 34, footnote 1; *Massey* v. *United States,* 291 U. S. 608), or to other substantial grounds available to petitioner although not previously presented (e. g., *Schriber-Schroth Co.* v. *Cleveland Trust Co.,* 305 U. S. 47, 50). Such petition is not subject to oral argument. A petition for rehearing filed under this paragraph must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay, and counsel must also certify that the petition is restricted to the grounds above specified.

"(a) A response, if printed and forty copies thereof furnished, accompanied by proof of service, may be filed with the clerk within ten days after service of petition, unless the time is shortened or enlarged by the Court or a justice thereof."

It is further ordered that the Rule as herein amended shall be applicable to all cases in which the action of the Court is taken after January 1, 1948.

October 13, 1947.

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