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IN

THE SUPREME COURT

AT

OCTOBER TERM, 1950

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ERRATA.

101 U. S. 273, line 12, "admissible" should be "inadmissible".

309 U. S. 34, line 27, "sustaining" should be "invalidating".

331 U. S. 316, last line of text, there should be a comma after "traffic".

338 U. S. 801, line 3 of caption, the date should be "February 13, 1950."

338 U. S. 874: In No. 15, Misc., the citation is to an earlier decision in the same case. The decision as to which certiorari was denied is not reported.

339 U. S. 951: In No. 294, Misc., the citation to the unofficial report of the decision below should be "179 F. 2d 466."

339 U. S. 977: In No. 766, the citation to the official report of the decision below should be "86 U. S. App. D. C. 248".

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.
ROBERT H. JACKSON, Associate Justice.
HAROLD H. BURTON, Associate Justice.
TOM C. CLARK, Associate Justice.
SHERMAN MINTON, Associate Justice.

J. HOWARD McGRATH, Attorney General.
PHILIP B. PERLMAN, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
WALTER WYATT, Reporter.
THOMAS ENNALLS WAGGAMAN, Marshal.
HELEN NEWMAN, Librarian.

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, pursuant to Title 28, United States Code, section 42, and that such allotment be entered of record, viz:

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

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, SHERMAN MINTON, Associate Justice.

For the Eighth Circuit, TOM C. CLARK, Associate Justice.

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

For the Tenth Circuit, TOM C. CLARK, Associate Justice.

October 14, 1949.

(For next previous allotment, see 337 U. S. p. IV.)

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES

In Memory of Mr. Justice Murphy[1]

TUESDAY, MARCH 6, 1951

Present: MR. CHIEF JUSTICE VINSON, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE JACKSON, MR. JUSTICE BURTON, MR. JUSTICE CLARK, and MR. JUSTICE MINTON.

MR. SOLICITOR GENERAL PERLMAN addressed the Court as follows:

May it please the Court: At a meeting of members of the Bar of the Supreme Court, held this morning,[2] resolutions expressing their profound sorrow at the death of Justice Frank Murphy were offered by a committee, of which the Honorable Benjamin V. Cohen was chairman.[3]

[1] Mr. Justice Murphy died at Detroit, Michigan, on July 19, 1949. Funeral services were held in Our Lady of Lake Huron Church, and interment was in Rock Falls Cemetery, Harbor Beach, Michigan, on July 22, 1949. See 338 U. S. pp. III–IV, VII.

[2] The Committee on Arrangements for the meeting of the Bar consisted of Solicitor General Philip B. Perlman, Chairman, Honorable Ira W. Jayne, Honorable Frank A. Picard, Dean E. Blythe Stason, and Honorable G. Mennen Williams.

[3] The Committee on Resolutions consisted of Mr. Benjamin V. Cohen, Chairman, Mr. John J. Adams, Mr. Thurman Arnold, Mr. Francis Biddle, Mr. James Crawford Biggs, Mr. Prentiss M. Brown, Mr. Wm. Marshall Bullitt, Mr. George J. Burke, Justice George E. Bushnell, Mr. James F. Byrnes, Mr. John T. Cahill, Judge William J. Campbell, Mr. Emanuel Celler, Mr. James A. Cobb, Mr. Archibald Cox, Mr. Myron C. Cramer, Mr. Homer S. Cummings, Mr. Walter J. Cummings, Jr., Mr. Joseph E. Davies, Mr. John W. Davis, Mr. John R. Dykema, Mr. John S. Flannery, Mr. Edward H. Foley, Jr.,

Addresses were made to the Bar by Edward G. Kemp, Esquire, who was closely associated with the late Justice through most of his career, Judge Charles Fahy of the United States Court of Appeals for the District of Columbia, and Thurgood Marshall, Chief Counsel of the National Association for the Advancement of Colored People.[4] The resolutions, adopted unanimously, are as follows:

RESOLUTIONS

We of the Bar of the Supreme Court of the United States are gathered here to commemorate the life and works of Mr. Justice Murphy, whose untimely death occurred in Detroit, Michigan, on July 19, 1949. The brief words of tribute uttered today can give but inadequate expression to the great qualities of his mind and heart. His life was indeed an abundant one, dedicated to the noblest and highest traditions of our civilization. In every step of his varied career of public service, he exhibited a passionate and selfless regard for the rights of his fellow men. We do well, therefore, to reflect upon the life of one who has enriched the history of the Court and of the Nation.

Frank Murphy was born in the village of Sand Beach, now the city of Harbor Beach, Michigan, on April 13, 1890, the third of four children of John F. and Mary

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Mr. John P. Frank, Mr. William L. Frierson, Mr. James W. Gerard, Mr. Eugene Gressman, Mr. Abraham J. Harris, Mr. Edward J. Hayes, Mr. Edwin E. Huddleson, Mr. Joseph B. Keenan, Mr. Isadore Levin, Mr. Norman M. Littell, Mr. George A. Malcolm, Mr. Francis P. Matthews, Judge Thomas F. McAllister, Mr. Kenneth Dobson Miller, Mr. Gilbert H. Montague, Mr. Thomas F. Moriarty, Mr. Robert P. Patterson, Mr. George Wharton Pepper, Mr. John H. Pickering, Mr. William J. Schrenk, Jr., Judge Raymond W. Starr, Mr. J. R. Swenson, Mr. Myron C. Taylor, Mr. Maurice J. Tobin, Mr. Thomas L. Tolan, Jr., Mr. John Patrick Walsh, Mr. Charles Warren, and Mr. James K. Watkins.

[4] It is understood that these addresses will be published privately in a memorial volume to be prepared under the supervision of Mr. Charles Elmore Cropley, Clerk of this Court.

Brennan Murphy. The father was respected as an able lawyer and as a public-spirited citizen in Huron County; he served two terms as prosecuting attorney and achieved notable success in jury cases as a private practitioner. He was also the leading Democrat in an overwhelmingly Republican community. From him the young Frank acquired an interest in law and politics, a rugged spirit of independence and a capacity for leadership. The spirituality and gentleness of the mother were of the rarest quality and it was she who endowed Frank Murphy with his deep religious conscience. The Bible which she gave him when he was graduated from high school he carried with him to his dying day and upon it he took the oaths of the high offices which he attained. His parents, devout Catholics of Irish stock, inculcated in Frank Murphy not only deep faith in his religion and genuine pride in his ancestry, but an unusual sense of security regarding his religion and ancestry. He never felt that his own religion could be hurt by the peaceful rivalry of other faiths. Nor did he think that he could add a cubit to his own pride of ancestry by disparaging that of others. From his parents he learned at an early age that true self-respect involves an abiding respect and tolerance for the rights of others, a principle that was to have a profound influence upon his political as well as his judicial work.

The early education of Justice Murphy was acquired in the public schools of Harbor Beach. There he demonstrated his natural talents as a student, an orator, an athlete, and a leader of his fellows. These talents he carried with him to the University of Michigan, where he pursued his undergraduate studies and received a Bachelor of Laws degree in 1914.

Following his admission to the Michigan Bar in 1914, he began work as a law clerk with the Detroit firm of Monaghan & Monaghan and he quickly received recognition as a promising trial lawyer. During his first years at the Bar he also taught at the Detroit College of Law.

Soon after the entry of the United States into World War I, Justice Murphy sought active service in the Army where he served as a first lieutenant and later as a captain in the Fourth and Eighty-fifth Infantry Divisions. After the Armistice he served with the occupation army in the German Rhineland. Upon his discharge from the service, he continued his legal studies at Lincoln's Inn, London, and Trinity College, Dublin. In Ireland the growth and vitality of the movement for independence enlisted his keen and sympathetic interest, and his understanding of that movement was to be of invaluable assistance to him in later years in his work with the leaders of the Philippine movement for independence.

He returned to the United States in 1919 and became Chief Assistant in the office of the United States District Attorney in Detroit. It is said that in this capacity he lost practically no cases among the many in which he participated. Notable was his work in obtaining convictions for graft and fraud against the Government on large war contracts. He also assisted the Government in the successful prosecution of the condemnation proceedings resulting in the widening of the River Rouge and which in later years made possible the development of the vast River Rouge plant of the Ford Motor Company.

It was in the election of 1920 that he made his first and unsuccessful bid for public office, the office of Congressman from the First District of Michigan. A Wilsonian Democrat, he was defeated in the Republican landslide. After his service in the District Attorney's office, a brief interlude of private law practice in Detroit ensued.

In 1923, in a spirited campaign, he was elected to the Recorder's Court, a criminal court of Detroit. Judge Murphy took an active interest in the administrative affairs of the court. He helped to make the psychopathic clinic and probation department indispensable, non-political adjuncts of the court.

The most noteworthy trial that he presided over was the Sweet murder case growing out of bitter racial tensions.

Dr. Sweet, a Negro, had established his home in a neighborhood previously reserved for whites. A threatening mob gathered near his home, frightening him and other Negroes with him. Shots were fired. A white man was killed. Dr. Sweet and several other Negroes were indicted for murder. Public feeling was inflamed against them. To administer justice in these circumstances required more than a mere crusader's zeal; it required more than book-learning. It required courage, human understanding, dignity, and a grasp of the essential principles of criminal procedure. At the trial young Judge Murphy showed that he possessed all these qualities in good measure. It is important to recall not only that the trial resulted in the acquittal of the defendants in face of public clamor, but that the community, despite its original hostility, was convinced that the trial was fairly conducted from the standpoint of the community as well as the defendants. Clarence Darrow, counsel for the defendants, later remarked that Murphy was "a judge who not only seemed human, but . . . proved to be the kindliest and most understanding man I have ever happened to meet on the bench."

In 1929, he was reelected to the Recorder's Court. A year later he resigned to become the successful candidate for the office of Mayor of Detroit. As chief executive of a great industrial city struck by the full force of unemployment and depression he recognized the importance of making all citizens conscious of their interest in the continued maintenance of the orderly processes of government. His bold advocacy of the principle of government responsibility for the destitute attracted Nation-wide attention. At the same time, however, he pursued a program of rigid economy in other services of the city government. He succeeded in fulfilling his campaign pledge that "not one deserving man or woman shall go hungry in Detroit because of circumstances beyond his control." Public appreciation of his efforts was demonstrated in 1931 by his reelection as Mayor.

In 1933 he was appointed by President Roosevelt to the post of Governor General of the Philippines. He quickly gained the confidence of the Filipino people and their leaders. Because he believed in them and in their right to freedom, they believed in him and eagerly sought his counsel long after he had left the Philippines. With the inauguration of the Commonwealth Government in 1935 he became the first United States High Commissioner of the Philippines. During his three years of service in the Philippines he was instrumental in placing the fiscal affairs of the government in good order and instituted several needed social reforms, including the modern probation system and public health services.

Frank Murphy returned home in 1936 to become the successful candidate for Governor of the State of Michigan. He assumed office on January 1, 1937, and was immediately confronted with the grave problems arising out of the historic sit-down strike then in progress at the Flint plant of the General Motors Corporation. His insistence that peaceful methods be exhausted before resort to force made him the center of Nation-wide attention and controversy. Some thought that he was condoning the flouting of the law, yet he never attempted to justify or condone the sit-down strike. He delayed sending troops into the plant when the strikers refused to obey a court order so that a peaceful settlement could be obtained which would avoid the use of force that he feared would result in bloodshed and resentment rather than respect for law. He continuously sought to convince the strike leaders that it was their duty to obey the law and within a few days a peaceful settlement was obtained.

Frank Murphy was profoundly convinced that collective bargaining and the settlement of labor disputes through direct negotiation of employer and employee representatives were fundamental prerequisites to our ultimate industrial and economic welfare, and even to the preservation of our system of government. In the bitter dispute at Flint, and in those which followed, he saw a

serious threat to these objectives. Men may differ as to the wisdom and propriety of his patient restraint. But both management and labor now testify that Governor Murphy's humane action prevented bloodshed. And it seems fair to say that by avoiding the use of force he strengthened the processes of peaceful settlement of industrial disputes.

During his term as Governor many reforms were accomplished—among these a civil-service law, an occupational-disease law, a modernized corrections system, a mental hygiene program, a modernized central accounting system, and an expanded old-age assistance program. He also initiated studies with a view to the modernization of the State government, the reorganization of the tax structure, and the stabilization of the milk industry.

He was defeated for reelection in 1938 but his great talents did not lie fallow. On January 1, 1939, President Roosevelt announced his appointment as Attorney General of the United States. Impressed by the growing threat of totalitarianism to our free world he had hoped to be given a position in which he could take an active part in building up our armed strength, but like a good soldier he accepted the post to which he was assigned. During the year that he served as the Nation's chief law officer he accomplished much of more than transient importance and value. Notable appointments to the Federal bench were made on his recommendation. He proceeded firmly against corruption in the judiciary and other high public offices. He set up a committee on Administrative Law under the Chairmanship of Dean Acheson whose work has had a great effect on the development of administrative law and practice. He also set up a committee on the administration of the Bankruptcy Act under the Chairmanship of Francis M. Shea and its recommendations led to important changes and improvements in the administration of insolvent estates in the Federal courts. A Civil Rights Section was established in the Criminal Division of the Department to encourage

more vigorous use of the civil rights statutes and to centralize responsibility for their enforcement; in 1947 the President's Committee on Civil Rights stated that "the total achievement of the Department of Justice in the civil rights field during the period of the Section's existence goes well beyond anything that had previously been accomplished."

Attorney General Murphy was nominated to be Associate Justice of the Supreme Court by President Roosevelt on January 4, 1940, and he took his seat on the Court on February 5, 1940 (309 U. S. III).

Frank Murphy thus brought to the Supreme Court uniquely significant talents and experiences. He brought to it a thorough and practical understanding of the interests and longings of masses of men and women in a highly mechanized society, an alert sensitiveness to the individual rights of a free people, an exceptional comprehension of the respective roles of the executive, legislative, and judicial branches of our Government, an acute awareness of the social and economic wrongs, and a determination to translate our constitutional and legal ideals into judicial reality.

Justice Murphy's labors on the Supreme Court bore rich fruit. In the decade of his association with the Court, he made a contribution that will forever be enshrined in the hearts of those devoted to the preservation and advancement of individual liberties. Time and again he spoke eloquently on behalf of the constitutional and legal rights of the accused, the unpopular, and the oppressed. Sometimes he spoke on behalf of the Court, sometimes for a minority of the Court, and not infrequently he spoke alone. But always he reflected a humane and an understanding sense of justice.

His forthright and eloquent defense of the rights of nonconforming individuals and groups, and his burning condemnation of racism, long will cheer and inspire defenders of freedom in a troubled world. His ability to rise above the popular passions of the moment to affirm the eternal

virtues of freedom despite the transient emotions engendered by crisis and war will long stand as an example of judicial fearlessness.

At the same time, the Justice was more than a humanitarian in his judicial labors. He was a hard-headed realist, a courageous fighter for his beliefs in all matters of judicial importance. And he helped to shape significant developments in the fields of constitutional law, labor law, administrative law, Federal-State relationships, and in numerous other aspects of the Court's jurisdiction. But he will probably be remembered, as he would probably want to be remembered, for his defense of human rights and freedoms under the Constitution. While he recognized the limited role of the judiciary in a democratic society, he believed and acted vigorously and constantly on the belief that the protection of the fundamental rights of the individual to freedom of thought, speech, and religion was essential to the preservation of democracy. He was concerned to protect the individual from the abuse of both political and economic power.

It is accordingly resolved that we express our deep sorrow at the untimely death of Mr. Justice Murphy and our grateful recognition of the enduring contribution made by him to the humanizing of the law, to the vindication of human rights, and to the preservation of the ideal of freedom.

It is further resolved that the Attorney General be asked to present these resolutions to the Court and to request that they be permanently inscribed upon its record.

Mr. Attorney General McGrath addressed the Court as follows:

May it please the Court: The Resolutions which have just been read, and the addresses which were delivered earlier this morning before the Bar of this Court, have described how the late Justice Frank Murphy devoted almost his entire adult life to a most distinguished career

of public service. That career is one to which fruitful consideration will be devoted at far greater length than is possible in these proceedings. I speak with personal knowledge, as it was my great privilege to have close associations with him during the major part of his public service. I came to know and value him when he was the Mayor of Detroit, and our friendship continued when he was Governor of Michigan and when he was Governor General of the Philippines. I was United States Attorney for the District of Rhode Island during the period when Justice Murphy was Attorney General of the United States, and, being an officer of the Justice Department, of which the Attorney General is the head, our duties brought us into frequent contact. After Justice Murphy became a member of this Court I appeared here as Solicitor General of the United States.

So it is that I am here, not only to pay a deserved tribute to a predecessor in the office I now hold, but also to speak of one who was my own chief in the Department of Justice, and who was my personal friend over a long period of years. It is, I believe, rare, indeed, that one who takes part in such ceremonies in an official capacity is privileged to bring to the occasion such an intimate and personal knowledge as I do of the departed Justice in whose memory we are gathered here today.

Justice Murphy was not one of those who thought that the only necessary or proper support for judicial action was a carefully constructed edifice of precedent. He by no means ignored the past; he accorded it all the respect that he felt was its due. But his realistic humanitarianism convinced him that the problems of today must be handled in a manner that will resolve them practically. He found abhorrent and incomprehensible the idea that old forms, which might indeed have contributed effectively to the attainment of justice in the past, should be permitted to govern in current cases where their operation seemed to him to result only in injustice. "The law

knows no finer hour," he wrote in his dissent in the *Falbo* case,[1] "than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution." Similarly, in his concurring opinion in the *Hooven & Allison Co.* case,[2] wherein this Court held that imports from the Philippine Islands were protected against taxation by the States during the period immediately preceding the attainment of Philippine independence, Justice Murphy supported this view as "compelled in good measure by practical considerations," as well as by the "moral and legal obligations" of the United States to those Islands. Like many great judges of the law before him, Justice Murphy subordinated strict precedent to an altogether human ideal of justice. His was an instinct which is most intimately intertwined with our basic national ideals. And I am profoundly convinced that his decisions were motivated throughout by a deep awareness of those ideals, with an ungrudging and unquestioning disregard of any personal preferences of his own that might have stood against what he felt to be required by our national principles.

An outstanding instance of this appears in his actions in the various cases concerning the religious sect called Jehovah's Witnesses, members of which were involved in cases before this Court almost constantly during Justice Murphy's tenure. Another instance is his insistence that constitutional protection be accorded Communists.[3] A devout Roman Catholic, he disregarded personal preferences which we all know were very dear to him in favor of what his conscience told him to be his duty as a Justice of this Court. His views on the freedoms of religion and of communication were thorough. He consistently believed that their enjoyment should be guaranteed to all persons in whatever manner indulged in except when,

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[1] *Falbo* v. *United States,* 320 U. S. 549, 561 (1944).

[2] *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 692 (1945).

[3] *Schneiderman* v. *United States,* 320 U. S. 118 (1943).

as in the *Chaplinsky* case,[4] the conduct in question was so deeply offensive to other principles vital to our society that the claim to freedom as an exercise of religion could not be tolerated. Thus, for instance, the late Justice wrote in his opinion for the Court in *Hartzel* v. *United States,*[5] that:

> ". . . an American citizen has the right to discuss these matters either by temperate reasoning or by immoderate and vicious invective . . . ."

Justice Murphy was humanitarian in the deepest sense. He had profound confidence and faith in, and complete respect for, the individuals who constitute society. For him it followed logically from such a belief that the personal guarantees contained in the Bill of Rights should occupy a preferred position in the constitutional scheme. These guarantees, often referred to as "civil liberties" or "civil rights," seemed to him to merit special protection by the judiciary, so that the usual presumption of constitutionality should be reversed when the question concerned statutes impinging on these guarantees. In one of his most famous and influential opinions, written for the Court in the case of *Thornhill* v. *Alabama,*[6] the late Justice declared that:

> "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. . . . It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations."

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[4] *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942).

[5] 322 U. S. 680, 689 (1944).

[6] 310 U. S. 88, 95–96 (1940).

The same emphasis appears in his vigorous dissent from the Court's holding in the first decision in *Jones* v. *Opelika*.[7] Tersely, but solemnly, Justice Murphy declared his conviction that "If this Court is to err in evaluating claims that freedom of speech, freedom of the press, and freedom of religion have been invaded, far better that it err in being overprotective of these precious rights."

He expressed this conviction perhaps most plainly in his dissenting opinion in *Prince* v. *Massachusetts*.[8] "In dealing with the validity of [these] statutes," the late Justice declared:

> ". . . we are not aided by any strong presumption of the constitutionality of such legislation. . . . On the contrary, the human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid. It follows [he concluded] that any restriction or prohibition must be justified by those who deny that the freedoms have been unlawfully invaded."

Justice Murphy was anxious that democracy should exist in action, in practice rather than merely in theory. Accordingly, he was profoundly distressed by manifestations of discriminatory treatment based on race. Governmental actions based on this factor were particularly abhorrent to him. In the *Kahanamoku* case,[9] which arose from the imposition of martial law in the Hawaiian Islands during the recent war, he protested strongly against the implication that the people of Hawaii, because of their racial situation, should be deprived of trials by jury. He expressed his deep feeling in these moving words:

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[7] 316 U. S. 584, 623 (1942).

[8] 321 U. S. 158, 173 (1944).

[9] *Duncan* v. *Kahanamoku*, 327 U. S. 304, 334 (1946).

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> "Especially deplorable, however, is this use of the iniquitous doctrine of racism to justify the imposition of military trials. Racism has no place whatever in our civilization. The Constitution as well as the conscience of mankind disclaims its use for any purpose . . . ."

In the *Hirabayashi* case,[10] Justice Murphy expressly pointed out in his concurring opinion that "Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals." Nevertheless, he did not feel that he could declare unconstitutional the curfew order applied to persons of Japanese ancestry on our West Coast in the early days of the recent war, even though he warned that he considered that the "restriction . . . goes to the very brink of constitutional power." But further than this he could not go. When the Court in the *Korematsu* case[11] held constitutional the wartime removal of Japanese-Americans from the West Coast, Justice Murphy dissented. Solemnly, he declared:

> ". . . Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism.
>
> . . . . . .
>
> "I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States."

The strength of his feeling on this subject never waned while he lived. In the *Restrictive Covenant* cases[12] and

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[10] *Hirabayashi* v. *United States,* 320 U. S. 81, 110, 111 (1943).

[11] *Korematsu* v. *United States,* 323 U. S. 214, 233, 242 (1944).

[12] *Shelley* v. *Kraemer,* 334 U. S. 1 (1948); *Hurd* v. *Hodge,* 334 U. S. 24 (1948).

in *Smith* v. *Allwright*, the *White Primary* case,[13] he joined the Court in invalidating the enforcement of restrictions against Negroes. Similarly, in the *Steele* case,[14] the late Justice concurred, expressly on constitutional grounds, in the Court's decision invalidating conduct by a labor union, under the Railway Labor Act, to discriminate deliberately against Negroes because of their race. Once again, Justice Murphy gave expression to the principle that "The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color."

The importance of procedure and administration in the rendition of justice has long been recognized as fundamental. The late Justice Murphy regarded it to be the duty of the Court to insist on strict adherence to all the requirements of procedural fairness set out in Constitution and statute. His vigorous dissent in the *Yamashita* case,[15] objecting to "the needless and unseemly haste" of the conviction there; his strong statements in the *Lyons* case [16] on the extreme impropriety of admitting in evidence a second confession which was obtained after a first one had been coerced; the exceptionally clear analysis characterizing his dissent in *Akins* v. *Texas*,[17] which involved the constitutionality of the selection of a jury; his insistence on the fullest definition of an accused person's right to counsel in the *Canizio* case; [18] his attitude toward police search and seizure as evidenced in his *Harris* [19] and *Trupiano* [20] opinions: these and many others of his written expressions from this Bench amply testify

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[13] 321 U. S. 649 (1944).

[14] *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 209 (1944).

[15] *In re Yamashita*, 327 U. S. 1, 26, 28 (1946).

[16] *Lyons* v. *Oklahoma*, 322 U. S. 596, 605 (1944).

[17] 325 U. S. 398, 407 (1945).

[18] *Canizio* v. *New York*, 327 U. S. 82, 87 (1946).

[19] *Harris* v. *United States*, 331 U. S. 145, 183 (1947).

[20] *Trupiano* v. *United States*, 334 U. S. 699 (1948).

to his awareness of and concern with the procedural protections to individual liberty.

The late Justice Murphy was a great humanitarian, who combined with his humanity and idealism a practical realism which moved him always to emphasize the need for effective solutions to actually existing problems. His practical idealism proved to be a precious endowment to the people of his City, his State, and his Nation. It is a quality all too rarely found in men. All of us have reason to feel deeply the absence of Frank Murphy from our midst.

Therefore, may it please the Court: On behalf of the Bar of this Court, who speak in this matter for all the lawyers in our land, I move that the Resolutions in memory of the late Justice Frank Murphy be accepted by the Court and that, together with the chronicle of these proceedings, they be spread upon the permanent records of this Court.

THE CHIEF JUSTICE said:

Mr. Attorney General: It is with a satisfaction tinged with sadness that I accept on behalf of the Court the Resolutions which have just been tendered—satisfaction, because those Resolutions demonstrate the appreciation which the Bar has for the works of Frank Murphy, late Associate Justice of this Court, and the respect which it holds for his memory; sadness, because of the absence from our midst of this kindly friend and brother. It is often said in ceremonies of this nature that the esteem of one's fellows is the highest accolade which can be accorded one in the legal profession. The many eloquent expressions of regret which came from so many different elements of our Nation at his demise have been no more sincere or laudatory than your own. For one who never attempted or professed to be a "lawyer's lawyer," your Resolutions thus become the highest of praise.

Full of the proverbial Irish wit and charm, Frank Murphy created an atmosphere of warmth and friendship wherever he went. His companionship was a constant delight to those of us who shared it. Although you, Mr. Attorney General, and you, Mr. Solicitor General, have indicated the awareness of the Bar to some of his most outstanding services, I should like to recount them once again, for I believe that the essence and spirit of Frank Murphy can best be revealed by the manner in which he administered the many distinguished offices which he attained.

Frank Murphy's history is one of Government service. He held high office almost from the day he finished his graduate work in London and Dublin to the date of his death. As an Assistant United States Attorney, he prosecuted with effective vigor the graft and corruption which plague government systems. As a municipal judge from 1923 to 1930, he instituted criminal reforms in his court and won Nation-wide praise for the manner in which he conducted the *Sweet* case. This trial took place in an ugly atmosphere of race prejudice and hysteria. Your Resolutions set forth that "the community, despite its original hostility, was convinced that the trial was fairly conducted from the standpoint of the community as well as the defendants." His steadfastness was an application of a facet of his belief which remained with him always—that our democratic system insists upon equal protection for all persons, including minorities, at all times. As Mayor of Detroit, in the depression years of 1930–1933, he labored to diminish the unhappy plight of the jobless and needy.

Serving as Governor General and United States High Commissioner to the Philippines from 1933 to 1936, he won and retained the affection and esteem of the people of those Islands till the day of his death. With his assistance and counsel, necessary reforms in the government of those Islands were instituted and the transition from the status of possession to independence was made easier.

His administration as Governor of the State of Michigan from 1937 to 1938 was marked by his efforts to resolve two evils—depression and industrial strife. Both he met characteristically, the former by calling a special session of the legislature in order to obtain money to feed the starving—a function of the State he called "elementary humanity"—the latter by refusing to evict forcibly the sit-down strikers. This decision, which brought him national prominence once again, illustrated his belief in the ability of the American people to solve the most difficult problems of the day by the use of the peaceful means of negotiation and conference. Indeed, this insistence upon the measures of the conference table, rather than the bayonet, characterized his entire administration of the industrial-relations dilemma of one of our most highly industrialized States. Criticized at the time as ineffectual and too partial, that approach, in the minds of many, has been vindicated by the subsequent history of labor-management relationships.

And, as Attorney General of the United States from 1939 to 1940, he attained a large measure of renown because of the integrity and care with which his recommendations for judicial office were made. But, his proudest achievement during this period was the establishment of a Civil Rights Section in the Department of Justice to provide the full weight of the Executive Branch of the Federal Government in assuring the civil liberties of all of its citizens.

Let it not be thought, however, that this impressive list of Frank Murphy's achievements, which I have related and those characteristics which I have emphasized, derogate from the other and perhaps more routine aspects of his positions, for what ranked this man above so many of his fellow citizens was his ability to accomplish ably and to the fullest every detailed requirement of his offices, while never neglecting or forgetting his ideals. Rare is the man with courage and conviction who attains an office which will enable him to effectuate those convictions.

Frank Murphy held many such offices. Rarer still is the man who, having attained high office, is able to hold fast to those ideals without serious compromise, and yet is able to effect substantial practical achievements consistent with those ideals. Frank Murphy was such a man.

The particularized actions and positions I have cited do not completely describe the man; they remain but indicia of his character. Though he was sociable and friendly, he limited himself in joining organizations lest there be a question as to the obligations he owed those associations. Devout, he joined in opinions of this Court that protected those who most bitterly assailed the religion to which he was deeply devoted. Peace-loving, he volunteered and served his country as an infantry officer in the First World War, and indeed sought service in World War II, because of his conviction that it was necessary to fight to preserve the democracy he loved. Tolerant, in the noncondescending sense of the word, he became the protagonist of the freedoms of those who were charged with attempting to destroy those very freedoms.

When Frank Murphy was appointed an Associate Justice of this Court in 1940, he had already prosecuted fraud in high places. He had witnessed the devastating effects of race prejudice and had battled poverty and hunger. He had assisted labor to rise to a new position of respect in the community, and had helped mediate some of the most violent struggles between management and labor. He had seen imperfections in a criminal system in this country and had assisted in the development of a foreign land from a possession to a self-administering nation. It was inevitable that Frank Murphy's frame of reference had as its centerpiece a vigilant defense of the underdog and an unassailable belief in the overwhelming importance of the individual.

Frank Murphy would have been proud of the emphasis which your Resolutions have placed on his stand on those issues which have come to be known as civil liberties issues, for he himself characterized civil liberties as "the

hallmarks of civilization" and the "finest contribution America has made to civilization." This conviction, formed in those earlier years and nurtured while on this Court, crystallized in his statement that "the law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution." In his philosophy, the most important function of government in general, and this Court, in particular, was the protection of individual freedom and thought from restriction.

In our accentuation of his vigorous stand on civil liberties and labor issues we tend to forget the many other problems which received his attention. Whatever the problem, each of his votes was his considered judgment, each of his opinions a clear and careful development of the issues. It is interesting to note, for example, that almost one-third of the majority opinions he wrote for this Court were concerned with tax matters. His views on the power of both State and national legislatures to alter existing economic conditions; his belief that State statutes should not be upset merely because there was a possibility that they conflicted with federal law; his respect for the determinations of administrative tribunals all received eloquent expression in his opinions. It was in those areas of the law, however, with which his experience had made him most familiar, that he became the zealot, the protagonist, the valiant defender. I shall not repeat at this time the citations to those opinions which are still fresh in our memories. No matter what our own conclusions of the merits of his views of those famous cases, Frank Murphy's fluent and cogent presentation will ever force us to reflect on considerations which are often submerged by the stress of modern times.

Frank Murphy was, is, and, for years, will continue to be a controversial figure. Whenever and wherever democracy is lived or discussed, the problem of the individual versus the state will occupy men's thoughts and deeds. Frank Murphy's opinions, whether he was writing for

the Court, for himself and others in separate agreement, or vigorous dissent, will be censured or revered, depending upon one's own predilections. Whatever may be history's decision, however, on his wisdom or the accuracy of his fears, all who read his words will be impressed with his integrity, his courage, and his faith in the principles for which he stood.

As municipal, state, territorial, or federal executive, administrator, or judge, Frank Murphy lived by the conviction that all men, if not created in equal circumstances, must be treated equally before the law and the majority who enact the law—that all men must be given the opportunity to attain that equality of circumstance. By his life and his deeds, those ideals were nourished and grew strong. By virtue of his own character, the democracy he loved gained compassion and vigor.

Let the minutes of the Resolutions be spread on the records of this Court.

TABLE OF CASES REPORTED

NOTE: Cases reported before page 801 are those decided with opinions of the Court. Those reported on pages 801 *et seq.* are memorandum decisions and orders.

910798 O—51——3

910798 O—51——4

910798 O—51——5

TABLE OF CASES

Cited in Opinions

910798 O—51——6

TABLE OF STATUTES
Cited in Opinions

(A) Statutes of the United States.

(B) Statutes of the States and Territories.

(C) Treaty.

(D) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1950.

MISSOURI EX REL. SOUTHERN RAILWAY CO. *v.* MAYFIELD, CIRCUIT COURT JUDGE.

NO. 15. CERTIORARI TO THE SUPREME COURT OF MISSOURI.*

Argued October 16, 1950.—Decided November 6, 1950.

In each of two suits brought in a Missouri state court under the Federal Employers' Liability Act, the plaintiff was not a resident of Missouri, the carrier was a foreign corporation, and the accident which gave rise to the claim occurred outside of Missouri. The State Supreme Court determined that the doctrine of *forum non conveniens* could not bar the suits; but it was not clear whether this holding was based on local law or upon a belief that it was required by federal law as enunciated by this Court. *Held:* The judgment is vacated and the cause is remanded, in order that the State Supreme Court may determine the availability of the principle of *forum non conveniens* according to its own local law. Pp. 2–3, 5.

(a) Neither *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44, nor *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, limited the power of a state to deny access to its courts to persons seeking recovery under the Federal Employers' Liability Act if in similar cases the state for reasons of local policy denies resort to its courts and enforces its policy impartially, so as not to involve a discrimination against Employers' Liability Act suits nor against citizens of other states. P. 4.

(b) Nor is any such restriction imposed upon the states merely because the Employers' Liability Act empowers their courts to entertain suits arising under it. P. 4.

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*Together with No. 16, *Missouri ex rel. Atchison, Topeka & Santa Fe Railway Co.* v. *Murphy, Circuit Court Judge,* also on certiorari to the same court.

(c) Even prior to § 1404 (a) of the 1948 revision of the Judicial Code (28 U. S. C.), there was nothing in the Federal Employers' Liability Act which purported "to force a duty" upon the state courts to entertain or retain Federal Employers' Liability litigation "against an otherwise valid excuse." Pp. 4–5.

359 Mo. 827, 224 S. W. 2d 105, judgment vacated and cause remanded.

In two suits brought in a Missouri state court under the Federal Employers' Liability Act, motions to dismiss under the doctrine of *forum non conveniens* were denied as beyond the jurisdiction of the court to grant. In original proceedings in mandamus to compel the trial court to exercise discretionary jurisdiction in disposing of the motions, the State Supreme Court denied relief. 359 Mo. 827, 224 S. W. 2d 105. This Court granted certiorari. 339 U. S. 918. *Judgment vacated and cause remanded,* p. 5.

Floyd E. Thompson argued the cause for petitioners. *Sidney S. Alderman, Bruce A. Campbell* and *H. G. Hedrick* were on the brief for the Southern Railway Co. *Mr. Thompson, J. C. Gibson* and *R. S. Outlaw* were on the brief for the Atchison, Topeka & Santa Fe Railway Co.

Roberts P. Elam argued the cause for respondents. With him on the brief was *Harvey B. Cox.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

These two cases had their origin in suits based on the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*, brought in the Circuit Court of the City of St. Louis, Missouri. It is superfluous to give concrete details regarding the parties, the circumstances of the injuries, and the considerations affecting the choice of forum. It suffices to state that in both cases the plaintiff was not a resident of Missouri, the carrier was a

foreign corporation, and the accident which gave rise to the claim of liability for negligence took place outside Missouri. In both, the doctrine of *forum non conveniens* was invoked; in both, the trial court denied the motion to dismiss the suit on that ground as beyond the jurisdiction of the court to grant. In both cases original proceedings in mandamus were thereupon begun in the Supreme Court of Missouri to compel the trial court to exercise discretionary jurisdiction in disposing of the motions. After alternative writs of mandamus had issued and the causes had been consolidated for consideration, the writs were quashed by a single judgment. 359 Mo. 827, 224 S. W. 2d 105. We brought the proceedings here for review, 339 U. S. 918, because they involved questions important to the enforcement of the Federal Employers' Liability Act by the courts of the States.

A decision by the highest court of a State determining that the doctrine of *forum non conveniens* cannot bar an action based on the Federal Employers' Liability Act, in the circumstances before us, may rest on one of three theories. (1) According to its own notions of procedural policy, a State may reject, as it may accept, the doctrine for all causes of action begun in its courts. If denial of a motion to dismiss an action under the Federal Employers' Liability Act is rested on such a general local practice, no federal issue comes into play. (It is assumed of course that the State has acquired jurisdiction over the defendant.) (2) By reason of the Privileges-and-Immunities Clause of the Constitution, a State may not discriminate against citizens of sister States. Art. IV, § 2. Therefore Missouri cannot allow suits by nonresident Missourians for liability under the Federal Employers' Liability Act arising out of conduct outside that State and discriminatorily deny access to its courts to

a non-resident who is a citizen of another State. But if a State chooses to "[prefer] residents in access to often overcrowded Courts" and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control. This is true also of actions for personal injuries under the Employers' Liability Act. *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, 387. Whether a State makes such a choice is, like its acceptance or rejection of the doctrine of *forum non conveniens*, a question of State law not open to review here.

But, (3), a State may reject the doctrine of *forum non conveniens* in suits under the Federal Employers' Liability Act because it may deem itself compelled by federal law to reject it. Giving the opinion of the Supreme Court of Missouri in these cases a scope most favorable to reliance on a non-federal ground, doubt still remains whether that Court did not deem itself bound to deny the motions for dismissal on the score of *forum non conveniens* by its view of the demands of our decisions in *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44, and *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698.

But neither of these cases limited the power of a State to deny access to its courts to persons seeking recovery under the Federal Employers' Liability Act if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially, see *McKnett* v. *St. Louis & S. F. R. Co.*, 292 U. S. 230, so as not to involve a discrimination against Employers' Liability Act suits and not to offend against the Privileges-and-Immunities Clause of the Constitution. No such restriction is imposed upon the States merely because the Employers' Liability Act empowers their courts to entertain suits arising under it. There was nothing in that Act even prior to § 1404 (a) of the 1948 revi-

sion of the Judicial Code, Title 28, U. S. C.,[1] which purported "to force a duty" upon the State courts to entertain or retain Federal Employers' Liability litigation "against an otherwise valid excuse." *Douglas* v. *New York, N. H. & H. R. Co., supra,* at 388.

Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be freed to decide the availability of the principle of *forum non conveniens* in these suits according to its own local law. To that end we vacate the judgment of the Supreme Court of Missouri and remand the cause to that Court for further proceedings not inconsistent with this opinion. *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511; *Minnesota* v. *National Tea Co.,* 309 U. S. 551; *Herb* v. *Pitcairn,* 324 U. S. 117; 325 U. S. 77.

Judgment vacated.

MR. JUSTICE JACKSON, concurring.

The Missouri Court appears to have acted under the supposed compulsion of *Miles* v. *Illinois Central R. Co.,* 315 U. S. 698, among other of this Court's decisions. The deciding vote in that case rested, in turn, only on what seemed to be compulsion of statutory provisions as to venue. By amendment, 28 U. S. C. § 1404 (a), as interpreted in *Ex parte Collett,* 337 U. S. 55, Congress has removed the compulsion which determined the *Miles* case, and the Missouri Court should no longer regard it as controlling. A federal court in Missouri would now be free to decline to hear this case and could transfer it to

[1] Section 1404 (a) reads, "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." See *Ex parte Collett,* 337 U. S. 55.

its proper forum. Certainly a State is under no obligation to provide a court for two nonresident parties to litigate a foreign-born cause of action when the Federal Government, which creates the cause of action, frees its own courts within that State from mandatory consideration of the same case. Because of what I wrote in the *Miles* case I add this note, but otherwise concur in the decision and opinion of the Court.

MR. JUSTICE CLARK, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS concur, dissenting.

In *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698 (1942), this Court defined the circumstances under which a State must entertain in its courts an F. E. L. A. action brought by a citizen of another State. The Court said: "To deny citizens from other states, suitors under F. E. L. A., access to its courts would, if it permitted access to its own citizens, violate the Privileges and Immunities Clause." *Id.* at 704. In the proceeding below the highest court of Missouri followed this view. It stated unequivocally:

> "The Federal Employers' Liability Act does not compel the courts of this state to hear cases arising under that act, but it empowers our courts to do so.
>
> "Since Missouri does allow its citizens to maintain Federal Employers' Liability actions in its courts, . . . it follows that not to allow citizens of other states the right to file Federal Employers' Liability suits in our state courts would violate Article 4, Section 2, of the Constitution of the United States." 359 Mo. 827 at 839, 224 S. W. 2d 105 at 110 (1949).

But the majority of this Court apparently presumes that when the Supreme Court of Missouri thus used the term "citizens" it was unmindful that the term includes all persons domiciled within a State regardless of their

actual residence. I am unwilling to conclude that the court thought that only actual residents of Missouri are citizens of that State. Indeed it seems clear that the court used the term "citizens" in the usual sense, meaning to include Missourians regardless of where they reside. That it did is shown by its discussion of the opinion of this Court in *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377 (1929), which upheld a New York statute permitting dismissal of suits by "non-residents" against foreign corporations. As against the contention that the New York statute discriminated against citizens of other States, this Court in the *Douglas* case found the statute unobjectionable since New York courts in defining "residents" had included only persons actually living in New York and had interpreted "non-residents" to mean all persons residing outside the State, whether citizens of New York or of some other State. The Missouri court below observed that Missouri had no such statute and that dismissal could not be justified in view of its local policy which "permits citizens of this state to file Federal Employers' Liability cases in its courts." 359 Mo. at 838, 224 S. W. 2d at 110.

Our duty is to uphold the decision below if there was a valid ground to sustain it. As there was a sufficient ground, we should not vacate and remand merely because certain statements of the Missouri court may indicate that it also felt under compulsion of federal decisions applying the Liability Act. The cases out of which this proceeding arises are now in their third year in the courts without coming to trial, and remand by this Court will unnecessarily cause further delay and expense in bringing them to final adjudication. I would affirm.

FOGARTY, TRUSTEE IN BANKRUPTCY, *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 6. Argued October 10, 1950.—Decided November 6, 1950.

In the circumstances of this case, *held* that the corporation of which petitioner is trustee in bankruptcy and which had contracts with the Navy Department for the production of war materials, did not, on or before August 14, 1945, file with the Navy Department a "written request for relief" within the meaning of § 3 of the War Contract Hardship Claims Act of August 7, 1946, and therefore was not entitled to relief under that Act. Pp. 8–14.

(a) Congress intended the term "written request for relief" to mean written notice presented prior to August 14, 1945, to an agency which was authorized to grant relief under § 201 of the First War Powers Act. P. 13.

(b) No particular form of notice is required; but, whatever the form of notice, it must be sufficient to apprise the agency that it was being asked to grant extra-legal relief under the First War Powers Act for losses sustained in the performance of war contracts. P. 13.

(c) Documents which sought payment as a matter of right, not relief as a matter of grace, were not sufficient to apprise the Navy Department that it was being asked to accord relief under the First War Powers Act. P. 14.

176 F. 2d 599, affirmed.

In a suit against the United States under the War Contract Hardship Claims Act of August 7, 1946, 60 Stat. 902, 41 U. S. C. § 106, the District Court entered summary judgment for the United States. 80 F. Supp. 90. The Court of Appeals affirmed. 176 F. 2d 599. This Court granted certiorari. 339 U. S. 909. *Affirmed*, p. 14.

George M. Shkoler argued the cause for petitioner. With him on the brief was *Henry S. Blum.*

Oscar H. Davis argued the cause for respondents. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Hubert H. Margolies.*

Raoul Berger filed a brief for Howard Industries, Inc., as *amicus curiae,* supporting petitioner.

MR. JUSTICE MINTON delivered the opinion of the Court.

Petitioner, as trustee in bankruptcy of Inland Waterways, Inc., brought suit against the United States in the District Court of Minnesota, Fifth Division, under the War Contract Hardship Claims Act, popularly known as the Lucas Act, adopted August 7, 1946, 60 Stat. 902, 41 U. S. C. § 106 note, to recover $328,804.42 as losses alleged to have been sustained under certain contracts with the Navy Department for the production of war supplies and materials. On motion, summary judgment was entered for the United States. 80 F. Supp. 90. The Court of Appeals for the Eighth Circuit affirmed. 176 F. 2d 599. The suit turns on the interpretation and meaning to be ascribed to parts of the federal statute. Because we deemed resolution of the issues important, especially in view of asserted conflicts of decision in the interpretation of the statute among other federal courts, certiorari was granted. 339 U. S. 909.

The facts are not in dispute. Inland Waterways, financed by a Government guaranteed loan and advances under the contracts, entered into several contracts and supplemental agreements with the Navy Department, dated from September 18, 1941, to October 30, 1942, for the production of submarine chasers and plane rearming boats. Little progress had been made under the contracts when, on December 18, 1942, Inland Waterways filed a petition for reorganization in bankruptcy. Peti-

tioner was appointed trustee in bankruptcy. The United States filed claims in these proceedings based primarily on the unpaid balance of the loan plus interest, the cost of completing incomplete and defective work on ships delivered under the contracts, and decreased costs resulting from certain changes in the plans and specifications. Petitioner filed a counterclaim based primarily on payments due for progress in construction, overtime work, changes in plans and specifications and in wage rates involving increased cost to Inland Waterways, and the value of partially completed work requisitioned by the Government and the cost of its preservation. In support of his counterclaim, petitioner submitted to the bankruptcy court a petition for compensation for requisitioned property and a number of invoices purporting to bill the Navy Department for goods and services, all of which had previously been submitted to agencies of the Navy Department. On February 20, 1945, the Government and petitioner executed an agreement compromising these claims upon payment of some $16,000 by the United States to petitioner. The settlement agreement embodied a mutual general release in the broadest of terms and was approved by the bankruptcy court.

Petitioner initiated his efforts to secure relief under the Lucas Act on February 1, 1947, by filing a claim with the War Contracts Relief Board of the Navy Department based on the same matters which had been the subject of the compromise agreement effected some two years before in the bankruptcy proceedings. The same documents submitted in support of the counterclaim in the bankruptcy court, plus the counterclaim itself, were relied on by petitioner as showing a timely request for relief under the Lucas Act. The Board denied the claim. This suit followed under § 6 of the Lucas Act.

The only question decided by the Court of Appeals was that petitioner did not file with the Navy Department

on or before August 14, 1945, a "written request for relief" within the meaning of § 3 of the Lucas Act. We direct our attention to the correctness of that holding. Neither the Act nor the regulations of the President thereunder define the term. Pertinent parts of the Act are set forth in the margin.[1]

Shortly after Pearl Harbor, Congress granted to the President under § 201 of the First War Powers Act, 55 Stat. 838, 839, 50 U. S. C. App. § 611, the power to authorize Government agencies to make amendments and modifications of contracts for war supplies without regard to consideration if "such action would facilitate the prosecution of the war." Throughout the war, departments and agencies of the Government utilized the provisions of the Act and regulations thereunder to alleviate hardships encountered by war contractors in an economy geared to all-out war. After the termination of hostilities August 14, 1945, however, departments of the Government took different views of their powers under the Act and regula-

[1] SEC. 1. ". . . where work, supplies, or services have been furnished between September 16, 1940, and August 14, 1945, under a contract or subcontract, for any department or agency of the Government which prior to the latter date was authorized to enter into contracts and amendments or modifications of contracts under section 201 of the First War Powers Act, 1941 . . . such departments and agencies are hereby authorized, in accordance with regulations to be prescribed by the President . . . to consider, adjust, and settle equitable claims . . . for losses (not including diminution of anticipated profits) incurred between September 16, 1940, and August 14, 1945, without fault or negligence on their part in the performance of such contracts or subcontracts. . . .

"SEC. 2. (a) In arriving at a fair and equitable settlement of claims under this Act . . . .

"SEC. 3. Claims for losses shall not be considered unless filed with the department or agency concerned within six months after the date of approval of this Act, and shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945 . . . ."

tions. Some continued to exercise those powers, while others took the position that they were no longer applicable, since the war was over and contract modifications could not "facilitate the prosecution of the war." This resulted in a disparity of treatment of claimants for the relief of the Act whose claims had been filed but not acted upon before August 14, 1945. Whether such a contractor was to be accorded relief under the Act depended on the view the department with which he had contracted took of the Act. This situation motivated congressional action. See S. Rep. No. 1669, 79th Cong., 2d Sess.,[2] accompanying S. 1477, which became the Lucas Act.

This legislative history illuminates, for purposes of the question at hand, the relation of the First War Powers and the Lucas Acts. The words of the Lucas Act itself shed further light on that subject. Like § 201 of the First War Powers Act, the Lucas Act contemplates relief by grace and not in recognition of legal rights. It speaks in § 1 of "equitable claims . . . for losses . . . in the performance of such contracts or subcontracts," and in § 2, of "fair and equitable settlement of claims." Fur-

[2] "This bill, as amended, would afford financial relief to those contractors who suffered losses in the performance of war contracts in those cases where the claim would have received favorable consideration under the First War Powers Act and Executive Order No. 9001 if action had been taken by the Government prior to the capitulation of the Japanese Government. However, upon the capitulation, the position was taken by certain departments and agencies of the Government involved, that no relief should be granted under the authority which then existed, unless the action was required in order to insure continued production necessary to meet post VJ-day requirements. This was on the basis that the First War Powers Act was enacted to aid in the successful prosecution of the war and not as an aid to the contractors. As a result, a number of claims which were in process at the time of the surrender of the Japanese Government, or which had not been presented prior to such time, were denied even though the facts in a particular case would have justified favorable action if such action had been taken prior to surrender."

ther, the Act limits the departments and agencies which may grant relief to those which were authorized to grant relief under the First War Powers Act. Finally, it limits claims upon which relief may be granted to those which had been presented "on or before August 14, 1945." As we have seen, that date was the one around which departments and agencies adopted the differing views of the First War Powers Act which necessitated congressional action.

In the light of the foregoing considerations and the relation of the Lucas Act to the First War Powers Act, we think Congress intended the term "written request for relief" to mean written notice presented prior to August 14, 1945, to an agency which was authorized to grant relief under § 201 of the First War Powers Act. Since there is no definition of the term in the Act or regulations, and since the legislative history of the Act does not show that any settled usage of the term was brought to the attention of Congress, no particular form of notice is required. But whatever the form of notice, it must be sufficient to apprise the agency that it was being asked to grant extra-legal relief under the First War Powers Act for losses sustained in the performance of war contracts.

Petitioner, in attempting to establish an interpretation of the Lucas Act which would allow him to maintain this suit, has placed much reliance on events which occurred in Congress subsequent to its enactment. The second session of the Eighty-first Congress passed H. R. 3436, which was vetoed by the President. 96 Cong. Rec. 8291, 8658, 9602. Thereafter, Congress passed S. 3906, which failed of enactment over another veto of the President. 96 Cong. Rec. 12911, 14652. Petitioner's argument is that these bills and their legislative history show that Congress had a different intent in passing the Lucas Act than that attributed to it by its administrators and some of the courts. If there is anything in these subsequent

events at odds with our finding of the meaning of § 3, it would not supplant the contemporaneous intent of the Congress which enacted the Lucas Act. Cf. *United States* v. *Mine Workers,* 330 U. S. 258, 281–282.

We do not think that the documents relied on by petitioner come within the meaning of the term "written request for relief." Neither the counterclaim in the bankruptcy court, nor the petition for compensation for requisitioned property, nor the invoices for extras, sought relief as a matter of grace. They sought payment as a matter of right. The counterclaim demanded judgment of the bankruptcy court. The petition for requisitioned property and the invoices were legal claims for compensation under contract. As such, they constituted a basis for suit in court. See, *e. g.,* 28 U. S. C. § 1346. That petitioner himself thought of them as judicially cognizable claims is evidenced by the fact that he included them in the counterclaim filed with the bankruptcy court, which obviously had no jurisdiction to award any extra-legal relief under the First War Powers Act.

None of the documents relied on by petitioner was sufficient to apprise the Navy Department that it was being asked to accord relief under the First War Powers Act. We must therefore agree with the Court of Appeals that no "written request for relief" was filed, and, therefore, that recovery was not available to petitioner under the Lucas Act. We do not reach alternative questions. The judgment is

Affirmed.

Mr. Justice Black concurs in the result.

Syllabus.

SNYDER *v.* BUCK, PAYMASTER GENERAL OF THE NAVY.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 64. Argued October 18, 1950.—Decided November 13, 1950.

1. In a suit in a Federal District Court against respondent in his official capacity as Paymaster General of the Navy, petitioner obtained a judgment directing respondent to pay her the death gratuity provided by 34 U. S. C. § 943 for the widow of a member of the naval service. After respondent had retired and his successor had taken office, an appeal was taken in respondent's name. Six months having elapsed since respondent's retirement without any effort being made to have respondent's successor in office substituted as a party, the Court of Appeals ruled that the action had abated; and it vacated the judgment and remanded the cause to the District Court with directions to dismiss the complaint. *Held:* This was a proper application of § 11 (a) of the Judiciary Act of 1925, 43 Stat. 936. Pp. 16–22.

   (a) Section 11 (a) of the Judiciary Act of 1925 made survival of the action dependent on a timely substitution. P. 19.

   (b) This was a declared policy of Congress not to be altered by an agreement of the parties or by some theory of estoppel. P. 19.

   (c) The application of § 11 (a) did not turn on whether the judgment rendered prior to the death or resignation of the official was for or against the plaintiff. P. 19.

   (d) Section 11 (a) is not limited to actions brought against officials for remedies which could not be obtained in direct suits against the United States. P. 20.

   (e) An action is nonetheless pending within the meaning of § 11 (a) though an appeal is being sought—even when, as in this case, the appeal was taken after the retirement of the official and therefore without authority. Pp. 20–21.

   (f) Since the suit had abated in the District Court, there was no way of substituting the successor on remand of the present case. Therefore, vacating the judgment of the District Court was the proper procedure for the Court of Appeals. P. 21.

2. Since the absence of a necessary party and the statutory barrier to substitution "involve jurisdiction," 28 U. S. C. § 2105 did not prohibit this Court's review of the ruling below on abatement. Pp. 21–22.

85 U. S. App. D. C. 428, 179 F. 2d 466, affirmed.

910798 O—51——8

No substitution of parties having been made under § 11 (a) of the Judiciary Act of 1925, 43 Stat. 936, within six months after his retirement, the Court of Appeals vacated a judgment against respondent in his official capacity of Paymaster General of the Navy. 85 U. S. App. D. C. 428, 179 F. 2d 466. This Court granted certiorari. 339 U. S. 951. *Affirmed,* p. 22.

John Geyer Tausig argued the cause for petitioner. With him on the brief was *Gibbs L. Baker.*

John R. Benney argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Morton Hollander.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner sued in the District Court for a death gratuity under the Act of June 4, 1920, 41 Stat. 824, as amended, 34 U. S. C. § 943, claiming as the widow of a member of the naval service. Respondent, the defendant in the suit, was Paymaster General of the Navy. The relief asked was mandamus to compel him to pay the widow's allowance. The District Court held for petitioner, ordering respondent to pay her the amount of the allowance. 75 F. Supp. 902. That judgment was entered January 30, 1948. On March 18, 1948, notice of appeal was filed in the name of Rear Admiral W. A. Buck, Paymaster General of the Navy. On March 1, 1948, however, Buck had been retired and Rear Admiral Edwin D. Foster had succeeded him in the office.

Section 11 (a) of the Judiciary Act of 1925, 43 Stat. 936, 941, provided that ". . . where, during the pendency of an action . . . brought by or against an officer of the United States . . . and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall

be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved." [1]

Neither party made any effort within the six months period [2] to have Buck's successor in office substituted for him. The Court of Appeals therefore ruled that the

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[1] Rule 19 (4) of the Rules of this Court provides that in such cases "the matter of abatement and substitution is covered by section 11 of the Act of February 13, 1925. Under that section a substitution of the successor in office may be effected only where a satisfactory showing is made within six months after the death or separation from office."

[2] This section was repealed as of September 1, 1948, 62 Stat. 992, 1000. It is argued that, since that date was the date on which the 6 months statutory period for substitution in this case expired and since the repealing Act preserved any rights or liabilities existing under any of the repealed laws (*id.*, 992), § 11 governs this case. We need not reach the effect of the repealing Act. For the Court of Appeals during the period material to our problem had in force its Rule 28 (b) which provided that abatement and substitution were governed by § 11 of the 1925 Act.

Rule 25 (d), Rules of Civil Procedure, now provides: "When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the

action had abated; it then vacated the judgment and remanded the cause to the District Court with directions to dismiss the complaint. 85 U. S. App. D. C. 428, 179 F. 2d 466.

The complaint in this case makes no claim against Buck personally. Therefore we put to one side cases such as *Patton* v. *Brady,* 184 U. S. 608, dealing with actions in assumpsit against collectors for taxes erroneously collected. The writ that issued against Buck related to a duty attaching to the office. The duty existed so long and only so long as the office was held. When Buck retired from office, his power to perform ceased. He no longer had any authority over death gratuity allowances. Moreover, his successor might on demand recognize the claim asserted and discharge his duty. For these reasons it was held that in absence of a statute an action aimed at compelling an official to discharge his official duties abated where the official died or retired from the office.[3] See *Secretary* v. *McGarrahan,* 9 Wall. 298, 313; *United States* v. *Boutwell,* 17 Wall. 604, 607–608; *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28, 31; *United States ex rel. Bernardin* v. *Butterworth,* 169 U. S. 600.

Congress changed the rule. It provided by the Act of February 8, 1899, 30 Stat. 822, that no action by or against a federal officer in his official capacity or in relation to the discharge of his official duties should abate

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United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object."

[3] An exception was a suit to enforce an obligation of the corporation or municipality to which the office was attached. See *Thompson* v. *United States,* 103 U. S. 480, 483, as explained in *United States ex rel. Bernardin* v. *Butterworth, supra,* p. 603, and in *Murphy* v. *Utter,* 186 U. S. 95, 101–102.

because of his death or resignation; and it provided a period in which substitution could be made.[4] See *LeCrone* v. *McAdoo,* 253 U. S. 217; H. R. Rep. No. 960, 55th Cong., 2d Sess.

The rule was again changed by § 11 of the Judiciary Act of 1925. The provision that no action should abate was eliminated. It was provided that the action might be continued against the successor on the requisite showing within the stated period. The revision effected a substantial change. The 1925 Act made survival of the action dependent on a timely substitution. *Defense Supplies Corp.* v. *Lawrence Co.,* 336 U. S. 631, 637–638. And see *Ex parte La Prade,* 289 U. S. 444, 456. Thus, where there was a failure to move for substitution within the statutory period, the judgment below was vacated and the cause was remanded with directions "to dismiss the cause as abated."[5] *United States ex rel. Claussen* v. *Curran,* 276 U. S. 590, 591; *Matheus* v. *United States ex rel. Cunningham,* 282 U. S. 802. This was a declared policy of Congress not to be altered by an agreement of the parties[6] or by some theory of estoppel. Nor did the application of § 11 turn on whether the judgment rendered prior to the death or resignation of the official was for or against the plaintiff. The inability of one who no longer holds the office to perform any of the official

[4] See note 5, *infra.*

[5] Under the earlier Act the passage of the period within which substitution could be made resulted in the proceeding being "at an end." *LeCrone* v. *McAdoo, supra,* p. 219. The practice of this Court was therefore to dismiss the writ, leaving undisturbed the judgments below. *LeCrone* v. *McAdoo, supra; United States ex rel. Wattis* v. *Lane,* 255 U. S. 566; *Payne* v. *Industrial Board,* 258 U. S. 613; *Payne* v. *Stevens,* 260 U. S. 705.

[6] In *United States ex rel. Claussen* v. *Curran, supra,* and *Matheus* v. *United States ex rel. Cunningham, supra,* the Solicitor General had expressed willingness for the successor to be substituted though the statutory period had expired.

duties would indeed only be emphasized by the rendition of the coercive judgment.

It is argued that § 11 should be read as covering only those "actions brought against officials for remedies which could not be got in a direct suit against the United States." Such a reading requires more than a tailoring of the Act; it requires a full alteration. Section 11 applies to "an action . . . brought by or against an officer of the United States . . . and relating to the present or future discharge of his official duties." Many actions against an official relating to the "discharge of his official duties" would in substance be suits against the United States. If the rule of abatement and substitution is to be altered in the manner suggested, the amending process is available for that purpose.

Section 11 by its terms applies only during the pendency of an action. But an action is nonetheless pending within the meaning of the section though an appeal is being sought (see *Becker Steel Co.* v. *Hicks,* 66 F. 2d 497, 499; *United States ex rel. Trinler* v. *Carusi,* 168 F. 2d 1014), as was implicit in *Matheus* v. *United States ex rel. Cunningham, supra.* For in that case a writ of habeas corpus, denied by the District Court, had been granted by the Circuit Court of Appeals. While the case was in the Circuit Court of Appeals the time expired for substituting the successor of the custodian against whom the prisoner had brought the action. Yet, as noted above, the Court applied § 11, vacated the judgments, and ordered the proceeding dismissed as abated.

There is a difference in the present case by reason of the fact that the appeal was taken by Buck after his retirement and therefore without authority. The judgment concerned the performance of official duties for which Buck was no longer responsible. Hence he was not in position to obtain a review of it. See *Davis* v. *Preston,* 280 U. S. 406. In the *Davis* case this Court

dismissed a writ of certiorari granted under such circumstances. The argument is that the Court of Appeals should have done no more in the present case. The difference is that the *Davis* case was a suit against the Federal Agent under the Federal Employers' Liability Act, 35 Stat. 65, in which a judgment was rendered against him. An Act of Congress made special provision for substitution in those cases.[7] The Court, however, held that this statute did not affect in any manner the appellate jurisdiction of this Court. But that Act preserved those judgments against abatement by reason of the death or retirement of the Federal Agent and allowed substitution at any time before satisfaction of the judgment. Therefore, on remand of the cause in the *Davis* case the successor Federal Agent could be substituted and the judgment enforced against him. On remand of the present cause there would be no way of substituting the successor, as the suit had abated in the District Court. Vacating the judgment of the District Court was therefore the proper procedure.

Nor is there any barrier to our review of this ruling on abatement by 28 U. S. C. § 2105 which prohibits a

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[7] The Act of March 3, 1923, 42 Stat. 1443, provided in part: "That section 206 of the Transportation Act, 1920, is amended by adding at the end thereof two new subdivisions to read as follows: '(h) Actions, suits, proceedings, and reparation claims, of the character described in subdivision (a), (c), or (d), properly commenced within the period of limitation prescribed, and pending at the time this subdivision takes effect, shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under subdivision (a), but may (despite the provisions of the Act entitled "An Act to prevent the abatement of certain actions," approved February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of such final judgment, decree, or award the agent designated by the President then in office.' "

reversal by the Court of Appeals or this Court for error in ruling upon matters in abatement "which do not involve jurisdiction." The absence of a necessary party and the statutory barrier to substitution go to jurisdiction. Petitioner loses her judgment and must start over.

Affirmed.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE JACKSON joins, dissenting.

Natural professional interest in trying to disentangle the legal snarl presented by this case would not justify me in enlarging my dissent from the Court's views. But the state of the law regarding litigation brought formally against an official but intrinsically against the Government is so compounded of confusion and artificialities that an analysis differing from the Court's may not be futile.

At the outset it is desirable to dispel a misconception regarding the legislation on abatement of suits in the federal courts. In 1899, Congress for the first time made provision for the continuance of a suit involving official conduct which abated by a succession in office during pendency of the suit. 30 Stat. 822. By § 11 of the Judiciary Act of 1925, Congress again dealt with this problem. 43 Stat. 936, 941. The Court finds that the provision of the 1925 Act "effected a substantial change." It does this on the basis of the analysis of the first enactment made in *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U. S. 631, 637–638. According to what was there said, the Act of 1899 had a categorical command that "no action shall abate," which was eliminated in 1925. So to interpret the relation between the 1899 and the 1925 provisions is to misread legislation by quoting out of context and disregarding authoritative legislative history.

So far as concerns the legal effect upon the pendency of an action due to change in the occupancy of an office, a reading of the provisions of the 1899 and 1925 Acts can leave not a shadow of doubt as to their identity of purpose and procedure for its accomplishment. The difference between the two acts is a matter of English and not of law. In both, Congress assumed that a proceeding by or against an officer of the United States in relation to his official conduct would abate unless within a time certain the court authorized continuance of the proceeding by or against the successor in office. Only the phrasing of this rule differs. In the 1899 Act, Congress said that such an action shall abate unless leave is given for its continuance; in the 1925 Act, Congress said that unless leave is given for the continuance of such a suit it is at an end. To say, as we said in *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, that the 1899 Act "categorically" provided that "no action shall abate" is a mutilating reading. The dominant thought of an enactment controls the primary import of isolated words. To find that the 1925 Act "eliminated" this provision has significance only if what is meant is that certain words of the 1899 Act were "eliminated" while the thought was retained. The full texts of the two provisions, set forth in the margin, speak for themselves.[1] What emerges is that the two enactments have essentially the same function regarding

[1] Chapter 121 of the Laws of 1899, 30 Stat. 822, provided: ". . . That no suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the Court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained

the abatement and mechanism for securing survival of an action by or against an officer of the United States. The only difference is that the thought is expressed more felicitously in the later enactment, as would be expected from Mr. Justice Van Devanter, who, as is well known, was the chief draftsman of the Judiciary Act of 1925.

The range of the 1899 Act was changed in 1925, which may have stimulated its redrafting. The change concerned not in the slightest the legal consequences to pending suits where the occupancy of an office of the United States was involved. The only modification made by the 1925 Act, apart from cutting down the time for substitu-

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by or against his successor in office, and the Court may make such order as shall be equitable for the payment of costs."

Section 11 of the Judiciary Act of 1925, 43 Stat. 936, 941, provided:

"(a) That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

"(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

"(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have."

tion to six months from twelve, was to extend the Act of 1899 so as to permit the substitution of successors of state and local officers as well as those of federal officials. The legislative histories of the 1899 and 1925 enactments, confirming the face of the legislation, demonstrate that the two enactments were conceived for the same purpose, were intended to have the same consequences, and are to be given the same significance, excepting only that the 1925 Act extended the range of applicability.

The Act of 1899 was a response to this Court's suggestion. See *United States ex rel. Bernardin* v. *Butterworth,* 169 U. S. 600, 605.[2] This was likewise true of the Act of 1925. See *Irwin* v. *Wright,* 258 U. S. 219, 223–224.[3] The opinion in that case was rendered on March 20, 1922, but while it was in the bosom of the Court, having been submitted on January 24, Chief Justice Taft sent to Senator Cummins a résumé of what was known as the "Judges' Bill," which became the Act of 1925. As to the matter

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[2] "In view of the inconvenience, of which the present case is a striking instance, occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that, in the case of suits against the heads of departments abating by death or resignation, it should be lawful for the successor in office to be brought into the case by petition, or some other appropriate method."

[3] "It may not be improper to say that it would promote justice if Congress were to enlarge the scope of the Act of February 8, 1899, so as to permit the substitution of successors for state officers suing or sued in the federal courts, who cease to be officers by retirement or death, upon a sufficient showing in proper cases. Under the present state of the law, an important litigation may be begun and carried through to this court after much effort and expense, only to end in dismissal because, in the necessary time consumed in reaching here, state officials, parties to the action, have retired from office. It is a defect which only legislation can cure." Chief Justice Taft used *Irwin* v. *Wright* as an illustration in his testimony before the House Judiciary Committee on March 30, 1922. Hearings before House Committee on the Judiciary on H. R. 10479, 67th Cong., 2d Sess. 7.

here under discussion, the Chief Justice said that the proposed bill "extends the right now given by statute, to substitute the successors of certain officers of the United States where the latter have died, resigned, or otherwise vacated their offices pending suit, so as to embrace the successors of officers of the District of Columbia, the Canal Zone, and the Territories and insular possessions of the United States, as well as of a State or political subdivision or agency thereof." Confidential Committee Print entitled "Jurisdiction of Circuit Courts of Appeals and of the Supreme Court," Senate Committee on the Judiciary, 67th Cong., 2d Sess. 4. The formulation of what was thus summarized by Chief Justice Taft is the present § 11, and that formulation was in the Judges' Bill from the time it was introduced in the two Houses by Senator Cummins and Congressman Walsh, respectively, on February 17, 1922.[4]

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[4] See 62 Cong. Rec. 2686, 2737. The language concerning abatement was the same in the bills introduced in 1922 (S. 3164 and H. R. 10479, 67th Cong., 2d Sess.), in the bills introduced by Senator Cummins and Congressman Graham, respectively, in 1924 (S. 2060 and H. R. 8206, 68th Cong., 1st Sess.) and in the statute as enacted, 43 Stat. 936, 941.

I am partly responsible for the misconception of finding a substantive change between the significance of the 1899 Act and the 1925 Act because I joined in *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U. S. 631. It is not by way of extenuating my responsibility that I deem it pertinent to suggest that the nature and volume of the Court's business preclude examination of all the judicial and legislative materials of all opinions in which one concurs. In order that the energies of the Court may be concentrated on those cases for which adjudication by this Court is indispensable, I have been insistent in my view that the Court should be rigorous in limiting the cases which it will allow to come here. That it may so control its business, the Congress, by the Act of 1925, gave the Court—for all practical purposes—a free hand. See *Ex parte Peru*, 318 U. S. 578, 602–604.

The correctness of the result in *Defense Supplies Corp.* v. *Lawrence Warehouse Co., supra,* does not depend on the misconceived relation indicated in its opinion. But it ought not to form a part of the chain of reasoning in disposing of this case. Therefore, insofar as § 11 of the Act of 1925 [5] is relevant to our present problem, we must reject the notion that, while under the 1899 Act such an action as this, brought against Paymaster General Buck, "did not abate," the 1925 Act eliminated this "command."

This brings us to the circumstances of the case. The petitioner claims to be the lawful widow of a naval officer. She brought this action to recover a death gratuity allowance, amounting to $1,365, payable under the Act of June 4, 1920. 41 Stat. 824, as amended, 34 U. S. C. § 943. Jurisdiction was alleged under the Tucker Act, 24 Stat. 505, as amended, and other statutes. Nominally, the action was for mandamus to compel Buck, the Paymaster General of the Navy, to make payment. The District Court refused to grant relief by mandamus, but, in accordance with modern practice, granted what it thought to be the proper remedy. The judgment, after enjoining Buck from persisting in his refusal to make payment, concluded: ". . . and the defendant is directed to pay the plaintiff Thirteen Hundred and Sixty-five Dollars ($1,365.00) which is the amount equal to six months' pay at the rate received by the deceased at the time of his death."

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[5] Section 11 of the 1925 Judiciary Act, 43 Stat. 936, 941, was repealed as of September 1, 1948. 62 Stat. 992, 1000. The repealing Act, however, preserved any rights or liabilities existing under the laws repealed. 62 Stat. 869, 992. Since the six-month statutory period within which substitution can be made expired on September 1, 1948, the repeal of § 11 does not affect the case at bar. Abatement of actions brought against officials is now governed, in the District Courts, by Rule 25 (d) of the Federal Rules of Civil Procedure, which also provides a six-month period for substitution.

The District Court judgment was entered on January 30, 1948. Admiral Buck was retired as Paymaster General on March 1. Notice of appeal was, nevertheless, filed in his name by Government attorneys on March 18. The issue of abatement was not raised until the Government attorney called the fact of Buck's retirement to the attention of the Court of Appeals upon oral argument, which occurred after the six-month period for substitution had passed. The Court of Appeals vacated the judgment of the District Court and remanded with directions to dismiss the complaint as abated.

1. I agree with the Court that this was not a personal action against Admiral Buck, and that the judgment was not against him as an individual. That suits against a collector of revenue for illegal exactions under the Revenue Acts are deemed personal actions enforceable as such against the collector is an anomalous situation in our law which calls for abrogation instead of extension. For the history of these actions, see *Cary* v. *Curtis,* 3 How. 236, and *United States* v. *Nunnally Investment Co.,* 316 U. S. 258.[6]

2. The starting point, then, is recognition of the fact that this was a suit to secure a money claim due from the United States, enforced against the officer who was the effective conduit for its payment. In short, this was a representative suit, and the crucial question, I submit, is the reach of the representative character of the suit.

The intrinsic and not merely formalistic answer to this question is of course entangled with the doctrine of sovereign immunity from suits. In scores of cases this Court

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[6] The problems raised by the personal liability of collectors have necessitated special legislation. See I. R. C., § 3770 (b), 26 U. S. C. § 3770 (b), R. S. § 3220, as amended (authority to reimburse collectors), and I. R. C., § 3772 (d), 26 U. S. C. § 3772 (d), 56 Stat. 956. (Suits against collectors are treated as suits against the United States for purposes of *res judicata.*)

has had to consider when a suit, though nominally against one holding public office, is in fact a suit against the Government and as such barred by want of the sovereign's consent to be sued. See *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, App. 729. The subject, it has been recognized, is not free from casuistry because of the natural, even if unconscious, pressure to escape from the doctrine of sovereign immunity which—whatever its historic basis—is hardly a doctrine based upon moral considerations. The trend of deep sentiment, reflected by legislation and adjudication, has looked askance at the doctrine. See *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 390–392. If astuteness has been exercised to deny the representative character of an official in order to avoid his identification as the sovereign *ad hoc,* it runs counter to the rational administration of justice not to find an official the sovereign *ad hoc* and the suit against him, in effect, a suit against the sovereign when sovereign immunity is not circumscribed thereby.

Under the Court of Claims Act, 12 Stat. 765, as amended, the plaintiff here could have gone to the Court of Claims.[7] By the Act of March 3, 1887, 24 Stat. 505, as amended, she could have brought suit in the District Court. When the sovereign has in fact given consent formally to be sued as such on the very claim and to allow, in the same court and by the same procedure (trial without a jury), precisely the same relief as was sought and obtained against the official in his representative capacity, it would needlessly enthrone formality to deny the intrinsic nature of the suit to be a suit against the sovereign. And that is this situation. Certainly those charged with the duty of defending the interests of the United States so

[7] *Campbell* v. *United States,* 80 Ct. Cl. 836; *Hill* v. *United States,* 68 Ct. Cl. 740; *Maxwell* v. *United States,* 68 Ct. Cl. 727; *Thomson* v. *United States,* 58 Ct. Cl. 207; *Phillips* v. *United States,* 49 Ct. Cl. 703.

conceived it. By denominating Admiral Buck as "Paymaster General of the Navy" in his notice of appeal, the United States Attorney recognized that Paymaster General Buck was, as it were, merely an alias for the United States, the real client of the United States Attorney. The Government, indeed, has consistently recognized that justice does not call for abatement of the suit. Both here and below it has disavowed a desire for abatement. Of course, if it were a fixed rule of law that a suit such as this should die when the nominal defendant dies, the Court would have to bow to it, however harsh and futile the rule. It required legislation represented by Lord Campbell's Act to make tort liability survive the death of the victim. But it is not the controlling policy of the law that such actions die upon change of office-holders. The policy of the law is to the contrary, even as to suits which could not be brought against the Government directly. So also, it has long been the policy of our law to look behind an office-holder nominally a party litigant in order to find that, for all practical purposes, it is a suit against the Government and therefore not maintainable. Justice should be equally open-eyed in order to find behind the nominal official defendant the United States as the real defendant.

This seems to me to be the spirit of the decision in *Thompson* v. *United States,* 103 U. S. 480. To be sure, Mr. Justice Bradley there differentiated his identification of an officer of a municipality with the municipality from the situation of an officer of the United States because normally the Government could not be sued. But when the Government does allow itself to be sued for the same cause of action for which suit was brought against him who for the purposes of the litigation is the United States, the reason for the differentiation disappears.

The differentiation remains in actions brought against officials for remedies which could not be got in a direct

suit against the United States. These are the situations in which substitution cannot come into play automatically and involve recourse to the remedial legislation of 1899 and 1925 in their present form. This gives ample scope to the legislation and at the same time avoids treating procedural requirements as tyrannical commands satisfying no other end except sterile formality.

Accordingly, I would recognize that the judgment of the District Court is in effect a money judgment against the United States and would allow the Government's notice of appeal the force it was intended to have as an effective instrument whereby the United States might obtain a review of that judgment. It would be nothing novel in the observance of decorous form by courts to note as a matter of record that the name of the Paymaster General of the Navy is now Fox and to proceed with the appeal on that basis.[8]

A final question has to be faced—a question which should, in logic, have been treated first, for it concerns the

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[8] *Davis* v. *Preston,* 280 U. S. 406, was a suit under the Federal Employers' Liability Act of 1908, 35 Stat. 65, brought to recover for the death of a railroad employee occurring while the railroad was being operated by the Director General. The Court held a petition for certiorari ineffective when taken in the name of an agent of the Government who had retired from office. A statute there applicable, however, required that the United States conduct the litigation in the name of a special agent. 41 Stat. 461. There is no such requirement in the case at bar, for suit could have been brought against the United States itself. Since this is true, the Court can scarcely refuse to give effect to the notice of appeal filed by the Government attorneys in the name of Buck as Paymaster General.

Mr. Justice Van Devanter discussed only the effectiveness of the appeal, for the Court was faced with no problem of abatement. Congress had made clear its policy of protecting suitors against the pitfalls of abatement by passing the Winslow Act, 42 Stat. 1443, to make certain that the 1899 statute would not prevent recovery for persons injured or killed during the Government operation of the railroads. This statute allowed substitution of a successor agent at

910798 O—51——9

power of this Court to decide the case. Section 2105 of 28 U. S. C. provides: "There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction." I agree with the Court that this statute is not applicable, but not on the ground that lack of substitution is a question of "jurisdiction." Section 2105 relates only to the modern equivalent of a common law plea in abatement, which was made in the trial court before issue was joined on the merits of the case.[9] It can have no effect upon a decision by an appellate court that a suit has abated.

MR. JUSTICE CLARK, with whom MR. JUSTICE BLACK concurs, dissenting.

Since the duty sought to be enforced in this action attached to the office of Paymaster General and rested upon Admiral Buck only so long as he held the office, it is clear that petitioner's claim is against Buck in his representa-

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"any time before satisfaction of such final judgment, decree, or award." The broad legislative policy reflected in the Winslow Act points to a reliance upon substance, rather than form, in the present case.

[9] The predecessor section, 28 U. S. C. (1946 ed.) § 879, R. S. § 1011, as amended, provided:

"There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

Section 22 of the Judiciary Act of 1789, 1 Stat. 84, provided:

". . . But there shall be no reversal in either court [*i. e.*, the Circuit Court or Supreme Court] on such writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact. . . ."

The Reviser's Note to § 2105 indicates that "matters in abatement" was substituted for "plea in abatement" because of the change in terminology under the Federal Rules.

tive capacity, not personally. After his retirement it was not within his power to comply with the District Court's injunction, and the judgment ceased to be enforceable against him.[1] Consequently Buck lacked standing to obtain review of the judgment on appeal.[2] Thus far I agree with the conclusions of the Court.

But I think that when the attorney for the Government called to the Court of Appeals' attention—after this suit had been pending there for more than a year—that the appeal had been taken by Buck after his retirement and that no appeal had been perfected by or on behalf of his successor, the court should have dismissed the appeal on its own motion.[3] That is the action which this Court took in *Davis* v. *Preston,* 280 U. S. 406 (1930), when review had been allowed at the instance of a federal officer who, it later appeared, because of separation from office had

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[1] Cf. *Commissioners* v. *Sellew,* 99 U. S. 624, 627 (1879); *United States ex rel. Emanuel* v. *Jaeger,* 117 F. 2d 483, 488 (C. A. 2d Cir. 1941).

[2] *Davis* v. *Preston,* 280 U. S. 406 (1930).

[3] *In re Michigan-Ohio Bldg. Corp.,* 117 F. 2d 191 (C. A. 7th Cir. 1941); *United Porto Rican Sugar Co.* v. *Saldana,* 80 F. 2d 13 (C. A. 1st Cir. 1935).

Appeal from the District Court in the instant case was governed by Federal Rule 73 (1946) which provided at all relevant times as follows:

"(a) . . . When an appeal is permitted by law from a district court to a circuit court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. . . .

"A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of

not had standing to petition for certiorari. A unanimous court dismissed the writ as improvidently granted, stating:

> "A motion is now made by Andrew W. Mellon, as Federal Agent, for his substitution in the present proceeding in the place of Davis. But the motion must be denied. The succession in office, as now appears, occurred before there was any effort to obtain a review in this Court. After the succession Davis was completely separated from the office and without right to invoke such a review . . . . Therefore his petition must be disregarded. The time within which such a review may be invoked is limited by statute and that time has long since expired. To grant the motion in these circumstances would be to put aside the statutory limitation and to subject the party prevailing in the [court below] to uncertainty and vexation which the limitation is intended to prevent." *Id.* at 408.[4]

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the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal . . . .

"(b) . . . The notice of appeal shall specify the parties taking the appeal . . . ."

It has been held that under Federal Rule 73 timely and proper notice of appeal goes to the jurisdiction of the Court of Appeals, *United Drug Co.* v. *Helvering,* 108 F. 2d 637 (C. A. 2d Cir. 1940); *Lamb* v. *Shasta Oil Co.,* 149 F. 2d 729 (C. A. 5th Cir. 1945); *Marten* v. *Hess,* 176 F. 2d 834 (C. A. 6th Cir. 1949); *Tinkoff* v. *West Pub. Co.,* 138 F. 2d 607 (C. A. 7th Cir. 1943); *St. Luke's Hospital* v. *Melin,* 172 F. 2d 532 (C. A. 8th Cir. 1949); *Spengler* v. *Hughes Tool Co.,* 169 F. 2d 166 (C. A. 10th Cir. 1948); *Walleck* v. *Hudspeth,* 128 F. 2d 343 (C. A. 10th Cir. 1942); see *Maloney* v. *Spencer,* 170 F. 2d 231, 233 (C. A. 9th Cir. 1948); and that this requirement cannot be dispensed with by waiver or consent of the parties. See *Lamb* v. *Shasta Oil Co., supra,* at 730; *Marten* v. *Hess, supra,* at 835; *St. Luke's Hospital* v. *Melin, supra,* at 533. Compare *Crump* v. *Hill,* 104 F. 2d 36 (C. A. 5th Cir. 1939) with *Piascik* v. *Trader Navigation Co.,* 178 F. 2d 886 (C. A. 2d Cir. 1949).

[4] Accord, *Nudelman* v. *Globe Varnish Co.,* 312 U. S. 690 (1941).

This Court now concludes that *Davis* v. *Preston* is inapposite because in that case, unlike the situation before us, applicable legislation prevented abatement of the suit against Davis following his separation from office. But the point made in the *Davis* case was simply that the succession in office had preceded Davis' effort to obtain review by this Court and pertinent statutes did not enable the former federal officer to invoke review of a judgment which was of no legal concern to him. And in this case since an appeal was not properly taken within the time allowed, it does not matter at this time whether the District Court judgment could be enforced by plaintiff against Buck's successor, by substitution of the latter as defendant or by other action.[5]

It is the decision of this Court that the failure of the appellee to substitute the judgment defendant's successor under § 11 of the Judiciary Act of 1925 excuses the Government's prior failure to perfect a valid appeal from a final judgment against one of its officers. In short, the Court places on an appellee the burden of correcting his adversary's error. From this result I dissent.

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[5] It seems that plaintiff would not be without a remedy which would give life to her judgment obtained in a court of competent jurisdiction against a federal officer who at the time of judgment had full authority in the premises. In *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 402–403 (1940), the Court said: "There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government. See *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620. The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy."

UNITED STATES *v.* MUNSINGWEAR, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 23 and 24. Argued October 18, 1950.—Decided November 13, 1950.

The United States sued respondent for alleged violations of a price-fixing regulation, seeking, in separate counts, (1) an injunction and (2) treble damages. By agreement, the second count was held in abeyance pending trial and final determination of the suit for an injunction. Holding that respondent's prices complied with the regulation, the District Court dismissed the complaint. While an appeal was pending the commodity involved was decontrolled, and the Court of Appeals dismissed the appeal for mootness. The United States acquiesced in the dismissal and made no motion to vacate the judgment. The District Court then dismissed the action for treble damages on the ground that the matter was *res judicata*. *Held:* The dismissal is sustained. Pp. 37–41.

(a) The issues and the parties being the same in both suits, the District Court having jurisdiction both over the parties and the subject matter, and its judgment in the injunction suit remaining unmodified, the case falls squarely within the rule of *res judicata*. *Southern Pacific R. Co.* v. *United States*, 168 U. S. 1. Pp. 37–38.

(b) The dismissal of the appeal on the ground of mootness and the deprivation of the United States of any review of the case in the Court of Appeals does not warrant an exception to the established rule, even though the United States had a statutory right to review in the Court of Appeals. Pp. 38–41.

(c) The United States could have protected its rights by moving in the Court of Appeals to vacate the judgment below and remand with a direction to dismiss. Having slept on its rights by failing to do so, it cannot obtain relief in this Court. Pp. 39–41.

178 F. 2d 204, affirmed.

The Court of Appeals affirmed an order of the District Court dismissing as *res judicata* a suit by the United States for violation of a price regulation. 178 F. 2d 204. This Court granted certiorari. 339 U. S. 941. *Affirmed*, p. 41.

Melvin Richter argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Stanley M. Silverberg* and *Paul A. Sweeney.*

John M. Palmer argued the cause for respondent. With him on the brief was *H. C. Mackall.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The United States filed a complaint on two counts against the respondent, alleging violations of a regulation fixing the maximum price of commodities which respondent sold. The first count prayed for an injunction, the second sought treble damages. By agreement and a pretrial order, the second count was held in abeyance pending trial and final determination of the suit for an injunction. The same procedure was followed as respects another suit for treble damages raising the same issues and covering a later period. The District Court held that respondent's prices complied with the regulation. Accordingly it dismissed the complaint. 63 F. Supp. 933. The United States appealed from that judgment to the Court of Appeals. While the appeal was pending the commodity involved was decontrolled. Respondent then moved to dismiss the appeal on the ground that the case had become moot. The Court of Appeals granted the motion and dismissed the appeal for mootness. 162 F. 2d 125.

Respondent then moved in the District Court to dismiss the treble damage actions on the ground that the unreversed judgment of the District Court in the injunction suit was *res judicata* of those other actions. This motion was granted, the District Court directing the treble damage actions to be dismissed. On appeal the Court of Appeals, by a divided vote, affirmed. 178 F. 2d 204.

The controversy in each of the suits concerned the proper pricing formula applicable to respondent's com-

modities under the maximum price regulation. That question was in issue and determined in the injunction suit. The parties were the same both in that suit and in the suits for treble damages. There is no question but that the District Court in the injunction suit had jurisdiction both over the parties and the subject matter. And its judgment remains unmodified. We start then with a case which falls squarely within the classic statement of the rule of *res judicata* in *Southern Pacific R. Co.* v. *United States,* 168 U. S. 1, 48–49:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

And see *Cromwell* v. *County of Sac,* 94 U. S. 351, 352; *Commissioner* v. *Sunnen,* 333 U. S. 591, 597–598. The question whether the respondent had sold the commodities in violation of the federal regulation, having been determined in the first suit, is therefore laid at rest by a principle which seeks to bring litigation to an end and promote certainty in legal relations.

That is the result unless the dismissal of the appeal on the ground of mootness and the deprivation of the United States of any review of the case in the Court of Appeals warrant an exception to the established rule.

The absence of a right to appeal was held in *Johnson Co.* v. *Wharton,* 152 U. S. 252, to make no difference, the determination in the first suit being binding in a second

suit on a different claim. Petitioner argues that that case is distinguishable because here Congress provided an appeal. It contends that if the right to appeal is to be protected, the rigors of *res judicata* must be alleviated. Concededly the judgment in the first suit would be binding in the subsequent ones if an appeal, though available, had not been taken or perfected. *Wilson's Executor* v. *Deen,* 121 U. S. 525; *Hubbell* v. *United States,* 171 U. S. 203. But it is said that those who have been prevented from obtaining the review to which they are entitled should not be treated as if there had been a review. That is the argument. The hardship of a contrary rule is presented. Estoppel is urged. And authorities are advanced to support the view that *res judicata* should not apply in this situation.[1]

But we see no reason for creating the exception. If there is hardship in this case, it was preventable. The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.[2] That was said in *Duke Power Co.* v. *Greenwood County,* 299 U. S. 259, 267,

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[1] See *Gelpi* v. *Tugwell,* 123 F. 2d 377; *Allegheny County* v. *Maryland Casualty Co.,* 146 F. 2d 633; Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1. Restatement, Judgments, § 69 (2) reads as follows: "Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action."

[2] This has become the standard disposition in federal civil cases: *New Orleans Flour Inspectors* v. *Glover,* 161 U. S. 101, 103, modifying 160 U. S. 170; *United States* v. *Hamburg-American Co.,* 239 U. S. 466; *Berry* v. *Davis,* 242 U. S. 468; *United States* v. *American-Asiatic Steamship Co.,* 242 U. S. 537; *Board of Public Utility Commissioners* v. *Compañia General de Tabacos de Filipinas,* 249 U. S. 425; *Commercial Cable Co.* v. *Burleson,* 250 U. S. 360; *United States* v. *Alaska*

to be "the duty of the appellate court." That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

In this case the United States made no motion to vacate the judgment. It acquiesced in the dismissal. It did not avail itself of the remedy it had to preserve its rights. Denial of a motion to vacate could bring the case here. Our supervisory power over the judgments of the lower federal courts is a broad one. See 28 U. S. C. § 2106, 62 Stat. 963; *United States* v. *Hamburg-American Co.*, 239

Steamship Co., 253 U. S. 113; *Heitmuller* v. *Stokes*, 256 U. S. 359; *Atherton Mills* v. *Johnston*, 259 U. S. 13; *Brownlow* v. *Schwartz*, 261 U. S. 216; *Alejandrino* v. *Quezon*, 271 U. S. 528; *Norwegian Nitrogen Co.* v. *Tariff Commission*, 274 U. S. 106; *United States* v. *Anchor Coal Co.*, 279 U. S. 812; *Sprunt & Son* v. *United States*, 281 U. S. 249; *Hargis* v. *Bradford*, 283 U. S. 781; *Mahan* v. *Hume*, 287 U. S. 575; *Railroad Commission of Texas* v. *Macmillan*, 287 U. S. 576; *Coyne* v. *Prouty*, 289 U. S. 704; *First Union Trust & Savings Bank* v. *Consumers Co.*, 290 U. S. 585; *Danciger Oil & Refining Co.* v. *Smith*, 290 U. S. 599; *O'Ryan* v. *Mills Novelty Co.*, 292 U. S. 609; *Hammond Clock Co.* v. *Schiff*, 293 U. S. 529; *Bracken* v. *S. E. C.*, 299 U. S. 504; *Leader* v. *Apex Hosiery Co.*, 302 U. S. 656; *Woodring* v. *Clarksburg-Columbus Short Route Bridge Co.*, 302 U. S. 658; *Retail Food Clerks & Managers Union* v. *Union Premier Food Stores*, 308 U. S. 526; *S. E. C.* v. *Long Island Lighting Co.*, 325 U. S. 833; *Montgomery Ward & Co.* v. *United States*, 326 U. S. 690; *Brotherhood of Locomotive Firemen & Enginemen* v. *Toledo, P. & W. R. Co.*, 332 U. S. 748; *S. E. C.* v. *Engineers Public Service Co.*, 332 U. S. 788; *Hodge* v. *Tulsa County Election Board*, 335 U. S. 889; *S. E. C.* v. *Philadelphia Co.*, 337 U. S. 901.

So far as federal civil cases are concerned, there are but few exceptions to this practice in recent years. See *Cantos* v. *Styer*, 329 U. S. 686; *Uyeki* v. *Styer*, 329 U. S. 689; *Pan American Airways Corp.* v. *Grace & Co.*, 332 U. S. 827; *Schenley Distilling Corp.* v. *Anderson*, 333 U. S. 878.

U. S. 466, 478; *Walling* v. *Reuter Co.*, 321 U. S. 671, 676–677. As already indicated, it is commonly utilized in precisely this situation to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences.

The case is therefore one where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation.

Affirmed.

MR. JUSTICE BLACK is of the opinion that *res judicata* should not be applied under the circumstances here shown.

UNITED STATES *v.* SANCHEZ ET AL.

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

No. 81. Argued October 20, 1950.—Decided November 13, 1950.

1. The tax of $100 per ounce imposed by § 2590 of the Internal Revenue Code on transferors of marihuana who make transfers to unregistered transferees without the order form required by § 2591 and without payment by the transferees of the tax imposed by § 2590 is a valid exercise of the taxing power of Congress, notwithstanding its collateral regulatory purpose and effect. Pp. 44–45.
   (a) A tax is not invalid merely because it regulates, discourages or deters the activities taxed; nor because the revenue obtained is negligible or the revenue purpose is secondary. P. 44.
   (b) A tax is not invalid merely because it affects activities which Congress might not otherwise regulate. P. 44.
2. The tax levied by § 2590 (a) (2) is not conditioned on the commission of a crime, and it may properly be treated as a civil rather than a criminal sanction. Pp. 45–46.
   (a) That Congress provided civil procedure for collection indicates its intention that the levy be treated as civil in character. P. 45.
   (b) The civil character of the tax of $100 per ounce imposed by § 2590 (a) (2) is not altered by its severity in relation to the tax of $1 per ounce levied by § 2590 (a) (1). Pp. 45–46.
   (c) The imposition by § 2590 (b) of liability on transferors is reasonably adapted to secure payment of the tax by transferees or stop transfers to unregistered persons, as well as to provide an additional source from which the expense of unearthing clandestine transfers can be recovered. Pp. 45–46.

Reversed.

The United States brought suit in the District Court to recover taxes alleged to be due under the Marihuana Tax Act, 50 Stat. 551, now 26 U. S. C. § 2590 *et seq.* Defendants' motion to dismiss, attacking the constitutionality of the tax, was granted by the District Court. On direct appeal to this Court, *reversed,* p. 46.

Philip Elman argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Melva M. Graney.*

No appearance for appellees.

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a direct appeal, 28 U. S. C. § 1252, from dismissal by the District Court of a suit for recovery of $8,701.65 in taxes and interest alleged to be due under § 7 (a) (2) of the Marihuana Tax Act, 50 Stat. 551, now § 2590 (a) (2) of the Internal Revenue Code. 26 U. S. C. § 2590 (a) (2). In their motion to dismiss, which was granted without opinion, defendants attacked the constitutionality of this subsection on the ground that it levied a penalty, not a tax. The validity of this levy is the issue here.

In enacting the Marihuana Tax Act, the Congress had two objectives: "First, the development of a plan of taxation which will raise revenue and at the same time render extremely difficult the acquisition of marihuana by persons who desire it for illicit uses and, second, the development of an adequate means of publicizing dealings in marihuana in order to tax and control the traffic effectively." S. Rep. No. 900, 75th Cong., 1st Sess. 3. To the same effect, see H. R. Rep. No. 792, 75th Cong., 1st Sess. 2.

Pursuant to these objectives, § 3230 of the Code imposes a special tax ranging from $1 to $24 on "every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana." For purposes of administration, § 3231 requires such persons to register at the time of the payment of the tax with the Collector of the District in which their

businesses are located. The Code then makes it unlawful—with certain exceptions not pertinent here—for any person to transfer marihuana except in pursuance of a written order of the transferee on a blank form issued by the Secretary of the Treasury. § 2591. Section 2590 requires the transferee at the time he applies for the order form to pay a tax on such transfer of $1 per ounce or fraction thereof if he has paid the special tax and registered, § 2590 (a) (1), or $100 per ounce or fraction thereof if he has not paid the special tax and registered. § 2590 (a) (2). The transferor is also made liable for the tax so imposed, in the event the transfer is made without an order form and without the payment of the tax by the transferee. § 2590 (b). Defendants in this case are transferors.

It is obvious that § 2590, by imposing a severe burden on transfers to unregistered persons, implements the congressional purpose of restricting traffic in marihuana to accepted industrial and medicinal channels. Hence the attack here rests on the regulatory character and prohibitive burden of the section as well as the penal nature of the imposition. But despite the regulatory effect and the close resemblance to a penalty, it does not follow that the levy is invalid.

First. It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. *Sonzinsky* v. *United States,* 300 U. S. 506, 513–514 (1937). The principle applies even though the revenue obtained is obviously negligible, *Sonzinsky* v. *United States, supra,* or the revenue purpose of the tax may be secondary, *Hampton & Co.* v. *United States,* 276 U. S. 394 (1928). Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate. As was pointed out in *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 47 (1934):

> "From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment."

These principles are controlling here. The tax in question is a legitimate exercise of the taxing power despite its collateral regulatory purpose and effect.

Second. The tax levied by § 2590 (a) (2) is not conditioned upon the commission of a crime. The tax is on the transfer of marihuana to a person who has not paid the special tax and registered. Such a transfer is not made an unlawful act under the statute. Liability for the payment of the tax rests primarily with the transferee; but if he fails to pay, then the transferor, as here, becomes liable. It is thus the failure of the transferee to pay the tax that gives rise to the liability of the transferor. Since his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction. The fact Congress provided civil procedure for collection indicates its intention that the tax be treated as such. *Helvering* v. *Mitchell,* 303 U. S. 391 (1938). Moreover, the Government is seeking to collect the levy by a judicial proceeding with its attendant safeguards. Compare *Lipke* v. *Lederer,* 259 U. S. 557 (1922); *Tovar* v. *Jarecki,* 173 F. 2d 449 (C. A. 7th Cir. 1949).

Nor is the civil character of the tax imposed by § 2590 (a) (2) altered by its severity in relation to that assessed by § 2590 (a) (1). The difference has a rational foundation. Unregistered persons are not likely to procure the required order form prior to transfer or pay the required tax. Free of sanctions, dealers would be prone to accommodate such persons in their unlawful activity. The imposition of equally severe tax burdens on such

transferors is reasonably adapted to secure payment of the tax by transferees or stop transfers to unregistered persons, as well as to provide an additional source from which the expense of unearthing clandestine transfers can be recovered. Cf. *Helvering* v. *Mitchell, supra.*

The judgment below must be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

UNITED STATES *v.* SECURITY TRUST & SAVINGS BANK, EXECUTOR, ET AL.

CERTIORARI TO THE DISTRICT COURT OF APPEAL, FOURTH APPELLATE DISTRICT, OF CALIFORNIA.

Nos. 10, 11, 12 and 13. Argued October 16, 1950.—Decided November 13, 1950.

1. A tax lien of the United States obtained under 26 U. S. C. §§ 3670, 3671, 3672, *held* prior in right to an attachment lien on property in California obtained under California Code of Civil Procedure, §§ 537, 542 (a), where the federal tax lien was recorded subsequent to the date of the attachment lien but before the attaching creditor obtained judgment. Pp. 48–51.
2. The effect of a state-law lien in relation to a provision of federal law for the collection of debts owed the United States is a federal question. P. 49.
3. Although a state court's classification of a lien as specific and perfected is entitled to weight, it is subject to reexamination by this Court. On the other hand, if the state court itself describes the lien as inchoate, this classification is practically conclusive. Pp. 49–50.
4. As described by the highest court of California, the attachment lien under the law of that State is contingent or inchoate. P. 50.
5. Priority in right of federal tax liens obtained under 26 U. S. C. §§ 3670, 3671, 3672, is not defeated by a contingent, inchoate lien prior in time. Pp. 50–51.
6. The result in this case cannot be affected by the doctrine of relation back. P. 50.

93 Cal. App. 2d 608, 209 P. 2d 657, reversed.

In four suits involving parcels of land in California, a state court awarded a judgment creditor priority over liens of the United States for taxes. The District Court of Appeal affirmed. 93 Cal. App. 2d 608, 209 P. 2d 657. The State Supreme Court declined to hear the case. This Court granted certiorari. 339 U. S. 947. *Reversed,* p. 51.

Helen Goodner argued the cause for the United States. With her on the brief were *Solicitor General Perlman,*

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Assistant Attorney General Caudle, Ellis N. Slack and *Hilbert P. Zarky.*

Thomas M. Hamilton submitted on the record for respondents.

MR. JUSTICE MINTON delivered the opinion of the Court.

The question presented here is whether a tax lien of the United States is prior in right to an attachment lien where the federal tax lien was recorded subsequent to the date of the attachment lien but prior to the date the attaching creditor obtained judgment.

On October 17, 1946, Wilton M. Morrison sued George and Genell Styliano on an unsecured note. Pursuant to §§ 537 and 542 of the California Code of Civil Procedure,[1] Morrison procured the attachment of four parcels of real estate owned by the Stylianos in San Diego County. On April 24, 1947, Morrison obtained judgment and it was recorded in the office of the Recorder of San Diego County on May 2, 1947. Meanwhile, on December 3, 5, and 10, 1946, the United States had filed notices of federal tax liens in the same office.[2]

Subsequently, four suits were brought in the Superior Court of San Diego County involving the four parcels of land upon which Morrison had procured the attachment. Morrison and the United States were made parties defendant in each of these suits. The first suit was brought to quiet title to one of the parcels of real estate. The Stylianos had sold this parcel to the plaintiffs of the suit, who paid the balance of the purchase price into court. The other three suits were to foreclose separate mortgages on the other three parcels. The Superior Court ordered the balance of the purchase price and any surplus

[1] Deering's Cal. Code Civ. Proc. Ann., 1941, §§ 537 and 542.

[2] Notice of a further lien in the sum of $412.18 was filed on January 22, 1948, but as to this the Government does not claim priority.

remaining from the foreclosure sales after the mortgagees received payment in full to be applied first in payment of Morrison's judgment lien, and secondly in payment of any federal tax liens.[3]

The District Court of Appeal for the Fourth Appellate District affirmed. 93 Cal. App. 2d 608, 209 P. 2d 657. The Supreme Court of California declined to hear the case, and we granted certiorari. 339 U. S. 947.[4] The four cases were consolidated below for purposes of appeal, and Morrison's claims of priority were treated as a single issue. They are treated here in the same manner.

Section 537 of the California Code of Civil Procedure provides that a plaintiff may have the property of the defendant attached at any time "as security for the satisfaction of any judgment that may be recovered." Section 542a provides: "The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ, together with a description of the property attached, and a notice that it is attached with the county recorder of the county wherein said real property is situate . . . . The attachment whether heretofore levied or hereafter to be levied shall be a lien upon all real property attached for a period of three years after the date of levy unless sooner released or discharged either as provided in this chapter, or by dismissal of the action, or by the filing with the recorder of an abstract of the judgment in the action."

The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question. Hence, although a state court's classification of a lien as specific and perfected is

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[3] The Government also disclaims any priority over the mortgages foreclosed in these proceedings.

[4] Morrison died while the case was pending on appeal to the District Court of Appeal, and the Security Trust and Savings Bank as executor of his last will and testament was substituted.

entitled to weight, it is subject to reexamination by this Court. On the other hand, if the state court itself describes the lien as inchoate, this classification is "practically conclusive." *Illinois* v. *Campbell,* 329 U. S. 362, 371. The Supreme Court of California has so described its attachment lien in the case of *Puissegur* v. *Yarbrough,* 29 Cal. 2d 409, 412, 175 P. 2d 830, 831, by stating that, "The attaching creditor obtains only a potential right or a contingent lien . . . ." Examination of the California statute shows that the above is an apt description. The attachment lien gives the attachment creditor no right to proceed against the property unless he gets a judgment within three years or within such extension as the statute provides. Numerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded. Thus the attachment lien is contingent or inchoate—merely a *lis pendens* notice that a right to perfect a lien exists.

Nor can the doctrine of relation back—which by process of judicial reasoning merges the attachment lien in the judgment and relates the judgment lien back to the date of attachment—operate to destroy the realities of the situation. When the tax liens of the United States were recorded, Morrison did not have a judgment lien. He had a mere "*caveat* of a more perfect lien to come." *New York* v. *Maclay,* 288 U. S. 290, 294.

The liens asserted by the United States stem from 53 Stat. 448, 449, 26 U. S. C. §§ 3670, 3671, 3672. Section 3670 provides: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." Section 3671 provides that the lien arises when

the assessment lists are received by the Collector unless some other date is specified by law. Section 3672 provides that the lien shall not be valid against mortgagees, pledgees, purchasers or judgment creditors, until notice thereof has been filed in the office provided by the law of the state for such filing—in this case, the office of the Recorder of San Diego County.

In cases involving a kindred matter, *i. e.,* the federal priority under R. S. § 3466,[5] it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it. *Illinois* v. *Campbell, supra,* 374. If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here. Accordingly, we hold that the tax liens of the United States are superior to the inchoate attachment lien of Morrison, and the judgment of the District Court of Appeal for the Fourth Appellate District is reversed.

Reversed.

MR. JUSTICE JACKSON, concurring.

I am persuaded that we are required to hold the tax lien of the Government superior to the California attachment. While we should accept the law of California as

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[5] R. S. § 3466. "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

its court has declared it, the federal question remains whether it is in conflict with 26 U. S. C. §§ 3670–72, 53 Stat. 448 as amended, 53 Stat. 882. The history of this tax lien statute indicates that only a judgment creditor in the conventional sense is protected.

United States v. *Snyder,* 149 U. S. 210 (1893), was decided at a time when the forerunner of the present statute, § 3186 of the Revised Statutes as amended by § 3 of the Act of March 1, 1879, provided:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment-list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person." 20 Stat. 327, 331.

The *Snyder* case held, in interpreting the above statute along with Art. I, § 8 of the Constitution, that the lien created by that statute was a valid binding lien even against a bona fide purchaser for value without knowledge or notice of the existence of such a lien.

Thereafter the statute was amended and a proviso added which said: ". . . That such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector . . . ." in the appropriate place for filing. 37 Stat. 1016. The House Report accompanying the proposed amendment, H. R. Rep. No. 1018, 62d Cong., 2d Sess. 2 (1912), said in part, after citing the above case:

> ". . . the lien is so comprehensive that it covers all the property and rights to property of the delinquent situated anywhere in the United States, and any person taking title to real estate is subjected to the

> impossible task of ascertaining whether any person, who has at any time owned the real estate in question, has been delinquent in the payment of the taxes referred to while the owner of the real estate in question. The business carried on under the internal-revenue law may be at a great distance from the property affected by this secret lien, but this will not relieve the property from the lien."

In 1938, *United States* v. *Rosenfield,* 26 F. Supp. 433 (D. C. E. D. Mich., S. D.), held that a bona fide purchaser for value of shares of stock from a seller against whom notice of lien for federal income taxes had been duly filed prior to the sale, took subject to the lien even though the purchaser did not have notice or knowledge of such lien. As a direct result of this decision, the statute was again amended, this time to include *pledgees* and the exception in case of securities as now found in 26 U. S. C. § 3672 (b) (1). The reason for this amendment is disclosed in the Committee Report accompanying the Revenue Bill of 1939. H. R. Rep. No. 855, 76th Cong., 1st Sess. 26 (1939). This report says, in part:

> ". . . While it is true that the filing of the notice of the tax lien may constitute notice in the case of real property, it is inequitable for the statute to provide that it constitutes notice as regards securities. . . . An attempt to enforce such liens on recorded notice would in many cases impair the negotiability of securities and seriously interfere with business transactions. . . ."

My conclusion from this history is that the statute excludes from the provisions of this secret lien those types of interests which it specifically included in the statute and no others.

STANDARD OIL COMPANY OF NEW JERSEY *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 27 and 28. Argued October 13, 1950.—Decided November 27, 1950.

1. A government war risk insurance policy insuring a ship against "all consequences of hostilities or warlike operations" does not, as a matter of law, cover a loss resulting from a collision occurring during wartime between the insured vessel and a Navy mine sweeper engaged in mine sweeping operations, where both vessels were at fault. Pp. 55–61.

   (a) To take a loss resulting from a collision out of the category covered by standard marine risk policies and bring it within the coverage of a war risk policy insuring against "all consequences of" warlike operations, the "warlike operation" must be the proximate cause of the collision. Pp. 57–58.

   (b) The courts below did not err in failing to hold as a matter of law that the "warlike operation" of mine sweeping was the proximate cause of the collision; and they properly considered the case as depending on the resolution of factual questions. Pp. 58–59.

   (c) While uniformity of decisions here and in England in the interpretation and enforcement of marine insurance contracts is desirable, American courts are not bound to follow House of Lords' decisions automatically. The practice is no more than to accord respect to established doctrines of English maritime law. P. 59.

   (d) This Court cannot be sure what conclusion the House of Lords would reach were this case presented to it. Pp. 59–60.

2. Since this Court was asked only to determine whether as a matter of law the provision insuring against "all consequences of . . . warlike operations" covered the loss resulting from the collision here involved, and certiorari was not granted to consider the divergence between the two courts below in their findings of fact, this Court does not review their findings of fact. Pp. 57, 59.

178 F. 2d 488, affirmed.

In an admiralty proceeding arising out of a collision between petitioner's ship and a Navy mine sweeper, the District Court found that the loss was covered by a government policy of war risk insurance. 81 F. Supp. 183. The

Court of Appeals reversed. 178 F. 2d 488. This Court granted certiorari. 339 U. S. 977. *Affirmed,* p. 61.

Edwin S. Murphy argued the cause for petitioner. With him on the brief was *Ira A. Campbell.*

Samuel D. Slade argued the cause for the United States. With him on the brief were *Solicitor General Perlman* and *Assistant Attorney General Morison.*

MR. JUSTICE BLACK delivered the opinion of the Court.

These are admiralty proceedings involving the Government's liability on a policy of war risk insurance by which it insured petitioner's steam tanker *John Worthington* against "all consequences of hostilities or warlike operations."[1] Stipulated facts show that on December 16, 1942, there was a collision between the *Worthington* and the *YMS–12,* one of three United States Navy mine sweepers clearing the channel approaches to New York harbor.[2] Both vessels were at fault in failing "to comply

[1] The quoted language comes from the "F. C. & S. Clause" ("Free from Capture and Seizure") and is incorporated by reference in the war risk policy. War risk insurance is written in the following manner: the marine policy, which covers common perils of the sea, generally contains an "F. C. & S. Clause" eliminating from coverage certain named war risks, one of which is "all consequences of hostilities or warlike operations." The excepted risks are insured against either by adding a rider to the original marine policy, or by buying coverage from another underwriter—here the Government—who insures the perils excluded by the "F. C. & S. Clause." The opinions below set out more fully the documents on which the present insurance obligation rested. For a history of the development of the "F. C. & S. Clause" which originated in England, see 18 Halsbury's Laws of England (2d ed. 1935) § 439; *Ionides* v. *Universal Marine Ins. Co.,* 14 C. B. (N. S.) 259, 273 (1863).

[2] Counsel described the operation this way: "A mine sweeping operation . . . is a formation of vessels, each of which streams out behind it a device on a long cable which, towed along a certain distance under the water, is designed to cut the cable of any mine and bring it to the surface, where it can be destroyed by gunfire and the like."

with the applicable rules" of good seamanship "under the circumstances."

In the District Court the United States conceded that mine sweeping is a "warlike operation" but urged that the evidence failed to show that the collision was a "consequence" of the mine sweeping within the meaning of the insurance contract. Petitioner contended that the mere showing of loss from collision with the moving warship established liability under the policy as a matter of law. It argued that this was the English rule which should be followed by American courts. The District Court did not accept petitioner's view of the English rule. It read both the American and English authorities as conditioning the underwriter's liability on proof of facts showing that the "warlike operation" was the "proximate," "predominant and determining" cause of the loss. The court held for petitioner, finding as a fact that this burden of proof had been met. 81 F. Supp. 183. The Court of Appeals reversed. 178 F. 2d 488. It recognized that some language in certain English opinions possibly indicated that the facts relied on would make the war underwriter liable as a matter of law. Nevertheless, it refused to go that far and, contrary to the District Court, found as a fact that petitioner's evidence failed to show that the warlike phase of the mine sweeper's operation had caused the collision.[3] Petitioner sought certiorari here without

[3] We do not read the Court of Appeals decision as meaning that when negligence is present, the resulting loss can never be a war risk. The District Court held (and the Court of Appeals approved) that "'"Proximate" here means, not latest in time, but predominant in efficiency.' '[T]here is necessarily involved a process of selection from among the co-operating causes to find what is the proximate cause in the particular case.' It is true that the causes of an event are all the preceding circumstances which brought the event to pass—and they are myriad." 81 F. Supp. 190. If the "warlike operation" was the "proximate cause" of the collision, then the fact

relying on the divergence below in the findings of fact on the question of causation. Its ground was that the Court of Appeals had failed to hold for petitioner as a matter of law as the English cases allegedly required. We granted the writ, 339 U. S. 977, because of asserted conflict on this one point with *General Ins. Co.* v. *Link*, 173 F. 2d 955.

We are asked only to determine whether as a matter of law the provision insuring against "all consequences of . . . warlike operations" covered the loss resulting from collision between the *Worthington* and the mine sweeper. Of course, the intention of the contracting parties would control this decision, but as is so often the case, that intention is not readily ascertainable. Losses from collisions are prima facie perils of the sea covered by standard marine risk policies.[4] To take such a loss out of the marine policy and to bring it within the coverage of the provision insuring against "all consequences of" warlike operations, common sense dictates that there must be some causal relationship between the warlike operation and the collision. Courts have long so held in interpreting what was meant by use of the phrase "all consequences" in war risk policies.[5] In turn, the existence or non-existence of causal connection between the peril insured against and the loss has been determined by looking to the factual situation in each case and applying the

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that the "warlike operation" was negligently conducted does not relieve the war risk underwriter of liability. Cf. *General Mut. Ins. Co.* v. *Sherwood*, 14 How. 351; 1 Phillips on Insurance (5th ed. 1867) ¶ 1049.

[4] Cases collected, 1912 D Ann. Cases 1038, 1040; 2 Arnould, Marine Insurance and Average (13th ed., Lord Chorley, 1950), § 827a.

[5] *Ionides* v. *Universal Marine Ins. Co.*, 14 C. B. (N. S.) 259 (1863); see *Queen Ins. Co.* v. *Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487, 491. 2 Arnould, Marine Insurance and Average (13th ed., Lord Chorley, 1950), § 790.

concept of "proximate cause." [6] Proximate cause in the insurance field has been variously defined. It has been said that proximate cause referred to the "cause nearest to the loss." [7] Again, courts have properly stated that proximate cause "does not necessarily refer to the cause nearest in point of time to the loss. But the true meaning of that maxim is, that it refers to that cause which is most nearly and essentially connected with the loss as its efficient cause." [8]

In view of the foregoing, can it be said that the Court of Appeals erred in failing to hold as a matter of law that the mine sweeping, a warlike operation, was the "predominant and determining" cause of the collision? As we read the record, the facts are susceptible both of the inference that the mine-sweeping activity of the *YMS–12* had some relation to the collision and that it did not. That is to say, reasonable triers of fact considering all of the circumstances of this collision might differ as to whether the loss was predominantly or proximately caused by usual navigational hazards (and therefore an ordinary marine insurance risk) or whether it was caused by extraordinary perils stemming from the mine sweeping (and therefore a war insurance risk).[9] Indeed, the District Court and the Court of Appeals did differ on this factual determination.

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[6] *Insurance Co.* v. *Boon*, 95 U. S. 117; 3 Kent's Commentaries (14th ed., Gould, 1896) 302; cases are collected in 6 Couch, Cyclopedia of Insurance Law, § 1463.

[7] *Queen Ins. Co.* v. *Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487, 492. Cf. *Insurance Co.* v. *Transportation Co.*, 12 Wall. 194, 197–199.

[8] *Dole* v. *New England Mut. Ins. Co.*, 7 Fed. Cas. 837, 853 (C. C. Mass. 1864) decided by Mr. Justice Clifford on circuit. Accord: *Insurance Co.* v. *Boon*, 95 U. S. 117; *Lanasa Fruit S. S. & Importing Co.* v. *Universal Ins. Co.*, 302 U. S. 556, 561–565; 3 Kent's Commentaries (14th ed., Gould, 1896) 302, n. 1; 1 Phillips on Insurance (5th ed. 1867) ¶ 1132.

[9] Ordinary marine insurance covers losses due to fortuitous perils of the sea. War risk insurance covers losses due to perils superimposed on usual marine perils by war. As Lord Wrenbury put it,

Since certiorari was not granted to consider that divergence in the findings of fact, we need go no further than to hold that the courts below properly considered the case as depending on the resolution of factual questions.

Petitioner nevertheless contends that (1) we are bound by certain decisions in the House of Lords and (2) these opinions have announced a rule-of-thumb construction of the phrase "all consequences of . . . warlike operations" under which the facts in this case result in war risk liability as a matter of law. We cannot accept these arguments. It is true that we and other American courts have emphasized the desirability of uniformity in decisions here and in England in interpretation and enforcement of marine insurance contracts.[10] Especially is uniformity desirable where, as here, the particular form of words employed originated in England. But this does not mean that American courts must follow House of Lords' decisions automatically. Actually our practice is no more than to accord respect to established doctrines of English maritime law.[11]

The difficulties inherent in the rigid conformity rule urged by petitioner are obvious to those familiar with the search for state decisional law under the *Erie-Tompkins* doctrine. In this very case, we, like the Court of Appeals, cannot be sure what conclusion the House of Lords would

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"The question is whether the loss was occasioned by a new risk arising by reason of warlike operations." *Attorney-General* v. *Ard Coasters, Ltd.*, [1921] 2 A. C. 141, 154.

[10] *Queen Ins. Co.* v. *Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487, 493. See *New York & Oriental S. S. Co.* v. *Automobile Ins. Co.*, 37 F. 2d 461, 463. The desire for uniformity in interpretation of the war risk clause may now be more academic than real. Since 1942, policies issued in England and in the United States have not contained similar provisions in this regard so that uniformity is no longer possible. Compare 1945 Am. Mar. Cas. 1035 with 1945 Am. Mar. Cas. 1036.

[11] *Aetna Ins. Co.* v. *United Fruit Co.*, 304 U. S. 430, 438.

reach were this case presented to it. Some of their decisions indicate that they would have held as a matter of law that the collision was the "consequence" of the warlike operation; [12] other cases cannot easily be reconciled with such a result.[13] Indeed, in one decision, Lord Wright declared that "In many cases reconciliation is impossible. What matters is the decision." [14] And even in those decisions implying that proof of certain facts results in liability as a matter of law, the House of Lords has spoken in terms of factual proximate cause.[15] Their most recent decision construing the words before us states that cases applying the "question of law" technique should be carefully restricted to their holdings; and Lord Normand warned, "The numerous authorities cited can therefore have only a limited bearing on the present issue. . . . [T]hey will easily lead to error if it is attempted to extract from them a principle of law to solve what is a question of fact." [16]

This Court, moreover, has long emphasized that in interpreting insurance contracts reference should be made to considerations of business and insurance practices.[17] The particular English cases relied on by petitioner produced such an unfavorable reaction among that country's underwriters that they revised the clause here involved

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[12] *E. g., Attorney-General* v. *Adelaide S. S. Co.,* [1923] A. C. 292; *Board of Trade* v. *Hain S. S. Co.,* [1929] A. C. 534; cf. *Yorkshire Dale S. S. Co.* v. *Minister of War Transport,* [1942] A. C. 691.

[13] *E. g., Clan Line Steamers, Ltd.* v. *Board of Trade,* [1929] A. C. 514; *Liverpool & London War Risks Assn.* v. *Ocean S. S. Co.,* [1948] A. C. 243.

[14] *Yorkshire Dale S. S. Co.* v. *Minister of War Transport,* [1942] A. C. 691, 708.

[15] See cases cited in note 12, *supra.* England has enacted the proximate cause test into its statutory law. Marine Insurance Act of 1906, 6 Edw. VII, c. 41, § 55 (2).

[16] *Liverpool & London War Risks Assn.* v. *Ocean S. S. Co.,* [1948] A. C. 243, 270.

[17] *General Mut. Ins. Co.* v. *Sherwood,* 14 How. 351, 362.

to avoid the injurious effects of those decisions.[18] The terms of American war risk policies have also been altered.[19]

The proximate cause method of determining on the facts of each case whether a loss was the "consequence" of warlike operations may fall short of achieving perfect results. For those insured and those insuring cannot predict with certainty what a trier of fact might decide is the predominant cause of loss. But neither could they predict with certainty what particular state of facts might cause a court to discover liability "as a matter of law." Long experience with the proximate cause method in American and English courts has at least proven it adaptable and useful in marine and other insurance cases. There is no reason to believe that its application in this case will disappoint the just expectations of insurer or insured.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE JACKSON, dissenting.

Although the parties are the United States and the Standard Oil Company of New Jersey, this is nothing more than an ordinary insurance case. It is before us because of a conflict with the views of the Court of Appeals for the Ninth Circuit in *General Insurance Co. of America* v. *Link,* 173 F. 2d 955. On December 16, 1942, the Standard tanker *Worthington* collided with a United States Navy mine sweeper, the *YMS–12,* engaged in sweeping mines in the channel outside New York harbor. It has been stipulated that the collision "was contributed to both by fault in the navigation of SS John

[18] 2 Arnould, Marine Insurance and Average (13th ed., Lord Chorley, 1950), § 905h.

[19] See note 10, *supra.*

Worthington and fault in the navigation of the United States Ship YMS–12, consisting of failures on the part of both vessels to comply with applicable rules for the prevention of collisions and the requirements of good seamanship under the circumstances." The *Worthington* was undamaged, but under admiralty law Standard was liable for half the damage sustained by the mine sweeper since both ships were at fault. Standard, as a self-insurer of its tanker *Worthington,* had assumed all marine risks except those undertaken by the United States, the charterer of the vessel. The Government's undertaking was to insure against "all consequences of hostilities or warlike operations." [1]

The United States filed a libel against Standard to recover for one-half the damage to the Navy mine sweeper. Standard answered that the United States, as insurer of the tanker, would, in view of the nature of the

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[1] The *Worthington* was under requisition time charter to the United States at the time of collision. Clause 20 of Part II of the charter provided:

"Unless otherwise mutually arranged, at all times during the currency of this Charter the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, under the terms and conditions of the full form of standard hull war risk policy of the War Shipping Administration, ..."

The clause further provided that Standard should assume or insure against all risks "[e]xcept as to risks or liabilities assumed, insured or indemnified against by the Charterer [i. e. the United States] . . . ."

The Government provided insurance against risks arising from hostilities or warlike operations by an involute and somewhat enigmatic set of forms. A binder of insurance issued to Standard by the United States provided: "3. This binder shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration. . . ." Endorsement No. 1 to the binder also provided: "2. This insurance shall be subject to all the rules, regulations, conditions and policy forms as prescribed by the War Shipping Administration in force at the time of issuance of the binder and shall be subject to the terms of the requisition

collision, have to reimburse Standard for any loss it sustained in the suit.[2] The District Court dismissed the libel upon this theory. 81 F. Supp. 183. The Court of Ap-

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charter party relative to this vessel accepted by the assured and any modifications or amendments thereto."

The standard War Shipping Administration policy form referred to in the charter and binder included the following clauses:

"*F. C. & S. Clause. Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from capture, seizure, arrest, restraint, or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion, or insurrection, or civil strife arising therefrom.*

"*If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.*"

An endorsement to the policy form further provided:

"It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty."

[2] In a letter to Standard counsel dated December 14, 1945, the Acting Chief Adjuster, Division of Maritime Insurance, stated that "any claim or suit by the United States of America, as Owners of the ship Y.M.S.–12, in which we might prove to be concerned, would be waived."

See Interdepartmental Waiver promulgated by War Shipping Administration in Legal Bulletin W. S. A. No. 23, Part II, dated January 14, 1943:

"II. *Inter-Departmental Claims*

"Generally stated, it can be said that all types of maritime claims in favor of or against a Government department or agency, such as War Shipping Administration, Army, Navy, Lend-Lease Administration, etc., which claims are in turn for or against another United States Government department or agency, are to be waived and will not be asserted or pressed to final conclusion. . . ."

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peals for the Second Circuit reversed, 178 F. 2d 488, and this Court granted certiorari, 339 U. S. 977, because, as already noted, there was a conflict between the Second and Ninth Circuits.

In granting without limitation the petition for certiorari, we brought here all that by fair implication is contained in the following question: "Is a collision between a war vessel engaged on a warlike operation and a merchant vessel, with fault on the part of both vessels, a consequence of the warlike operation of the war vessel?" I do not think it is permissible to limit the question that was brought here by an assumption that there was no proof of relation between the peculiar risks due to the warlike operation and the loss. The District Court found a connection between the loss and the risks incident to the warlike operation. The Court of Appeals opinion discussed at length the standard upon which such a finding is based. The petitioner's submission here seems clearly to adhere to the ground on which he prevailed in the District Court. It is true that where the standard to be applied to the facts is clear, we ought not to be concerned over a difference of view regarding the facts between the District Court and Court of Appeals. But where the clash of views may involve the meaning of the standard to be applied to the facts, it makes for uncertainty if this Court fails to consider the problem fully. The "proximate cause" standard of insurance liability is, at best, an elusive concept. It acquires more vivid meaning when abstract discussion leads to an application of the principle.

Since the issue is the scope to be given the words "all consequences of hostilities or warlike operations," it is important to place the phrase in its historic setting. Phrases like other organisms must be related to their environment. It furthers clarity explicitly to set to one side a group of cases construing an earlier phrase which arose in a different setting. In several cases the Court of

Claims and this Court had occasion to consider a provision in Civil War charters and later Government charters whereby the Government assumed the "war risk" for the vessels. When first called upon to construe the charter provision "war risk," the Court of Claims specifically noted that it was not dealing with a standard marine insurance clause and construed the words to mean "acts of the public enemy" or "casualties of war." *Bogert* v. *United States,* 2 Ct. Cl. 159, 163. This restrictive definition was reiterated in *Morgan* v. *United States,* 5 Ct. Cl. 182, 189–190, which was affirmed in 14 Wall. 531, and became settled doctrine in the subsequent cases involving the "war risk" charter term.

The clause that is our concern, "all consequences of hostilities or warlike operations," was not derived from the American "war risk" charter term and therefore is not to draw its meaning from the cases construing that term. It is a clause evolved by English maritime insurers. See the opinion of Lord Justice Atkin in *Britain S. S. Co.* v. *The King,* [1919] 2 K. B. 670, 692–693. And the language has often been construed in English courts. See *Yorkshire Dale S. S. Co.* v. *Minister of War Transport,* [1942] A. C. 691, 703, 714, for a discussion of the cases by Lord Wright and Lord Porter. It is only natural that American courts have looked to the English cases for illumination just as courts look to the decisions of another State for aid in determining the meaning of a statute adopted from that State. Provisions in a standard contract form become words of art, and their content is most dependably arrived at by considering the origin of the words and the meaning they have in practice acquired. These are considerations making for appropriate construction and do not imply subservience to English decisions.

Two problems arise in construing the clause: (1) What constitutes "hostilities or warlike operations?" (2) What is the sweep of the words "all consequences?" The first

question, which has presented great difficulties in cases involving convoys and blacked-out vessels, has been removed from the case by a stipulation that the mine sweeper was engaged in sweeping mines—beyond dispute a warlike operation. A warlike operation does not lose its warlike character because it is carried out negligently.

The only question before the Court is whether the collision was a "consequence" of the warlike operation, or, in the jargon of insurance cases, whether the warlike operation was the "proximate cause" of the collision. "Proximate cause," as a requirement of liability under an insurance policy, is not a technical legal conception but a convenient tag for the law's response to good sense. It is shorthand for saying that there must be such a nexus between the policy term under which insurance money is claimed and the events giving rise to the loss that it can be fairly declared that the loss was within the risk assumed. The case is one of "common-sense accommodation of judgment to kaleidoscopic situations." *Gully* v. *First National Bank,* 299 U. S. 109, 117.

Unlike obligations flowing from duties imposed upon people willy-nilly, an insurance policy is a voluntary undertaking by which obligations are voluntarily assumed. Therefore the subtleties and sophistries of tort liability for negligence are not to be applied in construing the covenants of a policy. It is one thing for the law to impose liability by its own notions of responsibility, and quite another to construe the scope of engagements bought and paid for. The law of marine insurance is concerned with and reflects the practicalities of commercial dealings. The law does not play an unreal metaphysical game of trying to find a single isolatable factor as the sole responsibility to which is to be attributed a loss against which insurance has been bought. As a matter of experience and reason such losses are invariably the resultant of a combination of factors. The scope of the undertaking

to cover for such losses is partly the law's confirmation of the settled understanding of those whose business is shipping—their understanding of what contingencies the undertaking covered. It is partly the law's endeavor, in view of the inevitable treacheries of language, to shield the insurer from liability for a loss on the basis of a factor too remote, and therefore too tenuous, in the combination of elements that converged toward the loss.

Looking to the facts of this case and the terms of the contract, does the failure of both vessels "to comply with applicable rules for the prevention of collisions and the requirements of good seamanship under the circumstances" relieve of responsibility the insurer against all consequences of hostilities and warlike operations? In other words, does contributory negligence in relation to a warlike operation displace the warlike operation as an effective force in bringing about a loss?

The collision occurred between 5 and 6 a. m. on December 16, 1942, in the swept channel in the approaches to New York harbor. The *YMS–12* was proceeding seaward with her mine-sweeping gear streamed. She was the starboard vessel in a formation of three mine sweepers engaged in sweeping the buoyed channel. In the words of the District Judge, who questioned counsel closely on the way in which mine sweeping was carried on:

> "Here, concededly, negligence in navigation existed on the part of both masters, but that negligence did not break the chain of causation so as to prevent the loss from being attributable to the warlike operation. The YMS–12 and the two accompanying vessels, in mine sweeping formation, proceeding with mine sweeping gear streamed and trailing paravanes, presented an unusual and unexpected obstacle to navigation. YMS–105 was the guide ship of the formation, the YMS–12 was stationed several hundred yards on the starboard beam of the YMS–105 and

the third vessel in the formation, the AMC–95, was echelon to the right of the guide ship, in a position approximately a half mile astern and midway between the YMS–105 and the YMS–12. From the time of the encounter until actual collision the vessels continued in their mine sweeping operations with their paravanes trailing; in all her manoeuvres and in her navigation the YMS–12 was necessarily restricted and impeded. This unusual formation, of which the YMS–12 was a part, closed to the S. S. John Worthington lanes of navigation affording possible escape which would ordinarily have been open to her.

"The negligence found to exist was negligence 'under the circumstances' of the special and extraordinary conditions existing—conditions created by the warlike operation of mine sweeping." 81 F. Supp. 183, 191.

Whether the Court of Appeals reached its decision by application of an erroneous rule of law, by the erroneous application of the proper rule of law, or by an erroneous construction of the stipulation of fact made by the parties is not clear. In any case, it should be reversed. If the matter is viewed simply—according to the fair judgment of men of commerce and clear of beclouding abstractions—one can hardly escape the conclusion of the District Court. The fact that the English courts have reached the same conclusion in similar cases does not weaken its force. See *Board of Trade* v. *Hain S. S. Co.*, [1929] A. C. 534; *Attorney-General* v. *Adelaide S. S. Co.*, [1923] A. C. 292.

The Government makes a second contention: that its war-risk undertaking did not extend to collision liability. Since the only loss to Standard was a liability for damage to the other ship, this argument would relieve the Government of its liability as insurer. The contention finds support in *Adelaide S. S. Co.* v. *Attorney-General* (*The Second Warilda*), [1926] A. C. 172. But subsequent

changes in the wording of the policy make it perfectly plain that the United States insured against collision liability.[3]

[3] The corresponding insurance provisions in the *Second Warilda* and the present case are set forth below:

Warilda	*Worthington*
[1926] A. C. at 177–178	"WAR RISK CLAUSES
"19. The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause:	"It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty. . . .
	"F. C. & S. Clause
" 'Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war.' "	*"Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from capture, seizure, arrest, restraint, or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations. . . .*
	"If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."

MR. JUSTICE DOUGLAS, dissenting.

We have here a question not of tort liability but of the determination of insurance coverage. The accidents which had been held to be covered by this insurance clause prior to 1942, when this contract was made, would therefore seem to be the reliable standards for interpretation. *Board of Trade* v. *Hain S. S. Co.*, [1929] A. C. 534, and *Attorney-General* v. *Adelaide S. S. Co.*, [1923] A. C. 292, dealt with this precise situation and held that where a ship engaged in a warlike operation collided with another vessel partly or wholly due to faulty navigation on its part the war insurer was liable. Adherence to British precedents in this field was early admonished. *Queen Ins. Co.* v. *Globe Ins. Co.*, 263 U. S. 487, 493. The rule of the foregoing English cases is for me the most authentic standard for interpreting the present contract. See *General Ins. Co.* v. *Link*, 173 F. 2d 955. And none of the cases cited as casting doubt on their holdings presents a contrary result on a similar set of facts.

LIBBY, McNEILL & LIBBY *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 37. Argued October 13, 1950.—Decided November 27, 1950.

A government war risk insurance policy insuring a ship against "all consequences of hostilities or warlike operations" did not cover a loss resulting from the stranding of the insured ship (because of a mistake in steering) while it was engaged in transporting military supplies and personnel between war bases, when there was in fact no causal connection between the "warlike operation" and the stranding. *Standard Oil Co.* v. *United States, ante,* p. 54. Pp. 71–72.

115 Ct. Cl. 290, 87 F. Supp. 866, affirmed.

In a suit by petitioner on a government policy of war risk insurance, the Court of Claims gave judgment for the United States. 115 Ct. Cl. 290, 87 F. Supp. 866. This Court granted certiorari. 339 U. S. 977. *Affirmed,* p. 72.

Stanley B. Long argued the cause for petitioner. With him on the brief was *Edward G. Dobrin.*

Samuel D. Slade argued the cause for the United States. With him on the brief were *Solicitor General Perlman* and *Assistant Attorney General Morison.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This is a companion case to *Standard Oil Company of New Jersey* v. *United States,* 340 U. S. 54, decided this day. Here, as there, the Government insured petitioner's ship against war risks including "all consequences of hostilities or warlike operations." The ordinary marine risks were covered by a Lloyd's policy. The vessel, United States Army Transport *David W. Branch,* stranded on January 13, 1942, when an inexperienced helmsman made a mistake in steering. The Government admits that the

Branch was engaged in the warlike operation of transporting military supplies and personnel between war bases, but denies that the warlike phases of the operation caused the stranding. The Court of Claims found as a fact that there was no causal connection between the "warlike operation" and the stranding, and accordingly gave judgment for the United States. 115 Ct. Cl. 290, 87 F. Supp. 866. Petitioner's contentions for reversal here are substantially the same as those advanced in *Standard Oil Company of New Jersey* v. *United States, supra.* The reasons given for our holding there require affirmance in this case.

Affirmed.

MR. JUSTICE DOUGLAS dissents for the reasons set forth in his dissent in *Standard Oil Company of New Jersey* v. *United States,* 340 U. S. 54, 70, decided this day.

MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE JACKSON, dissenting.

This is another marine insurance case raising the same legal issue as *Standard Oil Co.* v. *United States, ante,* p. 54, and is to be decided in light of it. The facts of the case must be considered, for the question whether the loss was a "consequence" of hostilities and warlike activities cannot be answered in the abstract.

The *Branch,* a combination passenger and cargo vessel having a gross tonnage of 5,544 tons, was chartered to the United States by her owners on September 15, 1941. The owners insured against marine risks, and the Government insured against "all consequences of hostilities or warlike operations." On January 11, 1942, the *Branch* departed from Seattle for certain Alaskan ports. She was operated by the Army and was loaded with materials and personnel destined for war bases in Alaska. The

sailing orders issued by the Army Transport Service directed the *Branch* to follow the inside passage to Alaska because there was danger of submarine attack if the outside route across open seas were followed. On the night of January 13, the *Branch,* running on a course 350 yards off Hanmer Island, diverged from the course and headed toward the island. The helmsman, who was found to be incompetent, turned in an opposite direction from that ordered by the pilot when the divergence was noticed, and the vessel ran aground on a partially submerged reef.

Here, as in the *Standard Oil* case, it is clear that the vessel was engaged in a warlike operation, and the Court of Claims so concluded. The only question is whether in the circumstances the running aground is fairly to be considered a "consequence" of the warlike activity. The court below concluded that it could not look beyond the fault of the helmsman although it found specially a number of facts indicating that the collision grew out of the warlike activity of the vessel.

(1) The court found that the "deperming process to which the vessel was subjected created an unstable and variable magnetic condition in the vessel which in turn created an unstable, variable, and unreliable condition of her magnetic compasses when reinstalled. . . . In normal circumstances a vessel such as the Branch would not put to sea with the compasses in that condition. . . . [B]ut because of the urgent military necessity for the transportation of the personnel and materials on board the vessel to the war bases in Alaska, the voyage was undertaken notwithstanding the known unreliable condition of the compasses." 115 Ct. Cl. 290, 301, 87 F. Supp. 866, 871. The court further found that the helmsman was steering "by the compass under directions from the pilot" prior to the stranding, and that the "instability of the steering compass as a result of the deperming operation may have been a contributing factor to the ship's

deviation from her course." 115 Ct. Cl. at 304, 305, 87 F. Supp. at 873, 874.

(2) The court found that the master "received instructions from the office of the Navy Routing Officer to proceed at her maximum full ahead speed, which was in excess of her normal and usual peacetime speed, and was so operating at the time of her stranding." 115 Ct. Cl. at 303, 87 F. Supp. at 872.

(3) The court found that the inside passage through which the *Branch* was ordered to proceed in order to avoid submarines, "is narrow and tortuous, contains submerged rocks, reefs, and shoals, and swift, strong, and unpredictable currents." 115 Ct. Cl. at 295, 87 F. Supp. at 868. It found that the inside passage "is navigationally dangerous, particularly in the wintertime when weather conditions interfere with the observation of landmarks, lights, and other visual aids, and it has been the scene of numerous vessel strandings and marine casualties." 115 Ct. Cl. at 296, 87 F. Supp. at 868.

(4) The court found: "Because of manpower shortage due to the war it was difficult to procure experienced and competent helmsmen, and for that reason the helmsmen on board were incompetent and inexperienced and there was a standing order for the mate on watch to stand alongside the helmsman to watch his steering." 115 Ct. Cl. at 305, 87 F. Supp. at 873.

In its opinion the court below concluded that the speed of the ship had nothing to do with the stranding. It also considered that sailing the inside passage, the incompetent helmsman, and the wandering compass were consequences of war, rather than the warlike operation of the ship, since civilian vessels would have been subject to the same conditions. But this misses the point, for the court itself found that the vessel put to sea with unreliable compasses only "because of the urgent military necessity for the transportation of the personnel and materials on

board the vessel to the war bases in Alaska." 115 Ct. Cl. at 301, 87 F. Supp. at 871. There is nothing to suggest that any civilian vessel would voluntarily embark on such a voyage through a tortuous passage, at high speed, with unreliable compasses and incompetent personnel. Where the contributing forces of an occurrence are in such large part patently referable to the warlike operation of the vessel, the insurer against all consequences of hostilities and warlike operations should not be relieved of liability because, under such circumstances, the helmsman was incompetent and failed to follow the orders of the pilot.

UNITED STATES *v.* UNITED STATES GYPSUM CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 30. Argued October 19, 1950.—Decided November 27, 1950.

1. On the remand ordered by this Court in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, of this suit to enjoin violations of the Sherman Act, the District Court entered a summary judgment for the United States. The District Court found that the defendants had acted in concert to restrain trade and fix prices in the gypsum board industry in the eastern territory of the United States, and had monopolized that industry, in violation of §§ 1 and 2 of the Sherman Act. *Held:*

(a) The previous decision of this Court, 333 U. S. 364, justified a summary judgment for the United States on the issue of the violation of the Sherman Act, when the record was considered in the light of this Court's opinion and defendants' offer of proof on the remand. P. 82.

(b) To establish a violation of the Sherman Act, it was sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices. It was not necessary then or now to decide whether a mere plurality of licenses, each containing a price-fixing provision, violates the Sherman Act. Pp. 84–85.

(c) On the remand, the defendants were entitled to introduce any evidence from which all or any of them might be found not to have violated the Sherman Act, and they had a right to lay before the court facts that were pertinent to the court's decision on the terms of the decree; but the trial court was not required to admit evidence that would not affect the outcome of the proceedings. P. 85.

(d) A summary judgment, under Rule 56 of the Federal Rules of Civil Procedure, was permissible on the remand. P. 86.

(e) Upon the evidence introduced by the Government and that proffered by the defendants, a finding that defendants had not violated the Sherman Act would have been clearly erroneous, in view of the concert of action to fix industry prices by the terms of the patent licenses. Pp. 86–87.

(f) The District Court's preliminary statement and summary decree are construed as an adjudication of violation of the Sherman Act by the action in concert of the defendants through the fixed-price licenses, accepting as true the underlying facts in the defendants' proffer of proof; and that conclusion entitled the Government only to relief based on that finding and the proffered facts. Pp. 87–88.

2. Upon a finding of conspiracy in restraint of trade and a monopoly in a civil proceeding under the Sherman Act, the trial court has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance. P. 88.
3. The relief which the trial court may afford from violations of the Sherman Act is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal; even acts which may be entirely proper when viewed alone may be prohibited. Pp. 88–89.
4. Participants in a conspiracy in violation of the Sherman Act should, so far as practicable, be denied future benefits from their forbidden conduct. P. 89.
5. While the determination of the scope of a decree in a Sherman Act case is peculiarly the responsibility of the trial court, this Court may intervene when there are inappropriate provisions in the decree. P. 89.
6. In resolving doubts as to the desirability of including in an anti-trust decree provisions designed to restore future freedom of trade, the courts should give weight to the fact of conviction as well as to the circumstances under which the illegal acts occur. Acts in disregard of law call for repression by sterner measures than where the conduct could reasonably have been thought permissible. Pp. 89–90.
7. Upon consideration of the Government's proposed amendments to the decree of the District Court in this case, *held:*

(a) The decree's definition of gypsum board is too restrictive, and the words "and embodying any of the inventions or improvements set forth and claimed in any of the Patents" should be stricken, if the definition is used. P. 90.

(b) Although the complaint of Sherman Act violation was restricted to the eastern territory of the United States and the evidence applied only to that area, the close similarity between interstate commerce violations of the Sherman Act in eastern territory

and western territory justifies the enlargement of the geographical scope of the decree to include all interstate commerce. P. 90.

(c) The decree should be extended to include all gypsum products instead of patented gypsum board alone. Pp. 90–91.

(d) The decree should forbid standardization of trade practices through concerted agreement. P. 91.

(e) The decree should forbid concerted use of delivered price systems; but, in order to avoid any possibility that an individual's meeting of competitors' prices may be construed as a contempt of the decree, the proposed provision relative to delivered price systems should read as follows: "5. Agreeing upon any plan of selling or quoting gypsum products at prices calculated or determined pursuant to a delivered price plan which results in identical prices or price quotations at given points of sales or quotation by defendants using such plan;". Pp. 91–92.

(f) In this case there should be no requirement of reciprocal grants under patents; but the United States Gypsum Company should be required to license all its patents in the gypsum products field to all applicants on equal terms. Pp. 93–94.

(g) Whether the term for compulsory licensing of new patents should be five years, or a longer period with a privilege to the appellees to move for a limitation, is in the discretion of the District Court, which should provide for its determination of a reasonable royalty either in each instance of failure to agree or by an approved form or by any other plan in its discretion. P. 94.

(h) The decree should not place upon the United States Gypsum Company the burden of establishing the reasonableness of the requested royalty; and this Court does not now decide where the burden of proof of value lies or who has the duty to go forward with the evidence in any particular instance. P. 94.

(i) The Government's proposed provision that the decree shall not be taken as preventing an "applicant" (here construed as meaning licensee) attacking the patent or as importing value to it should be omitted, leaving the parties to existing rules of law. P. 94.

(j) The Government's suggested provisions for inspection of licensees' books and reports to licensor are approved. P. 95.

(k) There should be included in the decree a provision granting the Government access to the records and personnel of the defendants for the purpose of advising the Government with respect to defendants' compliance with the judgment. P. 95.

(l) The provisions of Article V of the decree are adequate to bar the individual defendants, who signed the questioned agreements in their capacities as officials of the companies, from engaging in similar conspiracies. P. 95.

(m) This Court sees no reason to interfere with the discretion of the District Court in assessing the defendant companies 50%, rather than 100%, of the costs to be taxed in the proceeding. P. 95.

Reversed and remanded.

From a decree of a three-judge District Court enjoining violations of the Sherman Act, the United States appealed directly to this Court. Article III of the decree, finding that the defendants had violated the Sherman Act, was affirmed by this Court. 339 U. S. 960. The issues left for determination were those raised by the United States upon objections to provisions of the decree. *Reversed and remanded,* p. 95.

Charles H. Weston argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Bergson, Edward Knuff* and *Robert L. Stern.*

Bruce Bromley argued the cause for the United States Gypsum Co. et al., appellees. With him on the brief were *Cranston Spray, Albert R. Connelly* and *Hugh Lynch, Jr.*

Norman A. Miller argued the cause for Certain-Teed Products Corporation, appellee. With him on the brief were *Donald N. Clausen, Herbert W. Hirsh* and *Charlton Ogburn.*

Andrew J. Dallstream, Walter G. Moyle, Ralph P. Wanlass and *Albert E. Hallett* submitted on brief for the Celotex Corporation, appellee.

Elmer E. Finck for the National Gypsum Co., *Joseph S. Rippey* for the Ebsary Gypsum Co., Inc. and *David I. Johnston* for Gloyd, appellees, also submitted on brief.

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MR. JUSTICE REED delivered the opinion of the Court.

This proceeding was filed in 1940 in the District Court of the United States for the District of Columbia by the United States under the authority of the Attorney General. 15 U. S. C. § 4. The complaint charged, ¶ 44, a long-continued conspiracy by defendants in restraint of trade in gypsum products among the several states and in the District of Columbia, and a similar monopoly, all in violation of §§ 1, 2 and 3 of the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2, 3. The defendants, appellees here, were United States Gypsum Co., patentee, and various other gypsum board manufacturers, its licensees, and certain of their officers. It was alleged that the combination carried out its unlawful purposes as indicated in the excerpt from the complaint quoted below.[1] Civil relief, through prohibitory and mandatory orders, was prayed in various appropriate forms. After the United States concluded its evidence in chief at the trial, a three-judge District Court, 15 U. S. C. § 28, granted appellees' motion to dismiss under Rule 41 (b) of the Federal Rules of Civil Pro-

[1] "45. Said combination has been formed, has been carried out, and is being carried out by each of the defendant companies (acting, in part, through those of their officers and directors made defendants herein) and by other companies hereinafter referred to engaged in the manufacture of said gypsum products. Said companies have entered into, have carried out, and are carrying out said combination for the purpose, and with the effect, of restraining, dominating, and controlling the manufacture and distribution of said gypsum products in the Eastern area by:

"(a) Concertedly raising and fixing at arbitrary and noncompetitive levels the prices of gypsum board manufactured and sold by said companies in the Eastern area;

"(b) concertedly standardizing gypsum board and its method of production by limiting the manufacture of board to uniform methods, and by producing only uniform kinds of board, for the purpose, and with the effect, of eliminating competition arising from variations

cedure on the ground that no right to relief had been shown. On direct appeal, 15 U. S. C. § 29, we reversed the judgment of dismissal, March 8, 1948, *United States* v. *United States Gypsum Co.*, 333 U. S. 364, and remanded the case to the District Court for further proceedings in conformity with our opinion.

On remand a conference took place at the Government's suggestion. The Court acted under procedure similar to pretrial, Rule 16, and its inherent power to direct a case so as to aid in its disposition. As a result of that conference, without objection from any party, the Government filed a motion for a summary judgment under Rule 56 on the ground that there was no genuine issue as to any material fact, and the appellees filed an offer of proof, directed at matters as to which appellees were of the opinion a genuine issue existed. A summary judgment, without other findings than those contained in the decree, was entered November 7, 1949, on appellant's motion.[2] Both

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in methods of production and in kinds of board manufactured and distributed in the Eastern area;

"(c) concertedly raising, maintaining, and stabilizing the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by said companies in the Eastern area:

"(d) concertedly refraining from distributing gypsum board, plaster, and miscellaneous gypsum products manufactured by said companies through jobbers in the Eastern area, and concertedly refusing to sell said products to jobbers at prices below said companies' prices to dealers, for the purpose, and with the effect, of eliminating substantially all jobbers from the distribution of said gypsum products in the Eastern area;

"(e) concertedly inducing and coercing manufacturing distributors to resell, at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from said companies."

[2] The pertinent portions of the decree as entered below are set out in an appendix to this opinion (*post*, p. 96) in parallel columns with portions of the decree proposed by the Government in its brief here. This proposal is more limited than the Government's proposed decree offered in the District Court.

plaintiff and defendants took direct appeals from the decree to this Court. 15 U. S. C. § 29. Defendants' appeal objected to summary judgment on the ground of their right to introduce material evidence. That appeal was dismissed by this Court. 339 U. S. 959. The reasons for our action lay in the fact that our holding in our first opinion, 333 U. S. 364, justified a summary judgment for plaintiff on the issue of the violation of the Sherman Act when the record was considered in the light of our opinion and defendants' offer of proof on the remand. This point is discussed later in this opinion under subdivision I.

Probable jurisdiction was noted on the appeal of the United States. This is the case we are now discussing. For the same reasons that we dismissed defendants' appeal, this Court affirmed Article III of the District Court decree. Our order also carried the sanction of an injunction against violation of the decree, "pending further order of this Court." 339 U. S. 960.

The issues left for determination in this appeal are those raised by the United States in its effort to have the provisions of the District Court decree enlarged. It seeks to extend the injunctions against violations of the Sherman Act to cover gypsum products instead of being limited to gypsum board as defined in the decree; and to include interstate commerce generally instead of limiting the territorial scope of the decree to the eastern portion of the United States. It also seeks changes that forbid specific practices, in addition to price fixing, such as standardizing products, classifying customers, or adopting delivered price systems, all pursuant to the principal conspiracy. It seeks to compel licensing of all patents by United States Gypsum; to empower the Department of Justice to inspect certain records; to extend the decree's terms to cover individual defendants; and to require the defendants to pay all costs.

I.

Procedure on remand.—In determining the present issues, it is necessary to consider the trial court's solution of the procedural problems presented by our remand. Our decree was a reversal of the trial court's dismissal of the complaint on the merits at the completion of plaintiff's, the United States', presentation of its evidence. In our opinion, 333 U. S. 364, 389, we said that

> "the industry-wide license agreements, entered into with knowledge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins, were sufficient to establish a *prima facie* case of conspiracy."

We said that the intention of United States Gypsum and its licensees to act in concert to attain the purpose of the conspiracy, restraint of trade and monopoly, was apparent from the face of the license agreements. Pp. 389, 400.

> "The licensor was to fix minimum prices binding both on itself and its licensees; the royalty was to be measured by a percentage of the value of all gypsum products, patented or unpatented; the license could not be transferred without the licensor's consent; the licensee opened its books of accounts to the licensor; the licensee was protected against competition with more favorable licenses and there was a cancellation clause for failure to live up to the arrangements."

We stressed the acting in concert as differentiating the case from *United States* v. *General Electric Co.*, 272 U. S. 476, discussed on pp. 400 and 401 of 333 U. S., the concert of action being established by the favored licensee clause of the standard license agreement. 333 U. S. at 410.[3]

[3] Exhibit A and paragraph 4 referred to on p. 410 contain the licenses involved in this litigation.

In *United States* v. *Line Material Co.*, 333 U. S. 287, decided the same day as the *Gypsum* case, the opinion of the Court discussed the then standing of the *General Electric* rule as follows:

> "We are thus called upon to make an adjustment between the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act. That adjustment has already reached the point, as the precedents now stand, that a patentee may validly license a competitor to make and vend with a price limitation under the *General Electric* case and that the grant of patent rights is the limit of freedom from competition . . . ." P. 310.

We added, pp. 311 and 312, that while the *General Electric* rule permitted a patentee to fix the price the licensee of patents may charge for the device, separate patent owners could not combine the patents and thus reach an agreement to fix the price for themselves and their licensees. There was no holding in our first opinion in *Gypsum* that mere multiple licensing violated the Sherman Act.[4] The facts and the language placed our judgment squarely on the basis that

> "it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices." P. 401.[5]

As appears from the preliminary statement of its decree, the trial court acted on that understanding of our holding.

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[4] The dissenters in *Line* joined in the *United States Gypsum* opinion, since the concerted action in the *United States Gypsum* case was thought to violate the Sherman Act, despite their view that the mere multiplication of licenses, as in *Line*, "produces a repetition of the same issue [as in *General Electric*] rather than a different issue." 333 U. S. at 354.

[5] Gypsum's petition for rehearing sought a modification of this position. It argued that "separate but similar lawful agreements

See Appendix, *post,* p. 96. It was not necessary to reach the issue as to whether a mere plurality of licenses, each containing a price-fixing provision, violates the Sherman Act. It is not necessary now.

The reference, 333 U. S. at 389, to the establishment of a prima facie case of conspiracy by conscious industry concert in price fixing was directed at the basis for the admission of the separate declarations of alleged conspirators. Section V, pp. 399–402, of the opinion, however, contains our determination that an industry's concerted price fixing by license violates the Sherman Act *per se. United States* v. *Paramount Pictures,* 334 U. S. 131, 143.

Of course, when we remanded the case to the District Court the defendants had the right to introduce any evidence that they might have as to why all or any one of them should be found not to have violated the Sherman Act. Our reference at 333 U. S. 402, footnote 20, to *Gulbenkian* v. *Gulbenkian,* 147 F. 2d 173, shows that. See *Federal Deposit Ins. Corp.* v. *Mason,* 115 F. 2d 548, 552; *Bowles* v. *Biberman Bros.,* 152 F. 2d 700, 705. Furthermore, even though defendants had no substantial evidence to overcome the prima facie conclusion of Sherman Act violation, they had the right to lay facts before the court that were pertinent to the court's decision on the terms of the decree; for example, the purpose of the concerted action, or the reason for making new patents available to the licensees, or willingness to license all applicants for the patent privilege. Such rights, however, did not require the trial court to admit evidence that would not affect the outcome of the proceedings. They did not affect the power of the trial court to direct the progress of the case in such a way as to avoid a waste of time.

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must still be lawful if the result is lawful and no preliminary agreements or understandings to make them could be unlawful." We denied rehearing. 333 U. S. at 869.

A summary judgment, under Rule 56, was permissible on remand. It was allowed, as the last paragraph of the preliminary statement of the decree shows, on the court's understanding that our opinion "held that the defendants acted in concert to restrain trade and commerce in the gypsum board industry and monopolized said trade and commerce among the several states in that section hereinafter referred to as the eastern territory of the United States . . . ." As heretofore explained, that conclusion followed from our decision, if no evidence that controverted our ruling was offered. It is therefore necessary to examine briefly the offer of evidence.

The offer contained sixty-two paragraphs of proposed evidence. A full exposition is impracticable. Stress was laid on the available evidence to rebut our finding of an industry plan to stabilize prices.[6] Evidence was offered to show the licenses were for settlement of alleged infringements, and individual in character and were not used as a subterfuge to gain price control. Such evidence would not affect our determination, set out above, that price-fixing licenses made in knowing concert by standardized price requirements violated the Sherman Act by their very existence.

Defendants offered to prove that royalties based on unpatented gypsum board were compensation for patent licenses and installment payment for prior infringement damages. Such proof would not affect the fact that such a royalty added to the cost of producing unpatented board.

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[6] *E. g.*, "1. There was no agreement or understanding between the United States Gypsum Company (USG), patentee, and the other defendants or any of them that they would associate themselves in a plan to blanket the industry under patent licenses and stabilize prices or issue or cause to be issued substantially identical licenses to all of the defendants or any number of them."

Proof was offered that covenants against transfer of licenses, for price maintenance and for equality of license terms, and bulletin orders against rebates by selling other products at a cheaper price when patented articles were sold, were to protect the licensor's monopoly under its letters patent. It was offered to prove that the activities of the Board Survey Company, considered in our former opinion, 333 U. S. 364, 400, were to secure compliance with the licenses; that there was no agreement to eliminate jobbers but only a purpose to maintain patent prices by discontinuing the jobber's discount. Such proof, in view of our holding as to the Sherman Act, would not make legal concerted action under patents to stabilize prices. We pass over other offers of proof as clearly immaterial on the issue of liability for Sherman Act violation. Good intentions, proceeding under plans designed solely for the purpose of exploiting patents, are no defense against a charge of violation by admitted concerted action to fix prices for a producer's products, whether or not those products are validly patented devices. We do not think that, accepting the offers of fact as true, there is enough in the proffered evidence to change the actions of the defendants from the illegal to the permissible. A finding that the manufacturers did not violate the Sherman Act under the evidence introduced by the Government and that proffered by the defendants below would be clearly erroneous in view of the concert of action to fix industry prices by the terms of the licenses.[7]

We agree with a statement made by counsel for the Government in argument below that as a "matter of

[7] One of the defendants, Celotex Corporation, made a separate proffer of proof, indicating that it was the purchaser of a license from a licensee, American Gypsum Company. In the transfer, Celotex assumed the licensee's obligations to maintain the licensor's price. As Celotex took no other part in the conspiracy, it contends that the decree should not impose upon it any further restriction than a pro-

formulating the decree" many facts offered to be proven would have effect upon the conclusion of a court as to the decree's terms. However, we read the preliminary statement of the District Court to the decree and the summary decree itself as an adjudication of violation of the Sherman Act by the action in concert of the defendants through the fixed-price licenses, accepting as true the underlying facts in defendants' proof by proffer. The trial judges understood the summary judgment to be, as Judge Stephens said, "limited to that one undisputed question." Judge Garrett and Judge Jackson agreed.[8] That conclusion entitled the Government only to relief based on that finding and the proffered facts. On that basis we dismissed United States Gypsum's appeal from the decree, and on that basis we examine the Government's objection to the decree.

II.

The Government's proposed amendments to the decree.—A trial court upon a finding of a conspiracy in restraint of trade and a monopoly has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance. Such action is not limited to prohibition of the proven means by which the

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hibition against price maintenance. Since Celotex entered into the conspiracy by its purchase of the license with an agreement to operate in accordance with its terms, we think it should be treated in the decree like the other licensees.

[8] At the hearing on proper terms for the decree Judge Garrett said, "Judge Jackson and I thought that, within the limits of the decision of the Supreme Court, that decree should of course be granted and that nothing that was given us in the proffer of proof would change the attitude of the Supreme Court within the scope of those matters upon which it had specifically passed.

"Now, that was the summary judgment."

evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal.[9] Acts entirely proper when viewed alone may be prohibited.[10] The conspirators should, so far as practicable, be denied future benefits from their forbidden conduct.

The determination of the scope of the decree to accomplish its purpose is peculiarly the responsibility of the trial court. Its opportunity to know the record and to appraise the need for prohibitions or affirmative actions normally exceeds that of any reviewing court. This has been repeatedly recognized by us.[11] Notwithstanding our adherence to trial court responsibility in the molding of a decree as the wisest practice and the most productive of good results, we have never treated that power as one of discretion, subject only to reversal for gross abuse. Rather we have felt an obligation to intervene in this most significant phase of the case when we concluded there were inappropriate provisions in the decree.[12] In resolving doubts as to the desirability of including provisions designed to restore future freedom of trade, courts should give weight to the fact of conviction as well as the circumstances under which the illegal acts occur.[13] Acts in disregard of law call for repression by sterner measures than where the steps could reasonably have been thought

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[9] *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 461; *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 409; *International Salt Co.* v. *United States,* 332 U. S. 392, 401.

[10] *United States* v. *Bausch & Lomb Co.,* 321 U. S. 707, 724.

[11] *Associated Press* v. *United States,* 326 U. S. 1, 22; cf. *International Salt Co.* v. *United States,* 332 U. S. 392, 399–401. And see *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 185.

[12] *Standard Oil Co.* v. *United States,* 221 U. S. 1, 78–82; *United States* v. *American Tobacco Co.,* 221 U. S. 106, 184–188; *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 185–187; note especially *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 409–435.

[13] *Local 167, I. B. T.* v. *United States,* 291 U. S. 293, 299; *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 409.

permissible. We turn then to the Government's proposals for modification of the decree on the assumption that only a violation through concerted industry license agreements has been proven, but recognizing, as is conceded by defendants, that relief, to be effective, must go beyond the narrow limits of the proven violation.

(a) There is one change acceptable to the Government and United States Gypsum and which we think desirable. Article II, § 3, of the decree defines gypsum board as "made from gypsum and embodying any of the inventions or improvements set forth and claimed in any of the Patents." This is too restrictive, and the words "and embodying any of the inventions or improvements set forth and claimed in any of the Patents" should be stricken, if the definition is used.

(b) The Government accepts the finding of Article III of the decree but objects to Article V (2) and (3) because, read together, they allow agreements through price fixing by license between United States Gypsum and Pacific Coast licensees. The complaint of Sherman Act violation was restricted to the eastern territory of the United States. The evidence applied only to that area. However, the close similarity between interstate commerce violations of the Sherman Act in eastern territory and western territory seems sufficient to justify the enlargement of the geographical scope of the decree to include all interstate commerce. Article V of the Government's proposed decree indicates one way in which this extension could be accomplished.

(c) The Government asks an extension of the decree to include all gypsum products instead of patented gypsum board alone. Compare Appendix, Article V. The license agreements, as indicated above, required royalties on unpatented open edge gypsum board. Board Survey, the organization created to enforce the license agreements, found possibilities of price evasion to exist by a licensee's

cutting prevailing prices on other commodities, sold in conjunction with patented gypsum board. Bulletins, issued to standardize sale practices, criticized rebates as violative of the license agreements. 333 U. S. 364, 386. Defendants' offer of proof did not deny such effort to systematize sales. Their explanation was that the efforts were to enforce legitimate license agreements and were not calculated steps in conspiracy or monopoly. We think the Government's request that the decree's injunctions reach gypsum products, as defined in its proposed decree, is reasonable and should be allowed. See U. S. proposed decree, Article II, § 4, and Article V.

(d) The Government asks that the decree forbid standardization of trade practices through concerted agreement. Our former *Gypsum* opinion, pp. 382–383, gives a summary of the methods adopted. Another method of regulating sales was by special provision for certain classes of customers, jobbers and manufacturing distributors. See 333 U. S. at 397 and 399, n. 18. We think this would justify the Government's requests. Article V, §§ 3, 4 and 6.

(e) The Government asks the insertion of Article V, § 5, directed at an agreement for concerted action in selling or quoting products at prices calculated according to a delivered price system. It points out that such a system was said by this Court, 333 U. S. at 382, to have been employed, and no proffer of contrary proof has been made.

Defendants argue as follows: The price for the patented product was "the lowest combination of mill price and rail freight from mill to destination." Defendants urge that

> "The only witness at the trial who was interrogated about it said that the pricing system in the gypsum board industry was the very opposite of the basing point system; that the mill base prices were extended to all mills; and that it was really only a freight

> equalization method of pricing which resulted in the customer always getting the lowest possible price no matter from whom he bought."

And they say

> "It was not established by the license bulletins, but licensor, in stating the minimum price, merely used the method of pricing as it then existed."

Further, defendants point out

> "If appellee companies are to be questioned as to their method of pricing, they should be afforded a full hearing for the presentation of all pertinent matters bearing upon their pricing practices and should not be called upon to defend themselves in a summary hearing for an alleged contempt of court."

We think the defendants are unduly apprehensive. The Government's proposed prohibition of delivered price arrangements is directed at concerted action, by agreement or understanding among the manufacturers, not at any system of pricing the individual manufacturer may adopt or any price that he may make.[14] Since the conspiracy for restraint of trade was furthered by this arrangement, use of such a method should be banned for the future. To avoid any possibility that an individual's meeting of competitors' prices would be construed as a contempt of the decree, we think proposed Article V, § 5 should read as follows:

> "5. Agreeing upon any plan of selling or quoting gypsum products at prices calculated or determined pursuant to a delivered price plan which results in identical prices or price quotations at given points of sales or quotation by defendants using such plan;"

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[14] See our discussion in *Federal Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 727–728.

(f) The Government objects to Article VI of the decree which provides, § 1, for compulsory licensing for 90 days to any applicant of all then-owned patents relating to gypsum board at not to exceed the standardized royalties as theretofore charged to defendant licensees. The objection is that the limited time makes the requirement futile except for present licensees. There is a corollary objection to Article VIII because of provisions in the approved license agreements. Particular reference is made by the Government to an approved provision requiring the licensee to report its monthly sales and price with right to Gypsum to have an inspection by a certified public accountant approved by the parties. The Government fears the competitive advantage to Gypsum of knowing its competitors' sales and prices, and the depressive effect of such information on a strenuous sales program by the licensee.

The Government suggests expanding the requirement of licensing to include all United States Gypsum patents, old and new, with a provision by which new patents may be excluded after five years. See proposed decree, Article VI, § 6. Other proposed changes require all licensees to receive equal treatment as to royalties, put the burden of establishing royalty values on United States Gypsum and allow a licensee to attack the validity of patents.

In *United States* v. *National Lead Co.*, 332 U. S. 319, 335–351, we recently dealt with problems of licenses and royalties after a finding of Sherman Act violation. The arrangements on account of which the companies manufacturing titanium pigments in that combination were adjudged violators were as offensive to the prohibitions of the Sherman Act as those proven in the present case. Depending largely upon the discretion of the trial court, we refused to modify the decree. It ordered the accused patent owners to license all patents controlled by them concerning titanium and titanium manufactures during

the succeeding five years at a reasonable royalty to be fixed by the Court. Paragraphs 4 and 7 of that decree, 332 U. S. at 335–337.

The terms of the *National Lead* decree are somewhat like those the Government asks here. In the present case there should be no requirement of reciprocal grants. 332 U. S. 336.

We think that the United States Gypsum Company should be required to license all its patents in the gypsum products field to all applicants on equal terms. Whether the term for compulsory licensing of new patents is to be five years, or for a longer period with the privilege to the appellees to move for a limitation for such new patents, as provided in the suggested decree, Article VI, § 6, we leave to the District Court. That court should provide for its determination of a reasonable royalty either in each instance of failure to agree or by an approved form or by any other plan in its discretion.

We disapprove the Government's suggestion that the burden of establishing the reasonableness of the requested royalty should be placed upon Gypsum by the decree. We do not decide where the burden of proof of value lies or who has the duty to go forward with the evidence in any particular instance.

We disapprove the Government's suggestion, contained in Article VI, § 5, that the decree shall not be taken as preventing an "applicant" (we construe this as meaning licensee) attacking the patent or as importing value to it. We see no occasion for this unusual provision and think it should be entirely omitted.[15]

We direct that Article VI of the decree be so modified as generally to conform to the above suggestions.

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[15] *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173; *Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394; *MacGregor* v. *Westinghouse Electric & Mfg. Co.*, 329 U. S. 402; and cf. *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U. S. 249.

We approve the Government's suggested provisions for inspection of licensees' books and reports to licensor, substantially as set out in proposed Article VI, § 2 (c).

(g) The Government seeks access to the records and personnel of the defendants for the purpose of advising itself as to the defendants' compliance with the judgment. See proposed Article VIII. Construing the article as we did in *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 725, n. 6, we think the request reasonable. This article, or one of similar import, should be included in the decree.

(h) We have noted the Government's contentions in regard to the individual defendants, Avery, Knode, Baker, Ebsary and Tomkins, and its suggestion that Article III be modified so as to read "defendants" in the first line, instead of "defendant companies." It is true that these individuals signed the questioned agreements, but they were acting as officials and we think the provisions of Article V bar them from engaging in similar conspiracies.

(i) The Government asks that all costs be taxed against the defendant companies. Article IX, proposed decree; Article X, decree entered. We see no reason to interfere with the discretion of the trial court in this matter.

"With these general suggestions, the details and form of the injunction can be more satisfactorily determined by the District Court." [16] Its procedure for the settlement of a decree is more flexible than ours. The decree is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice Black believes that all the amendments proposed by the Government to Article VI of the decree

[16] *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 533.

are necessary to protect the public from a continuation of monopolistic practices by United States Gypsum.

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

APPENDIX.

DISTRICT COURT DECREE OF NOVEMBER 7, 1949.

Preliminary Statement

This cause came on for trial before this Court on November 15, 1943. At the conclusion of plaintiff's presentation of the case, defendants moved, pursuant to Rule 41 (b) of the Federal Rules of Civil Procedure, for judgment dismissing the complaint on its merits. The motion of defendants was granted August 6, 1946. The judgment so rendered by this Court was reversed by the Supreme Court of the United States, and the case was remanded to this Court for further proceedings in conformity with the opinion of the Supreme Court (333 U. S. 364).

Following the remand, the plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moved for summary judgment in its favor upon the pleadings and all of the proceedings which theretofore had been had in the case, or, in the alternative, for such further proceedings as this Court might direct, and defendants, by direction of the Court, filed proffers of proof.

Argument by counsel for the respective parties upon the motion of plaintiff was heard by the Court, and after due consideration of such argument and of defendants' proffers of proof, Garrett, J. and Jackson, J., constituting a majority of the Court, announced a ruling to the effect that plaintiff's motion for summary judgment would be granted, and Stephens, J., who presided during the trial, announced his dissent from such ruling.

Thereafter counsel for plaintiff and counsel for certain of the defendants submitted forms of final decrees for the consideration of the Court and also suggested findings of fact, the latter to be considered in the event the Court should deem it necessary to make any findings of fact additional to those originally found by it and to those stated in the opinion of the Supreme Court.

In due course, the Court heard arguments respecting the proposed decrees and the suggested findings of fact, and full consideration has been given thereto and to all prior proceedings—all being considered in the light of the decision of the Supreme Court which, as understood by the majority of this Court, held that the defendants acted in concert to restrain trade and commerce in the gypsum board industry and monopolized said trade and commerce among the several states in that section hereinafter referred to as the eastern territory of the United States, which section embraces all the states of the United States westward from the eastern coast thereof to the Rocky Mountains and including New Mexico, Colorado, Wyoming, and the eastern half of Montana.

Provisions of District Court Decree.	Provisions of United States' Proposed Decree.
[The articles of these decrees have been rearranged to facilitate comparison.]	
Article I	Article I
This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a cause of action against defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sher-	This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a cause of action against defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sher-

man Anti-trust Act, and acts amendatory thereof and supplemental thereto,

Article II

As used in this decree:

1. "Defendant companies" shall mean all of the corporate defendants and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.

2. The "Patents" shall mean United States Letters Patent and applications for United States Letters Patent owned by defendant United States Gypsum Company which are described in the Patent Licenses, as hereinafter defined, and continuations in whole or in part, renewals, reissues, divisions, and extensions thereof.

3. "Gypsum board" shall mean plaster board or lath (including perforated and metallized lath) and wallboard (including metallized wallboard) made from gypsum and embodying any of the inventions or improvements set forth and claimed in any of the Patents.

4. "Patent Licenses" shall mean the patent license agreements which were in effect between defendant United States Gypsum Company and each of the other defendant companies at the time the complaint herein was filed and described in said complaint as follows: [Listed to cover all.]

Article III

The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to

man Antitrust Act, and acts amendatory thereof and supplemental thereto.

Article II

For the purposes of this judgment:

1. "Defendant companies" shall mean all of the corporate defendants and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.

2. "Patents" shall mean United States Letters Patent and applications for United States Letters Patent relating to gypsum board, its processes, methods of manufacture, or use, and continuations in whole or in part, renewals, reissues, divisions, and extensions of any such patent or patent application.

3. "Gypsum board" shall mean plasterboard, lath, wallboard, special surfaced board, sheathing, liner board (including any such product which is perforated or metallized) made from gypsum.

4. "Gypsum products" shall mean gypsum board as defined in the preceding paragraph, and plaster, block, tile and Keene's cement made from gypsum.

5. As used in Article IV, "license agreements" shall mean the patent license agreements which were in effect between defendant United States Gypsum Company and each of the other defendant companies at the time the complaint herein was filed and described in said complaint as follows: [Listed to cover all.]

Article III

The defendants have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, main-

fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of sections 1 and 2 of the Sherman Antitrust Act.

Article IV

Each of the license agreements listed in Article II hereof is adjudged unlawful under the antitrust laws of the United States and illegal, null and void.

Article V

Each of the defendant companies and each of their respective officers, directors, agents, employees, representatives, subsidiaries, and any person acting or claiming to act under, through or for them or any of them are hereby enjoined and restrained from

(1) the further performance or enforcement of any of the provisions of the Patent Licenses, including any price bulletin issued thereunder;

(2) entering into or performing any agreement or understanding among the defendants or any of them for the purpose or with the effect of continuing, reviving or reinstating any monopolistic practice.

(3) entering into or performing any agreement or understanding among the defendants or any of them in restraint of trade and commerce in gypsum board among the several states in the eastern territory of the United States by license agreements to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof.

tain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of Sections 1 and 2 of the Sherman Antitrust Act.

Article IV

Each of the license agreements listed in Article II hereof is adjudged unlawful under the antitrust laws of the United States and illegal, null and void.

Article V

The defendant companies, and their respective officers, directors, agents, employees, representatives, and subsidiaries, be and each of them hereby is enjoined from entering into or performing any agreement or understanding to fix, maintain, stabilize, or make uniform, by patent license agreements or by other concerted action, the prices, or the terms or conditions of sale of, gypsum products sold or offered for sale or resale in or affecting interstate commerce; and from engaging in, pursuant to such an agreement or understanding, any of the following acts or practices:

1. Fixing, maintaining or making uniform the kinds, types, or varieties of gypsum products manufactured or sold, or the methods of manufacturing, selling, packaging, shipping, delivering or distributing gypsum products;

2. Refraining from the manufacture, sale or distribution of any kind, type, or variety of gypsum products or the method of manufacturing, selling, packaging, shipping, delivering or distributing gypsum products;

3. Agreeing upon or adhering to any basis for the selection or classification of purchasers of gypsum products;

4. Refraining from selling gypsum products to any purchaser or any class of purchasers;

5. Agreeing upon or adhering to any system of selling or quoting gypsum products at prices calculated or determined pursuant to a basing point delivered price system or any other plan or system which results in identical prices or price quotations at given points of sale or quotation by defendants using such plan or system;

6. Policing, investigating, checking or inquiring into the prices, quantities, terms or conditions of any offer to sell or sale of gypsum products.

Article VI

1. Defendant United States Gypsum Company is hereby ordered and directed to grant to each applicant therefor within 90 days after the effective date hereof, but only in so far as it has the right to do so, a non-exclusive license to make, use and vend under any, some, or all patents and patent applications now owned or controlled by it relating to gypsum board, provided that such license agreement fixes a royalty not to exceed the royalty of the same article or process fixed in the license agreements set out in Article II hereof.

2. Defendant United States Gypsum Company is hereby enjoined and restrained from making any sale or other disposition of any of said patents or patent applications which would deprive it of the power or authority to grant such licenses, unless in any sale, transfer or assignment it shall be required that the purchaser, transferee or assignee shall observe the provisions of this section.

Article VI

1. Defendant United States Gypsum Company is hereby ordered and directed to grant to each applicant therefor a non-exclusive license to make, use and vend under any, some or all of the patents now or hereafter owned or controlled by it; and is hereby enjoined from making any sale or other disposition of any of said patents which deprives it of the power or authority to grant such licenses, unless it requires, as a condition of such sale, transfer or assignment, that the purchaser, transferee or assignee shall observe the requirements of Articles VI and VIII of this judgment and unless the purchaser, transferee or assignee shall file with this Court, prior to consummation of said transaction, an undertaking to be bound by said articles of this judgment.

Article VIII

The forms of license agreement which the Court has this day ordered filed herein are hereby approved; and the tender by defendant United States Gypsum Company to each applicant for a license agreement containing the terms and conditions set forth in the applicable filed form or forms shall constitute compliance by defendant United States Gypsum Company with the provisions of Article VI.

2. Defendant United States Gypsum Company is hereby enjoined from including any restriction or condition whatsoever in any license or sublicense granted by it pursuant to the provisions of this article except that (a) the license may be nontransferable; (b) a reasonable non-discriminatory royalty may be charged, which royalty may not be imposed upon or measured by patent-free products, processes or uses; (c) reasonable provisions may be made for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee, who shall report to the licensor only the amount of the royalty due and payable; (d) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalty or to permit the inspection of its books and records as hereinabove provided; (e) the license must provide that the licensee may cancel the license at any time after one year from the initial date thereof by giving 30 days' notice in writing to the licensor.

3. Upon receipt of written request for a license under the provisions of this article, defendant United States Gypsum Company shall advise the applicant in writing of the royalty which it deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within 60 days from the date such request for a license was received by United States Gypsum Company, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty, and United

States Gypsum Company shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General, who shall have the right to be heard thereon. In such proceeding, the burden of proof shall be on United States Gypsum Company to establish the reasonableness of the royalty requested by it, and the reasonable royalty rates, if any, determined by the Court shall apply to the applicant and all other licensees under the same patent or patents. Pending the completion of any such proceeding the applicant shall have the right to make, use and vend under the patents to which his application pertains without payment of royalty or other compensation except as provided in paragraph 4 of this article.

4. Where an application has been made to this Court for the determination of a reasonable royalty under paragraph 3 of this article, United States Gypsum Company may apply to the Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If the Court fixes such interim royalty rate, United States Gypsum Company shall then issue and the applicant shall accept a license, or, as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be grounds for the dismissal of his application. Where an interim license or sublicense has been issued pursuant to this paragraph, reasonable

royalty rates, if any, as finally determined by the Court shall be retroactive for the applicant and for all other licensees under the same patent or patents whose licenses provide for a higher royalty rate to a date to be fixed by the Court.

5. This judgment shall not be construed (a) as preventing any applicant from attacking, in this proceeding or in any other proceeding, the validity or scope of any patent of defendant United States Gypsum Company, or (b) as importing any validity or value to any such patent.

6. At any time after five years from the effective date of this judgment defendant United States Gypsum Company may apply to this Court, after notice to the Attorney General, for an order limiting the application of paragraph 1 of this Article to patents coming under the ownership or control of the United States Gypsum Company prior to the date of such application; and the Court, upon a showing by United States Gypsum Company that the effects of defendants' combination have been dissipated and that competitive conditions in the gypsum board industry have been restored, shall grant said application and enter an order modifying paragraph 1 of Article VI of this judgment.

Article VII

Nothing contained in this decree shall be deemed to have any effect upon the operations or activities of said defendants which are authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or the Act of Congress of August 17, 1937, commonly called the Miller-Tyd-

Article VII

Nothing contained in this judgment shall be deemed to have any effect upon the operations or activities of the defendants which are authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or the Act of Congress of August 17, 1937, commonly called the Miller-

ings Act, or by any present or future act of Congress or amendment thereto; provided, however, nothing contained in this article shall in any manner affect the provisions of Article VI of this decree.

Tydings Act, or by any present or future act of Congress or amendment thereto; provided, however, nothing contained in this article shall in any manner affect the provisions of Article VI of this judgment.

Article VIII

For the purpose of securing compliance with this judgment, authorized representatives of the Department of Justice, upon written request of the Attorney General or an Assistant Attorney General to any defendant company and upon reasonable notice, shall be permitted, subject to any legally recognized privilege, access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this judgment. Any authorized representative of the Department of Justice shall be permitted to interview officers or employees of any defendant company regarding any such matters, subject to the reasonable convenience of said defendant but without restraint or interference from it; provided, however, that such officer or employee may have counsel present. No information obtained by the means provided in this article shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment or as otherwise required by law.

Article X

Judgment is entered against the defendant companies for 50% of the costs to be taxed in this proceeding, and the costs so to be taxed are hereby prorated against the several defendant companies as follows: [Here follows allocation.]

Article IX

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, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such 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.

Article IX

Judgment is entered against the defendant companies for all costs to be taxed in this proceeding, and the costs so to be taxed are hereby prorated against the several defendant companies as follows: [Here follows allocation.]

Article X

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 judgment, or any other person, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this judgment, and (2) for the enforcement of compliance therewith and the punishment of violations thereof.

HARRIS *v.* COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 14. Argued October 16, 1950.—Decided November 27, 1950.

1. Petitioner and her husband entered into an agreement for settlement of their property rights, conditioned on the entry of a decree of divorce in a suit then pending in Nevada. The divorce court approved the agreement and entered a decree of divorce. Both the agreement and the decree provided that the agreement should survive the decree. A federal gift tax was assessed on the amount by which the value of the property transferred to the husband exceeded that received by petitioner. *Held:* The federal gift tax (26 U. S. C. §§ 1000, 1002) was not applicable. Pp. 108–113.
2. Petitioner having died since the submission of this case and an administrator of her estate having not yet been appointed, the judgment of this Court is entered as of the date the case was submitted, in pursuance of the practice obtaining in those circumstances. Pp. 112–113.

178 F. 2d 861, reversed.

The Commissioner's determination of a gift tax deficiency for 1943 was expunged by the Tax Court. 10 T. C. 741. The Court of Appeals reversed. 178 F. 2d 861. This Court granted certiorari, limited to questions 2 and 3 presented by the petition. 339 U. S. 917. *Reversed,* p. 113.

Irwin N. Wilpon argued the cause and filed a brief for petitioner.

Lee A. Jackson argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *I. Henry Kutz.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The federal estate tax and the federal gift tax, as held in a line of cases ending with *Commissioner* v. *Wemyss,* 324 U. S. 303, and *Merrill* v. *Fahs,* 324 U. S. 308, are construed *in pari materia,* since the purpose of the gift tax is to complement the estate tax by preventing tax-free depletion of the transferor's estate during his lifetime. Both the gift tax [1] and the estate tax [2] exclude transfers

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[1] Section 1002 of 26 U. S. C. (1946 ed.) provides: "Where property is transferred for less than *an adequate and full consideration in money or money's worth,* then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year." (Italics added.)

[2] Section 812 of 26 U. S. C. (1946 ed.) provides: "For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—. . . (b) *Expenses, losses, indebtedness, and taxes.* Such amounts—. . . (3) for claims against the estate, (4) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate, . . . as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or property taxes not accrued before his death, or any estate, succession, legacy, or inheritance taxes. The deduction herein allowed in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, *when founded upon a promise or agreement,* be limited to the extent that they were contracted bona fide and *for an adequate and full consideration in money or money's worth* . . . . For the purposes of this subchapter, *a relinquishment* or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or *of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth.'* " (Italics added.)

made for "an adequate and full consideration in money or money's worth." In the estate tax this requirement is limited to deductions for claims based upon "a promise or agreement"; [3] but the consideration for the "promise or agreement" may not be the release of marital rights in the decedent's property.[4] In the *Wemyss* and *Merrill* cases the question was whether the gift tax was applicable to premarital property settlements. If the standards of the estate tax were to be applied *ex proprio vigore* in gift tax cases, those transfers would be taxable because there was a "promise or agreement" touching marital rights in property. We sustained the tax, thus giving "adequate and full consideration in money or money's worth" the same meaning under both statutes insofar as premarital property settlements or agreements are concerned.

The present case raises the question whether *Wemyss* and *Merrill* require the imposition of the gift tax in the type of post-nuptial settlement of property rights involved here.

Petitioner divorced her husband, Reginald Wright, in Nevada in 1943. Both she and her husband had substantial property interests. They reached an understanding as respects the unscrambling of those interests, the settlement of all litigated claims to the separate properties, the assumption of obligations, and the transfer of properties.

Wright received from petitioner the creation of a trust for his lifetime of the income from her remainder interest in a then-existing trust; an assumption by her of an indebtedness of his of $47,650; and her promise to pay him $416.66 a month for ten years.

Petitioner received from Wright 21/90 of certain real property in controversy; a discontinuance of a partition

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[3] See § 812 (b) *supra*, note 2.

[4] *Ibid.*

suit then pending; an indemnification from and assumption by him of all liability on a bond and mortage on certain real property in London, England; and an indemnification against liability in connection with certain real property in the agreement. It was found that the value of the property transferred to Wright exceeded that received by petitioner by $107,150. The Commissioner assessed a gift tax on the theory that any rights which Wright might have given up by entering into the agreement could not be adequate and full consideration.

If the parties had without more gone ahead and voluntarily unravelled their business interests on the basis of this compromise, there would be no question that the gift tax would be payable. For there would have been a "promise or agreement" that effected a relinquishment of marital rights in property. It therefore would fall under the ban of the provision of the estate tax [5] which by judicial construction has been incorporated into the gift tax statute.

But the parties did not simply undertake a voluntary contractual division of their property interests. They were faced with the fact that Nevada law not only authorized but instructed the divorce court to decree a just and equitable disposition of both the community and the separate property of the parties.[6] The agreement recited that it was executed in order to effect a settlement of the respective property rights of the parties "in the event a divorce

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[5] See § 812 (b) *supra*, note 2.

[6] At the time of the divorce Nevada Compiled Laws (Supp. 1931–1941) § 9463 provided: "In granting a divorce, the court may award such alimony to the wife and shall make such disposition of the community and separate property of the parties as shall appear just and equitable, having regard to the respective merits of the parties and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens, if any, imposed upon it for the benefit of the children. . . ."

should be decreed"; and it provided that the agreement should be submitted to the divorce court "for its approval." It went on to say, "It is of the essence of this agreement that the settlement herein provided for shall not become operative in any manner nor shall any of the Recitals or covenants herein become binding upon either party unless a decree of absolute divorce between the parties shall be entered in the pending Nevada action."

If the agreement had stopped there and were in fact submitted to the court, it is clear that the gift tax would not be applicable. That arrangement would not be a "promise or agreement" in the statutory sense. It would be wholly conditional upon the entry of the decree; the divorce court might or might not accept the provisions of the arrangement as the measure of the respective obligations; it might indeed add to or subtract from them. The decree, not the arrangement submitted to the court, would fix the rights and obligations of the parties. That was the theory of *Commissioner* v. *Maresi,* 156 F. 2d 929, and we think it sound.

Even the Commissioner concedes that that result would be correct in case the property settlement was litigated in the divorce action. That was what happened in *Commissioner* v. *Converse,* 163 F. 2d 131, where the divorce court decreed a lump-sum award in lieu of monthly payments provided by the separation agreement. Yet without the decree there would be no enforceable, existing agreement whether the settlement was litigated or unlitigated. Both require the approval of the court before an obligation arises. The happenstance that the divorce court might approve the entire settlement, or modify it in unsubstantial details, or work out material changes seems to us unimportant. In each case it is the decree that creates the rights and the duties; and a decree is not a "promise or agreement" in any sense—popular or statutory.

But the present case is distinguished by reason of a further provision in the undertaking and in the decree. The former provided that "the covenants in this agreement shall survive any decree of divorce which may be entered." And the decree stated "It is ordered that said agreement and said trust agreements forming a part thereof shall survive this decree." The Court of Appeals turned the case on those provisions. It concluded that since there were two sanctions for the payments and transfers—contempt under the divorce decree and execution under the contract—they were founded not only on the decree but upon both the decree and a "promise or agreement." It therefore held the excess of the value of the property which petitioner gave her husband over what he gave her to be taxable as a gift. 178 F. 2d 861.

We, however, think that the gift tax statute is concerned with the source of rights, not with the manner in which rights at some distant time may be enforced. Remedies for enforcement will vary from state to state. It is "the transfer" of the property with which the gift tax statute is concerned,[7] not the sanctions which the law supplies to enforce transfers. If "the transfer" of marital rights in property is effected by the parties, it is pursuant to a "promise or agreement" in the meaning of the statute. If "the transfer" is effected by court decree, no "promise or agreement" of the parties is the operative fact. In no realistic sense is a court decree a

[7] Section 1000 of 26 U. S. C. (1946 ed.) provides: "(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon *the transfer* during such calendar year by any individual, resident or nonresident, of property by gift. . . . (b) The tax shall apply whether *the transfer* is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to *a transfer* only if the property is situated within the United States." (Italics added.)

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"promise or agreement" between the parties to a litigation. If finer, more legalistic lines are to be drawn, Congress must do it.

If, as we hold, the case is free from any "promise or agreement" concerning marital rights in property, it presents no remaining problems of difficulty. The Treasury Regulations [8] recognize as tax free "a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent)." This transaction is not "in the ordinary course of business" in any conventional sense. Few transactions between husband and wife ever would be; and those under the aegis of a divorce court are not. But if two partners on dissolution of the firm entered into a transaction of this character or if chancery did it for them, there would seem to be no doubt that the unscrambling of the business interests would satisfy the spirit of the Regulations. No reason is apparent why husband and wife should be under a heavier handicap absent a statute which brings all marital property settlements under the gift tax.

We are now advised that since submission of the case on October 16, 1950, petitioner has died, and that it will

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[8] Section 86.8 of Treas. Reg. 108 provides: "Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift."

take some weeks before an administrator of her estate can be appointed. Accordingly we enter our judgment as of October 16, 1950, in pursuance of the practice obtaining in those circumstances. See *Mitchell* v. *Overman,* 103 U. S. 62, 64–65; *McDonald* v. *Maxwell,* 274 U. S. 91, 99.

Reversed.

MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE BLACK, MR. JUSTICE BURTON, and MR. JUSTICE MINTON, dissenting.

Section 503 of the Revenue Act of 1932 imposes a gift tax on property "transferred for less than an adequate and full consideration in money or money's worth." 47 Stat. 247, now I. R. C., § 1002, 26 U. S. C. § 1002. In *Merrill* v. *Fahs,* 324 U. S. 308, the Court held that an antenuptial settlement is subject to this tax.[1] Believing as I do that the disposition of the case before us largely depends on the weight given to the considerations which there prevailed, recapitulation of them is appropriate. The Court there based its result on the conclusion that a transfer of property pursuant to an antenuptial settlement was not made in exchange for "an adequate and full consideration in money or money's worth." This conclusion was reinforced by reading into the gift tax provision the gloss of the interrelated estate tax of the same year that the relinquishment of "marital rights . . .

[1] The *Merrill* settlement did not involve release of support rights. Nor are they involved in the case before us, for the transfer here sought to be taxed passed to the husband from the wife, who was under no obligation to support him. We are, therefore, not concerned here with the Commissioner's view that "to the extent that the transfers are made in satisfaction of support rights the transfers are held to be for an adequate and full consideration." E. T. 19, 1946–2 Cum. Bull. 166. See 2 Paul, Federal Estate and Gift Taxation, § 16.15. But cf. *Meyer's Estate* v. *Commissioner,* 110 F. 2d 367; *Helvering* v. *United States Trust Co.,* 111 F. 2d 576.

shall not be considered to any extent a consideration 'in money or money's worth.' " Revenue Act of 1932, § 804, 47 Stat. 280, now I. R. C., § 812 (b), 26 U. S. C. § 812 (b).

The case before us concerns not an antenuptial agreement, but what the Tax Court called a "property settlement agreement," contracted in anticipation of divorce. Each spouse transferred property of substantial value to the other and each agreed "to release completely the property of the other from all claims arising out of their marriage." 10 T. C. 741, 743.

Unless we are now to say that a settlement of property in winding up, as it were, a marriage, smacks more of a business arrangement than an antenuptial agreement and therefore satisfies the requirement of "an adequate and full consideration in money or money's worth" which we found wanting in *Merrill* v. *Fahs,* and unless we are further to overrule *Merrill* v. *Fahs* insofar as it joined the gift tax and the estate tax of the Revenue Act of 1932, so as to infuse into the gift tax the explicitness of the estate tax in precluding the surrender of marital rights from being deemed to any extent a consideration "in money or money's worth," we must hold that a settlement of property surrendering marital rights in anticipation of divorce is not made for "an adequate and full consideration in money or money's worth."

The same year that it enacted the gift tax Congress amended the estate tax by adding to the provision that "adequate and full consideration" was prerequisite to deduction of "claims against the estate" the phrase, "when founded upon a promise or agreement." Revenue Act of 1932, § 805, 47 Stat. 280, now I. R. C., § 812 (b), 26 U. S. C. § 812 (b). Legislative history demonstrates that this amendment was intended not to change the law but to make clear that the requirement of consideration did not prevent "deduction of liabilities imposed by law or arising out of torts." H. R. Rep. No. 708, 72d Cong., 1st Sess. 48;

S. Rep. No. 665, 72d Cong., 1st Sess. 51. A similar principle is implicit in the gift tax. By its statutory language and authoritative commentaries thereon Congress did not leave the incidence of the gift tax at large by entrusting its application to the play of subtleties necessary to finding a "donative intent." *Commissioner* v. *Wemyss,* 324 U. S. 303, 306. But while by the gift tax Congress meant "to hit all the protean arrangements which the wit of man can devise that are not business transactions" to the common understanding, *Commissioner* v. *Wemyss, ibid.,* a gift tax is an exaction which does presuppose the voluntary transfer of property and not a transfer in obedience to law. In *Merrill* v. *Fahs, supra,* at 313, we stated that "to interpret the same phrases in the two taxes concerning the same subject matter in different ways where obvious reasons do not compel divergent treatment is to introduce another and needless complexity into this already irksome situation." Application of that principle would require the Court to hold that § 503 of the Revenue Act of 1932, I. R. C., § 1002, imposes a tax on "the amount by which the value of the property [transferred exceeds] the value of the consideration" received only when the transfer is "founded upon a promise or agreement." The taxpayer does not contest applicability of the principle; and in the view we take of the case it may be assumed.[2] Taxpayer contends (1) that the transfers in the situation now before us were or must be deemed to have been for an "adequate and full consideration in money or money's worth," and (2) that the Commissioner imposed a liability which

[2] We therefore need not pass on the suggestion of the Government brief that the estate and gift tax provisions should not in this instance be read in *pari materia* because the interpretation of a phrase common to the two statutes is not involved. Nor do we pass on the contention that under both gift and estate taxes liability is imposed on transfers and claims resulting from loss of marital rights even when no promise or agreement is involved.

was not "founded upon a promise or agreement." Her position was sustained by the Tax Court, 10 T. C. 741, but rejected by the Court of Appeals for the Second Circuit. 178 F. 2d 861.

1. I would adhere to the views we expressed in the *Wemyss* and *Merrill* decisions as to the meaning to be given to the requirement of "adequate and full consideration" in the enforcement of the gift tax "in order to narrow the scope of tax exemptions." 324 U. S. at 312. Nor would I depart from the conclusion there reached that the relinquishment of marital rights is not to be deemed "money or money's worth" because that definition in the estate tax of 1932 is by implication to be read into the gift tax passed in the same year.

2. But was the transfer of the property here in controversy "founded upon a promise or agreement"? The answer requires recital of the governing facts of the case.

Taxpayer separated from her husband in August, 1942, and shortly thereafter brought suit in Nevada for divorce. One week prior to entry of the divorce decree, she and her husband entered into an agreement "for the purpose of settling the respective property rights of the parties hereto and of removing the subject matter thereof from the field of litigation." After providing for the transfers of property and the release of claims, the agreement recited,

> "This agreement shall be submitted to the court for its approval, but nevertheless the covenants in this agreement shall survive any decree of divorce which may be entered. It is of the essence of this agreement that the settlement herein provided for shall not become operative in any manner nor shall any of the Recitals or covenants herein become binding upon either party unless a decree of absolute divorce between the parties shall be entered in the pending Nevada action. The settlement herein pro-

> vided shall become immediately effective and operative in the event of and upon the entry of a decree of divorce between said parties in said pending Nevada action. The parties hereto, however, shall proceed as expeditiously as possible to carry into effect the covenants herein, which it is provided are to be performed by either of the parties prior to the entry of the decree as aforesaid."

After a hearing at which both parties were represented, the court granted the divorce. It found that certain transfers from the wife to the husband were "in discharge of a legal obligation which, because of the marital relationship has been imposed" on her; and concluded that "the agreement and trust agreements forming a part thereof, made and entered into between plaintiff and defendant under date of February 27th, 1943 is entitled to be approved." The divorce decree "approved" the agreement, directed performance of two of its paragraphs, and declared,

> "Notwithstanding the approval of said agreement and the trust agreements forming a part thereof by the Court herein, It is ordered that said agreement and said trust agreements forming a part thereof shall survive this decree.
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> . . . . .
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> "It is further ordered, adjudged and decreed that the decree herein entered is absolute and final in all respects and the Court herein divests itself of all power to amend or modify the same in the future without the consent of both of the parties hereto."

The parties executed the provisions of the decree and the agreement, and the Commissioner assessed the tax in question on the amount by which the value of the property transferred by the wife to her husband exceeded the value of the property transferred by him to her.

3. Such being the facts of the case, was the transfer by Cornelia Harris "founded upon a promise or agreement"? The statute does not say founded "solely upon a promise or agreement." The statute does not say that the tax should not fall on "property transferred under the terms of a judgment or decree of the court." Nor is the phrase "founded upon agreement" a technical term having a well-known meaning either in law or in literature. The question is whether the transfer made by the taxpayer to her husband was, within the fair meaning of the language, "founded" upon her agreement with her husband. Did the Nevada judge in decreeing the divorce describe what actually took place here when he said that on the "date of February 27, 1943, the plaintiff and defendant entered into an agreement and trust agreements forming a part thereof, under the terms of which the parties settled all obligations arising out of their marriage"?

The fact that the undertakings defined by this agreement would come into force only on the occurrence of a condition, to wit, the entering of a decree of divorce, is apparently regarded as decisive of taxability. But does this make any real difference? The terms of that decree might be different from the terms of the agreement; but "nevertheless the covenants in this agreement shall survive any decree of divorce which may be entered." If the divorce court had disapproved the agreement and had not decreed the transfer of any property of the wife to her husband, it is difficult to see how transfers which she made, solely because of the compulsion of the agreement, would be effected by court decree and for that reason not subject to tax. The condition on which an agreement comes into force does not supplant the agreement any more than a deed in escrow ceases to be a deed when it comes out of escrow. In the *Wemyss* and *Merrill* cases, would the gifts have been any the less founded upon an agreement if, as a condition to the antenuptial arrangements in those cases,

the consent of the parents of the fiancée had been made a condition of the marriage? Nor can excluding the transfers here involved from the gift tax be made tenable by resting decision on the narrower ground that to the extent the divorce decree "approved" the agreement or embodied its provisions so as to make them enforceable by contempt the transfers were not "founded upon" the agreement within the meaning of the statute.[3] If the taxpayer had been sued by her husband for the sums she was obligated to transfer to him could he not have brought the suit on the contract?[4] Even though a promise for

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[3] The ground adopted for reversal of the court below is important to the disposition of the case. On the broader ground apparently employed, no gift tax is due. But if the narrower basis be used, it is probable that some liability should be imposed. One of the transfers required by the agreement—the wife's assumption of a $47,650 indebtedness of her husband—was not incorporated into the divorce decree and therefore is presumably enforceable only under the contract. If enforceability under the decree is the criterion, a gift tax is due to the extent this indebtedness is reflected in the amount determined by the Commissioner to represent the value attributable to release of marital rights.

[4] In none of the twelve jurisdictions in which decisions in point have been found has it been held that a suit could not be brought on the contract in a situation like that before us. In four States actions may apparently be brought subsequent to divorce on prior separation agreements which are construed to contemplate survival even though the divorce decree directs different payments than the agreement. See *Seuss* v. *Schukat,* 358 Ill. 27, 36, 192 N. E. 668, 672; *Freeman* v. *Sieve,* 323 Mass. 652, 84 N. E. 2d 16; *Goldman* v. *Goldman,* 282 N. Y. 296, 301, 26 N. E. 2d 265, 267; *Holahan* v. *Holahan,* 77 N. Y. S. 2d 339; *Mobley* v. *Mobley,* 221 S. W. 2d 565 (Tex. Civ. App.). In three States such suits may be brought at least where the decree is not inconsistent with the agreement and does not indicate an intention to terminate it. See *Heinsohn* v. *Chandler,* 23 Del. Ch. 114, 2 A. 2d 120; *Coe* v. *Coe,* 71 A. 2d 514 (Maine); *Allen* v. *Allen,* 196 Okla. 36, 162 P. 2d 193. In five others it appears that actions on the contract will lie except when the agreement is recited in the decree so as to be enforceable by contempt; but in none of the

which inadequate consideration was given has been reduced to a judgment, a claim based upon it has been held not deductible from the gross estate and thus must have been deemed to be "founded upon a promise." *Markwell's Estate* v. *Commissioner,* 112 F. 2d 253. If a transfer does not cease to be "founded upon a promise" when the promise is merged into a judgment, is not a transfer pursuant to an agreement which survives a ratifying decree *a fortiori* "founded upon" that agreement?

Judge Learned Hand's treatment of this matter is so hard-headed and convincing that it would be idle to paraphrase his views.

> "In some jurisdictions contracts, made in anticipation of a divorce, are held to persist *ex proprio vigore* after the divorce decree has incorporated their terms, and has added its sanctions to those available in contract. That, for example, is the law of New York, where the contract remains obligatory even after the court has modified the allowances which it originally adopted; and where the promises will be thereafter enforced by execution and the like. Perhaps, that is also the law of Nevada, which the parties provided should govern 'all matters affecting the interpreta-

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cases refusing to permit a suit on the contract did the decree or the agreement direct survival. See *Hough* v. *Hough,* 26 Cal. 2d 605, 160 P. 2d 15; *McWilliams* v. *McWilliams,* 110 Colo. 173, 132 P. 2d 966; *Hertz* v. *Hertz,* 136 Minn. 188, 161 N. W. 402; *Corbin* v. *Mathews,* 129 N. J. Eq. 549, 19 A. 2d 633; *Mendelson* v. *Mendelson,* 123 Ohio St. 11, 173 N. E. 615. See Lindey, Separation Agreements and Ante-Nuptial Contracts, 389–395; Note, Control of Post-Divorce Level of Support by Prior Agreement, 63 Harv. L. Rev. 337. *Schacht* v. *Schacht,* 295 N. Y. 439, 68 N. E. 2d 433, relied on by petitioner, held only that a determination by the divorce court of the fairness of a separation agreement was *res judicata* in a subsequent suit to set the agreement aside for fraud. The issue does not appear to have been determined in Nevada, where the agreement here involved was made and the divorce entered.

tion of this agreement or the rights of the parties.' Be that as it may, in the case at bar, the Nevada decree having declared that the agreement was 'entitled to be approved,' that included the provision that its 'covenants' should 'survive' as well as any of its other stipulations. Thus the payments made under it were 'founded' as much upon the 'promise or agreement' as upon the decree; indeed, they were 'founded' upon both; the parties chose to submit themselves to two sanctions—contempt under the divorce court and execution under the contract. The payments were therefore subject to the gift tax." 178 F. 2d 861, 865.

I would affirm the judgment.

WHELCHEL *v.* McDONALD, WARDEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 109. Argued November 10, 1950.—Decided December 4, 1950.

Petitioner, while on active duty with the United States Army in Germany, was convicted of rape by a general court-martial. He applied to the Federal District Court for a writ of habeas corpus, challenging the legality of his detention under the sentence, on the ground that he was insane at the time of the offense. *Held:* The military tribunal that tried petitioner was not deprived of jurisdiction by the manner in which the insanity issue was dealt with, and habeas corpus was therefore not an available remedy. Pp. 123–127.

1. Under the law governing court-martial procedure, there must be afforded a defendant at some point of time an opportunity to tender the issue of insanity, and petitioner was afforded that opportunity. P. 124.

2. Any error that may be committed by the military authorities in evaluating the evidence tendered is beyond the reach of review by the civil courts. P. 124.

3. The fact that the law member of the court-martial was not named from the Judge Advocate General's Department does not establish a gross abuse of discretion in the absence of a showing of the availability of an officer of the Department. P. 126.

4. The provision of Article 4 of the revised Articles of War, whereby an accused may request that enlisted men be included on the court-martial, was not yet in effect when petitioner was tried, and the fact that he was tried by a court-martial composed wholly of officers does not raise a question which goes to jurisdiction. Pp. 126–127.

5. The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions. P. 127.

178 F. 2d 760, affirmed.

In a habeas corpus proceeding to secure petitioner's release from imprisonment under a sentence of a general court-martial, the District Court dismissed the petition

and remanded petitioner to custody. The Court of Appeals affirmed. 176 F. 2d 260, 178 F. 2d 760. This Court granted certiorari. 339 U. S. 977. *Affirmed,* p. 127.

Hugh Carney argued the cause and filed a brief for petitioner.

John F. Davis argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney* and *Robert S. Erdahl.*

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner, while on active duty with the Army in Germany, was convicted by a general court-martial of rape on a German girl. The sentence of death, originally imposed, was reduced to a term of years. This case arises on a petition for a writ of habeas corpus filed in the District Court, challenging the legality of petitioner's detention under that sentence. That court denied the petition and the Court of Appeals affirmed. 178 F. 2d 760. The main point presented by the petition for certiorari is whether the military tribunal that tried petitioner was deprived of jurisdiction by reason of the treatment of the insanity issue tendered by petitioner. We hold that it was not.

The charges against petitioner were referred to an investigating officer in accordance with Article 70 of the Articles of War, 10 U. S. C. (1946 ed.) § 1542. The investigating officer reported that he had no reasonable ground for believing petitioner was deranged. A neuropsychiatrist attached to petitioner's division reported, after examining petitioner, that he was legally sane. The Division Staff Judge Advocate recommended a general court-martial trial, stating there was no reason to believe petitioner to be temporarily or permanently deranged. The defense of insanity was not raised, however, either at the pretrial investigation or the trial itself. After the trial

petitioner's trial counsel wrote the Division Commanding General requesting that the case be reopened and petitioner be given a neuropsychiatric examination on the ground that counsel had received information that petitioner might have been in an epileptic fit at the time of the offense. This request received the concurrence of five of the six members of the court-martial and was accompanied by similar letters from two officers and a sergeant of petitioner's division. The record was in this condition when it was reviewed by General Eisenhower of the European Theatre of Operations, by the Board of Review of that Theatre, and by the Assistant Judge Advocate General.

There was evidence in the hearing before the District Court that petitioner may have been either insane or drunk at the time of the crime.

We put to one side the due process issue which respondent presses, for we think it plain from the law governing court-martial procedure that there must be afforded a defendant at some point of time an opportunity to tender the issue of insanity. It is only a denial of that opportunity which goes to the question of jurisdiction. That opportunity was afforded here. Any error that may be committed in evaluating the evidence tendered is beyond the reach of review by the civil courts.

The Manual prescribes the ordinary test of criminal responsibility, *viz.*, whether the accused was able to tell right from wrong.[1] Insanity is a defense.[2] The pretrial

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[1] Paragraph 78*a* Manual for Courts-Martial (1928 ed.) provides: "A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right."

[2] Paragraph 63 of the Manual provides: "The court will inquire into the existing mental condition of the accused whenever at any time while the case is before the court it appears to the court for any reason

procedure prescribed in Article 70 offers the accused an opportunity to present the defense of insanity. Petitioner had that opportunity. The Manual provides that the reviewing authority (here the Commanding General of the Division) "will take appropriate action where it appears from the record or otherwise that the accused may have been insane" at the time of the crime, whether or not such question was raised at the trial.[3] That is also a provision which is applicable to the confirming authority[4] (here the General in charge of the European Theatre of Operations). The confirming authority had before it the request of the defense counsel and the other letters and recommendations submitted to it. The Manual does not require either the reviewing authority or the confirming authority to halt the proceedings, make a further investigation, or start over again. It entrusts the matter to the discretion of those authorities.

Petitioner had a further consideration by the military authorities of the insanity issue which he tenders. By Article 53 of the revised Articles of War, Act of June 24, 1948, 62 Stat. 639, 642, 10 U. S. C. (Supp. III) § 1525, which was effective February 1, 1949, the Judge Advocate General is authorized "upon application of an accused person, and upon good cause shown, in his discretion to grant

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that such inquiry ought to be made in the interest of justice. Reasons for such action may include anything that would cause a reasonable man to question the accused's mental capacity either to understand the nature of the proceedings or intelligently to conduct or to cooperate in his defense."

Paragraph 75*a* provides: "If the court determines that the accused was not mentally responsible, it will forthwith enter a finding of not guilty as to the proper specification."

Paragraph 78*a* provides: "Where a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused can not legally be convicted of that offense."

[3] *Id.* ¶ 87*b*.

[4] *Id.* ¶ 88.

a new trial" in any court-martial case on application within the prescribed time limits. That Article became effective after the petition for habeas corpus was filed. But while the case was pending on appeal the Court of Appeals delayed final action while petitioner made application under Article 53. The Judge Advocate General reviewed all the evidence on the insanity issue which petitioner had tendered both to the military authorities and to the District Court in the habeas corpus proceeding and concluded "I entertain no doubt that Whelchel was so far free from mental defect, disease, and derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right . . . ."

Any error by the military in evaluating the evidence on the question of insanity would not go to jurisdiction, the only issue before the court in habeas corpus proceedings.

The law member of the court-martial was not named from the Judge Advocate General's Department. But since no showing was made of the availability of such a member, a case of gross abuse of discretion has not been established. See *Hiatt* v. *Brown,* 339 U. S. 103, 109–110.

Under Article 4 of the revised Articles of War an accused may now request that enlisted men be included on the court-martial that tries him.[5] There was no such provision of the law when petitioner was tried.[6] But the fact that he was tried by a court-martial composed wholly of officers does not raise a question which goes to jurisdiction. Petitioner can gain no support from the analogy

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[5] 10 U. S. C. (Supp. III) § 1475.

[6] At the time of petitioner's trial Article 4, 10 U. S. C. (1946 ed.) § 1475, provided in pertinent part as follows: "All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial."

of trial by jury in the civil courts. The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions. See *Kahn* v. *Anderson,* 255 U. S. 1, 8; *Ex parte Quirin,* 317 U. S. 1, 40–41. Courts-martial have been composed of officers both before and after the adoption of the Constitution.[7] The constitution of courts-martial, like other matters relating to their organization and administration (see *Kahn* v. *Anderson, supra,* 6–7; *Swaim* v. *United States,* 165 U. S. 553, 556–559; *Mullan* v. *United States,* 140 U. S. 240, 244–245; *Martin* v. *Mott,* 12 Wheat. 19, 34–35), is a matter appropriate for congressional action.

Affirmed.

[7] See collection of precedents in Winthrop's Military Law and Precedents (2d ed., Reprint 1920): British Articles of War of 1765, p. 942; American Articles of War of 1776, p. 967; American Articles of War of 1806, pp. 981–982.

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GUSIK *v.* SCHILDER, WARDEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 110. Argued November 10, 1950.—Decided December 4, 1950.

1. Article 53 of the Articles of War gives the Judge Advocate General discretion to grant a new trial in any court-martial case. *Held:* A federal court should not entertain a petition for habeas corpus on behalf of one imprisoned under a sentence of a court-martial until the remedy afforded by Article 53 has been exhausted, notwithstanding that the petition for habeas corpus was filed prior to the effective date of the Article and that the petitioner had exhausted the previously existing administrative remedies. Pp. 129–134.
2. Article 53 is applicable to World War II court-martial cases in which appellate review was completed prior to the effective date of the Article or in which habeas corpus proceedings had been instituted prior to that date. Pp. 130–132.
3. The provision of Article 53 that all action by the Judge Advocate General thereunder shall be "final and conclusive" and shall be "binding upon all departments, courts, agencies, and officers of the United States" must be read as describing the terminal point for proceedings within the court-martial system and not as depriving the civil courts of jurisdiction to review by habeas corpus the judgments of military tribunals. Pp. 132–133.
4. Petitioner's belief that resort to Article 53 will be futile cannot excuse his failure to exhaust the remedy provided by that Article. P. 133.
5. The trial of this case in the District Court having ended before the effective date of Article 53, and the question of the exhaustion of the new remedy not having been raised until the case was on appeal, the Court of Appeals should have held the case pending resort to the new remedy under the Article. Pp. 133–134.

180 F. 2d 662, reversed.

In a habeas corpus proceeding to secure petitioner's release from imprisonment under sentence of a court-martial, the District Court sustained the writ and ordered

petitioner released on bond. The Court of Appeals reversed. 180 F. 2d 662. This Court granted certiorari. 339 U. S. 977. *Reversed and remanded,* p. 134.

Morris Morgenstern argued the cause for petitioner. With him on the brief were *Bernard B. Direnfeld, Leo Chimo, Francis Picklow, Marvin L. Shaw* and *Cedric Griffith.*

John F. Davis argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Irving S. Shapiro.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a petition for a writ of habeas corpus filed in the District Court on behalf of petitioner challenging the legality of his detention by respondent. Respondent holds Gusik pursuant to a court-martial judgment convicting him of murder while he was stationed in Italy as a member of the United States Army. After conviction by the court-martial petitioner exhausted all his remedies for reversal or modification of the judgment of conviction which then existed under the Articles of War. When he secured no relief from the military authorities he filed this petition in which he challenges the jurisdiction of the court-martial both under the Articles of War and the Constitution. The District Court, after a hearing, sustained the writ and released Gusik on bond. It found that the court-martial did not have jurisdiction, because no thorough and impartial pretrial investigation was conducted in compliance with Article 70 of the Articles of War, because the Trial Judge Advocate failed to call material witnesses, and because Gusik was denied the effective assistance of counsel. The Court of Appeals reversed, 180 F. 2d 662. It did not reach the merits of

the case; it held that there was an administrative remedy which petitioner had not exhausted and that the petition must be dismissed without prejudice to the filing of a new petition after resort to the additional administrative remedy had been made.

The new remedy is Article 53 of the Articles of War, 62 Stat. 639, 10 U. S. C. (Supp. III) § 1525.[1] It gives the Judge Advocate General discretion, *inter alia,* to grant a new trial in any court-martial case. Time limitations are specified; and "with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later." Peti-

[1] Article 53 reads as follows:

"Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided,* That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided,* That only one such application for a new trial may be entertained with regard to any one case: *And provided further,* That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States."

tioner argues that Article 53 is not applicable to World War II court-martial cases in which appellate review was completed prior to the effective date of the Article or in which habeas corpus proceedings had been instituted prior to that date. That construction of the Act would require extensive tailoring of the language of Article 53, since the new Article explicitly applies to "cases involving offenses committed during World War II" without reference to the stage in which the cases may be on the effective date of the Article. Our conclusion is in harmony with the construction which the President, who is authorized to provide the regulations under Article 53, gave to the statutory language in Executive Order 10020 which promulgated the Manual for Courts-Martial.[2] That Order states that the new Manual shall be in force and effect on and after February 1, 1949, "with respect to all court-martial processes taken on or after February 1, 1949." A petition for a new trial under Article 53 is such a process.

If Article 53 had been in force when the habeas corpus proceedings were instituted, the District Court would not have been justified in entertaining the petition unless the remedy afforded by the Article had first been exhausted. An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere. That is not only the holding of the Court in a long line of cases (see *Mooney* v. *Holohan,* 294 U. S. 103, 115; *Ex parte Hawk,* 321 U. S. 114, 116); it is the rule which Congress recently wrote into the Judicial Code. 28 U. S. C. § 2254. The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state

[2] 13 Fed. Reg. 7519. And see c. 22 Manual for Courts-Martial, *id.* at 7550.

courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. That policy is as well served whether the remedy which is available was existent at the time resort was had to the federal courts or was subsequently created, as indeed is implicit in cases from a state court whose review we denied pending exhaustion of a newly created state remedy. See *Walker* v. *Ragen,* 338 U. S. 833; *Marks* v. *Ragen,* 339 U. S. 926. Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.

An argument is woven around the finality clause of Article 53 as a foundation to a claim of unconstitutionality. The provision is that all action by the Judge Advocate General under Article 53 shall be "final and conclusive" and shall be "binding upon all departments, courts, agencies, and officers of the United States." It is argued that this clause deprives the courts of jurisdiction to review these military judgments and therefore amounts to a suspension of the writ. We do not so read Article 53. Congress was legislating as respects tribunals over which the civil courts have traditionally exercised no power of supervision or review. See *In re Grimley,* 137 U. S. 147, 150. These tribunals have operated in a self-sufficient system, save only as habeas corpus was available to test their jurisdiction in specific cases. We read the finality clause of Article 53 as doing no more than describing the terminal point for proceedings within the court-martial system. If Congress had intended to deprive the civil courts of their habeas corpus jurisdiction, which has been

exercised from the beginning,[3] the break with history would have been so marked that we believe the purpose would have been made plain and unmistakable. The finality language so adequately serves the more restricted purpose that we would have to give a strained construction in order to stir the constitutional issue that is tendered.

Petitioner says that resort to Article 53 will be futile. If it proves to be, no rights have been sacrificed. Habeas corpus will then be available to test any questions of jurisdiction which petitioner may offer.

Trial of the case in the District Court had ended before the effective date of Article 53 and the question of the exhaustion of the new remedy which the Article affords was not raised until the case was in the Court of Appeals.[4] We conclude that in the interests of justice the Court of Appeals, instead of reversing the District Court and ordering the petition to be dismissed, should have done what the Court of Appeals in *Whelchel* v. *McDonald, ante,* p. 122, did under like circumstances and held the case pending resort to the new remedy under Article 53. If relief is obtained from the Judge Advocate General, the case

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[3] Collateral attack of a judgment of a court-martial was early entertained. *Wise* v. *Withers,* 3 Cranch 331, was an action in trespass against one who justified the taking as collector of a fine imposed by a court-martial. The Court, speaking through Marshall, C. J., held that since the court-martial acted without its jurisdiction the court and the officers were trespassers. And see *Houston* v. *Moore,* 5 Wheat. 1 (trespass); *Martin* v. *Mott,* 12 Wheat. 19 (replevin); *Dynes* v. *Hoover,* 20 How. 65 (assault, battery, and false imprisonment). *Ex parte Reed,* 100 U. S. 13, allowed habeas corpus to test the jurisdiction of a court-martial.

[4] The petition for habeas corpus was filed April 27, 1948; the return was filed June 17, 1948; the parties finished introducing evidence on January 7, 1949; Article 53 became effective February 1, 1949; the District Court filed its opinion on March 31, 1949; notice of appeal was filed May 17, 1949; the case was argued in the Court of Appeals on January 31, 1950.

will then be remanded for dismissal. If the relief is not obtained under Article 53, petitioner will not be put to the time and expense of trying anew the case which he tried when he had no relief other than habeas corpus.

We agree with the Court of Appeals on the main issue tendered under Article 53. But since we think a different disposition of the case should be made pending resort to the new remedy which Article 53 affords, we reverse the judgment below and remand the cause to the Court of Appeals for further proceedings in conformity with this opinion.

So ordered.

Syllabus.

FERES, EXECUTRIX, *v.* UNITED STATES.

NO. 9. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued October 12, 1950.—Decided December 4, 1950.

The United States is not liable under the Federal Tort Claims Act for injuries to members of the armed forces sustained while on active duty and not on furlough and resulting from the negligence of others in the armed forces. Pp. 136–146.

(a) The Tort Claims Act should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole. P. 139.

(b) One of the purposes of the Act was to transfer from Congress to the courts the burden of examining tort claims against the Government; and Congress was not burdened with private bills on behalf of military and naval personnel, because a comprehensive system of relief had been authorized by statute for them and their dependents. Pp. 139–140.

(c) The Act confers on the district courts broad jurisdiction over "civil actions on claims against the United States, for money damages"; but it remains for the courts to determine whether any claim is recognizable in law. Pp. 140–141.

(d) It does not create new causes of action but merely accepts for the Government liability under circumstances that would bring private liability into existence. P. 141.

(e) There is no analogous liability of a "private individual" growing out of "like circumstances," when the relationship of the wronged to the wrongdoers in these cases is considered. Pp. 141–142.

(f) The provision of the Act making "the law of the place where the act or omission occurred" govern any consequent liability is inconsistent with an intention to make the Government liable in

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*Together with No. 29, *Jefferson* v. *United States*, on certiorari to the United States Court of Appeals for the Fourth Circuit, argued October 12–13, 1950, and No. 31, *United States* v. *Griggs, Executrix*, on certiorari to the United States Court of Appeals for the Tenth Circuit, argued October 13, 1950.

the circumstances of these cases, since the relationship of the Government and members of its armed forces is "distinctively federal in character." Pp. 142–144.

(g) The failure of the Act to provide for any adjustment between the remedy provided therein and other established systems of compensation for injuries or death of those in the armed services is persuasive that the Tort Claims Act was not intended to be applicable in the circumstances of these cases. Pp. 144–145.

(h) *Brooks* v. *United States*, 337 U. S. 49, distinguished. P. 146.

177 F. 2d 535 and 178 F. 2d 518, affirmed; 178 F. 2d 1, reversed.

The cases are stated in the opinion. The orders granting certiorari in Nos. 9 and 29 are reported at 339 U. S. 910 and in No. 31 at 339 U. S. 951. The decisions below in Nos. 9 and 29 are *affirmed* and that in No. 31 is *reversed*, p. 146.

David H. Moses argued the cause for petitioner in No. 9. With him on the brief was *Morris Pouser*.

Morris Rosenberg argued the cause for petitioner in No. 29. With him on the brief was *Henry M. Decker, Jr.*

Newell A. Clapp argued the cause for the United States. With him on the briefs were *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Hollander*. *John R. Benney* was also with them on the brief in No. 31.

Frederick P. Cranston argued the cause, and *James S. Henderson* filed a brief, for respondent in No. 31.

MR. JUSTICE JACKSON delivered the opinion of the Court.

A common issue arising under the Tort Claims Act, as to which Courts of Appeals are in conflict, makes it appropriate to consider three cases in one opinion.

The *Feres* case: The District Court dismissed an action by the executrix of Feres against the United States to

recover for death caused by negligence. Decedent perished by fire in the barracks at Pine Camp, New York, while on active duty in service of the United States. Negligence was alleged in quartering him in barracks known or which should have been known to be unsafe because of a defective heating plant, and in failing to maintain an adequate fire watch. The Court of Appeals, Second Circuit, affirmed.[1]

The *Jefferson* case: Plaintiff, while in the Army, was required to undergo an abdominal operation. About eight months later, in the course of another operation after plaintiff was discharged, a towel 30 inches long by 18 inches wide, marked "Medical Department U. S. Army," was discovered and removed from his stomach. The complaint alleged that it was negligently left there by the army surgeon. The District Court, being doubtful of the law, refused without prejudice the Government's pretrial motion to dismiss the complaint.[2] After trial, finding negligence as a fact, Judge Chesnut carefully reexamined the issue of law and concluded that the Act does not charge the United States with liability in this type of case.[3] The Court of Appeals, Fourth Circuit, affirmed.[4]

The *Griggs* case: The District Court dismissed the complaint of Griggs' executrix, which alleged that while on active duty he met death because of negligent and unskillful medical treatment by army surgeons. The Court of Appeals, Tenth Circuit, reversed and, one judge dissenting, held that the complaint stated a cause of action under the Act.[5]

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[1] 177 F. 2d 535.
[2] 74 F. Supp. 209.
[3] 77 F. Supp. 706.
[4] 178 F. 2d 518.
[5] 178 F. 2d 1.

The common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces. The only issue of law raised is whether the Tort Claims Act extends its remedy to one sustaining "incident to the service" what under other circumstances would be an actionable wrong. This is the "wholly different case" reserved from our decision in *Brooks* v. *United States,* 337 U. S. 49, 52.

There are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind. Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy.

We do not overlook considerations persuasive of liability in these cases. The Act does confer district court jurisdiction generally over claims for money damages against the United States founded on negligence. 28 U. S. C. § 1346 (b). It does contemplate that the Government will sometimes respond for negligence of military personnel, for it defines "employee of the Government" to include "members of the military or naval forces of the United States," and provides that " 'acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty." 28 U. S. C. § 2671. Its exceptions might also imply inclusion of claims such as we have here. 28 U. S. C. § 2680 (j) excepts "any claim arising out of the *combatant* activities of the military or naval forces, or the Coast Guard, *during time of war*" (emphasis supplied), from which it is said we should infer allowance of claims arising from noncombat activities in peace. Section 2680 (k) excludes "any claim arising in a foreign country." Significance

also has been attributed in these cases, as in the *Brooks* case, *supra,* p. 51, to the fact that eighteen tort claims bills were introduced in Congress between 1925 and 1935 and all but two expressly denied recovery to members of the armed forces; but the bill enacted as the present Tort Claims Act from its introduction made no exception. We also are reminded that the *Brooks* case, in spite of its reservation of service-connected injuries, interprets the Act to cover claims not incidental to service, and it is argued that much of its reasoning is as apt to impose liability in favor of a man on duty as in favor of one on leave. These considerations, it is said, should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language if the liability here asserted should prove so depleting of the public treasury as the Government fears.

This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole. The Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit. While the political theory that the King could do no wrong was repudiated in America, a legal doctrine derived from it that the Crown is immune from any suit to which it has not consented [6] was invoked on behalf of the Republic and applied by our courts as vigorously as it had been on behalf of the Crown.[7] As the Federal Government expanded its activities, its agents caused a multiplying number of remediless wrongs—wrongs which would have been actionable if inflicted by an individual or a corporation but remedi-

[6] The Crown has recently submitted itself to suit, see *post,* p. 141.

[7] *United States* v. *McLemore,* 4 How. 286; *Reeside* v. *Walker,* 11 How. 272, 290; *Ickes* v. *Fox,* 300 U. S. 82, 96.

less solely because their perpetrator was an officer or employee of the Government. Relief was often sought and sometimes granted through private bills in Congress, the number of which steadily increased as Government activity increased. The volume of these private bills, the inadequacy of congressional machinery for determination of facts, the importunities to which claimants subjected members of Congress, and the capricious results, led to a strong demand that claims for tort wrongs be submitted to adjudication. Congress already had waived immunity and made the Government answerable for breaches of its contracts and certain other types of claims.[8] At last, in connection with the Reorganization Act, it waived immunity and transferred the burden of examining tort claims to the courts. The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional. Congress was suffering from no plague of private bills on the behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute.

Looking to the detail of the Act, it is true that it provides, broadly, that the District Court "shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . ."[9] This confers jurisdiction to render judgment upon all such claims.

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[8] 28 U. S. C. § 1491.

[9] 28 U. S. C. § 1346 (b). The provisions of the Tort Claims Act are now found in Title 28, §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671–2680. In recodifying Title 28 of the United States Code, changes in language were made. The Tort Claims Act, as originally enacted, 60 Stat. 843, provided in § 410 that the District Court "shall have exclusive jurisdiction to hear, determine, and render judgment on *any* claim against the United States, for money only . . . ." (Emphasis supplied.) We attribute to this change of language no substantive change of law.

But it does not say that all claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as matter of law as much as to adjudge that liability exists. We interpret this language to mean all its says, but no more. Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law.

For this purpose, the Act goes on to prescribe the test of allowable claims, which is, "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . .," with certain exceptions not material here. 28 U. S. C. § 2674. It will be seen that this is not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence. This, we think, embodies the same idea that its English equivalent enacted in 1947 (Crown Proceedings Act 1947; 10 and 11 Geo. VI, c. 44, p. 863) expressed, "Where any person has a claim against the Crown after the commencement of this Act, and, if this Act had not been passed, the claim might have been enforced, subject to the grant . . ." of consent to be sued, the claim may now be enforced without specific consent. One obvious shortcoming in these claims is that plaintiffs can point to no liability of a "private individual" even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving.[10] Nor is there any liability "under like circumstances," for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons

[10] Cf. *Dinsman* v. *Wilkes*, 12 How. 390, and *Weaver* v. *Ward*, Hobart 135, 80 Eng. Rep. 284 (1616), as to intentional torts.

of command. The nearest parallel, even if we were to treat "private individual" as including a state, would be the relationship between the states and their militia. But if we indulge plaintiffs the benefit of this comparison, claimants cite us no state, and we know of none, which has permitted members of its militia to maintain tort actions for injuries suffered in the service, and in at least one state the contrary has been held to be the case.[11] It is true that if we consider relevant only a part of the circumstances and ignore the status of both the wronged and the wrongdoer in these cases we find analogous private liability. In the usual civilian doctor and patient relationship, there is of course a liability for malpractice. And a landlord would undoubtedly be held liable if an injury occurred to a tenant as the result of a negligently maintained heating plant. But the liability assumed by the Government here is that created by "all the circumstances," not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.

It is not without significance as to whether the Act should be construed to apply to service-connected injuries that it makes ". . . the law of the place where the act or omission occurred" govern any consequent liability. 28 U. S. C. § 1346 (b). This provision recognizes and assimilates into federal law the rules of substantive law of the several states, among which divergencies are notorious. This perhaps is fair enough when the claimant is not on duty or is free to choose his own habitat and thereby limit the jurisdiction in which it will be possible for federal

[11] *Goldstein* v. *New York*, 281 N. Y. 396, 24 N. E. 2d 97.

activities to cause him injury. That his tort claims should be governed by the law of the location where he has elected to be is just as fair when the defendant is the Government as when the defendant is a private individual. But a soldier on active duty has no such choice and must serve any place or, under modern conditions, any number of places in quick succession in the forty-eight states, the Canal Zone, or Alaska, or Hawaii, or any other territory of the United States. That the geography of an injury should select the law to be applied to his tort claims makes no sense. We cannot ignore the fact that most states have abolished the common-law action for damages between employer and employee and superseded it with workmen's compensation statutes which provide, in most instances, the sole basis of liability. Absent this, or where such statutes are inapplicable, states have differing provisions as to limitations of liability and different doctrines as to assumption of risk, fellow-servant rules and contributory or comparative negligence. It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value.

The relationship between the Government and members of its armed forces is "distinctively federal in character," as this Court recognized in *United States* v. *Standard Oil Co.*, 332 U. S. 301, wherein the Government unsuccessfully sought to recover for losses incurred by virtue of injuries to a soldier. The considerations which lead to that decision apply with even greater force to this case:

> ". . . 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. . . ." Pp. 305–306.

No federal law recognizes a recovery such as claimants seek. The Military Personnel Claims Act, 31 U. S. C. § 223b (now superseded by 28 U. S. C. § 2672), permitted recovery in some circumstances, but it specifically excluded claims of military personnel "incident to their service."

This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services.[12] We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy. There is as much statutory authority for one as for another of these conclusions. If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.

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[12] 48 Stat. 8 (1933), as amended, 38 U. S. C. § 701 (1946); 48 Stat. 11 (1933), as amended, 38 U. S. C. § 718 (1946); 55 Stat. 608 (1941), 38 U. S. C. § 725 (1946); 57 Stat. 558 (1943), as amended, 38 U. S. C. § 731 (1946); 62 Stat. 1219, 1220 (1948), 38 U. S. C. (Supp. III) §§ 740, 741 (1950).

A soldier is at peculiar disadvantage in litigation.[13] Lack of time and money, the difficulty if not impossibility of procuring witnesses, are only a few of the factors working to his disadvantage. And the few cases charging superior officers or the Government with neglect or misconduct which have been brought since the Tort Claims Act, of which the present are typical, have either been suits by widows or surviving dependents, or have been brought after the individual was discharged.[14] The compensation system, which normally requires no litigation, is not negligible or niggardly, as these cases demonstrate. The recoveries compare extremely favorably with those provided by most workmen's compensation statutes. In the *Jefferson* case, the District Court considered actual and prospective payments by the Veterans' Administration as diminution of the verdict. Plaintiff received $3,645.50 to the date of the court's computation and on estimated life expectancy under existing legislation would prospectively receive $31,947 in addition. In the *Griggs* case, the widow, in the two-year period after her husband's death, received payments in excess of $2,100. In addition, she received $2,695, representing the six months' death gratuity under the Act of December 17, 1919, as amended, 41 Stat. 367, 57 Stat. 599, 10 U. S. C. § 903. It is estimated that her total future pension payments will aggregate $18,000. Thus the widow will receive an amount in excess of $22,000 from Government gratuities, whereas she sought and could seek under state law only $15,000, the maximum permitted by Illinois for death.

[13] Relief was provided in the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, 50 U. S. C. App. § 501 *et seq.*

[14] *Brooks* v. *United States, supra* (discharged at time of suit); *Santana* v. *United States,* 175 F. 2d 320 (C. A. 1st Cir.) (suit by sole heirs); *Ostrander* v. *United States,* 178 F. 2d 923 (C. A. 2d Cir.) (suit by widow); *Samson* v. *United States,* 79 F. Supp. 406 (D. C. S. D. N. Y.) (suit by administrator); *Alansky* v. *Northwest Airlines,* 77 F. Supp. 556 (D. C. D. Mont.) (suit by widow and son).

It is contended that all these considerations were before the Court in the *Brooks* case and that allowance of recovery to Brooks requires a similar holding of liability here. The actual holding in the *Brooks* case can support liability here only by ignoring the vital distinction there stated. The injury to Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission. A government owned and operated vehicle collided with him. Brooks' father, riding in the same car, recovered for his injuries and the Government did not further contest the judgment but contended that there could be no liability to the sons, solely because they were in the Army. This Court rejected the contention, primarily because Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders.

We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command. Accordingly, the judgments in the *Feres* and *Jefferson* cases are affirmed and that in the *Griggs* case is reversed.

Nos. 9 and 29, affirmed.
No. 31, reversed.

MR. JUSTICE DOUGLAS concurs in the result.

GREAT ATLANTIC & PACIFIC TEA CO. *v.* SUPERMARKET EQUIPMENT CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 32. Argued October 18–19, 1950.—Decided December 4, 1950.

Claims 4, 5 and 6 of the Turnham patent No. 2,242,408, for a cashier's counter and movable frame for "cash and carry" grocery stores, *held* invalid for want of invention. Pp. 148–154.

(a) The extension of the counter alone was not sufficient to sustain the patent, unless, together with the other old elements, it made up a new combination patentable as such. Pp. 149–150.

(b) The mere combination of a number of old parts or elements which, in combination, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention. P. 151.

(c) This patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them in congregation as a monopoly. P. 153.

(d) Commercial success without invention does not make patentability. P. 153.

(e) The concurrence of the two courts below in holding the patent claims valid does not preclude this Court from overruling them, where, as in this case, a standard of invention appears to have been used that is less exacting than that required where a combination is made up entirely of old components. Pp. 153–154.

179 F. 2d 636, reversed.

The District Court sustained the validity of certain patent claims. 78 F. Supp. 388. The Court of Appeals affirmed. 179 F. 2d 636. This Court granted certiorari. 339 U. S. 947. *Reversed,* p. 154.

John H. Glaccum argued the cause for petitioner. With him on the brief was *Edwin J. Balluff.*

Townsend F. Beaman argued the cause for respondent. With him on the brief was *Lloyd W. Patch.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

Two courts below have concurred in holding three patent claims to be valid,[1] and it is stipulated that, if valid, they have been infringed. The issue, for the resolution of which we granted certiorari,[2] is whether they applied correct criteria of invention. We hold that they have not, and that by standards appropriate for a combination patent these claims are invalid.

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[1] Claims 4, 5, and 6 of the Turnham patent No. 2,242,408, which are involved in the controversy, read as follows:

"4. A checker's stand including a counter of the character described, an open bottom pusher frame thereon, means to guide said frame in sliding movement so that goods placed on the end of said counter within said frame may be pushed along the counter in a group to a position adjacent the checker by movement of said frame.

"5. A cashier's counter for cash and carry type of grocery comprising a portion spaced from the cashier's stand and upon which the merchandise may be deposited and arranged, a bottomless three sided frame on said portion and within which the merchandise is deposited and arranged, means whereby said frame is movable on said counter from said portion to a position adjacent the cashier's stand so that the merchandise may thus be moved as a group to a point where it may be conveniently observed, counted and registered by the cashier.

"6. A cashier's counter for cash and carry type of grocery comprising a portion spaced from the cashier's stand and upon which the merchandise may be deposited and arranged, a bottomless frame on said portion and within which the merchandise is deposited and arranged, means whereby said frame is movable on said counter from said portion to a position adjacent the cashier's stand so that the merchandise may thus be moved as a group to a point where it may be conveniently observed, counted and registered by the cashier, said frame being open at the end adjacent the cashier's stand and readily movable to be returned over said portion so as to receive the merchandise of another customer while the cashier is occupied with the previous group."

[2] 339 U. S. 947.

Stated without artifice, the claims assert invention of a cashier's counter equipped with a three-sided frame, or rack, with no top or bottom, which, when pushed or pulled, will move groceries deposited within it by a customer to the checking clerk and leave them there when it is pushed back to repeat the operation. It is kept on the counter by guides. That the resultant device works as claimed, speeds the customer on his way, reduces checking costs for the merchant, has been widely adopted and successfully used, appear beyond dispute.

The District Court explicitly found that each element in this device was known to prior art. "However," it found, "the conception of a counter with an extension to receive a bottomless self-unloading tray with which to push the contents of the tray in front of the cashier was a decidedly novel feature and constitutes a new and useful combination." [3]

The Court of Appeals regarded this finding of invention as one of fact, sustained by substantial evidence, and affirmed it as not clearly erroneous. It identified no other new or different element to constitute invention and overcame its doubts by consideration of the need for some such device and evidence of commercial success of this one.

Since the courts below perceived invention only in an extension of the counter, we must first determine whether they were right in so doing. We think not. In the first place, the extension is not mentioned in the claims, except, perhaps, by a construction too strained to be consistent with the clarity required of claims which define the boundaries of a patent monopoly. 38 Stat. 958, 35 U. S. C. § 33; *United Carbon Co.* v. *Binney & Smith Co.*, 317 U. S. 228; *General Electric Co.* v. *Wabash Corp.*, 304

[3] Finding of Fact No. 15 of District Judge Picard, whose opinion appears at 78 F. Supp. 388.

U. S. 364. In the second place, were we to treat the extension as adequately disclosed, it would not amount to an invention. We need not go so far as to say that invention never can reside in mere change of dimensions of an old device, but certainly it cannot be found in mere elongation of a merchant's counter—a contrivance which, time out of mind, has been of whatever length suited the merchant's needs. In the third place, if the extension itself were conceded to be a patentable improvement of the counter, and the claims were construed to include it, the patent would nevertheless be invalid for overclaiming the invention by including old elements, unless, together with its other old elements, the extension made up a new combination patentable as such. *Bassick Mfg. Co.* v. *Hollingshead Co.*, 298 U. S. 415, 425; *Carbice Corp.* v. *American Patents Development Corp.*, 283 U. S. 27. Thus, disallowing the only thing designated by the two courts as an invention, the question is whether the combination can survive on any other basis. What indicia of invention should the courts seek in a case where nothing tangible is new, and invention, if it exists at all, is only in bringing old elements together?

While this Court has sustained combination patents,[4] it never has ventured to give a precise and comprehensive definition of the test to be applied in such cases. The voluminous literature which the subject has excited discloses no such test.[5] It is agreed that the key to patent-

[4] *E. g., Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139; *Diamond Rubber Co.* v. *Consolidated Tire Co.*, 220 U. S. 428.

[5] The Index to Legal Periodicals reveals no less than sixty-four articles relating to combination patents and the theory and philosophy underlying the patent laws. Among the many texts are 1 Walker on Patents (Deller's ed. 1937); Stedman, Patents; Toulmin, Handbook of Patents; Merwin, Patentability of Inventions; Amdur, Patent Law and Practice; and 1 Roberts, Patentability and Patent Interpretation.

ability of a mechanical device that brings old factors into cooperation is presence or lack of invention. In course of time the profession came to employ the term "combination" to imply its presence and the term "aggregation" to signify its absence, thus making antonyms in legal art of words which in ordinary speech are more nearly synonyms. However useful as words of art to denote in short form that an assembly of units has failed or has met the examination for invention, their employment as tests to determine invention results in nothing but confusion. The concept of invention is inherently elusive when applied to combination of old elements. This, together with the imprecision of our language, have counselled courts and text writers to be cautious in affirmative definitions or rules on the subject.[6]

The negative rule accrued from many litigations was condensed about as precisely as the subject permits in *Lincoln Engineering Co.* v. *Stewart-Warner Corp.,* 303 U. S. 545, 549: "The mere aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention." To the same end is *Toledo*

[6] With respect to the word "invention," Mr. Justice Brown said: "The truth is the word cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not. In a given case we may be able to say that there is present invention of a very high order. In another we can see that there is lacking that impalpable something which distinguishes invention from simple mechanical skill. Courts, adopting fixed principles as a guide, have by a process of exclusion determined that certain variations in old devices do or do not involve invention; but whether the variation relied upon in a particular case is anything more than ordinary mechanical skill is a question which cannot be answered by applying the test of any general definition." *McClain* v. *Ortmayer,* 141 U. S. 419, 427.

Pressed Steel Co. v. *Standard Parts, Inc.*, 307 U. S. 350, and *Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84. The conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable. Elements may, of course, especially in chemistry or electronics, take on some new quality or function from being brought into concert, but this is not a usual result of uniting elements old in mechanics. This case is wanting in any unusual or surprising consequences from the unification of the elements here concerned, and there is nothing to indicate that the lower courts scrutinized the claims in the light of this rather severe test.

Neither court below has made any finding that old elements which made up this device perform any additional or different function in the combination than they perform out of it. This counter does what a store counter always has done—it supports merchandise at a convenient height while the customer makes his purchases and the merchant his sales. The three-sided rack will draw or push goods put within it from one place to another—just what any such a rack would do on any smooth surface—and the guide rails keep it from falling or sliding off from the counter, as guide rails have ever done. Two and two have been added together, and still they make only four.

Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into

the field of its monopoly and diminishes the resources available to skillful men. This patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them in congregation as a monopoly.

The Court of Appeals and the respondent both lean heavily on evidence that this device filled a long-felt want and has enjoyed commercial success. But commercial success without invention will not make patentability. *Toledo Pressed Steel Co.* v. *Standard Parts, Inc., supra.* The courts below concurred in finding that every element here claimed (except extension of the counter) was known to prior art. When, for the first time, those elements were put to work for the supermarket type of stores, although each performed the same mechanical function for them that it had been known to perform, they produced results more striking, perhaps, than in any previous utilization. To bring these devices together and apply them to save the time of customer and checker was a good idea, but scores of progressive ideas in business are not patentable, and we conclude on the findings below that this one was not.

It is urged, however, that concurrence of two courts below, in holding the patent claims valid, concludes this Court. A recent restatement of the "two-court rule" reads, "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank Co.* v. *Linde Co.,* 336 U. S. 271, 275. The questions of general importance considered here are not contingent upon resolving conflicting testimony, for the facts are little in dispute. We set aside no finding of fact as to invention, for none has been made except as to the extension of the counter, which

cannot stand as a matter of law. The defect that we find in this judgment is that a standard of invention appears to have been used that is less exacting than that required where a combination is made up entirely of old components. It is on this ground that the judgment below is

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK agrees, concurring.

It is worth emphasis that every patent case involving validity presents a question which requires reference to a standard written into the Constitution. Article I, § 8, contains a grant to the Congress of the power to permit patents to be issued. But, unlike most of the specific powers which Congress is given, that grant is qualified. The Congress does not have free rein, for example, to decide that patents should be easily or freely given. The Congress acts under the restraint imposed by the statement of purpose in Art. I, § 8. The purpose is "To promote the Progress of Science and useful Arts . . . ." The means for achievement of that end is the grant for a limited time to inventors of the exclusive right to their inventions.

Every patent is the grant of a privilege of exacting tolls from the public. The Framers plainly did not want those monopolies freely granted. The invention, to justify a patent, had to serve the ends of science—to push back the frontiers of chemistry, physics, and the like; to make a distinctive contribution to scientific knowledge. That is why through the years the opinions of the Court commonly have taken "inventive genius" as the test.* It

*"Inventive genius"—Mr. Justice Hunt in *Reckendorfer* v. *Faber*, 92 U. S. 347, 357; "Genius or invention"—Mr. Chief Justice Fuller in *Smith* v. *Whitman Saddle Co.*, 148 U. S. 674, 681; "Intuitive genius"—Mr. Justice Brown in *Potts* v. *Creager*, 155 U. S. 597, 607; "Inventive

is not enough that an article is new and useful. The Constitution never sanctioned the patenting of gadgets. Patents serve a higher end—the advancement of science. An invention need not be as startling as an atomic bomb to be patentable. But it has to be of such quality and distinction that masters of the scientific field in which it falls will recognize it as an advance. Mr. Justice Bradley stated in *Atlantic Works* v. *Brady,* 107 U. S. 192, 200, the consequences of a looser standard:

> "It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith."

The standard of patentability is a constitutional standard; and the question of validity of a patent is a question of law. *Mahn* v. *Harwood,* 112 U. S. 354, 358. The Court fashioned in *Graver Mfg. Co.* v. *Linde Co.,* 336 U. S.

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genius"—Mr. Justice Stone in *Concrete Appliances Co.* v. *Gomery,* 269 U. S. 177, 185; "Inventive genius"—Mr. Justice Roberts in *Mantle Lamp Co.* v. *Aluminum Products Co.,* 301 U. S. 544, 546; *Cuno Corp.* v. *Automatic Devices Corp.,* 314 U. S. 84, 91, "the flash of creative genius, not merely the skill of the calling."

271, 275, a rule for patent cases to the effect that this Court will not disturb a finding of invention made by two lower courts, in absence of a very obvious and exceptional showing of error. That rule, imported from other fields, never had a place in patent law. Having served its purpose in *Graver Mfg. Co.* v. *Linde Co.*, it is now in substance rejected. The Court now recognizes what has long been apparent in our cases: that it is the "standard of invention" that controls. That is present in every case where the validity of a patent is in issue. It is that question which the Court must decide. No "finding of fact" can be a substitute for it in any case. The question of invention goes back to the constitutional standard in every case. We speak with final authority on that constitutional issue as we do on many others.

The attempts through the years to get a broader, looser conception of patents than the Constitution contemplates have been persistent. The Patent Office, like most administrative agencies, has looked with favor on the opportunity which the exercise of discretion affords to expand its own jurisdiction. And so it has placed a host of gadgets under the armour of patents—gadgets that obviously have had no place in the constitutional scheme of advancing scientific knowledge. A few that have reached this Court show the pressure to extend monopoly to the simplest of devices:

Hotchkiss v. *Greenwood,* 11 How. 248: Doorknob made of clay rather than metal or wood, where different shaped door knobs had previously been made of clay.

Rubber-Tip Pencil Co. v. *Howard,* 20 Wall. 498: Rubber caps put on wood pencils to serve as erasers.

Collar Co. v. *Van Dusen,* 23 Wall. 530: Making collars of parchment paper where linen paper and linen had previously been used.

Brown v. *Piper,* 91 U. S. 37: A method for preserving fish by freezing them in a container operating in the same manner as an ice cream freezer.

Reckendorfer v. *Faber,* 92 U. S. 347: Inserting a piece of rubber in a slot in the end of a wood pencil to serve as an eraser.

Dalton v. *Jennings,* 93 U. S. 271: Fine thread placed across open squares in a regular hairnet to keep hair in place more effectively.

Double-Pointed Tack Co. v. *Two Rivers Mfg. Co.,* 109 U. S. 117: Putting a metal washer on a wire staple.

Miller v. *Foree,* 116 U. S. 22: A stamp for impressing initials in the side of a plug of tobacco.

Preston v. *Manard,* 116 U. S. 661: A hose reel of large diameter so that water may flow through hose while it is wound on the reel.

Hendy v. *Miners' Iron Works,* 127 U. S. 370: Putting rollers on a machine to make it moveable.

St. Germain v. *Brunswick,* 135 U. S. 227: Revolving cue rack.

Shenfield v. *Nashawannuck Mfg. Co.,* 137 U. S. 56: Using flat cord instead of round cord for the loop at the end of suspenders.

Florsheim v. *Schilling,* 137 U. S. 64: Putting elastic gussets in corsets.

Cluett v. *Claflin,* 140 U. S. 180: A shirt bosom or dickey sewn onto the front of a shirt.

Adams v. *Bellaire Stamping Co.,* 141 U. S. 539: A lantern lid fastened to the lantern by a hinge on one side and a catch on the other.

Patent Clothing Co. v. *Glover,* 141 U. S. 560: Bridging a strip of cloth across the fly of pantaloons to reinforce them against tearing.

Pope Mfg. Co. v. *Gormully Mfg. Co.,* 144 U. S. 238: Placing rubber hand grips on bicycle handlebars.

Knapp v. *Morss,* 150 U. S. 221: Applying the principle of the umbrella to a skirt form.

Morgan Envelope Co. v. *Albany Perforated Wrapping Paper Co.,* 152 U. S. 425: An oval rather than cylindrical toilet paper roll, to facilitate tearing off strips.

Dunham v. *Dennison Mfg. Co.,* 154 U. S. 103: An envelope flap which could be fastened to the envelope in such a fashion that the envelope could be opened without tearing.

The patent involved in the present case belongs to this list of incredible patents which the Patent Office has spawned. The fact that a patent as flimsy and as spurious as this one has to be brought all the way to this Court to be declared invalid dramatically illustrates how far our patent system frequently departs from the constitutional standards which are supposed to govern.

BLAU *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 22. Argued November 7, 1950.—Decided December 11, 1950.

1. It is a violation of the Fifth Amendment to compel a witness who objects on the ground of self-incrimination to testify before a grand jury in response to questions concerning his employment by the Communist Party or intimate knowledge of its operations when there is in effect a statute such as the Smith Act, 18 U. S. C. § 2385, making it a crime to advocate, or to affiliate with a group which advocates, overthrow of the Government by force. Pp. 159–161.
2. It is immaterial whether answers to the questions asked would have been sufficient standing alone to support a conviction when they would have furnished a link in the chain of evidence needed in a prosecution of the witness for violation of (or conspiracy to violate) the Smith Act. P. 161.

180 F. 2d 103, reversed.

Petitioner was adjudged guilty of contempt of court for refusing, on the ground of possible self-incrimination, to answer certain questions before a federal grand jury and later before a federal district court. The Court of Appeals affirmed. 180 F. 2d 103. This Court granted certiorari. 339 U. S. 956. *Reversed,* p. 161.

Samuel D. Menin argued the cause and filed a brief for petitioner.

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Assistant Attorney General McInerney, John F. Davis* and *J. F. Bishop.*

MR. JUSTICE BLACK delivered the opinion of the Court.

In response to a subpoena, petitioner appeared as a witness before the United States District Court Grand Jury at Denver, Colorado. There she was asked several

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questions concerning the Communist Party of Colorado and her employment by it.[1] Petitioner refused to answer these questions on the ground that the answers might tend to incriminate her. She was then taken before the district judge where the questions were again propounded and where she again claimed her constitutional privilege against self-incrimination and refused to testify. The district judge found petitioner guilty of contempt of court and sentenced her to imprisonment for one year. The Court of Appeals for the Tenth Circuit affirmed. 180 F. 2d 103. We granted certiorari because the decision appeared to deny rights guaranteed by the Fifth Amendment.[2] The holding below also was in conflict with recent decisions of the Fifth and Ninth Circuits. *Estes* v. *Potter,* 183 F. 2d 865; *Alexander* v. *United States,* 181 F. 2d 480.

At the time petitioner was called before the grand jury, the Smith Act was on the statute books making it a crime among other things to advocate knowingly the desirability of overthrow of the Government by force or violence; to organize or help to organize any society or group which

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[1] The grand jury's questions which petitioner refused to answer were as follows: "Mrs. Blau, do you know the names of the State officers of the Communist Party of Colorado?" "Do you know what the organization of the Communist Party of Colorado is, the table of organization of the Communist Party of Colorado?" "Were you ever employed by the Communist Party of Colorado?" "Mrs. Blau, did you ever have in your possession or custody any of the books and records of the Communist Party of Colorado?" "Did you turn the books and records of the Communist Party of Colorado over to any particular person?" "Do you know the names of any persons who might now have the books and records of the Communist Party of Colorado?" "Could you describe to the grand jury any books and records of the Communist Party of Colorado?"

[2] The Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U. S. Const., Amend. V.

teaches, advocates or encourages such overthrow of the Government; to be or become a member of such a group with knowledge of its purposes.[3] These provisions made future prosecution of petitioner far more than "a mere imaginary possibility . . . ." *Mason* v. *United States,* 244 U. S. 362, 366; she reasonably could fear that criminal charges might be brought against her if she admitted employment by the Communist Party or intimate knowledge of its workings. Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act. Prior decisions of this Court have clearly established that under such circumstances, the Constitution gives a witness the privilege of remaining silent. The attempt by the courts below to compel petitioner to testify runs counter to the Fifth Amendment as it has been interpreted from the beginning. *United States* v. *Burr,* 25 Fed. Cas., Case No. 14,692e, decided by Chief Justice Marshall in the Circuit Court of the United States for the District of Virginia; *Counselman* v. *Hitchcock,* 142 U. S. 547; *Ballmann* v. *Fagin,* 200 U. S. 186; *Arndstein* v. *McCarthy,* 254 U. S. 71; *Boyd* v. *United States,* 116 U. S. 616; cf. *United States* v. *White,* 322 U. S. 694, 698, 699.

Reversed.

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

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[3] 62 Stat. 808, 18 U. S. C. § 2385.

McGRATH, ATTORNEY GENERAL, ET AL. *v.* KRISTENSEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 34. Argued October 19–20, 1950.—Decided December 11, 1950.

1. A justiciable question under Article III of the Constitution is presented by the suit of an alien for a judgment declaring that, in passing on his application for suspension of deportation under § 19 (c) of the Immigration Act, the Attorney General and other immigration and naturalization officials must act on the assumption that he is eligible for naturalization. Pp. 167–169.

   (a) A different result is not required by the provision of § 19 (c) that suspensions of deportation for more than six months must be submitted to Congress for approval, since the Attorney General is given final power to suspend deportation for at least six months. *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, distinguished. Pp. 167–168.

2. An administrative decision against a requested suspension of deportation under § 19 (c) of the Immigration Act (based solely upon a finding of ineligibility for naturalization) can be challenged in a suit for a declaratory judgment by an alien not in custody. Pp. 168–171.

   (a) The provision of § 19 (a) of the Immigration Act making the Attorney General's decision on deportation "final" does not preclude judicial review by declaratory judgment of the question of eligibility for citizenship. Pp. 168–169.

   (b) Where an official's authority to act depends upon the status of the person affected, that status, when in dispute, may be determined by a declaratory judgment proceeding after the exhaustion of administrative remedies. *Perkins* v. *Elg*, 307 U. S. 325. Pp. 169–171.

3. Respondent, a Danish citizen, entered the United States on August 17, 1939, as a temporary visitor for 60 days. The outbreak of World War II prevented his return to Denmark. Successive extensions of stay were granted and deportation proceedings begun in May 1940 were stayed for the duration of World War II and reopened in 1946. On March 30, 1942, he applied for and obtained relief from liability for military service under § 3 (a) of the Selec-

tive Training and Service Act of 1940. *Held:* Respondent was not "residing in the United States" within the meaning of § 3 (a) of the Selective Training and Service Act and the regulations issued thereunder when he applied for relief from "liability" for military service, and such application did not make him ineligible for naturalization or for a suspension of deportation under § 19 (c) of the Immigration Act. Pp. 171–176.

86 U. S. App. D. C. 48, 179 F. 2d 796, affirmed.

The District Court dismissed respondent's suit for a declaratory judgment and an injunction. The Court of Appeals reversed. 86 U. S. App. D. C. 48, 179 F. 2d 796. This Court granted certiorari. 339 U. S. 956. *Affirmed,* p. 176.

Robert W. Ginnane argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, L. Paul Winings* and *Charles Gordon.*

David W. Louisell argued the cause for respondent. With him on the brief was *Samuel Spencer.*

Jack Wasserman filed a brief for Rasmussen et al., as *amici curiae,* supporting respondent.

MR. JUSTICE REED delivered the opinion of the Court.

Review was granted by this Court to determine whether the Attorney General was justified in refusing to suspend deportation of an alien under § 19 (c), as amended, 62 Stat. 1206, of the Immigration Act of 1917,[1] 39 Stat. 874,

[1] "(c) In the case of any alien . . . who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; . . . . If the depor-

889, 8 U. S. C. §§ 101, 155 (c), on the sole ground that the alien was ineligible for naturalization. The alien's eligibility for naturalization, the substantive question in this case, depends upon whether the alien was "residing" in the United States and therefore liable for military service under the Selective Training and Service Act of 1940, when he made application to be relieved from the liability. Section 3 (a) of that Act as amended, the applicable section, provides that "any person who makes such application shall thereafter be debarred from becoming a citizen of the United States." [2]

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tation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law."

[2] Section 3 (a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 55 Stat. 845, provides in part:

"Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States . . . shall be liable for training and service in the land or naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States . . . ."

The grant of certiorari also covered a procedural question: whether the Attorney General's refusal on the ground stated to grant suspension of deportation was subject to judicial review otherwise than by habeas corpus.

The allegations of the alien's complaint have not been controverted. Kristensen, a Danish citizen, entered the United States on August 17, 1939, as a temporary visitor for sixty days, to attend the New York World's Fair and visit relatives. The outbreak of World War II prevented his return to Denmark. Successive extensions of stay were applied for and granted, but eventually economic necessity compelled Kristensen to become employed and thereby violate his visitor's status. The process of deportation on the ground of violation of his visitor's status was begun in May 1940, stayed for the duration of World War II, and reopened in 1946. A warrant of deportation was issued in 1941 but was withdrawn on June 10, 1946, to permit the alien to submit an application for suspension of deportation under § 19 (c) of the Immigration Act, *supra,* which allows such suspension when deportation would result in serious economic detriment to the United States citizen wife of an alien. This relief was refused on the sole ground of Kristensen's asserted ineligibility for citizenship resulting from his having filed with his Selective Service Board on March 30, 1942, after registration, an application for relief from service under § 3 (a) of the Selective Training and Service Act, *supra.* Eligibility is a statutory prerequisite to the Attorney General's exercise of his discretion to suspend deportation in this case.[3]

Respondent, not then nor thereafter in custody, sought a declaratory judgment that the Attorney General and other immigration and naturalization officials must, in

[3] See note 1.

passing upon his application for suspension of deportation, decide on the basis that he is eligible for naturalization in the United States.[4] He also sought to enjoin the Attorney General and other officials from exercising their authority under § 19 (c) of the Immigration Act on the assumption of respondent's ineligibility.

The District Court dismissed the complaint without opinion, apparently for failure to state a ground for relief. The United States Court of Appeals for the District of Columbia reversed on the ground that, under the facts alleged, Kristensen could not have been subject to the Selective Training and Service Act of 1940 at the time he made his claim for exemption, and therefore the claim was without effect and did not render him ineligible for naturalization. 86 U. S. App. D. C. 48, 179 F. 2d 796. The Court of Appeals ruled that the Selective Training and Service Act of 1940, as amended, applied only to aliens "residing in the United States" and "absent any showing of acts or declarations indicating an intention to remain at the time the form was filed, the immigration authorities erroneously construed 'residing in the United States' when they held it applicable to an alien in this country under a temporary visitor's visa whose deportation had been ordered and then stayed because of war." [5]

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[4] While respondent alleged that his application for deferment was filed because of erroneous advice received from a member of the local Selective Service Board, it sufficiently, though inartistically, appears from the complaint that its true gravamen is the ineffectiveness of the application for relief from service to bar the alien's naturalization because he was not "residing" in the United States within the meaning of the Selective Training and Service Act at the time the application was filed. This construction was put upon the complaint by the Court of Appeals and has been adopted by the United States in its presentation here.

[5] 86 U. S. App. D. C. 48, 56, 179 F. 2d 796, 804.

We granted certiorari because of the importance of the question in the administration of the immigration and naturalization laws. The principle of the decision below is in conflict with that applied in *Benzian* v. *Godwin,* 168 F. 2d 952. An important procedural question also exists in view of the Government's insistence that habeas corpus is the only available judicial remedy for aliens in deportation proceedings. Before we consider these questions, however, we turn to a jurisdictional problem.

Federal Jurisdiction.—The Government properly presents for our consideration an issue of federal jurisdiction not heretofore raised. The *quaere* is whether this proceeding involves a justiciable question under Article III of the Constitution.[6] It is said the Attorney General's suspension of deportation is merely a recommendation to Congress, and that federal courts cannot intervene because at this point a court order does not finally control the deportation of the alien.[7] This argument is founded on § 19 (c) of the Immigration Act which provides that, if deportation is suspended longer than six months, a detailed report must be made to Congress, and, if Congress fails to approve the suspension before the termination of the session next following the session in which the case is reported, the Attorney General must thereupon proceed with the deportation.[8]

While such a jurisdictional point may be raised at any time,[9] we do not think there is basis for the objection

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[6] Federal constitutional courts act only on cases and controversies and do not give advisory opinions. *Hayburn's Case,* 2 Dall. 409; *Muskrat* v. *United States,* 219 U. S. 346; *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.,* 333 U. S. 103, 113–14.

[7] Cf. *Gordon* v. *United States,* 117 U. S. 697, 702; *United States* v. *Jefferson Electric Co.,* 291 U. S. 386, 400–401; *Chicago & Southern Air Lines* v. *Waterman S. S. Corp., supra.*

[8] See note 1.

[9] *King Bridge Co.* v. *Otoe County,* 120 U. S. 225, 226; *United States* v. *Corrick,* 298 U. S. 435, 440.

here. The statute gives the Attorney General the power to suspend deportation for a minimum of six months and until Congress acts or the time for action elapses. The Attorney General's power is final for such deferment of deportation. That other forces may come into play later with authority to take other steps does not detract from that finality. The United States relies particularly on *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103. The congressional power here is quite distinct from the Presidential power concerning overseas licensing in the *Chicago & Southern* case. The license in question there was ineffective until the President acted. The delay here is effective despite subsequent congressional action. This litigation, whatever its ultimate effect, is aimed only at the delay. The judgment sought in this proceeding would be binding and conclusive on the parties if entered and the question is justiciable.

Declaratory Judgment.—The United States does not challenge finality for purpose of review.[10] However, the Government does contend that the Immigration Act provision, § 19 (a), making the Attorney General's decision on deportation "final" precludes judicial review except by habeas corpus of his refusal to grant suspension of deportation. The procedural question as thus narrowed is whether an administrative decision against a requested suspension of deportation under § 19 (c) of the Immigration Act can be challenged by an alien free from custody through a declaratory judgment or whether, to secure redress, he must await the traditional remedy of habeas corpus after his arrest for deportation.

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[10] We think the Attorney General's refusal to suspend deportation for the reason of ineligibility for citizenship has administrative finality. Administrative remedies are exhausted. Compare *Levers* v. *Anderson*, 326 U. S. 219.

The Immigration Act of 1917, 39 Stat. 889, as amended, 8 U. S. C. § 155 (a), authorized the deportation of any alien found in the United States in violation of the immigration laws, and always provided that administrative decision as to deportation "shall be final." The end of that administrative proceeding creates a situation which is subject to test on constitutional grounds through habeas corpus by one in custody.[11] We do not find it necessary to consider the applicability of § 10 of the Administrative Procedure Act, 60 Stat. 243, to this proceeding. Where an official's authority to act depends upon the status of the person affected, in this case eligibility for citizenship, that status, when in dispute, may be determined by a declaratory judgment proceeding after the exhaustion of administrative remedies. Under § 19 (c) of the Immigration Act the exercise of the Attorney General's appropriate discretion in suspending deportation is prohibited in the case of aliens ineligible for citizenship. The alien is determined to have a proscribed status by this administrative ruling of ineligibility. Since the administrative determination is final, the alien can remove the bar to consideration of suspension only by a judicial determination of his eligibility for citizenship. This is an actual controversy between the alien and immigration officials over the legal right of the alien to be considered for suspension. As such a controversy over federal laws, it is within the jurisdiction of federal courts, 28 U. S. C. § 1331, and the terms of the Declaratory Judgment Act, 28 U. S. C. § 2201.

It was so held in *Perkins* v. *Elg,* 307 U. S. 325, where a declaratory judgment action was brought against the

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[11] *Ng Fung Ho* v. *White,* 259 U. S. 276; *Mahler* v. *Eby,* 264 U. S. 32, 43; *Wong Yang Sung* v. *McGrath,* 339 U. S. 33. Cf. *Gusik* v. *Schilder,* 340 U. S. 128; *Estep* v. *United States,* 327 U. S. 114, 122.

Secretary of Labor, then the executive official in charge of deportation of aliens, the Secretary of State, and the Commissioner of Immigration, to settle citizenship status. The Department of Labor had notified Miss Elg, who was not in custody, that she was not a citizen and was illegally remaining in the United States, and the Department of State had refused her a passport "solely on the ground that she had lost her native born American citizenship." The District Court sustained a motion to dismiss the proceeding against the Secretary of State because his function as to passports was discretionary, but declared against the contention of the Secretary of Labor and held that Miss Elg had not lost her American citizenship. On appeal, the Court of Appeals for the District of Columbia affirmed both the dismissal of the Secretary of State from the proceeding and the holding that Miss Elg was a citizen, and also determined that the case was properly brought within the Declaratory Judgment Act. *Perkins* v. *Elg*, 69 App. D. C. 175, 99 F. 2d 408. The United States raised no question on its petition for certiorari as to the propriety of the declaratory judgment action. Miss Elg, however, obtained certiorari from the dismissal of the proceeding against the Secretary of State, and the United States defended the judgment of dismissal on the ground that the Declaratory Judgment Act did not add to federal court jurisdiction but merely gave an additional remedy.[12] In the Government's brief it was said judicial jurisdiction would be expanded without warrant "by permitting the court to substitute its discretion for that of the executive departments in a matter belonging to the proper jurisdiction of the latter." We rejected that con-

[12] *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240; *United States* v. *West Virginia*, 295 U. S. 463, 475; *Aetna Casualty & Surety Co.* v. *Quarles*, 92 F. 2d 321, 324, were cited.

tention and reversed the Court of Appeals on this point, saying,

> "The court below, properly recognizing the existence of an actual controversy with the defendants (*Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227), declared Miss Elg 'to be a natural born citizen of the United States,' and we think that the decree should include the Secretary of State as well as the other defendants. The decree in that sense would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship." 307 U. S. 349–350.[13]

So here a determination that Kristensen is not barred from citizenship by § 3 (a) of the Selective Training and Service Act of 1940 only declares that he has such status as entitles him to consideration under § 19 (c) of the Immigration Act. We think that the present proceeding is proper.[14]

Eligibility for Naturalization.—Under § 3 (a) of the Selective Training and Service Act of 1940, Kristensen was liable for service if "residing" in the United States within the meaning of the Act. Section 3 (a) also pro-

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[13] 8 U. S. C. § 903 has since been enacted, providing in part:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States."

[14] Cf. *Benzian* v. *Godwin,* 168 F. 2d 952.

vided that if he applied "to be relieved from such liability" as a subject of a neutral country he would be excused from service but would thereafter be debarred from our citizenship.[15]

If Kristensen was not "residing" at the time of his application for relief, he could not then have had "such liability" for service. If there was no "liability" for service, the disqualification for citizenship under the penalty clause could not arise because the applicant had not made the "application" referred to in the statute as "such application." "Such application" refers to an application to be relieved from "such liability." As there was no "liability" for service, his act in applying for relief from a nonexistent duty could not create the bar against naturalization. By the terms of the statute, that bar only comes into existence when an alien resident liable for service asks to be relieved.

The question, then, is whether Kristensen was "residing," within the meaning of the Selective Training and Service Act of 1940 and regulations issued thereunder, at the time of his application, March 30, 1942. As we conclude that he was not a resident under the Act at the time of his application for relief from military service, we do not decide whether Denmark was a neutral country. Nor need we determine whether the bar against citizenship has been removed by the termination of the Selective Training and Service Act of 1940.[16]

The phrase of § 3 (a), "every other male person residing in the United States," when used as it is, in juxtaposition with "every male citizen," [17] falls short of saying that every person in the United States is subject to mili-

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[15] See note 2.

[16] See § 16 (b), 54 Stat. 897, as amended, 59 Stat. 166, 60 Stat. 181, 342; *Benzian* v. *Godwin,* 168 F. 2d 952, 956.

[17] See note 2.

tary service. But the Act did not define who was a "male person residing in the United States," liable for training and service after December 20, 1941. 55 Stat. 845.[18] Such precisiveness was left for administrative regulation. Section 10 (a) and (b), 54 Stat. 893, 894, authorized the President to prescribe rules and regulations for the Act with power of delegation. The President prescribed the first regulations on September 23, 1940, and authorized the Director to prescribe amendments. Exec. Order 8545, 3 CFR, 1943 Cum. Supp., 719, 722. Amendments promulgating the regulations here applicable were issued, effective February 7, 1942, 7 Fed. Reg. 855. They are set out below.[19] Under these regulations it would seem that Kristensen, who never declared an intention to become a

[18] The original version of the Act required every male alien residing in the United States to register, but subjected only aliens who had declared their intention to become citizens to liability for service. 54 Stat. 885. The Attorney General construed the words "male alien residing in the United States," the earlier phrase defining those subject to registration, to include "every alien . . . who lives or has a place of residence or abode in the United States, temporary or otherwise, or for whatever purpose taken or established, ..." 39 Op. Atty. Gen. 504, 505.

[19] "§ 611.12 *When a nondeclarant alien is residing in the United States.* Every male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States, unless he is in one of the categories specifically excepted by the provisions of § 611.13, is 'a male person residing in the United States' within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended.

"§ 611.13 *When a nondeclarant alien is not residing in the United States.* (a) A male alien who is now in or hereafter enters the United States who has not declared his intention to become a citizen of the United States is not 'a male person residing in the United States' within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended:

. . . . . .

"(6) If he has entered or hereafter enters the United States in a manner prescribed by its laws and does not remain in the United

citizen of the United States and who entered the United States in August 1939, was not classified as a resident neutral alien until May 16, 1942. Otherwise, there would have been no occasion for § 611.13 (b), which declares the male alien who remains in the United States after May 16, 1942, to be a resident. Until that date he was in the same category as the newly arrived nondeclarant alien who, under the regulations and the Act, did not become a resident for three months. The application for relief from service was made on March 30, 1942.

The regulations, quoted above, either made an alien in Kristensen's situation a nonresident of the United States for the purpose of the Selective Training and Service Act, between February 7 and May 17, 1942, or

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States after May 16, 1942, or for more than 3 months following the date of his entry, whichever is the later.

"(b) When a male alien who has not declared his intention to become a citizen of the United States has entered or hereafter enters the United States in a manner prescribed by its laws and remains in the United States after May 16, 1942, or for more than 3 months following the date of his entry, whichever is the later, he is 'a male person residing in the United States' within the meaning of section 2 and section 3 of the Selective Training and Service Act of 1940, as amended, unless he has filed an Alien's Application for Determination of Residence (Form 302) in the manner provided in § 611.21 and such application is either (1) pending or (2) has resulted in a determination that he is not 'a male person residing in the United States' within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, in either of which events he shall not be considered as 'a male person residing in the United States' within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended, during the period when such application is pending or during the period covered by the Alien's Certificate of Nonresidence (Form 303) issued to him as a result of the determination that he is not 'a male person residing in the United States' within the meaning of section 2 or section 3 of the Selective Training and Service Act of 1940, as amended. (54 Stat. 885; 50 U. S. C., Sup. 301–318, inclusive; E. O. No. 8545, 5 F. R. 3779)"

they were nondeterminative of status in that period.[20] In the absence of a determinative regulation, the meaning of the word "residing" in § 3 (a) requires examination. The meaning of that word, of course, depends upon the meaning of "residence." "Residence" sometimes equals domicile, as in voting. Again, as in taxation, one who is not a mere transient or sojourner is a "resident." § 29.211–2, Income Tax Regulations. The definition varies with the statute. Restatement, Conflict of Laws (1934), § 9, comment *e*. See *Carroll* v. *United States,* 133 F. 2d 690, 693. In a naturalization case where eligibility depended upon the required residence in the United States, it was held that an enforced service in the German army 1914–1918 and subsequent foreign residence until 1921 on account of lack of means and inability to obtain a passport did not break the continuity of American residence. The court there said,

> "We shall not try to define what is the necessary attitude of mind to create or retain a residence under this statute, and how it differs from the choice of a 'home,' which is the test of domicile. Frankly it is doubtful whether courts have as yet come to any agreement on the question. But there is substantial unanimity that, however construed in a statute, residence involves some choice, again like domicile, and that presence elsewhere through constraint has no effect upon it." [21]

When we consider that § 3 (a) was obviously intended to require military service from all who sought the advan-

[20] Apparently the regulations intended to give aliens time to enable them to file the Alien's Application for Determination of Residence, see 7 Fed. Reg. 2084, § 611.21 (b) (1), or to leave the country before their status as "residents," resulting in liability for military service, was fixed.

[21] *Neuberger* v. *United States,* 13 F. 2d 541, 542. Cf. *Stadtmuller* v. *Miller,* 11 F. 2d 732, 738.

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tages of our life and the protection of our flag, we cannot conclude, without regulations so defining residence, that a sojourn within our borders made necessary by the conditions of the times was residence within the meaning of the statute.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BLACK concurs in the judgment of the Court.

MR. JUSTICE DOUGLAS dissents from the holding of the Court that respondent was not "residing" in the United States within the meaning of § 3 (a) of the Act. See the opinion of Judge Frank in *Benzian* v. *Godwin,* 168 F. 2d 952.

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

MR. JUSTICE JACKSON, concurring.

I concur in the judgment and opinion of the Court. But since it is contrary to an opinion which, as Attorney General, I rendered in 1940, I owe some word of explanation. 39 Op. Atty. Gen. 504. I am entitled to say of that opinion what any discriminating reader must think of it—that it was as foggy as the statute the Attorney General was asked to interpret. It left the difficult borderline questions posed by the Secretary of War unanswered, covering its lack of precision with generalities which, however, gave off overtones of assurance that the Act applied to nearly every alien from a neutral country caught in the United States under almost any circumstances which required him to stay overnight.

The opinion did not at all consider aspects of our diplomatic history, which I now think, and should think I

would then have thought, ought to be considered in applying any conscription Act to aliens.

In times gone by, many United States citizens by naturalization have returned to visit their native lands. There they frequently were held for military duty by governments which refused to recognize a general right of expatriation. The United States consistently has asserted the right of its citizens to be free from seizure for military duty by reason of temporary and lawful presence in foreign lands. Immunities we have asserted for our own citizens we should not deny to those of other friendly nations. Nor should we construe our legislation to penalize or prejudice such aliens for asserting a right we have consistently asserted as a matter of national policy in dealing with other nations. Of course, if an alien is not a mere sojourner but acquires residence here in any permanent sense, he submits himself to our law and assumes the obligations of a resident toward this country.

The language of the Selective Service Act can be interpreted consistently with this history of our international contentions. I think the decision of the Court today does so. Failure of the Attorney General's opinion to consider the matter in this light is difficult to explain in view of the fact that he personally had urged this history upon this Court in arguing *Perkins* v. *Elg,* 307 U. S. 325. Its details may be found in the briefs and their cited sources. It would be charitable to assume that neither the nominal addressee nor the nominal author of the opinion read it. That, I do not doubt, explains Mr. Stimson's acceptance of an answer so inadequate to his questions. But no such confession and avoidance can excuse the then Attorney General.

Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. See Chief Justice Taney, *License Cases,* 5 How. 504, recanting views he

had pressed upon the Court as Attorney General of Maryland in *Brown* v. *Maryland,* 12 Wheat. 419. Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, "The matter does not appear to me now as it appears to have appeared to me then." *Andrews* v. *Styrap,* 26 L. T. R. (N. S.) 704, 706. And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: "My own error, however, can furnish no ground for its being adopted by this Court . . . ." *United States* v. *Gooding,* 12 Wheat. 460, 478. Perhaps Dr. Johnson really went to the heart of the matter when he explained a blunder in his dictionary—"Ignorance, sir, ignorance." But an escape less self-depreciating was taken by Lord Westbury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all.

Syllabus.

CITIES SERVICE GAS CO. *v.* PEERLESS OIL & GAS CO. ET AL.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 153. Argued November 9–10, 1950.—Decided December 11, 1950.

The Oklahoma Corporation Commission, after hearings and on findings made in proceedings before it, issued an order fixing a minimum wellhead price on all gas taken from a natural gas field located within the State. A second order directed appellant, a producer in this field and operator of an interstate gas pipe-line system, to take gas ratably from another producer in the field, at the price fixed in the first order. A large percentage of the production of the field was sold in interstate commerce. *Held:* The orders of the Commission were valid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Commerce Clause of the Federal Constitution. Pp. 180–183, 185–189.

1. A state may adopt reasonable regulations to prevent economic and physical waste of natural gas. P. 185.

2. Prevention of waste of natural resources, protection of the correlative rights of owners through ratable taking, and protection of the economy of the state may justify legislative control over production even though the uses to which property may profitably be put are restricted. Pp. 185–186.

3. A price-fixing order, like any other regulation, is lawful if substantially related to a legitimate end sought to be attained. P. 186.

4. There was ample evidence in the proceedings before the Commission to sustain its finding that existing low field prices for gas were resulting in economic waste and were conducive to physical waste; and that was a sufficient basis for the orders issued. Pp. 180–183, 186.

5. It is no concern of this Court that other regulatory devices might be more appropriate, or that less extensive measures might suffice. P. 186.

6. In a field of this complexity with such diverse interests involved, this Court cannot say that there is a clear national interest so harmed that the state price-fixing orders here employed fall within the ban of the Commerce Clause. Pp. 186–188.

7. It is not for this Court to consider whether the State's unilateral efforts to conserve gas will be fully effective. P. 188.

8. *Hood & Sons* v. *Du Mond,* 336 U. S. 525, distinguished. P. 188.

9. There is before this Court no question of conflict between the orders of the State Commission and federal authority under the Natural Gas Act. Pp. 188–189.

203 Okla. 35, 220 P. 2d 279, affirmed.

Two orders of the Oklahoma Corporation Commission, challenged as violative of the Federal Constitution, were sustained by the State Supreme Court. 203 Okla. 35, 220 P. 2d 279. On appeal to this Court, *affirmed,* p. 189.

Glenn W. Clark argued the cause for appellant. With him on the brief were *Joe Rolston, Jr., Robert R. McCracken, R. E. Cullison* and *O. R. Stites.*

T. Murray Robinson argued the cause for the State of Oklahoma, *Floyd Green* for the Corporation Commission of Oklahoma, and *D. A. Richardson* for the Peerless Oil & Gas Co., appellees. With them on the brief were *Mac Q. Williamson,* Attorney General, and *Fred Hansen,* Assistant Attorney General, for the State of Oklahoma, and *Thomas J. Lee* and *Richard H. Dunn* for the Commissioners of the Land Office of Oklahoma.

Mr. Justice Clark delivered the opinion of the Court.

The issue in this case is the power of a state to fix prices at the wellhead on natural gas produced within its borders and sold interstate. It originates from proceedings before the Oklahoma Corporation Commission which terminated with the promulgation of two orders. The first order set a minimum wellhead price on all gas taken from the Guymon-Hugoton Field, located in Texas County, Oklahoma. The second directed Cities Service, a producer in this field and operator of an interstate gas pipe-line system, to take gas ratably from Peerless, another producer in the same field, at the price incorporated in the first order. The Supreme Court of Okla-

homa upheld both orders against contentions that they contravened the constitution and statutes of Oklahoma and the Fourteenth Amendment and Commerce Clause of the Constitution of the United States. 203 Okla. 35, 220 P. 2d 279 (1950). From this judgment Cities Service appealed to this Court. A substantial federal claim having been duly raised and necessarily denied by the highest state court, we noted probable jurisdiction. 28 U. S. C. § 1257 (2).

I.

The case may be summarized as follows. The Hugoton Gas Field, 120 miles long and 40 miles wide, lies in the States of Texas, Oklahoma and Kansas. The Oklahoma portion, known as the Guymon-Hugoton Field, has approximately 1,062,000 proven acres with some 300 wells, of which 240 are producing. About 90 percent of Guymon-Hugoton's production is ultimately consumed outside the State. Cities Service, operator of a pipe line connected with the field, owns about 300,000 acres and 123 wells. In addition, it has 94 wells dedicated to it by lease for the life of the field and some 19 wells under term lease, giving it control over 236 of the 300 wells. Aside from the holdings of a few small tract owners and the acreages held in trust by the Oklahoma Land Office—some 49,600 acres—the only reserves in the field not owned by or affiliated with a pipe line are those of Harrington-Marsh with some 75,000 acres and Peerless with about 100,000 acres. Under prevailing market conditions, wellhead prices range from 3.6 to 5 cents per thousand cubic feet, varying prices being paid to different producers at the same time. In contrast, there is evidence that the "commercial heat value" of natural gas, in terms of competitive fuel equivalents, is in excess of 10 cents per thousand cubic feet at the wellhead.

While the Guymon-Hugoton Field has three principal production horizons, they are so interconnected as to make in effect one large reservoir of gas. Cities' wells are located in an area in which the gas pressure is considerably lower than that found beneath the wells of Peerless. As a result, production from Cities' wells was causing drainage from the Peerless section of the field, and Peerless was losing gas even though its wells were not producing.

Having no pipe-line outlet of its own, Peerless offered to sell the potential output of its wells to Cities Service. Cities refused except on the condition that Peerless dedicate all gas from its acreage, at a price of 4 cents per thousand cubic feet, for the life of the leases. Dissatisfied with the price and the other terms, Peerless requested the Oklahoma Corporation Commission (a) to order Cities to make a connection with a Peerless well and purchase the output of that well ratably at a price fixed by the Commission, and (b) to fix the price to be paid by all purchasers of natural gas in the Guymon-Hugoton Field. Shortly thereafter, the Oklahoma Land Office intervened as owner in trust of large acreages in the field. The Land Office alleged that no fair, adequate price for natural gas existed in the field; that existing prices were discriminatory, unjust and arbitrary and if continued would deplete, destroy and exhaust the field within a few years. It joined Peerless' prayer for relief. The Commission thereupon, by written notice, invited all producers and purchasers of gas in the field to appear and participate in the proceedings.

The Commission heard testimony to the effect that the field price of gas has a direct bearing on conservation. Witnesses testified that low prices make enforcement of conservation more difficult, retard exploration and development, and result in abandonment of wells long before all recoverable gas has been extracted. They also

testified that low prices contribute to an uneconomic rate of depletion and economic waste of gas by promoting "inferior" uses.

At the end of the hearings, the Commission concluded that there was no competitive market for gas in the Guymon-Hugoton Field, that the integrated well and pipe-line owners were able to dictate the prices paid to producers without pipe-line outlets, and that as a result gas was being taken from the field at a price below its economic value. It further concluded that the taking of gas at the prevailing prices resulted in both economic and physical waste of gas, loss to producer and royalty owners, loss to the State in gross production taxes, inequitable taking of gas from the common source of supply, and discrimination against various producers in the field. On the basis of these findings, the Commission issued the two orders challenged here. The first provided "that no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton field . . . at a price, at the wellhead, of less than 7¢ per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds absolute pressure per square inch." The second directed Cities Service "to take natural gas ratably from . . . [Peerless'] well . . . in accordance with the formula for ratable taking prescribed in Order No. 17867 of this Commission" (a provision not under attack here), and at the same price and pressure terms indicated in the general field-price order.

On appeal to the Oklahoma Supreme Court, Cities Service attacked the orders on the following grounds: (1) that the Commission acted beyond its authority in that Oklahoma statutes did not permit general price-fixing or specific price-fixing at a figure in excess of the prevailing market price, and in that the statutes did not contemplate the prevention of economic, as distinct from physical, waste; (2) that if construed to permit such

price-fixing, the statutes and orders thereunder violated the state constitution; (3) that if so construed, the statutes and orders violated the Due Process and Equal Protection clauses of the Fourteenth Amendment, in that (a) there was no evidence of physical waste in the Guymon-Hugoton Field and the price order cannot be reasonably related to the prevention of waste, (b) the statutes contain no adequate standards governing the Commission's price-fixing powers, (c) the orders are too vague, (d) the proceedings lacked procedural due process, and (e) the specific order discriminates against Cities Service, and the general order, applying only to the Guymon-Hugoton Field, discriminates against those producing or purchasing in that field; (4) that the orders violate the Commerce Clause, Art. I, § 8, in that they cast an undue burden on, and discriminate against, interstate commerce.

The Supreme Court of Oklahoma rejected these claims. It found that the Oklahoma statutes fully empowered the Commission to take the action which it took. The Oklahoma legislature, as early as 1913, declared that gas underlying land is the property of the land owner or his lessee; that gas may be taken from a common source of supply proportionately to the natural flow of the well and that the drilling of a well by an owner or lessee shall be regarded as reducing to possession his share of the gas; that any person taking gas from the field, except in cases not here pertinent, shall take ratably from each owner in proportion to his interest and upon such terms as may be agreed upon; that if no agreement can be reached then the price and terms shall be such as may be fixed by the Corporation Commission after notice and hearing. 52 Okla. Stats. §§ 23–25, 231–233 (1941). These sections explicitly authorize the order requiring Cities to take gas ratably from Peerless and at a specific price. In 1915, Oklahoma strengthened its gas conservation laws by

authorizing regulation of production of gas from a common source when production is in excess of market demand. 52 Okla. Stats. §§ 239–240 (1941). The Commission was authorized to limit the gas taken by any producer to "such proportion of the natural gas that may be marketed without waste" as the natural flow of gas at the wells of such producer bears to the total natural flow of the common source. In authorizing such regulation, the legislature declared that it acted "so as to prevent waste, protect the interests of the public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another." The Oklahoma Supreme Court construed the 1915 Act to permit the general order setting a minimum price in the field. It further ruled that economic waste was within the contemplation of the statute. Finally, with regard to state questions, it held that the orders did not violate the Oklahoma Constitution.

The Oklahoma court also concluded that the statutes so construed and the orders made thereunder do not violate the Federal Constitution on the grounds relied on by Cities Service. We agree.

II.

The Due Process and Equal Protection issues raised by appellant are virtually without substance. It is now undeniable that a state may adopt reasonable regulations to prevent economic and physical waste of natural gas. This Court has upheld numerous kinds of state legislation designed to curb waste of natural resources and to protect the correlative rights of owners through ratable taking, *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210 (1932), or to protect the economy of the state. *Railroad Commission* v. *Rowan & Nichols Oil Co.,* 310 U. S. 573 (1940). These ends have been held to justify

control over production even though the uses to which property may profitably be put are restricted. *Walls* v. *Midland Carbon Co.,* 254 U. S. 300 (1920).

Like any other regulation, a price-fixing order is lawful if substantially related to a legitimate end sought to be attained. *Nebbia* v. *New York,* 291 U. S. 502 (1934) and cases therein cited. In the proceedings before the Commission in this case, there was ample evidence to sustain its finding that existing low field prices were resulting in economic waste and conducive to physical waste. That is a sufficient basis for the orders issued. It is no concern of ours that other regulatory devices might be more appropriate, or that less extensive measures might suffice. Such matters are the province of the legislature and the Commission.

We have considered the other arguments raised by appellant concerning Due Process and Equal Protection and find them similarly lacking in merit.

III.

The Commerce Clause gives to the Congress a power over interstate commerce which is both paramount and broad in scope. But due regard for state legislative functions has long required that this power be treated as not exclusive. *Cooley* v. *Port Wardens,* 12 How. 299 (1851). It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce. *Parker* v. *Brown,* 317 U. S. 341 (1943); *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346 (1939); *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177 (1938). The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh

whatever national interest there might be in the prevention of state restrictions. Nor should we lightly translate the quiescence of federal power into an affirmation that the national interest lies in complete freedom from regulation. *South Carolina Highway Dept.* v. *Barnwell Bros., supra.* Compare *Leisy* v. *Hardin,* 135 U. S. 100 (1890), decided prior to the Wilson Act, 26 Stat. 313, with *In re Rahrer,* 140 U. S. 545 (1891), decided thereafter.

That a legitimate local interest is at stake in this case is clear. A state is justifiably concerned with preventing rapid and uneconomic dissipation of one of its chief natural resources. The contention urged by appellant that a group of private producers and royalty owners derive substantial gain from the regulations does not contradict the established connection between the orders and a statewide interest in conservation. Cf. *Thompson* v. *Consolidated Gas Corp.,* 300 U. S. 55 (1937).

We recognize that there is also a strong national interest in natural gas problems. But it is far from clear that on balance such interest is harmed by the state regulations under attack here. Presumably all consumers, domestic and industrial alike, want to obtain natural gas as cheaply as possible. On the other hand, groups connected with the production and transportation of competing fuels complain of the competition of cheap gas. Moreover, the wellhead price of gas is but a fraction of the price paid by domestic consumers at the burner-tip, so that the field price as herein set may have little or no effect on the domestic delivered price. Some industrial consumers, who get bargain rates on gas for "inferior" uses, may suffer. But strong arguments have been made that the national interest lies in preserving this limited resource for domestic and industrial uses for which natural gas has no completely satisfactory substitute. See generally, Federal Power Commission, Natural Gas Investigation (1948); *Federal Power Comm'n* v. *Hope Natural Gas Co.,*

320 U. S. 591, 657–660 (1944) (dissenting opinion). Insofar as conservation is concerned, the national interest and the interest of producing states may well tend to coincide. In any event, in a field of this complexity with such diverse interests involved, we cannot say that there is a clear national interest so harmed that the state price-fixing orders here employed fall within the ban of the Commerce Clause. *Parker* v. *Brown, supra; Milk Control Board* v. *Eisenberg Farm Products, supra.* Nor is it for us to consider whether Oklahoma's unilateral efforts to conserve gas will be fully effective. See *South Carolina Highway Dept.* v. *Barnwell Bros., supra* at 190–191.

Hood & Sons v. *Du Mond,* 336 U. S. 525 (1949), is not inconsistent with this result. The *Hood* case specifically excepted from consideration the question here raised, whether price-fixing was forbidden as an undue burden on interstate commerce. Moreover, the Court carefully distinguished *Eisenberg,* which approved price regulations even though applied to a producer whose entire purchases of milk went directly, without processing, into interstate commerce. The vice in the regulation invalidated by *Hood* was solely that it denied facilities to a company in interstate commerce on the articulated ground that such facilities would divert milk supplies needed by local consumers; in other words, the regulation discriminated against interstate commerce. There is no such problem here. The price regulation applies to all gas taken from the field, whether destined for interstate or intrastate consumers.

Appellant does not contend that the orders conflict with the federal authority asserted by the Natural Gas Act, 52 Stat. 821 (1938), 15 U. S. C. §§ 717 *et seq.* (1948). The Federal Power Commission has not participated in these proceedings. Whether the Gas Act authorizes the Power Commission to set field prices on sales by independent

producers, or leaves that function to the states, is not before this Court.

We hold that on this record the Oklahoma Corporation Commission issued valid orders, and that the decision of the court below should be

Affirmed.

MR. JUSTICE BLACK is of the opinion that the alleged federal constitutional questions are frivolous and that the appeal therefore should be dismissed.

PHILLIPS PETROLEUM CO. *v.* OKLAHOMA ET AL.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 73. Argued November 9–10, 1950.—Decided December 11, 1950.

Appellant is a producer of gas in an Oklahoma natural gas field, but does not purchase from other producers in that field. The gas which it produces is transported through its own facilities to Texas, where it processes the gas, utilizes or sells the by-products, and sells the residue of natural gas to pipe-line companies. *Held:* Orders of the Oklahoma Corporation Commission fixing a minimum wellhead price on all gas taken from the Oklahoma field, as applied to appellant, are not unreasonably vague and are valid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Federal Constitution. Pp. 191–192.

203 Okla. 35, 220 P. 2d 279, affirmed.

The validity under the Federal Constitution of orders of the Oklahoma Corporation Commission fixing a minimum wellhead price for gas taken from an Oklahoma natural-gas field was sustained by the State Supreme Court as applied to appellant. 203 Okla. 35, 220 P. 2d 279. On appeal to this Court, *affirmed,* p. 192.

Don Emery and *R. M. Williams* argued the cause for appellant. With them on the brief were *Rayburn L. Foster* and *Harry D. Turner.*

T. Murray Robinson argued the cause for the State of Oklahoma, *Floyd Green* for the Corporation Commission of Oklahoma, and *D. A. Richardson* for the Peerless Oil & Gas Co., appellees. With them on the brief were *Mac Q. Williamson,* Attorney General, and *Fred Hansen,* Assistant Attorney General, for the State of Oklahoma, and *Thomas J. Lee* and *Richard H. Dunn* for the Commissioners of the Land Office of Oklahoma.

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a companion case to *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.,* 340 U. S. 179, decided this date. Appellant is a producer in the Guymon-Hugoton Field, owning leases on approximately 183,000 acres, but unlike Cities Service it does not purchase from other producers in this field. It has its own gathering system through which gas is transported to a central point in Hansford County, Texas. There the gas is processed for the extraction of gasoline and other liquid hydrocarbons. These by-products are either utilized or sold, and the residue of natural gas is sold to pipe-line companies. Appellant's first appearance before the Oklahoma Corporation Commission in connection with the *Peerless* proceedings was on January 17, 1947, after the entry of the order setting a minimum price on all natural gas taken from the Guymon-Hugoton Field. Phillips moved that the Commission either vacate the order insofar as applicable to it, or clarify the application of the order to gas not actually sold at the wellhead. On February 4, 1947, the Commission issued Order No. 19702, refusing to vacate or further clarify its general minimum price order. The Commission concluded that Phillips had no standing to complain of the general order since the company was currently complying with it by realizing on the average, from sale and utilization of by-products and sale of gas, the minimum price set.

On appeal, the Oklahoma Supreme Court consolidated the two cases and with respect to Phillips stated:

> "Our discussion of the Cities Service appeal is here applicable. We find no basis in the due process and equal protection clause of the Federal and State Constitutions for condemning the orders appealed from in their application to Phillips." 203 Okla. 35, 48, 220 P. 2d 279, 292 (1950).

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It is apparent from this opinion that the court below took jurisdiction and passed upon the constitutional issues raised. We assumed therefore that the court, noting the evidence of injury contained in the record, found no technical defects in the pleadings before the Commission which would deprive Phillips of standing to appeal. We noted probable jurisdiction of the appeal to this Court in order to secure a complete picture of the issues at stake.

Appellant does not argue that the orders violate the Commerce Clause. In other respects, the appeal presents only minor variations of the issues raised by Cities Service. Phillips argues that it is not a purchaser but merely a producer; that unlike the situation in *Cities Service,* the order as applied to it lacks any connection with correlative rights, the interest of the public, monopolistic practices or discrimination. The distinction is without a difference: the connection between realized price and conservation applies to all production in the field, whether owners purchase from others or not, and whether they own pipe lines or not. In a field which constitutes a common reservoir of gas, the Commission must be able to regulate the operations of all producers or there is little point in regulating any.

Phillips also relies heavily on the contention that the orders are unreasonably vague. In substance, this argument is nothing more than that the determination by an integrated company of proceeds realized from gas at the wellhead involves complicated problems in cost accounting. These problems are common to a host of valid regulations. There is nothing to indicate that Phillips will be penalized for reasonable and good faith efforts to solve them.

Affirmed.

Mr. Justice Black is of the opinion that the alleged federal constitutional questions are frivolous and that the appeal therefore should be dismissed.

ACKERMANN *v.* UNITED STATES.

NO. 35. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.*

Argued October 19, 1950.—Decided December 11, 1950.

In proceedings against petitioner, his wife and a relative, the District Court in 1943 entered judgments canceling their certificates of naturalization on grounds of fraud. Petitioner and his wife did not appeal; but the relative appealed and the judgment against him was reversed. More than four years after rendition of the judgment against petitioner, he filed in the District Court a motion to set aside the denaturalization judgment under amended Rule 60 (b) of the Federal Rules of Civil Procedure. He alleged that the denaturalization judgment was erroneous; that he did not appeal because his attorney advised him that he would have to sell his home to pay costs; and that a federal officer, in whose custody he and his wife then were and in whom he had confidence, had told him "to hang on to their home" and he would be released at the end of the war. *Held:* The District Court properly denied the motion. Pp. 194–202.

1. Relief on the ground of "excusable neglect" was not available to petitioner under Rule 60 (b) (1), since by the Rule's terms a motion for relief on this ground must be made not more than one year after the judgment is entered, whereas in this case the judgment was entered more than four years previously. P. 197.

2. The allegations of the motion did not bring petitioner within Rule 60 (b) (6), which applies if "any other reason justifying relief" exists. Pp. 197–199.

3. *Klapprott* v. *United States,* 335 U. S. 601, distinguished. Pp. 199–202.

178 F. 2d 983, 179 F. 2d 236, affirmed.

The District Court denied petitioners' motions to set aside judgments canceling their certificates of naturalization. The Court of Appeals affirmed. 178 F. 2d 983, 179 F. 2d 236. This Court granted certiorari. 339 U. S. 962. *Affirmed,* p. 202.

*Together with No. 36, *Ackermann* v. *United States,* also on certiorari to the same Court.

E. M. Grimes argued the cause and filed a brief for petitioners.

James L. Morrisson argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney* and *Israel Convisser.*

MR. JUSTICE MINTON delivered the opinion of the Court.

Petitioner Hans Ackermann filed a motion in the District Court for the Western District of Texas to set aside a judgment entered December 7, 1943, in that court cancelling his certificate of naturalization. The motion was filed March 25, 1948, pursuant to amended Rule 60 (b) of the Federal Rules of Civil Procedure which became effective March 19, 1948.* The United States filed a

*"RELIEF FROM JUDGMENT OR ORDER.

. . . . . .

"(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defend-

motion to dismiss petitioner's motion. The District Court denied petitioner's motion and the Court of Appeals affirmed. 178 F. 2d 983. We granted certiorari. 339 U. S. 962.

The question is whether the District Court erred in denying the motion for relief under Rule 60 (b).

Petitioner and his wife Frieda were natives of Germany. They were naturalized in 1938. They resided, as now, at Taylor, Texas, where petitioner and Max Keilbar owned and operated a German language newspaper. Frieda Ackermann wrote for the paper. She was a sister of Keilbar, who was also a native of Germany and who had been naturalized in 1933.

In 1942 complaints were filed against all three to cancel their naturalization on grounds of fraud. Petitioner and Keilbar were represented by counsel and answered the complaints. After an order of consolidation, trial of the three cases began November 1, 1943, and separate judgments were entered December 7, 1943, cancelling and setting aside the orders admitting them to citizenship. Keilbar appealed to the Court of Appeals, and by stipulation with the United States Attorney his case in that court was reversed, and the complaint against him was ordered dismissed. The Ackermanns did not appeal.

Petitioner in his motion here under consideration alleges that his "failure to appeal from said judgment is excusable" for the reason that he had no money or property other than his home in Taylor, Texas, owned by him and his wife and worth $2,500, "and the costs of transcribing

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ant not actually personally notified as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." Fed. Rules Civ. Proc., 60 (b).

the evidence and printing the record and brief on appeal were estimated at not less than $5,000.00." On December 11, 1943, petitioner was detained in an Alien Detention Station at Seagoville, Texas. Before time for appeal had expired, petitioner was advised by his attorney that he and his wife could not appeal on affidavits of inability to pay costs until they had "appropriated said home to the payment of such costs to the full extent of the proceeds of a sale thereof"; that this information distressed them, and they sought advice from W. F. Kelley, "Assistant Commissioner for Alien Control, Immigration and Naturalization Department," in whose custody petitioner and his wife were being held, "and he being a person in whom they had great confidence"; that Kelley on being informed of their financial condition and the advice of their attorney that it would be necessary for them to dispose of their home in order to appeal, advised them in substance to "hang on to their home," and told them further that they had lost their American citizenship and were stateless, and that they would be released at the end of the war; that relying upon Kelley's advice, they refrained from appealing from said judgments; that on April 29, 1944, after time for appeal had expired, they were interned, and on January 25, 1946, the Attorney General ordered them to depart within thirty days or be deported. They did not depart, and they have not been deported, although the orders of deportation are still outstanding. Petitioner further alleged that he would show that the judgment of December 7, 1943, was unlawful and erroneous by producing the record in the *Keilbar* case.

The District Court on September 28, 1948, denied petitioner's motion to vacate the judgment of denaturalization, the court stating in the order that "there is no merit to said motion."

It will be noted that petitioner alleged in his motion that his failure to appeal was *excusable.* A motion for relief because of excusable neglect as provided in Rule 60 (b) (1) must, by the rule's terms, be made not more than one year after the judgment was entered. The judgment here sought to be relieved from was more than four years old. It is immediately apparent that no relief on account of "excusable neglect" was available to this petitioner on the motion under consideration.

But petitioner seeks to bring himself within Rule 60 (b) (6), which applies if "any other reason justifying relief" is present, as construed and applied in *Klapprott* v. *United States,* 335 U. S. 601. The circumstances alleged in the motion which petitioner asserts bring him within Rule 60 (b) (6) are that the denaturalization judgment was erroneous; that he did not appeal and raise that question because his attorney advised him he would have to sell his home to pay costs, while Kelley, the Alien Control officer, in whom he alleges he had confidence and upon whose advice he relied, told him "to hang on to their home" and that he would be released at the end of the war; and that these circumstances justify failure to appeal the denaturalization judgment.

We cannot agree that petitioner has alleged circumstances showing that his failure to appeal was justifiable. It is not enough for petitioner to allege that he had confidence in Kelley. On the allegations of the motion before us, Kelley was a stranger to petitioner. In that state of the pleadings there are two reasons why petitioner cannot be heard to say his neglect to appeal brings him within the rule. First, anything said by Kelley could not be used to relieve petitioner of his duty to take legal steps to protect his interest in litigation in which the United States was a party adverse to him. *Munro* v. *United States,* 303 U. S. 36; *Burnham Chemical Co.* v. *Krug,* 81 F. Supp. 911, 913, aff'd *per curiam sub nom.*

Burnham Chemical Co. v. *Chapman,* 86 U. S. App. D. C. 412, 181 F. 2d 288. Secondly, petitioner had no right to repose confidence in Kelley, a stranger. There is no allegation of any fact or circumstance which shows that Kelley had any undue influence over petitioner or practiced any fraud, deceit, misrepresentation, or duress upon him. There are no allegations of privity or any fiduciary relations existing between them. Indeed, the allegations of the motion all show the contrary. However, petitioner had a confidential adviser in his own counsel. Instead of relying upon that confidential adviser, he freely accepted the advice of a stranger, a source upon which he had no right to rely. Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the *Keilbar* case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

As further evidence of the inadequacy of petitioner's motion to bring himself within any division of Rule 60 (b) which would excuse him from not having taken an appeal, we call attention to the fact that Keilbar got the record before the Court of Appeals, and it contained all the evidence that was introduced as to petitioner and his wife, who were tried together with Keilbar. The Ackermanns and Keilbar were related, yet no effort was made to get into the Court of Appeals and use the same record as to the evidence that Keilbar used. It certainly would not have taken five thousand dollars or one-tenth thereof for petitioner and his wife to have supplemented the Keilbar record with that pertaining to themselves and

to prepare a brief, even if all of it were printed. We are further aware of the practice of the Courts of Appeals permitting litigants who are poor but not paupers to file typewritten records and briefs at a very small cost to them. With the same counsel representing petitioner as represented his kinsman Keilbar, and with Frieda Ackermann having funds sufficient to employ separate counsel, failure to appeal because of the fear of losing his home in defraying the expenses of the brief and record, makes it further evident that Rule 60 (b) has no application to petitioner in this setting.

The *Klapprott* case was a case of extraordinary circumstances. MR. JUSTICE BLACK stated in the following words why the allegations in the *Klapprott* case, there taken as true, brought it within Rule 60 (b) (6):

> "But petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part. The undenied facts set out in the petition reveal far more than a failure to defend the denaturalization charges due to inadvertence, indifference, or careless disregard of consequences. For before, at the time, and after the default judgment was entered, petitioner was held in jail in New York, Michigan, and the District of Columbia by the United States, his adversary in the denaturalization proceedings. Without funds to hire a lawyer, petitioner was defended by appointed counsel in the criminal cases. Thus petitioner's prayer to set aside the default judgment did not rest on mere allegations of 'excusable neglect.' The foregoing allegations and others in the petition tend to support petitioner's argument that he was deprived of any reasonable opportunity to make a defense to the criminal charges instigated by officers of the very United States agency which supplied the secondhand information upon which his citizenship was taken

away from him in his absence. The basis of his petition was not that he had neglected to act in his own defense, but that in jail as he was, weakened from illness, without a lawyer in the denaturalization proceedings or funds to hire one, disturbed and fully occupied in efforts to protect himself against the gravest criminal charges, he was no more able to defend himself in the New Jersey court than he would have been had he never received notice of the charges." *Klapprott* v. *United States,* 335 U. S. 601, 613–614.

By no stretch of imagination can the voluntary, deliberate, free, untrammeled choice of petitioner not to appeal compare with the Klapprott situation. MR. JUSTICE BLACK set forth in order the extraordinary circumstances alleged by Klapprott. We paraphrase them and give the comparable situation of Ackermann.

In the spring of 1942 Klapprott was ill, and the illness left him financially poor and unable to work. On May 12, 1942, proceedings were commenced in a New Jersey District Court to cancel his citizenship. As for Ackermann, when he was sued he was well, and had a home worth $2,500, one-half interest in a newspaper, and the means to employ counsel.

When complaint was served upon Klapprott, he had no money to hire a lawyer, and he wrote an answer to the complaint filed against him and a letter to the American Civil Liberties Union asking it to represent him without fee. Ackermann had the means to hire and did hire able counsel of his own choice who prepared and filed an answer for him.

In less than two months after the complaint was served on the penniless, ill Klapprott, he was arrested for conspiracy to violate the Selective Service Act and taken to New York and jailed in default of bond. His letter to the American Civil Liberties Union was taken by the

Federal Bureau of Investigation before time for him to answer had expired, and was not mailed by that Bureau. Ackermann was never indicted or in jail from the time complaint was filed against him until after judgment, during all of which time he had the benefit of counsel and freedom of movement and action.

Within ten days after his arrest, Klapprott was defaulted in the citizenship proceedings in New Jersey. He was still in jail in New York. No evidence was offered to prove the complaint in the denaturalization proceedings, which complaint was verified on information and belief only. In Ackermann's case, no default was entered. He appeared in person and by counsel and had a trial in open court with able counsel to defend him. Much evidence was introduced and a record was made of it.

Klapprott was convicted in New York and sent to a penitentiary in Michigan. He was later transferred to the District of Columbia, where he was lodged in jail and tried on another charge, later dismissed. The New York conviction was reversed, but he had been in jail for about two years. He was then lodged at Ellis Island for deportation because his citizenship had been cancelled in the New Jersey proceedings where he had been defaulted. While at Ellis Island, the motion to relieve from the default judgment cancelling his citizenship was prepared and filed, denied by the District Court and the Court of Appeals and finally sustained by this Court. Ackermann was never under criminal charges or detained while the suit for cancellation of his citizenship was pending. During all of that time he was free, well, and able to defend himself, and in that regard had able counsel representing him in a trial in open court. Even after the judgment cancelling his citizenship, he had counsel and free access to him, although detained by the United States Government.

From a comparison of the situations shown by the allegations of Klapprott and Ackermann, it is readily apparent that the situations of the parties bore only the slightest resemblance to each other. The comparison strikingly points up the difference between no choice and choice; imprisonment and freedom of action; no trial and trial; no counsel and counsel; no chance for negligence and inexcusable negligence. Subsection 6 of Rule 60 (b) has no application to the situation of petitioner. Neither the circumstances of petitioner nor his excuse for not appealing is so extraordinary as to bring him within *Klapprott* or Rule 60 (b) (6).

The motion for relief was properly denied, and the judgment is

Affirmed.

No. 36, *Frieda Ackermann* v. *United States,* is a companion case to No. 35, and it was stipulated that the decision in No. 36 should be the same as in No. 35. The judgment in No. 36 therefore is also

Affirmed.

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

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

The Court's interpretation of amended Rule 60 (b) of the Federal Rules of Civil Procedure neutralizes the humane spirit of the Rule and thereby frustrates its purpose. The Rule empowers courts to set aside judgments under five traditional, specified types of circumstances in which it would be inequitable to permit a judgment to stand. But the draftsmen of the Rule did not intend that these specified grounds should prevent the granting of similar relief in other situations where fairness might re-

quire it. Accordingly, there was added a broad sixth ground: "any other reason justifying relief from the operation of the judgment." The Court nevertheless holds that the allegations of the present motions were not sufficient to justify the District Court in hearing evidence to determine whether justice would best be served by granting relief from the judgments against petitioners.* Because I disagree with this interpretation of Rule 60 (b), it becomes necessary to summarize the allegations of the motions.

Petitioners, a husband and wife whose native country was Germany, became naturalized citizens of the United States in 1938. After the declaration of war against Germany, the Government commenced proceedings which resulted in the denaturalization of petitioners and also of their relative, Keilbar. *United States* v. *Ackermann,* 53 F. Supp. 611. Petitioners did not appeal from these judgments but on March 25, 1948, filed duly verified motions for relief from the judgments. The uncontradicted allegations of the motions show: When the judgments were entered, neither of the petitioners had any money or property except a home at Taylor, Texas, worth not in excess of $2,500. They were told by their counsel that the cost of an appeal would be $5,000; that to prosecute an appeal

*Petitioners' motions to be relieved from the judgments of denaturalization invoked the jurisdiction of the District Court under Rule 60 (b). Contending that these motions did "not state grounds sufficient to invoke the authority of the Court . . .," the Government moved to dismiss them. These pleadings therefore posed only the question of the trial court's jurisdiction. Without further pleadings or the taking of evidence, the court entered an order which stated that "there is no merit to said [petitioners'] motion[s] and . . . the same should be denied." But since we cannot assume that an issue not framed by the pleadings was decided, it necessarily follows that the District Court held it was without jurisdiction to grant relief under Rule 60 (b). But cf. *Bell* v. *Hood,* 327 U. S. 678, 682–683; *Brown* v. *Western R. Co.,* 338 U. S. 294.

they would have to sell their home, contribute that $2,500 and then hope to have the appeal tried out on an affidavit of insolvency. Being distressed by reason of having to choose between selling their home or foregoing an appeal, the petitioners sought advice from the United States official who then held them in custody, one W. F. Kelley, assistant commissioner for alien control, Immigration and Naturalization Service of the United States. Petitioners had great confidence in this officer. Kelley advised them to "hang on to their home" and also that they "would be released at the end of the war." Because of their reliance on this advice, petitioners "refrained from appealing . . . said judgments." Thereafter their relative Keilbar did appeal and the judgment of denaturalization against him was reversed on the Government's admission that the evidence was insufficient to support it. *Keilbar* v. *United States,* 144 F. 2d 866. Petitioners insisted both in their motions to set the judgments aside and in argument that the evidence against them and Keilbar was substantially the same.

In holding that the allegations of these motions are not even sufficient to justify the District Court in hearing evidence, the Court relies heavily on its assertion that petitioners "had no right to repose confidence in Kelley" because Kelley was a "stranger" to them. In the first place, Rule 60 (b)'s broad grant of power to the District Court should not be constricted by the importation of the concept of legal "rights." Moreover, far from being a stranger, Kelley was the United States official who held petitioners in custody. Any person held by the United States should be able to repose confidence in the Government official entrusted with his custody. There are obvious reasons why this should be true in the case of the foreign born, less familiar with our customs than are our native citizens.

The Court also relies on the fact that the motions to set aside the judgments contain "no allegations of privity or any fiduciary relations existing" between petitioners and Kelley. Surely the liberalizing provisions of 60 (b) should not be emasculated by common-law ideas of "privity" or "fiduciary relations." If relevant, however, I should think that the phrase "fiduciary relations" given its best meaning encompasses the relationship between petitioners and the official who held them in custody.

Finally, since the Court holds that the allegations of petitioners' motions were insufficient to justify the hearing of evidence by the District Court, I think it inappropriate for the Court to consider what purports to be its judicial knowledge of the cost of transcripts and the ability of litigants to file typewritten records and briefs. The motions refute any such knowledge on the part of these petitioners and I am satisfied that no such knowledge would be established if the District Court were permitted to try these cases.

The result of the Court's illiberal construction of 60 (b) is that these foreign-born people, dependent on our laws for their safety and protection, are denied the right to appeal to the very court that held (on the Government's admission) that the judgment against their co-defendant was unsupported by adequate evidence. It does no good to have liberalizing rules like 60 (b) if, after they are written, their arteries are hardened by this Court's resort to ancient common-law concepts. I would reverse.

DOWD, WARDEN, *v.* UNITED STATES EX REL. COOK.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 66. Argued November 28, 1950.—Decided January 2, 1951.

In a habeas corpus proceeding brought by respondent in a Federal District Court in 1948, the court found that in 1931 respondent was convicted of murder in an Indiana state court, sentenced to life imprisonment, and immediately confined in a state prison; that his timely appeal was prevented by the warden's suppression of his appeal papers pursuant to prison rules; that he sought unsuccessfully to have the state courts review his conviction by *coram nobis* in 1937 and by habeas corpus in 1947; and that in 1946 his petition to the State Supreme Court for a delayed appeal was denied. The District Court ordered respondent's discharge, and the Court of Appeals affirmed. *Held:*

1. The prevention of respondent's original timely appeal by the warden's suppression of his appeal papers was a violation of the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution. Pp. 207–208.

2. Even if *res judicata* were applicable in habeas corpus proceedings, the 1946 litigation in the State Supreme Court was not *res judicata* of the issues in the present case. P. 208.

3. Respondent did not "waive" his right of appeal. Pp. 208–209.

4. In the circumstances of this case, nothing short of an actual appellate determination of the merits of the conviction will cure the original denial of equal protection of the law. P. 209.

5. The judgments of the Court of Appeals and the District Court are vacated and the cause is remanded, with directions to the District Court to enter such orders as are appropriate to allow the State a reasonable time in which to afford respondent the full appellate review he would have received but for the suppression of his appeal papers, in default whereof by the State respondent shall be discharged. Pp. 209–210.

180 F. 2d 212, judgment vacated.

In a habeas corpus proceeding seeking respondent's release from imprisonment under sentence of a state court, the District Court ordered respondent discharged. The Court of Appeals affirmed. 180 F. 2d 212. This Court granted certiorari. 340 U. S. 849. *Judgments vacated and cause remanded,* p. 210.

Charles F. O'Connor, Deputy Attorney General of Indiana, argued the cause for petitioner. With him on the brief were *J. Emmett McManamon,* Attorney General, and *George W. Hand* and *Merl M. Wall,* Deputy Attorneys General.

William S. Isham argued the cause and filed a brief for respondent.

Mr. Justice Black delivered the opinion of the Court.

Respondent, Lawrence E. Cook, brought this habeas corpus proceeding in the United States District Court in 1948. After hearing evidence, the District Court found as follows: In 1931 respondent was convicted of murder in an Indiana court, sentenced to life imprisonment, and immediately confined in the state penitentiary. Within the six-month period allowed for appeal as of right by Indiana law, respondent prepared proper appeal papers. His efforts to file the documents in the state supreme court, however, were frustrated by the warden acting pursuant to prison rules. Subsequently, but after the six-month period had expired, the ban on sending papers from the prison was lifted and respondent unsuccessfully sought to have the state courts review his conviction by *coram nobis* in 1937 [1] and by habeas corpus in 1945.[2]

[1] See *Cook* v. *State,* 219 Ind. 234, 37 N. E. 2d 63; *State ex rel. Cook* v. *Wickens,* 222 Ind. 383, 53 N. E. 2d 630.

[2] *State ex rel. Cook* v. *Howard,* 223 Ind. 694, 64 N. E. 2d 25, cert. denied 327 U. S. 808.

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In 1946 his petition to the Supreme Court of Indiana for a delayed appeal was denied.[3] On these findings, the District Court held that there had been a denial of equal protection of the law for which the State provided no remedy, and ordered respondent's discharge. The Court of Appeals for the Seventh Circuit affirmed. 180 F. 2d 212.

In this Court the State admits, as it must, that a discriminatory denial of the statutory right of appeal is a violation of the Equal Protection Clause of the Fourteenth Amendment. *Cochran* v. *Kansas,* 316 U. S. 255. It contends, however, that the 1946 litigation in the Supreme Court of Indiana established that the prison authorities had not prevented a timely appeal by respondent, and that the principle of *res judicata* precluded a contrary determination of this fact by the District Court. Even if the rule of *res judicata* were applicable in habeas corpus proceedings, but cf. *Waley* v. *Johnston,* 316 U. S. 101, 105, it would have no bearing in the present case. The Indiana court made only one finding, and that pertained to a matter not now in dispute.[4] Moreover, so far as the suppression of respondent's original appeal papers is concerned, the record before us strongly indicates that the finding ascribed to the state supreme court could not have been made.

The State also contends that despite the denial of equal protection, respondent is no longer entitled to relief because he "waived" his right of appeal. The argument is that the ban on sending papers from the prison suspended the statutory limitation on the time for review so that

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[3] This order is unreported. Certiorari to review the denial of the petition for delayed appeal was sought here and denied. 330 U. S. 841.

[4] The finding was that "the basic allegation of said petition to-wit: that [Cook's] counsel refused, without pay, to take an appeal is not true . . . ."

respondent could have appealed within six months from the date the restraint was removed in 1933. We cannot accept this view. In 1931 Indiana appellate jurisdiction apparently was conditioned on a timely filing of the proper papers.[5] More recently, the rigid rule may have been relaxed so as to provide discretionary delayed appeals for convicted defendants.[6] But we find no indication either that there is any time limitation on the taking of delayed appeals or that such appeals will ever be heard *as of right.* The record shows that respondent's delayed appeal was denied in 1946, apparently as a matter within the state court's discretion.[7] Consequently, respondent has never had the same review of the judgment against him as he would have had as of right in 1931 but for the suppression of his papers. We therefore agree with the Court of Appeals that, while the State's "waiver" theory is ingenious, it is without merit. Under the peculiar circumstances of this case, nothing short of an actual appellate determination of the merits of the conviction—according to the procedure prevailing in ordinary cases—would cure the original denial of equal protection of the law.

There remains the question of the disposition to be made of this case. Fortunately, we are not confronted with the dilemma envisaged by the State of having to

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[5] *Dudley* v. *State,* 200 Ind. 398, 161 N. E. 1; *Farlow* v. *State,* 196 Ind. 295, 142 N. E. 849; *Farrell* v. *State,* 85 Ind. 221; *Winsett* v. *State,* 54 Ind. 437; *Lichtenfels* v. *State,* 53 Ind. 161.

[6] The Supreme Court of Indiana suggested in 1945 that this respondent might be able to take a delayed appeal. *State ex rel. Cook* v. *Howard,* 223 Ind. 694, 64 N. E. 2d 25. Cf. also *Warren* v. *Indiana Telephone Co.,* 217 Ind. 93, 26 N. E. 2d 399; *State ex rel. White* v. *Hilgemann,* 218 Ind. 572, 34 N. E. 2d 129; but cf. *Johns* v. *State,* 227 Ind. 737, 89 N. E. 2d 281. In 1947 Indiana enacted the more liberal rule into its statutory law. Burns' Ind. Ann. Stat., 1942 Replacement Vol. (Cum. Supp. 1949), § 9–3305.

[7] See note 3 *supra;* cf. *Sweet* v. *State,* 226 Ind. 566, 81 N. E. 2d 679.

choose between ordering an absolute discharge of the prisoner and denying him all relief. The District Court has power in a habeas corpus proceeding to "dispose of the matter as law and justice require." 28 U. S. C. § 2243. The Fourteenth Amendment precludes Indiana from keeping respondent imprisoned if it persists in depriving him of the type of appeal generally afforded those convicted of crime. On the other hand, justice does not require Indiana to discharge respondent if such an appeal is granted and reveals a trial record free from error. Now that this Court has determined the federal constitutional question, Indiana may find it possible to provide the appellate review to which respondent is entitled. The judgments of the Court of Appeals and the District Court are vacated and the case remanded. On remand, the District Court should enter such orders as are appropriate to allow the State a reasonable time in which to afford respondent the full appellate review he would have received but for the suppression of his papers, failing which he shall be discharged. See *Mahler* v. *Eby,* 264 U. S. 32, 46.

It is so ordered.

KIEFER-STEWART CO. *v.* JOSEPH E. SEAGRAM & SONS, INC. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 297. Argued December 8, 1950.—Decided January 2, 1951.

1. An agreement among competitors in interstate commerce to fix maximum resale prices of their products violates the Sherman Act. P. 213.
2. Under the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*. P. 213.
3. The evidence in this case was sufficient to support a finding by the jury that respondents had conspired to fix maximum resale prices. Pp. 213–214.
4. In an action under the Sherman Act for treble damages, brought by a complainant injured by a conspiracy of sellers of liquor in interstate commerce to fix maximum resale prices, it is no defense that the complainant had conspired with others to fix minimum prices for liquor in violation of the antitrust laws. P. 214.
5. The fact that corporations are under common ownership and control does not relieve them from liability under the antitrust laws, especially where they hold themselves out as competitors. P. 215.
6. Since the District Court's instructions to the jury submitted to them only the cause of action under the Sherman Act, it did not err in refusing a more formal withdrawal of an issue concerning a violation of the Clayton Act, which had been charged in the complaint but which was not proved. P. 215.

182 F. 2d 228, reversed.

In an action under the Sherman Act for treble damages, the jury returned a verdict for petitioner and damages were awarded. The Court of Appeals reversed. 182 F. 2d 228. This Court granted certiorari. 340 U. S. 863. *Reversed*, p. 215.

Joseph J. Daniels and *Paul A. Porter* argued the cause and filed a brief for petitioner.

Paul Y. Davis argued the cause for respondents. With him on the brief were *Joseph M. Hartfield* and *Thomas Kiernan.*

Solicitor General Perlman, Acting Assistant Attorney General Underhill and *Charles H. Weston* filed a brief for the United States, as *amicus curiae,* supporting petitioner.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner, Kiefer-Stewart Company, is an Indiana drug concern which does a wholesale liquor business. Respondents, Seagram and Calvert corporations, are affiliated companies that sell liquor in interstate commerce to Indiana wholesalers. Petitioner brought this action in a federal district court for treble damages under the Sherman Act. 15 U. S. C. §§ 1, 15. The complaint charged that respondents had agreed or conspired to sell liquor only to those Indiana wholesalers who would resell at prices fixed by Seagram and Calvert, and that this agreement deprived petitioner of a continuing supply of liquor to its great damage.* On the trial, evidence was introduced tending to show that respondents had fixed maximum prices above which the wholesalers could not resell. The jury returned a verdict for petitioner and damages were awarded. The Court of Appeals for the Seventh Circuit reversed. 182 F. 2d 228. It held that an agreement among respondents to fix maximum resale prices did not violate the Sherman Act because such prices promoted rather than restrained competition. It also held the evidence insufficient to show that respondents had acted in concert. Doubt as to the correctness

*Petitioner also charged a violation of the Clayton Act, 15 U. S. C. § 18, but this theory has been abandoned and is not important here. See p. 215, *infra.*

of the decision on questions important in antitrust litigation prompted us to grant certiorari. 340 U. S. 863.

The Court of Appeals erred in holding that an agreement among competitors to fix maximum resale prices of their products does not violate the Sherman Act. For such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment. We reaffirm what we said in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 223: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."

The Court of Appeals also erred in holding the evidence insufficient to support a finding by the jury that respondents had conspired to fix maximum resale prices. The jury was authorized by the evidence to accept the following as facts: Seagram refused to sell to petitioner and others unless the purchasers agreed to the maximum resale price fixed by Seagram. Calvert was at first willing to sell without this restrictive condition and arrangements were made for petitioner to buy large quantities of Calvert liquor. Petitioner subsequently was informed by Calvert, however, that the arrangements would not be carried out because Calvert had "to go along with Seagram." Moreover, about this time conferences were held by officials of the respondents concerning sales of liquor to petitioner. Thereafter, on identical terms as to the fixing of retail prices, both Seagram and Calvert resumed sales to other Indiana wholesalers who agreed to abide by such conditions, but no shipments have been made to petitioner.

The foregoing is sufficient to justify the challenged jury finding that respondents had a unity of purpose or a common design and understanding when they forbade

their purchasers to exceed the fixed ceilings. Thus, there is support for the conclusion that a conspiracy existed, *American Tobacco Co.* v. *United States,* 328 U. S. 781, 809–810, even though, as respondents point out, there is other testimony in the record indicating that the price policies of Seagram and Calvert were arrived at independently.

Respondents also seek to support the judgment of reversal on other grounds not passed on by the Court of Appeals but which have been argued here both orally and in the briefs. These grounds raise only issues of law not calling for examination or appraisal of evidence and we will consider them. Respondents introduced evidence in the District Court designed to show that petitioner had agreed with other Indiana wholesalers to set minimum prices for the sale of liquor in violation of the antitrust laws. It is now contended that the trial court erred in charging the jury that petitioner's part in such a conspiracy, even if proved, was no defense to the present cause of action. We hold that the instruction was correct. Seagram and Calvert acting individually perhaps might have refused to deal with petitioner or with any or all of the Indiana wholesalers. But the Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers. If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured. Cf. *Fashion Originators' Guild* v. *Trade Comm'n,* 312 U. S. 457; *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219, 242–243.

Respondents next suggest that their status as "mere instrumentalities of a single manufacturing-merchandizing unit" makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. *E. g. United States* v. *Yellow Cab Co.*, 332 U. S. 218. The rule is especially applicable where, as here, respondents hold themselves out as competitors.

It is also claimed that the District Court improperly refused to withdraw from the jury an issue as to respondents' violation of the Clayton Act which had been charged in the complaint but which was not proved. A fair reading of the instructions to the jury, however, reveals that the trial court submitted to them only the cause of action under the Sherman Act. We are convinced from this record that a more formal withdrawal of the Clayton Act issue would have served solely to confuse.

Other contentions of error in the admission of evidence and in the charge to the jury are so devoid of merit that it is unnecessary to discuss them.

The judgment of the Court of Appeals is reversed and that of the District Court is affirmed.

It is so ordered.

ALABAMA GREAT SOUTHERN RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

NO. 45. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.*

Argued November 8–9, 1950.—Decided January 2, 1951.

An order of the Interstate Commerce Commission, issued pursuant to § 307 (d) of the Transportation Act of 1940, 49 U. S. C. § 907 (d), required certain common carriers by railroad and certain interstate barge lines to establish joint through routes for the transportation of property, and to establish and apply to such through routes joint rates based on prescribed differentials from higher all-rail rates. The differentials were absorbed by the barge lines, but the Commission made no finding that barge-rail costs were lower than all-rail costs. *Held:* The order of the Commission is sustained. Pp. 218–229.

1. A finding of lesser cost of barge service is not indispensable to the validity of the Commission's order. Pp. 223–225.

(a) The barge-rail rates based on the prescribed differentials were considered by the Commission to be compensatory with respect to the barge lines. P. 224.

(b) The judgment of the Commission that competition between barge and rail service was worth preserving was legitimately rested on relevant factors other than lesser cost of service. Pp. 224–225.

2. The Commission's determination that its order is in accordance with general expressions of congressional policy is not the sole basis of the order, since the Commission gave careful consideration to other relevant factors. Pp. 225–226.

3. The prescription of differentials in this proceeding does not deprive the appellant railroads of their inherent advantages contrary to the National Transportation Policy. *I. C. C.* v. *Mechling*, 330 U. S. 567, distinguished. Pp. 226–227.

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*Together with No. 46, *Galveston Chamber of Commerce et al.* v. *United States et al.;* No. 47, *Railroad Commission of Texas* v. *United States et al.;* and No. 48, *Savannah Sugar Refining Corp.* v. *United States et al.*, also on appeals to the same court.

4. The basic findings essential to the statutory validity of the order are sufficiently disclosed in the written report of the Commission in this case. Pp. 227–228.

5. The order of the Commission is not invalid as giving a preference to the port of New Orleans over certain ports of Georgia and Texas, in violation of Art. I, § 9, cl. 6 of the Federal Constitution, since that clause does not forbid discriminations as between ports, and since whatever preference there is results from geography and not from any action of the Commission. Pp. 228–229.

88 F. Supp. 982, affirmed.

In a suit to enjoin the enforcement of an order of the Interstate Commerce Commission, the District Court of three judges denied the injunction and dismissed the complaint. 88 F. Supp. 982. On direct appeals to this Court, *affirmed*, p. 229.

Harold E. Spencer argued the cause for appellants in No. 45. With him on the brief were *Robert H. Bierma, Harry E. Boe, Charles Clark, Frank H. Cole, Jr., Leo P. Day, Roland J. Lehman, David O. Mathews, John E. McCullough* and *Toll R. Ware.*

William A. Disque argued the cause for appellants in No. 46. *Price Daniel,* Attorney General of Texas, submitted on brief for appellant in No. 47. *Mr. Daniel* and *Mr. Disque* were on the brief for appellants in Nos. 46 and 47.

C. R. Hillyer argued the cause and filed a brief for appellant in No. 48.

Philip Elman argued the cause for the United States and the Interstate Commerce Commission, appellees. With him on the brief were *Solicitor General Perlman, Acting Assistant Attorney General Underhill, J. Roger Wollenberg, Daniel W. Knowlton* and *Edward M. Reidy.*

Nuel D. Belnap argued the cause for the American Barge Line Co. et al., appellees. With him on the brief were *Samuel H. Moerman, Harry C. Ames, Robert N. Burchmore* and *John S. Burchmore.*

MR. JUSTICE MINTON delivered the opinion of the Court.

In No. 45 appellant common carriers by railroad brought this suit against the United States in the District Court for the Northern District of Illinois to enjoin an order of the Interstate Commerce Commission issued June 13, 1949, in a proceeding instituted by the Commission entitled *Rail and Barge Joint Rates,* No. 26712 on the Commission's docket. Appellee Interstate Commerce Commission intervened as a party defendant before the District Court, as did appellee common carriers by water, American Barge Line Company (American), Inland Waterways Corporation, doing business as Federal Barge Lines (Federal), and Mississippi Valley Barge Line Company (Valley). A statutory three-judge court heard the case and, upon findings of fact made and conclusions of law stated, denied the injunction and dismissed the complaint. 88 F. Supp. 982. This direct appeal under 28 U. S. C. § 1253 followed.

The *Rail and Barge Joint Rates* proceeding before the Commission was instituted in 1934 as an investigation ancillary to certain formal complaints before the Commission under § 3 (e) of the Inland Waterways Corporation Act, as amended by the Denison Act, 45 Stat. 980,[1] and ancillary to other proceedings involving the same subject matter as the complaints. The investigation instituted concerned the reasonableness and lawfulness of existing through routes and joint rates, rules, regulations and practices for application by common carriers

[1] Repealed by Transportation Act of 1940, 54 Stat. 898, 950.

by railroad and common carriers by water operating upon the Mississippi and Warrior Rivers and their tributaries; the reasonableness of existing minimum differentials between all-rail rates and corresponding rail-barge, barge-rail and rail-barge-rail rates; the necessity, if any, for the establishment by the railroad and water carriers of additional through routes and joint rates, rules, regulations and practices; and the necessity, if any, for fixing reasonable differentials between corresponding all-rail rates and joint rail and barge rates. Consolidated for disposition with the general investigation were the complaints and other proceedings involving the same general questions.

Hearings held pursuant to this investigation over a period of eight years resulted in a record of some 16,000 pages and 1,500 exhibits. An examiner submitted a report, to which exceptions and replies were filed. After argument before the full Commission, it rendered its written report and findings dated July 7, 1948, 270 I. C. C. 591, supplemented by report dated June 13, 1949, 274 I. C. C. 229, and promulgated the order under attack. The order, made pursuant to § 307 (d) of the Transportation Act of 1940,[2] required the common carriers by rail-

[2] "(d) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. . . ." 54 Stat. 898, 937, 49 U. S. C. § 907 (d).

road and water to establish the joint through routes for the transportation of property prescribed in the reports, and to establish and thereafter to maintain and apply over the through routes the joint rates prescribed based upon certain differentials found in the reports to be justified.

Appellant common carriers by railroad represent the railroads required by the order to enter into differential joint rail-barge rates, while appellee common carriers by water are the principal barge lines affected by the order. Appellee Federal is a corporation created by act of Congress, and is supervised by the Department of Commerce. It operates between St. Paul, Chicago, Omaha, St. Louis, New Orleans, Port Birmingham, Alabama, and intermediate ports via waterways connecting the ports. Valley operates between Pittsburgh, points on the Monongahela River, Cincinnati, St. Louis and New Orleans. American operates principally between Pittsburgh and New Orleans. Valley and American are privately owned and their operations have been financially profitable, while Federal has incurred an average net deficit from water-line operations of over $240,000 per year during the period from 1925 to 1947 inclusive.

Much evidence was introduced early in the investigation by both the railroads and the barge lines as to their costs of transportation. The cost section of the Commission made a study of relative costs for the period 1933–38 and concluded that rail-barge operating costs were greater than all-rail operating costs, due largely to the costs of added terminal handling operations. In its report the Commission stated that no useful purpose would be served by making a finding as to relative all-rail and rail-barge costs in the period covered by the study, because since that period there had been radical changes in the conditions affecting cost of transportation service by barge as well as by rail. And after reviewing other

factors bearing on costs of operation, the Commission concluded:

> "In the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials." 270 I. C. C. at 606.

Appellants' primary contention is that the Commission could not prescribe reasonable differentials between all-rail rates and joint rates in connection with the water carriers without proof of lower cost of the rail-barge service. Since the Commission had no valid proof as to the relative costs of the services, appellants insist that the Commission's order is arbitrary and capricious and its conclusions that the differentials are "justified as reasonable" and "necessary and desirable in the public interest" are not supported by substantial evidence and essential findings. This, it is contended by appellants, is apparent on the face of the Commission's report, so that it is not necessary for us to examine the evidence before the Commission.

The case will perhaps be better understood by an illustration of how the order operates. Assume

Illinois Central local rate New Orleans to Cairo, Ill	$1.00
Big Four local rate, Cairo to Cleveland, Ohio	1.00
Illinois Central-Big Four joint *all-rail rate,* New Orleans to Cleveland	1.60
The joint all-rail rate of $1.60 is divided as follows:	
Illinois-Central, New Orleans to Cairo	.80
Big Four, Cairo to Cleveland	.80
Assume a prescribed *differential* of	.20
Deduct the differential of $.20 from the $1.60 joint all-rail rate and the joint *barge-rail rate* is	1.40
The $1.40 barge-rail rate is divided between the rail and barge carriers as follows:	
Big Four, Cairo to Cleveland	.80
Barge, Cairo to New Orleans	.60

The local situation, New Orleans to Cairo, then, is:

On Illinois Central:	
Local all-rail rate	$1.00
Division of $1.60 joint all-rail rate	.80
On the barge line:	
Local port-to-port rate	.80
Division of $1.40 barge-rail rate	.60

All-rail rates are not disturbed and no question of their being compensatory is raised. The differentials fixed by the Commission are applied to the presently-existing all-rail rates to compute the prescribed joint rail-barge rate. If an all-rail rate should be modified, the differential would not automatically attach to the new all-rail rate; the joint rail-barge rate would remain as now prescribed (subject to independent modification, of course).[3] It is apparent that the barge line absorbs all the differential. A railroad carrier always gets the same amount for its leg, *e. g.*, Big Four, Cairo to Cleveland (see illustration, above), of a joint movement, whether the joint movement is all-rail or rail-barge. The railroad connecting with the barge carrier in a joint rail-barge movement is, as appellants admit, never hurt. "It is not the rail lines with which the barge lines connect which object to these unjustified differentials. It is the rail lines with which

[3] Counsel for the United States and the Commission have so interpreted the order. Finding 1 of the Commission reads: "We find that the amounts shown in appendix A and appendix B are justified as reasonable differentials *to be deducted from the present first-class all-rail rates* . . ." [Emphasis supplied.] 270 I. C. C. at 619. The Commission's order, which incorporates the reports and findings by reference, requires the carriers to establish and thereafter to maintain and apply *"the joint rates prescribed in the said reports* based upon the differentials found in the said reports to be justified." [Emphasis supplied.]

This appears to require maintenance of the joint rail-barge rates prescribed, not a fixed difference between all-rail rates, no matter what they may be, and joint rail-barge rates, and we therefore accept the interpretation of counsel for appellees.

the barge lines compete," say appellants. In short, the railroads complain of competition.

First. Appellants' attack upon the ground that the order gives a competitive advantage, not justified because not supported by a finding of lesser cost of barge service, is not persuasive. Admittedly, barge service is worth less than rail service. It is slower, requires more handling and entails more risk. A shipper will pay only what the service is worth to him. The shippers' evidence, the Commission found, indicated a fairly unanimous view that the principal worth to them of shipping by barge was the saving in transportation expense which it offered. The Commission is not bound to require a rate as high for the inferior as for the superior service. To do so would certainly destroy the principal worth of the inferior service and send all freight to the railroads; practically, there would be no competition between the different modes of transportation.

Neither the Commission nor this Court has held that lesser cost of service is a finding without which the Commission may not fix a charge, division of rate, or differential.[4] On the other hand, the considerations just discussed were rightly taken into account by the Commission. We must not lose sight of the fact that the Commission has the interests of shippers and consumers to safeguard as well as those of the carriers. *Ayrshire Corp.* v. *United*

[4] Both the Commission and this Court have consistently rejected any thought that costs should be the controlling factor in rate making. E. g., *New York* v. *United States,* 331 U. S. 284, 331; *Baltimore & O. R. Co.* v. *United States,* 298 U. S. 349, 359; *Louisiana Public Service Commission* v. *Texas & N. O. R. Co.,* 284 U. S. 125, 132; *Charges for Protective Service to Perishable Freight,* 241 I. C. C. 503, 510–511; *Proposed Lake Erie-Ohio River Canal,* 235 I. C. C. 753, 761; *Lighterage Cases,* 203 I. C. C. 481, 510; *West Coast Lumbermen's Assn.* v. *Akron, C. & Y. R. Co.,* 183 I. C. C. 191, 198–199; *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.,* 159 I. C. C. 691, 696–697.

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States, 335 U. S. 573, 592. The accommodation of the factors entering into rate structures, including competition, is a task peculiarly for the Commission. *Id.,* at 593; *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 535–536.

A carrier may, if it deems it advantageous, voluntarily accept a rate yielding a low return. *Baltimore & O. R. Co.* v. *United States,* 298 U. S. 349, 379. The Commission may permit it to do so if satisfied that the rate is compensatory, fair and reasonable, and in the public interest. *Id.,* at 358. Appellants intimate that the rates fixed are not compensatory with respect to the barge lines, and that the Commission knew they were not compensatory. We disagree. The barge lines in the instant proceedings represented to the Commission that the differentials which they had proposed, and which were thoroughly examined and considered by the Commission in the light of the railroads' criticisms, were compensatory. From the Commission's report it appears that it substantially adopted the proposals of the barge lines. In any event, it is not apparent from the report that the Commission substantially exceeded these recommended differentials or was not warranted in adopting them. We conclude that the differentials fixed were considered by the Commission to be compensatory. 270 I. C. C. at 612, 613–617. If the rates obtained by the barge lines after applying the differentials are deemed to be less than relevant costs, a rate hearing is the proper proceeding to rectify prejudice flowing therefrom.

Here then, the barge lines, in order to protect the sole advantage of their service to the public, are willing to accept less for their inferior service than rail carriers receive for superior service. Competition was adjudged by the Commission to be worth preserving. That judgment was legitimately rested on relevant factors other than lesser cost of service. There is no provision in the

statute making relative costs of rail and water carriers the sole and controlling consideration in establishing joint rates. Indeed, the statute makes no mention of such costs at all. We do not say that relative costs when properly supported by evidence are not a matter to be considered, but we cannot say that the absence of that factor is fatal.

With respect to appellants' argument that the inferior barge service cannot be given at a lower rate than the superior without a finding that the inferior costs less than the superior, we note further that even if rail costs were no more than barge costs it would not follow that barge rates must be as great or greater than the rail rates. The rail rates may be too high. From their arguments, it appears to be the purpose of the railroads to eliminate the differentials, and thus, competition, not by reducing the all-rail rates but by increasing the rail-barge rates. The observation of Judge Lindley for the District Court is pertinent: "Of course, if the railroads were petitioning the Commission for a reduction in all-rail rates, proof of lower operating costs might well warrant such a reduction, but it is difficult to see how the lower costs of the railroads, if satisfactorily proven, would warrant an increase in the rates of a competitor." 88 F. Supp. 982, at 987.

Second. It has been contended by appellants that without a finding or any evidence to support a finding that barge costs are lower than rail costs, there is no basis for the Commission's order other than the Commission's determination that its order is in accordance with general expressions of congressional policy. It is apparent from the Commission's report that it gave careful consideration to numerous expressions of congressional policy. See particularly, 270 I. C. C. at 609–613. This it was in duty bound to do. But it is also apparent, as we have already indicated, that the Commission gave careful consideration to other factors—factors such as the tremendous

loss of traffic to the barge lines due to a loss of interchange traffic; the inferiority of the barge service; the shippers' testimony to the effect that they would not use barge service unless it were cheaper to do so; the compensatory character of the differentials adopted; the willingness of the barge lines to accept rates yielding low returns; as well as the fact that elimination of the differentials would curtail competition, and that this would negate support, financial and otherwise, which Congress had given Federal while it pioneered in the field of barge transportation.

Third. Appellants also contend that the prescription of differentials in this proceeding deprives them of their inherent advantages contrary to the National Transportation Policy.[5] They point to *I. C. C.* v. *Mechling,* 330 U. S. 567, as having established the principle that the lower costs of the barge carrier there involved was an inherent advantage, and that the Commission had no discretion to approve a rate structure which would reduce such advantage. They argue that the "fair and impartial regulation" called for by the National Transportation Policy demands

[5] "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 54 Stat. 899, 49 U. S. C. (1946 ed.), p. 5443.

that the rule of the *Mechling* case be applied impartially to protect the "inherent advantage" of the rail carriers here.

In the *Mechling* case, the Commission had fixed a rate for transportation of wheat east by rail from Chicago at a rate higher if it arrived in Chicago by barge than if by rail or lake. This was a plain case of discrimination. There were different rates provided for equal service without any showing that any additional service was rendered for the additional charge. Here the question is whether the barge lines may charge less than the railroads for the different service they render. There is no unlawful discrimination here as there was in the *Mechling* case. The differentials providing a lower rate for barge service do not constitute an "unjust discrimination" by express proviso of § 305 (c) of the Act. 54 Stat. 935, 49 U. S. C. § 905 (c).

The joint rail-barge rates prescribed neither ignore nor destroy the inherent advantage of rail traffic. The "inherent advantage" of rail carriers shown here is superiority of service. The joint rail-barge rates do not fail to reflect this "inherent advantage" for the same reason that a man who wishes to ride quickly and comfortably buys a Pullman ticket on a fast train instead of a coach seat on a "milk run" train. No one would contend that fixing a lower price on the "milk run" train seat fails to preserve the superior accommodations offered by a Pullman space. Each mode of transportation satisfies the needs and wants of some customers. It is for the customer to decide which mode satisfies his circumstances.

Fourth. As to the contention of appellants that the Commission's order is not supported by essential findings of fact, § 14 (1) of the Interstate Commerce Act, 49 U. S. C. § 14 (1), does not require the Commission to make detailed findings of fact except in a case where damages are awarded. *Manufacturers R. Co.* v. *United*

States, 246 U. S. 457, 487, 489–490. The statute requires the Commission only to file a written report, stating its conclusions, together with its decision and order. This the Commission did, and the essential basis of its judgment is sufficiently disclosed in its report. Of course § 14 (1) does not relieve the Commission of the duty to make the "basic" or "quasi-jurisdictional" findings essential to the statutory validity of an order. *Florida* v. *United States,* 282 U. S. 194, 215; *United States* v. *Baltimore & O. R. Co.,* 293 U. S. 454, 464–465. And the basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented. E. g., *United States* v. *Pierce Auto Lines,* 327 U. S. 515; *North Carolina* v. *United States,* 325 U. S. 507; *Yonkers* v. *United States,* 320 U. S. 685; *United States* v. *Carolina Carriers Corp.,* 315 U. S. 475. Here the Commission found, in conformity to the statute invoked, *supra* note 2, that the differentials prescribed are "justified as reasonable" and "necessary and desirable in the public interest." And "the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data . . . ." *United States* v. *Louisiana,* 290 U. S. 70, 80. Enough has been "put of record to enable us to perform the limited task which is ours." *Eastern-Central Assn.* v. *United States,* 321 U. S. 194, 212.

Appellants in Nos. 46, 47, and 48 were permitted to intervene in the District Court as parties plaintiff. They represent various commercial interests allegedly affected adversely by the order of the Commission. The only points urged by these appellants not answered in No. 45 are that the order gives a preference to the port of New Orleans over certain ports of Georgia and Texas, in violation of the Interstate Commerce Act and of Art. I, § 9, cl. 6 of the Federal Constitution.

With respect to the constitutional argument, this Court in *Louisiana Public Service Commission* v. *Texas & N. O. R. Co.*, 284 U. S. 125, 131, stated:

> "The clause of the Constitution invoked is: 'No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; Nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.' The specified limitations on the power of Congress were set to prevent preference as between States in respect of their ports or the entry and clearance of vessels. It does not forbid such discriminations as between ports. Congress, acting under the commerce clause, causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring States."

And we are clear that whatever preference there is to New Orleans is the result of geography and not of any action of the Commission. "The law does not attempt to equalize fortune, opportunities or abilities." *I. C. C.* v. *Diffenbaugh*, 222 U. S. 42, 46.

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

I agree that the differentials established under § 307 (d) of the Act need not be measured by the difference in cost between rail and barge transportation. Barge costs as compared with rail costs are, however, a relevant factor for consideration by the Commission under § 307 (f)* when it determines what differentials are reasonable.

*"In the exercise of its power to prescribe just and reasonable rates, fares, and charges of common carriers by water, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the effect of rates upon the movement of traffic by the carrier or carriers for

When the Commission proceeds to fix differentials without knowing what the relative barge and rail costs are, it is to my mind experimenting as a legislative body might do, not performing the infinitely more exacting task of the rate expert.

The Commission practically concedes that in this case it adopts a different standard than the statutory one. It is admitted that on this record there can be no adequate findings on costs. The evidence for an earlier period (1933–1938) shows that the cost for joint rail-barge routing is greater than for direct all-rail routing. The Commission refused to pursue the cost study into later years. The reason is apparent. One of the appellees is Inland Waterways Corp. which operates Federal Barge Lines. Inland is a federal corporation (43 Stat. 360, 49 U. S. C. § 151) and it and Federal are subsidized by Congress. It is that program that the Commission is seeking to promote here. That may be important and desirable. But the standards which guide the Commission are still found in § 307 (f). Costs have some relevance to the problem of differentials as § 307 (f) makes clear. Congress is entitled to disregard costs completely. But I do not think the Commission is.

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which the rates are prescribed; to the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable water carriers, under honest, economical, and efficient management, to provide such service." 54 Stat. 938.

STANDARD OIL CO. *v.* FEDERAL TRADE COMMISSION.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 1. Argued January 9–10, 1950.—Reargued October 9, 1950.—Decided January 8, 1951.

1. Under § 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13 (b), petitioner was justified in selling gasoline in interstate commerce to four comparatively large "jobber" customers in Detroit at 1½ cents per gallon less than it sold like gasoline to many comparatively small service station customers in the same area, if the lower price to the "jobbers" was made to retain each of them as a customer and in good faith to meet a lawful and equally low price of a competitor—even though the effect of such price discrimination was to injure, destroy or prevent competition. Pp. 233–251.

(a) The amendments made by the Robinson-Patman Act restricted the scope of the defense now provided by § 2 (b) to a price reduction made to meet in good faith a lawful and equally low price of a competitor; but they did not deprive this defense of its character as an absolute defense nor condition it upon the absence of any resulting injury to competition. Pp. 240–251.

(b) This conclusion is consistent with *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, and *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746. Pp. 243–246.

(c) There has been a widespread understanding that, under the Robinson-Patman Act, it is a complete defense to a charge of price discrimination for the seller to show that its price differential has been made in good faith to meet a lawful and equally low price of a competitor; and this Court sees no reason to depart now from that interpretation. Pp. 246–250.

(d) Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor. P. 249.

(e) In a case where a seller sustains the burden of proof placed upon it to establish its defense under § 2 (b), this Court finds no reason to destroy that defense indirectly, merely because it also appears that the beneficiaries of the seller's price reductions may

derive a competitive advantage from them or may, in the natural course of events, reduce their own resale prices to their customers. P. 250.

(f) This Court rejects a construction of the proviso of § 2 (b) which would make the defense afforded thereby dependent upon the conclusion which the Commission might reach in weighing the potentially injurious effect of a seller's price reduction upon competition at all lower levels against its beneficial effect in permitting the seller to meet competition at its own level. P. 251.

2. Petitioner obtains gasoline from fields in Kansas, Oklahoma, Texas and Wyoming, refines it in Indiana, and distributes it in 14 middle western states. Gasoline sold by it in the Detroit area is carried by tankers on the Great Lakes from Indiana to petitioner's marine terminal at River Rouge, Mich. Enough is accumulated there during each navigation season so that a winter's supply is available from the terminal. It remains there or in nearby bulk storage stations for varying periods. While there, the gasoline is owned by petitioner and en route from its refinery in Indiana to its market in Michigan. Although the gasoline is not brought to River Rouge pursuant to orders already taken, the demands of the Michigan territory are fairly constant, and the demands of petitioner's customers can be estimated accurately. Gasoline sold to customers in Detroit is taken from that at the terminal. *Held:* Such sales are in interstate commerce within the meaning of §§ 1 and 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. §§ 12, 13, and are not deprived of their interstate character by such temporary storage of the gasoline in the Detroit area. Pp. 236–238.

3. The Federal Trade Commission instituted proceedings to challenge the right of petitioner, under § 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13, to sell gasoline in interstate commerce to four comparatively large "jobber" customers in Detroit at 1½ cents per gallon less than it sold like gasoline to many comparatively small service station customers in the same area. Petitioner presented evidence tending to prove that its lower price to each "jobber" was made in order to retain that "jobber" as a customer and in good faith to meet an equally low price of one or more competitors. The Commission held as a matter of law that such evidence was not material, and it made no finding of fact on this question. It found that the effect of such price discriminations was to injure, destroy and prevent competition; and it ordered petitioner to cease and desist from making such a price differential. *Held:* The Commission should have made a

finding as to whether or not petitioner's price reduction was made in good faith to meet an equally low price of a competitor within the meaning of § 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13 (b). Pp. 233–251.
173 F. 2d 210, reversed.

The Federal Trade Commission ordered petitioner to cease and desist from selling gasoline to four comparatively large "jobber" customers in Detroit at a lower price than it sold like gasoline to many comparatively smaller service station customers in the same area. 43 F. T. C. 56. The Court of Appeals ordered enforcement of the order with a slight modification. 173 F. 2d 210. This Court granted certiorari. 338 U. S. 865. *Reversed and remanded,* p. 251.

Howard Ellis argued the cause for petitioner. With him on the brief were *Weymouth Kirkland, Hammond E. Chaffetz, W. H. Van Oosterhout, Arthur J. Abbott, Thomas E. Sunderland* and *Gordon E. Tappan.*

By special leave of Court, *William Simon* argued the cause and filed a brief for the Empire State Petroleum Association, Inc. et al., as *amici curiae,* urging reversal.

James W. Cassedy argued the cause for respondent. With him on the brief was *W. T. Kelley.*

By special leave of Court, *Cyrus Austin* argued the cause and filed a brief for the Retail Gasoline Dealers Association of Michigan, Inc. et al., as *amici curiae,* urging affirmance.

Raoul Berger filed a brief for the Citrin-Kolb Oil Company, as *amicus curiae,* urging reversal.

MR. JUSTICE BURTON delivered the opinion of the Court.

In this case the Federal Trade Commission challenged the right of the Standard Oil Company, under the Rob-

inson-Patman Act,[1] to sell gasoline to four comparatively large "jobber" customers in Detroit at a less price per gallon than it sold like gasoline to many comparatively small service station customers in the same area. The company's defenses were that (1) the sales involved were not in interstate commerce and (2) its lower price to the jobbers was justified because made to retain them as customers and in good faith to meet an equally low price of a competitor.[2] The Commission, with one member dissenting, ordered the company to cease and desist from making such a price differential. 43 F. T. C. 56. The Court of Appeals slightly modified the order and required its enforcement as modified. 173 F. 2d 210. We granted certiorari on petition of the company because the case presents an important issue under the Robinson-Patman Act which has not been settled by this Court. 338 U. S. 865. The case was argued at our October Term, 1949, and reargued at this term. 339 U. S. 975.

For the reasons hereinafter stated, we agree with the court below that the sales were made in interstate commerce but we agree with petitioner that, under the Act, the lower price to the jobbers was justified if it was made to retain each of them as a customer and in good faith to meet an equally low price of a competitor.

I. Facts.

Reserving for separate consideration the facts determining the issue of interstate commerce, the other material

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[1] Specifically under § 2 of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13. For the material text of § 2 (a) and (b) see pp. 242–243, *infra*.

[2] The company contended before the Commission that the price differential allowed by it to the jobbers made only due allowance for differences in the cost of sale and delivery of gasoline to them. It did not, however, pursue this defense in the court below and does not do so here.

facts are summarized here on the basis of the Commission's findings. The sales described are those of Red Crown gasoline because those sales raise all of the material issues and constitute about 90% of petitioner's sales in the Detroit area.

Since the effective date of the Robinson-Patman Act, June 19, 1936, petitioner has sold its Red Crown gasoline to its "jobber" customers at its tank-car prices. Those prices have been 1½¢ per gallon less than its tank-wagon prices to service station customers for identical gasoline in the same area. In practice, the service stations have resold the gasoline at the prevailing retail service station prices.[3] Each of petitioner's so-called "jobber" customers has been free to resell its gasoline at retail or wholesale. Each, at some time, has resold some of it at retail. One now resells it only at retail. The others now resell it largely at wholesale. As to resale prices, two of the "jobbers" have resold their gasoline only at the prevailing wholesale or retail rates. The other two, however, have reflected, in varying degrees, petitioner's reductions in the cost of the gasoline to them by reducing their resale prices of that gasoline below the prevailing rates. The effect of these reductions has thus reached competing retail service stations in part through retail stations operated by the "jobbers" and in part through retail stations which purchased gasoline from the "jobbers" at less than the prevailing tank-wagon prices. The Commission found that such reduced resale prices "have resulted in injuring, destroying, and preventing competition between said favored dealers and retail dealers in respondent's [petitioner's] gasoline and other major brands of gasoline . . . ." 41 F. T. C. 263, 283. The distinctive

[3] About 150 of these stations are owned or leased by the customers independently of petitioner. Their operators buy all of their gasoline from petitioner under short-term agreements. The other 208 stations are leased or subleased from petitioner for short terms.

characteristics of these "jobbers" are that each (1) maintains sufficient bulk storage to take delivery of gasoline in tank-car quantities (of 8,000 to 12,000 gallons) rather than in tank-wagon quantities (of 700 to 800 gallons) as is customary for service stations; (2) owns and operates tank wagons and other facilities for delivery of gasoline to service stations; (3) has an established business sufficient to insure purchases of from one to two million gallons a year; and (4) has adequate credit responsibility.[4] While the cost of petitioner's sales and deliveries of gasoline to each of these four "jobbers" is no doubt less, per gallon, than the cost of its sales and deliveries of like gasoline to its service station customers in the same area, there is no finding that such difference accounts for the entire reduction in price made by petitioner to these "jobbers," and we proceed on the assumption that it does not entirely account for that difference.

Petitioner placed its reliance upon evidence offered to show that its lower price to each jobber was made in order to retain that jobber as a customer and in good faith to meet an equally low price offered by one or more competitors. The Commission, however, treated such evidence as not relevant.

II. The Sales Were Made in Interstate Commerce.

In order for the sales here involved to come under the Clayton Act, as amended by the Robinson-Patman Act,

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[4] Not denying the established industry practice of recognizing such dealers as a distinctive group for operational convenience, the Commission held that petitioner's classification of these four dealers as "jobbers" was arbitrary because it made "no requirement that said jobbers should sell only at wholesale." 41 F. T. C. at 273. We use the term "jobber" in this opinion merely as one of convenience and identification, because the result here is the same whether these four dealers are wholesalers or retailers.

they must have been made in interstate commerce.[5] The Commission and the court below agree that the sales were so made. 41 F. T. C. 263, 271, 173 F. 2d 210, 213–214.

Facts determining this were found by the Commission as follows: Petitioner is an Indiana corporation, whose principal office is in Chicago. Its gasoline is obtained from fields in Kansas, Oklahoma, Texas and Wyoming. Its refining plant is at Whiting, Indiana. It distributes its products in 14 middle western states, including Michigan. The gasoline sold by it in the Detroit, Michigan, area, and involved in this case, is carried for petitioner by tankers on the Great Lakes from Indiana to petitioner's marine terminal at River Rouge, Michigan. Enough gasoline is accumulated there during each navigation season so that a winter's supply is available from the terminal. The gasoline remains for varying periods at the terminal or in nearby bulk storage stations, and while there it is under the ownership of petitioner and en route from petitioner's refinery in Indiana to its market in Michigan. "Although the gasoline was not brought to River Rouge pursuant to orders already taken, the demands of the Michigan territory were fairly constant, and the petitioner's customers' demands could be accurately estimated, so the flow of the stream of commerce kept surging from Whiting to Detroit." 173 F. 2d at 213–214. Gasoline delivered to customers in Detroit, upon individual orders for it, is taken from the gasoline at the terminal in interstate commerce en route for delivery in that area. Such sales are well within the jurisdictional requirements of the Act. Any other conclusion would fall short of the recog-

[5] Section 2 (a) of the Clayton Act, as amended, relates only to persons "engaged in commerce, in the course of such commerce . . . where either or any of the purchases involved . . . are in commerce . . . ." 49 Stat. 1526, 15 U. S. C. § 13 (a). "Commerce" is defined in § 1 of the Clayton Act as including "trade or commerce among the several States . . . ." 38 Stat. 730, 15 U. S. C. § 12.

nized purpose of the Robinson-Patman Act to reach the operations of large interstate businesses in competition with small local concerns. Such temporary storage of the gasoline as occurs within the Detroit area does not deprive the gasoline of its interstate character. *Stafford* v. *Wallace,* 258 U. S. 495. Compare *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 570, with *Atlantic Coast Line R. Co.* v. *Standard Oil Co.,* 275 U. S. 257, 268.[6]

III. There Should Be a Finding as to Whether or Not Petitioner's Price Reduction Was Made in Good Faith to Meet a Lawful Equally Low Price of a Competitor.

Petitioner presented evidence tending to prove that its tank-car price was made to each "jobber" in order to retain that "jobber" as a customer and in good faith to meet a lawful and equally low price of a competitor. Petitioner sought to show that it succeeded in retaining these customers, although the tank-car price which it offered them merely approached or matched, and did not undercut, the lower prices offered them by several competitors of petitioner. The trial examiner made findings on the point[7] but the Commission declined to do so, saying:

> "Based on the record in this case the Commission concludes as a matter of law that it is not material

[6] The Fair Labor Standards Act cases relied on by petitioner are not inconsistent with this result. They hold that, for the purposes of that statute, interstate commerce ceased on delivery to a local distributor. *Higgins* v. *Carr Bros. Co.,* 317 U. S. 572; *Walling* v. *Jacksonville Paper Co., supra.* The sales involved here, on the other hand, are those of an interstate producer and refiner to a local distributor.

[7] The trial examiner concluded:

"The recognition by respondent [petitioner] of Ned's Auto Supply Company as a jobber or wholesaler [which carried with it the tank-car price for gasoline], was a forced recognition given to retain that company's business. Ned's Company at the time of recognition,

> whether the discriminations in price granted by the respondent to the said four dealers were made to meet equally low prices of competitors. The Commission further concludes as a matter of law that it is unnecessary for the Commission to determine whether the alleged competitive prices were in fact available or involved gasoline of like grade or quality or of equal public acceptance. Accordingly the Commission does not attempt to find the facts regarding those matters because, even though the lower prices in question may have been made by respondent in good faith to meet the lower prices of competitors, this does not constitute a defense in the face of affirmative proof that the effect of the discrimination was to injure, destroy and prevent competition with the retail stations operated by the said named dealers and with stations operated by their retailer-customers." 41 F. T. C. 263, 281–282.

The court below affirmed the Commission's position.[8]

There is no doubt that under the Clayton Act, before its amendment by the Robinson-Patman Act, this evidence would have been material and, if accepted, would have

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and ever since, has possessed all qualifications required by respondent [petitioner] for recognition as a jobber and the recognition was given and has ever since been continued in transactions between the parties, believed by them to be bona fide in all respects . . . ." (Conclusion of Fact 2, under § IX, R. 5098–5099.)

"The differentials on its branded gasolines respondent [petitioner] granted Ned's Auto Supply Company, at all times subsequent to March 7, 1938, and Stikeman Oil Company, Citrin-Kolb Oil Company and the Wayne Company [the four jobbers], at all times subsequent to June 19, 1936, were granted to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality." (Conclusion of Fact, under § X, R. 5104.)

[8] "Now as to the contention that the discriminatory prices here complained of were made in good faith to meet a lower price of a competitor. While the Commission made no finding on this point,

established a complete defense to the charge of unlawful discrimination. At that time the material provisions of § 2 were as follows:

> "SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided, That nothing herein contained shall prevent* discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or *discrimination in price in the same or different communities made in good faith to meet competition: And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." (Emphasis added within the first proviso.) 38 Stat. 730–731, 15 U. S. C. (1934 ed.) § 13.

The question before us, therefore, is whether the amendments made by the Robinson-Patman Act deprived those facts of their previously recognized effectiveness as a defense. The material provisions of § 2, as amended, are

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it assumed its existence but held, contrary to the petitioner's contention, that this was not a defense.

. . . . . .

"We agree with the Commission that the showing of the petitioner that it made the discriminatory price in good faith to meet competition is not controlling in view of the very substantial evidence that its discrimination was used to affect and lessen competition at the retail level." 173 F. 2d at 214, 217.

quoted below, showing in italics those clauses which bear upon the proviso before us. The modified provisions are distributed between the newly created subsections (a) and (b). These must be read together and in relation to the provisions they supersede. The original phrase "that nothing herein contained shall prevent" is still used to introduce each of the defenses. The defense relating to the meeting of the price of a competitor appears only in subsection (b). There it is applied to discriminations in services or facilities as well as to discriminations in price, which alone are expressly condemned in subsection (a). In its opinion in the instant case, the Commission recognizes that it is an absolute defense to a charge of price discrimination for a seller to prove, under § 2 (a), that its price differential makes only due allowances for differences in cost or for price changes made in response to changing market conditions. 41 F. T. C. at 283. Each of these three defenses is introduced by the same phrase "nothing . . . shall prevent," and all are embraced in the same word "justification" in the first sentence of § 2 (b). It is natural, therefore, to conclude that each of these defenses is entitled to the same effect, without regard to whether there also appears an affirmative showing of actual or potential injury to competition at the same or a lower level traceable to the price differential made by the seller. The Commission says, however, that the proviso in § 2 (b) as to a seller meeting in good faith a lower competitive price is not an absolute defense if an injury to competition may result from such price reduction. We find no basis for such a distinction between the defenses in § 2 (a) and (b).

The defense in subsection (b), now before us, is limited to a price reduction made to meet in good faith an equally low price of a competitor. It thus eliminates certain difficulties which arose under the original Clayton Act. For example, it omits reference to discriminations in price "in

the same or different communities . . ." and it thus restricts the proviso to price differentials occurring in actual competition. It also excludes reductions which undercut the "lower price" of a competitor. None of these changes, however, cut into the actual core of the defense. That still consists of the provision that wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price. Actual competition, at least in this elemental form, is thus preserved.

Subsections 2 (a) and (b), as amended, are as follows:

> "SEC. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided, That nothing herein contained shall prevent* differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . . *And provided further, That nothing herein contained shall prevent* price changes from time to time . . . in response to changing conditions affecting the market for or the marketability of the goods concerned . . . .
>
> "(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, *the burden of rebutting the prima-facie case thus*

> *made by showing justification* shall be upon the person charged with a violation of this section, and *unless justification shall be affirmatively shown,* the Commission is authorized to issue an order terminating the discrimination: *Provided, however, That nothing herein contained shall prevent* a seller rebutting the prima-facie case thus made by *showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.*" (Emphasis added in part.) 49 Stat. 1526, 15 U. S. C. § 13 (a) and (b).

This right of a seller, under § 2 (b), to meet in good faith an equally low price of a competitor has been considered here before. Both in *Corn Products Refining Co.* v. *Federal Trade Comm'n,* 324 U. S. 726, and in *Federal Trade Comm'n* v. *Staley Mfg. Co.,* 324 U. S. 746, evidence in support of this defense was reviewed at length. There would have been no occasion thus to review it under the theory now contended for by the Commission. While this Court did not sustain the seller's defense in either case, it did unquestionably recognize the relevance of the evidence in support of that defense. The decision in each case was based upon the insufficiency of the seller's evidence to establish its defense, not upon the inadequacy of its defense as a matter of law.[9]

In the *Corn Products* case, *supra,* after recognizing that the seller had allowed differentials in price in favor of certain customers, this Court examined the evidence presented by the seller to show that such differentials were

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[9] In contrast to that factual situation, the trial examiner for the Commission in the instant case has found the necessary facts to sustain the seller's defense (see note 7, *supra*), and yet the Commission refuses, as a matter of law, to give them consideration.

justified because made in good faith to meet equally low prices of a competitor. It then said:

> "Examination of the *testimony* satisfies us, as it did the court below, that it *was insufficient* to sustain a finding that the lower prices allowed to favored customers were in fact made to meet competition. Hence petitioners *failed to sustain the burden* of showing that the price discriminations were granted for the purpose of meeting competition." (Emphasis added.) 324 U. S. at 741.[10]

In the *Staley* case, *supra,* most of the Court's opinion is devoted to the consideration of the evidence introduced in support of the seller's defense under § 2 (b). The discussion proceeds upon the assumption, applicable here, that if a competitor's "lower price" is a lawful individual price offered to any of the seller's customers, then the seller is protected, under § 2 (b), in making a counteroffer provided the seller proves that its counteroffer is made to meet in good faith its competitor's equally low price. On the record in the *Staley* case, a majority of the Court of Appeals, in fact, declined to accept the findings of the Commission and decided in favor of the accused seller.[11] This Court, on review, reversed that judgment

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[10] In the *Corn Products* case, the same point of view was expressed by the Court of Appeals below: "We think the evidence is insufficient to sustain this affirmative defence." 144 F. 2d 211, 217 (C. A. 7th Cir.). The Court of Appeals also indicated that, to sustain this defense, it must appear not only that the competitor's lower price was met in good faith but that such price was lawful.

[11] The *Staley* case was twice before the Court of Appeals for the Seventh Circuit. In 1943 the case was remanded by that court to the Commission for findings as to wherein the discriminations occurred and how they substantially lessened competition and promoted monopoly and also "for consideration of the defense [under § 2 (b)] urged by the petitioners, and for findings in relation thereto." 135 F. 2d 453, 456. In 1944, a majority of the court decided in favor of the seller. 144 F. 2d 221. One judge held that the complaint

but emphatically recognized the availability of the seller's defense under § 2 (b) and the obligation of the Commission to make findings upon issues material to that defense. It said:

> "Congress has left to the Commission the determination of fact in each case whether the person, charged with making discriminatory prices, acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence is for the Commission. See *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73. In the present case, the Commission's finding that respondents' price discriminations were not made to meet a 'lower' price and consequently were not in good faith, is amply supported by the record, and we think the Court of Appeals erred in setting aside this portion of the Commission's order to cease and desist.
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> . . . . .
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> "In appraising the evidence, the Commission recognized that the statute does not place an impossible burden upon sellers, but it emphasized the good faith requirement of the statute, which places the burden

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was insufficient under § 2 (a) and that, therefore, he need not reach the seller's defense under § 2 (b). He expressly stated, however, that he did not take issue with the basis for the conclusion that the seller's price was made in good faith to meet an equally low price of a competitor. *Id.*, at 227–231. His colleague held squarely that the seller's defense of meeting competition in good faith under § 2 (b) had been established. *Id.*, at 221–225. The third judge found against the seller both under § 2 (a) and (b). *Id.*, at 225–227. The important point for us is that the Court of Appeals, as well as this Court, unanimously recognized in that case the materiality of the seller's evidence in support of its defense under § 2 (b), even though the "discriminations 'have resulted, and do result, in substantial injury to competition among purchasers . . . .'" *Id.*, at 222.

of proving good faith on the seller, who has made the discriminatory prices. . . .

". . . We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor. Nor was the Commission wrong in holding that respondents failed to meet this burden." 324 U. S. at 758, 759–760.

See also, *Federal Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 721–726; *Federal Trade Comm'n* v. *Morton Salt Co.,* 334 U. S. 37, 43; and *United States* v. *United States Gypsum Co.,* 340 U. S. 76, 92. All that petitioner asks in the instant case is that its evidence be considered and that findings be made by the Commission as to the sufficiency of that evidence to support petitioner's defense under § 2 (b).

In addition, there has been widespread understanding that, under the Robinson-Patman Act, it is a complete defense to a charge of price discrimination for the seller to show that its price differential has been made in good faith to meet a lawful and equally low price of a competitor. This understanding is reflected in actions and statements of members and counsel of the Federal Trade Commission.[12] Representatives of the Department of

[12] In cease and desist orders, issued both before and after the order in the instant case, the Commission has inserted saving clauses which recognize the propriety of a seller making a price reduction in good faith to meet an equally low price of a competitor, even though the seller's discrimination may have the effect of injuring competition at a lower level. See *In re Ferro Enamel Corp.,* 42 F. T. C. 36; *In re Anheuser-Busch, Inc.,* 31 F. T. C. 986; *In re Bausch & Lomb Optical Co.,* 28 F. T. C. 186.

See also, the statement filed by Walter B. Wooden, Assistant Chief

Justice have testified to the effectiveness and value of the defense under the Robinson-Patman Act.[13] We see no reason to depart now from that interpretation.[14]

Counsel, and by Hugh E. White, Examiner for the Commission, with the Temporary National Economic Committee in 1941:

"The amended Act now safeguards the right of a seller to discriminate in price in good faith to meet an equally low price of a competitor, but he has the burden of proof on that question. This right is guaranteed by statute and could not be curtailed by any mandate or order of the Commission. . . . The right of self defense against competitive price attacks is as vital in a competitive economy as the right of self defense against personal attack." The Basing Point Problem 139 (TNEC Monograph 42, 1941).

In regard to the Commission's position on § 2 (b), urged in the instant case, Allen C. Phelps, Assistant Chief Trial Counsel and Chief of the Export Trade Division of the Commission, testified before the Subcommittee on Trade Policies of the Senate Committee on Interstate and Foreign Commerce in January, 1949, that "This position, if upheld in the courts, in my judgment will effectively and completely erase section 2 (b) from the Robinson-Patman Act." Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 236, 81st Cong., 1st Sess. 66. See also, pp. 274–275.

[13] Herbert A. Bergson, then Assistant Attorney General, testifying for the Department, January 25, 1949, said: "The section [2 (b)] presently permits sellers to justify otherwise forbidden price discriminations on the ground that the lower prices to one set of buyers were made in good faith to meet the equally low prices of a competitor." Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 236, 81st Cong., 1st Sess. 77. See also, report on S. 236 by Peyton Ford, The Assistant to the Attorney General, to the Senate Committee on Interstate and Foreign Commerce. *Id.*, at 320. Mr. Bergson added the following in June, 1949: "While we recognize the competitive problem which arises when one purchaser obtains advantages denied to other purchasers, we do not believe the solution to this problem lies in denying to sellers the opportunity to make sales in good faith competition with other sellers." Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on S. 1008, 81st Cong., 1st Sess. 12.

[14] Attention has been directed again to the legislative history of the proviso. This was considered in the *Corn Products* and *Staley*

The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act,

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cases. See especially, 324 U. S. at 752–753. We find that the legislative history, at best, is inconclusive. It indicates that it was the purpose of Congress to limit, but not to abolish, the essence of the defense recognized as absolute in § 2 of the original Clayton Act, 38 Stat. 730, where a seller's reduction in price had been made "in good faith to meet competition . . . ." For example, the legislative history recognizes that the Robinson-Patman Act limits that defense to price differentials that do not undercut the competitor's price, and the amendments fail to protect differentials between prices in different communities where those prices are not actually competitive. There is also a suggestion in the debates, as well as in the remarks of this Court in the *Staley* case, *supra,* that a competitor's lower price, which may be met by a seller under the protection of § 2 (b), must be a lawful price. And see, S. Res. 224, 70th Cong., 1st Sess., directing the Federal Trade Commission to investigate and report to it on chain-store operators and F. T. C. Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess.

In the report of the Judiciary Committee of the House of Representatives, which drafted the clause which became § 2 (b), there appears the following explanation of it:

"This proviso represents a contraction of an exemption now contained in section 2 of the Clayton Act which permits discriminations without limit where made in good faith to meet competition. It should be noted that while the seller is permitted to meet local competition, it does not permit him to cut local prices until his competitor has first offered lower prices, and then he can go no further than to meet those prices. If he goes further, he must do so likewise with all his other customers, or make himself liable to all of the penalties of the act, including treble damages. In other words, the proviso permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further." H. R. Rep. No. 2287, 74th Cong., 2d Sess. 16.

See also, 80 Cong. Rec. 6426, 6431–6436, 8229, 8235.

Somewhat changing this emphasis, there was a statement made by the managers on the part of the House of Representatives, accompanying the conference report, which said that the new clause was a "provision relating to the question of meeting competition, intended to operate only as a rule of evidence in a proceeding before the

"Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent." *Staley Mfg. Co.* v. *Federal Trade Comm'n,* 135 F. 2d 453, 455. We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts.[15] It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor. For example, if a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller's competitors, the seller may well find it essential, as a matter of business survival, to meet that price rather than to lose the customer. It might be that this customer is the seller's only available market for the major portion of the seller's product, and that the loss of this customer would result in forcing a much higher unit cost and higher sales price upon the seller's other custom-

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Federal Trade Commission . . . ." H. R. Rep. No. 2951, 74th Cong., 2d Sess. 7. The Chairman of the House Conferees also received permission to print in the Record an explanation of the proviso. 80 Cong. Rec. 9418. This explanation emphasizes the same interpretation as that put on the proviso in the *Staley* case to the effect that the lower price which lawfully may be met by a seller must be a lawful price. That statement, however, neither justifies disregarding the proviso nor failing to make findings of fact where evidence is offered that the prices met by the seller are lawful prices and that the meeting of them is in good faith.

[15] It has been suggested that, in theory, the Robinson-Patman Act as a whole is inconsistent with the Sherman and Clayton Acts. See Adelman, Effective Competition and the Antitrust Laws, 61 Harv. L. Rev. 1289, 1327–1350; Burns, The Anti-Trust Laws and the Regulation of Price Competition, 4 Law & Contemp. Prob. 301; Learned & Isaacs, The Robinson-Patman Law: Some Assumptions and Expectations, 15 Harv. Bus. Rev. 137; McAllister, Price Control by Law in the United States: A Survey, 4 Law & Contemp. Prob. 273.

ers. There is nothing to show a congressional purpose, in such a situation, to compel the seller to choose only between ruinously cutting its prices to all its customers to match the price offered to one, or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs. There is, on the other hand, plain language and established practice which permits a seller, through § 2 (b), to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers.

In a case where a seller sustains the burden of proof placed upon it to establish its defense under § 2 (b), we find no reason to destroy that defense indirectly, merely because it also appears that the beneficiaries of the seller's price reductions may derive a competitive advantage from them or may, in a natural course of events, reduce their own resale prices to their customers. It must have been obvious to Congress that any price reduction to any dealer may always affect competition at that dealer's level as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory. Likewise, it must have been obvious to Congress that any price reductions initiated by a seller's competitor would, if not met by the seller, affect competition at the beneficiary's level or among the beneficiary's customers just as much as if those reductions had been met by the seller. The proviso in § 2 (b), as interpreted by the Commission, would not be available when there was or might be an injury to competition at a resale level. So interpreted, the proviso would have such little, if any, applicability as to be practically meaningless. We may, therefore, conclude that Congress meant to permit the natural consequences to follow the seller's action in meeting in good faith a lawful and equally low price of its competitor.

In its argument here, the Commission suggests that there may be some situations in which it might recognize

the proviso in § 2 (b) as a complete defense, even though the seller's differential in price did injure competition. In support of this, the Commission indicates that in each case it must weigh the potentially injurious effect of a seller's price reduction upon competition at all lower levels against its beneficial effect in permitting the seller to meet competition at its own level. In the absence of more explicit requirements and more specific standards of comparison than we have here, it is difficult to see how an injury to competition at a level below that of the seller can thus be balanced fairly against a justification for meeting the competition at the seller's level. We hesitate to accept § 2 (b) as establishing such a dubious defense. On the other hand, the proviso is readily understandable as simply continuing in effect a defense which is equally absolute, but more limited in scope than that which existed under § 2 of the original Clayton Act.

The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded to that court with instructions to remand it to the Federal Trade Commission to make findings in conformity with this opinion.

It is so ordered.

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

MR. JUSTICE REED, dissenting.*

The Federal Trade Commission investigated practices of the Standard Oil Company of Indiana in selling its gasoline in the Detroit area at different prices to competing local distributors, in alleged violation of the Robinson-Patman (anti-price discrimination) Act. Standard's defense is not a denial of that discriminatory practice but a complete justification, said to be allowed by the

*[Joined by THE CHIEF JUSTICE and MR. JUSTICE BLACK. See *post*, p. 267.]

Robinson-Patman Act, on the ground of trade necessity in order to meet an equally low price in Detroit of other gasoline refiners. On concluding that the practice violated federal prohibitions against discriminatory sale prices, the Commission entered a cease and desist order against Standard's sale system. The order was enforced by the Court of Appeals after a minor modification. 43 F. T. C. 56; 173 F. 2d 210.

The need to allow sellers to meet competition in price from other sellers while protecting the competitors of the buyers against the buyers' advantages gained from the price discrimination was a major cause of the enactment of the 1936 Robinson-Patman Act. The Clayton Act of 1914 had failed to solve the problem. The impossibility of drafting fixed words of a statute so as to allow sufficient flexibility to meet the myriad situations of national commerce, we think led Congress in the Robinson-Patman Act to put authority in the Federal Trade Commission to determine when a seller's discriminatory sales price violated the prohibitions of the anti-monopoly statute, § 2 (a), 49 Stat. 1526, and when it was justified by a competitor's legal price.[1] The disadvantage to business of this choice was that the seller could not be positive before the Commission acted as to precisely how far he might go in price discrimination to meet and beat his competition. The Commission acted on its interpretation of the Act.[2] Believing it important to support the purpose of Congress and the Commission's interpretation of the Act, with which we agree, we state our reasons.

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[1] The difficulties of any other approach are illustrated by the attempt of Congress to clarify the Robinson-Patman Act. See President's veto message on S. 1008, 96 Cong. Rec. 8721, and conference reports, H. R. Rep. No. 1422, 81st Cong., 1st Sess., October 13, 1949, and 2d Sess., H. R. Rep. No. 1730, March 3, 1950.

[2] Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on S. 1008, 81st Cong., 1st Sess., June 8 and 14, 1949, p. 61.

The Court first condemns the Commission's position that meeting in good faith a competitor's price merely rebuts the prima facie establishment of discrimination based on forbidden differences in sales price, so as to require an affirmative finding by the Commission that nevertheless there may be enjoinable injury under the Robinson-Patman Act to the favored buyer's competitors. The Court then decides that good faith in meeting competition was an absolute defense for price discrimination, saying:

> "On the other hand, the proviso is readily understandable as simply continuing in effect a defense which is equally absolute, but more limited in scope than that which existed under § 2 of the original Clayton Act."

Such a conclusion seems erroneous. What follows in this dissent demonstrates, we think, that Congress intended so to amend the Clayton Act that the avenue of escape given price discriminators by its "meeting competition" clause should be narrowed. The Court's interpretation leaves what the seller can do almost as wide open as before. See p. 263 *et seq., infra.* It seems clear to us that the interpretation put upon the clause of the Robinson-Patman Act by the Court means that no real change has been brought about by the amendment.

The public policy of the United States fosters the free-enterprise system of unfettered competition among producers and distributors of goods as the accepted method to put those goods into the hands of all consumers at the least expense.[3] There are, however, statutory exceptions to such unlimited competition.[4] Nondiscriminatory

[3] *Associated Press* v. *United States,* 326 U. S. 1, 13; *United States* v. *Line Material Co.,* 333 U. S. 287, 309.

[4] *E. g.,* Interstate Commerce Act, § 5, 49 U. S. C. § 5; Communications Act of 1934, § 221, 47 U. S. C. § 221; Miller-Tydings Act, 15 U. S. C. § 1. And see Mason, The Current Status of the Monopoly Problem in the United States, 62 Harv. L. Rev. 1265.

pricing tends to weaken competition in that a seller, while otherwise maintaining his prices, cannot meet his antagonist's price to get a single order or customer. But Congress obviously concluded that the greater advantage would accrue by fostering equal access to supplies by competing merchants or other purchasers in the course of business.[5]

The first enactment to put limits on discriminatory selling prices was the Clayton Act in 1914, 38 Stat. 730, § 2. Section 11 enabled the Commission to use its investigatory and regulatory authority to handle price discrimination. Section 2 provided for the maintenance of competition by protecting the ability of business rivals to obtain commodities on equal terms. The Robinson-Patman Act moved further toward this objective. In the margin appear the applicable words of the Clayton Act followed by those of the Robinson-Patman Act. Phrased summarily for this case, it may be said that the italicized words in the Clayton Act were the source of the difficulties in enforcement that Congress undertook to avoid by the italicized words of the Robinson-Patman Act.[6]

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[5] For a discussion of the merits of the legislation, see Adelman, Effective Competition and the Antitrust Laws, 61 Harv. L. Rev. 1289.

[6] Clayton Act:

"SEC. 2. That it shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities, . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That nothing herein contained shall prevent . . . *discrimination in price in the same or different communities made in good faith to meet competition:* . . . ."

Robinson-Patman Act:

"SEC. 2. (a) That it shall be unlawful for any person engaged in commerce, . . . to discriminate in price between different purchasers of commodities . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, *or to injure, destroy, or prevent competition*

It will be noted that unless the effect is given the Robinson-Patman amendment contended for by the Federal Trade Commission, there is little done to overcome the difficulties arising from the "meeting competition" clause of the Clayton Act. Formerly "discrimination in price in the same or different communities made in good faith to meet competition" was allowed as a complete defense. Now it is "made in good faith to meet an equally low price of a competitor." The Court says:

> "It thus eliminates certain difficulties which arose under the original Clayton Act. For example, it omits reference to discriminations in price 'in the same or different communities . . .' and it thus restricts the proviso to price differentials occurring in actual competition. It also excludes reductions which undercut the 'lower price' of a competitor. None of these changes, however, cut into the actual core of the defense. That still consists of the provision that wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price."

We see little difference. The seller may still, under the Court's interpretation, discriminate in sales of goods of

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with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . . .

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, *the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown,* the Commission is authorized to issue an order terminating the discrimination: Provided, however, *That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.*"

910798 O--51——23

like quantity and quality between buyers on opposite corners, so long as one gets a lower delivered price offer from another seller, no matter where located. The "actual core of the defense" remains intact.

I.

Legislative History. Upon the interpretation of the words and purpose of this last addition by the Robinson-Patman Act to curbs on discrimination in trade, the narrow statutory issues in this case turn. Though narrow, they are important if trade is to have the benefit of careful investigation before regulation, attainable under the Federal Trade Commission Act but so difficult when attempted by prosecutions in courts with the limitations of judicial procedure. As an aid to the interpretation of § 2 (b), we set out applicable parts of its legislative history.

The Clayton Act created a broad exception from control for prices made in good faith to meet competition. This raised problems of which Congress was aware. In reporting on a redrafted version of S. 3154, the Senate's companion bill to the House bill that became the Robinson-Patman Act, the Senate Committee on the Judiciary, February 3, 1936, pointed out the weakness of § 2 of the Clayton Act in permitting discrimination to meet competition, and suggested a harsh remedy, the elimination of its italicized proviso in note 6, *supra,* without the mollifying words of § 2 (b) of the Robinson-Patman Act.[7] In

[7] S. Rep. No. 1502, 74th Cong., 2d Sess. 4:

"The weakness of present section 2 lies principally in the fact that: (1) It places no limit upon differentials permissible on account of differences in quantity; and (2) it permits discriminations to meet competition, and thus tends to substitute the remedies of retaliation for those of law, with destructive consequences to the central object of the bill. Liberty to meet competition which can be met only by price cuts at the expense of customers elsewhere, is in its un-

March, the House Committee on the Judiciary made its report on the bill that became the Act. Section 2 (b) was then in substantially its present form. The report pointed out the draftsmen's purpose to strengthen the laws against price discrimination, directly or indirectly through brokerage or other allowances, services or absorptions of costs.[8] It commented that the subsection that became § 2 (b) let a seller "meet the price actually pre-

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masked effect the liberty to destroy competition by selling locally below cost, a weapon progressively the more destructive in the hands of the more powerful, and most deadly to the competitor of limited resources, whatever his merit and efficiency. While the bill as now reported closes these dangerous loopholes, it leaves the fields of competition free and open to the most efficient, and thus in fact protects them the more securely against inundations of mere power and size.

"Specific phrases of section 2 (a), as now reported, may be noted as follows:

"One:

"'* * * where either or any of the purchases involved in such discrimination are in commerce * * *.'

"Section 2 (a) attaches to competitive relations between a given seller and his several customers, and this clause is designed to extend its scope to discriminations between interstate and intrastate customers, as well as between those purely interstate. Discriminations in excess of sound economic differences involve generally an element of loss, whether only of the necessary minimum of profits or of actual costs, that must be recouped from the business of customers not granted them. When granted by a given seller to his customers in other States, and denied to those within the State, they involve the use of that interstate commerce to the burden and injury of the latter. When granted to those within the State and denied to those beyond, they involve conversely a directly resulting burden upon interstate commerce with the latter. Both are within the proper and well-recognized power of Congress to suppress."

[8] H. R. Rep. No. 2287, 74th Cong., 2d Sess. 3:

"The purpose of this proposed legislation is to restore, so far as possible, equality of opportunity in business by strengthening antitrust laws and by protecting trade and commerce against unfair trade practices and unlawful price discrimination, and also against restraint and monopoly for the better protection of consumers,

viously offered by a local competitor." [9] The language used in regard to competition in the bills and in the Act seems to have been based on a recommendation of the Federal Trade Commission.[10] The Commission had been

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workers, and independent producers, manufacturers, merchants, and other businessmen.

"To accomplish its purpose, the bill amends and strengthens the Clayton Act by prohibiting discriminations in price between purchasers where such discriminations cannot be shown to be justified by differences in the cost of manufacture, sale, or delivery resulting from different methods or quantities in which such commodities are to such purchasers sold and delivered. It also prohibits brokerage allowances except for services actually rendered, and advertising and other service allowances unless such allowances or services are made available to all purchasers on proportionally equal terms. It strikes at the basing-point method of sale, which lessens competition and tends to create a monopoly."

[9] *Id.*, p. 16:

"This proviso represents a contraction of an exemption now contained in section 2 of the Clayton Act which permits discriminations without limit where made in good faith to meet competition. It should be noted that while the seller is permitted to meet local competition, it does not permit him to cut local prices until his competitor has first offered lower prices, and then he can go no further than to meet those prices. If he goes further, he must do so likewise with all his other customers, or make himself liable to all of the penalties of the act, including treble damages. In other words, the proviso permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further."

[10] Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. 96: "A simple solution for the uncertainties and difficulties of enforcement would be to prohibit unfair and unjust discrimination in price and leave it to the enforcement agency, subject to review by the courts, to apply that principle to particular cases and situations. The soundness of and extent to which the present provisos would constitute valid defenses would thus become a judicial and not a legislative matter.

"The Commission therefore recommends that section 2 of the Clayton Act be amended to read as follows:

" 'It shall be unlawful for any person engaged in commerce, in

unable to restore the desired competition under the Clayton Act, and Congress evidently sought to open the way for effective action.[11]

Events in the course of the proposed legislation in the Senate and House have pertinence. The Senate inserted the original ineffective language of the Clayton Act in its exact form in the Senate bill. In the same draft it adopted an amendment similar to the proviso ultimately enacted. 80 Cong. Rec. 6426, 6435. In the House, Representative Patman explained his view of the dangers in the original proviso.[12] It was taken out in Confer-

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any transaction in or affecting such commerce, either directly or indirectly to discriminate unfairly or unjustly in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States.' "

This report was utilized by the House Committee dealing with the proposed Robinson-Patman legislation. H. R. Rep. No. 2287, 74th Cong., 2d Sess. 3, 7.

[11] *Id.*, p. 64: "If the discrimination is 'on account of differences in the grade, quality, or quantity of the commodity sold', or makes 'only due allowance for difference in the cost of selling or transportation', or is 'made in good faith to meet competition', it is not unlawful, even though the effect 'may be to substantially lessen competition or tend to create a monopoly in any line of commerce.' Discriminatory price concessions given to prevent the loss of a chain store's business to a competing manufacturer, to prevent it manufacturing its own goods, or to prevent it from discouraging in its stores the sale of a given manufacturer's goods, may be strongly urged by the manufacturer as 'made in good faith to meet competition.' " See p. 90, *id.*

Attention was called to this need. H. R. Rep. No. 2287, 74th Cong., 2d Sess. 7: "Some of the difficulties of enforcement of this section as it stands are pointed out in the [Final Report] of the Federal Trade Commission above referred to, at pages 63 and following."

[12] 80 Cong. Rec. 8235:

"Mr. Chairman, I would like to ask a question of the gentleman from Texas [Mr. PATMAN]. A great many of the industries in Ohio

ence.[13] The Chairman of the House managers, Mr. Utterback, before the Conference Report was agreed to by the House, received permission to print an explanation

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were very much in favor of the proviso in the Senate bill, appearing on page 4, and reading as follows:

" '*And provided further*, That nothing herein contained shall prevent discrimination in price in the same or different commodities made in good faith to meet competition.'

"I find that on page 9 of the Patman bill, beginning in line 14, there appear these words:

" '*Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor.'

"Will the gentleman explain the difference between these two proposals?

"Mr. PATMAN. If the Senate amendment should be adopted it would really destroy the bill. It would permit the corporate chains to go into a local market, cut the price down so low that it would destroy local competitors and make up for their losses in other places where they had already destroyed their competitors. One of the objects of the bill is to get around that phrase and prevent the large corporate chains from selling below cost in certain localities, thus destroying the independent merchants, and making it up at other places where their competitors have already been destroyed. I hope the gentleman will not insist on the Senate amendment, because it would be very destructive of the bill. The phrase 'equally low price' means the corporate chain will have the right to compete with the local merchants. They may meet competition, which is all right, but they cannot cut down the price below cost for the purpose of destroying the local man.

"Mr. COOPER of Ohio. What does the gentleman's proviso mean?

"Mr. PATMAN. It means they may meet competition, but not cut down the price below cost. It means an equally low price but not below that. It permits competition, but it does not permit them to cut the price below cost in order to destroy their competitors. I hope the gentleman will not insist on the Senate amendment."

But see pp. 265 and 266, *infra*.

[13] H. R. Rep. No. 2951, 74th Cong., 2d Sess. 6–7:

"The Senate bill contained a further proviso—

" 'That nothing herein contained shall prevent discrimination in price

of his understanding of the proviso. He explained that the proviso "does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. . . . It leaves it a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given, ..." The pertinent parts of the statement appear in the margin.[14]

II.

Statutory Interpretation. This résumé of the origin and purpose of the original § 2 of the Clayton Act and

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in the same or different communities made in good faith to meet competition.'

"This language is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the present Clayton Act. The Senate receded, and the language is stricken. A provision relating to the question of meeting competition, intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commission, is included in subsection (b) in the conference text as follows:

" '*Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.' "

[14] 80 Cong. Rec. 9418:

"In connection with the above rule as to burden of proof, it is also provided that a seller may show that his lower price was made in good faith to meet an equally low price of a competitor, or that his furnishing of services or facilities was made in good faith to meet those furnished by a competitor. It is to be noted, however, that this does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. This provision is entirely procedural. It does not determine substantive rights, liabilities, and duties. They are fixed in the other provisions of the bill. It leaves it a question of fact to be determined in each case, whether the competition to be

the amendments of the Robinson-Patman Act gives a basis for determining the effect of this section in a hearing before the Commission where the charge, as here, that a seller during the same period of time has sold the same commodities to various purchasers at different prices, is admitted, and the defense, the elements of which are likewise admitted, is that the discrimination was made in good faith to meet an equally low price of a competitor. Does meeting in good faith a competitor's price constitute a complete defense under the proviso to § 2 (b)? Or does the fact of good faith reduction in price to a purchaser to meet a competitor's price merely rebut the prima facie establishment of discrimination, arising under the statute from proof of forbidden differences in price,[15] so as to require under § 2 (a) affirmative finding by the Commis-

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met was such as to justify the discrimination given, as one lying within the limitations laid down by the bill, and whether the way in which the competition was met lies within the latitude allowed by those limitations.

"This procedural provision cannot be construed as a carte blanche exemption to violate the bill so long as a competitor can be shown to have violated it first, nor so long as that competition cannot be met without the use of oppressive discriminations in violation of the obvious intent of the bill.

. . . . . .

"If this proviso were construed to permit the showing of a competing offer as an absolute bar to liability for discrimination, then it would nullify the act entirely at the very inception of its enforcement, for in nearly every case mass buyers receive similar discriminations from competing sellers of the same product. One violation of law cannot be permitted to justify another. As in any case of self-defense, while the attack against which the defense is claimed may be shown in evidence, its competency as a bar depends also upon whether it was a legal or illegal attack. A discrimination in violation of this bill is in practical effect a commercial bribe to lure the business of the favored customer away from the competitor, and if one bribe were permitted to justify another the bill would be futile to achieve its plainly intended purposes."

[15] See n. 6, *supra*.

sion that there may be injury to competition? Petitioner asserts that good faith meeting of a competitor's price is a complete defense. The Commission and the Court of Appeals take the opposite position, with which we concur.

This is our reason. The statutory development and the information before Congress concerning the need for strengthening the competitive price provision of the Clayton Act, make clear that the evil dealt with by the proviso of § 2 (b) was the easy avoidance of the prohibition against price discrimination. The control of that evil was an important objective of the Robinson-Patman Act. The debates, the Commission's report and recommendation, and statutory changes show this. The Conference Report and the explanation by one of the managers, Mr. Utterback, are quite definitive upon the point. Because of experience under the Clayton Act, Congress refused to continue its competitive price proviso. Yet adoption of petitioner's position would permit a seller of nationally distributed goods to discriminate in favor of large chain retailers, for the seller could give to the large retailer a price lower than that charged to small retailers, and could then completely justify its discrimination by showing that the large retailer had first obtained the same low price from a local low-cost producer of competitive goods. This is the very type of competition that Congress sought to remedy. To permit this would not seem consonant with the other provisions of the Robinson-Patman Act, strengthening regulatory powers of the Commission in "quantity" sales, special allowances and changing economic conditions.

The structure and wording of the Robinson-Patman Amendment to the Clayton Act also conduce to our conclusion. In the original Clayton Act, § 2 was not divided into subsections. In that statute, § 2 stated the body of the substantive offense, and then listed, in a series of provisos, various circumstances under which discrimi-

nations in price were permissible. Thus the statute provided that discriminations were not illegal if made on account of differences in the grade of the commodity sold, or differences in selling or transportation costs. Listed among these absolute justifications of the Clayton Act appeared the provision that "nothing herein contained shall prevent discrimination in price . . . made in good faith to meet competition." The Robinson-Patman Act, however, made two changes in respect of the "meeting competition" provision, one as to its location, the other in the phrasing. Unlike the original statute, § 2 of the Robinson-Patman Act is divided into two subsections. The first, § 2 (a), retained the statement of substantive offense and the series of provisos treated by the Commission as affording full justifications for price discriminations; § 2 (b) was created to deal with procedural problems in Federal Trade Commission proceedings, specifically to treat the question of burden of proof. In the process of this division, the "meeting competition" provision was separated from the other provisos, set off from the substantive provisions of § 2 (a), and relegated to the position of a proviso to the procedural subsection, § 2 (b). Unless it is believed that this change of position was fortuitous, it can be inferred that Congress meant to curtail the defense of meeting competition when it banished this proviso from the substantive division to the procedural. In the same way, the language changes made by § 2 (b) of the Robinson-Patman Act reflect an intent to diminish the effectiveness of the sweeping defense offered by the Clayton Act's "meeting of competition" proviso. The original provisos in the Clayton Act, and the provisos now appearing in § 2 (a), are worded to make it clear that nothing shall prevent certain price practices, such as price "differentials [making] . . . due allowance for differences in the cost of manufacture . . .," or "price changes . . . in response to chang-

ing conditions affecting the market for . . . the goods concerned . . . ." But in contrast to these provisions, the proviso to § 2 (b) does not provide that nothing "shall prevent" a certain price practice; it provides only that "nothing . . . shall prevent a seller rebutting [a] prima-facie case . . . by showing" a certain price practice—meeting a competitive price. The language thus shifts the focus of the proviso from a matter of substantive defense to a matter of proof. Consistent with each other, these modifications made by the Robinson-Patman Act are also consistent with the intent of Congress expressed in the legislative history.

The Court suggests that former Federal Trade Commission cases decided here have treated the "meeting competition" clause of the Robinson-Patman Act as being an absolute defense, not merely a rebuttal of the discrimination charge requiring further finding by the Commission. Reference is made to *Corn Products Refining Co.* v. *Federal Trade Comm'n,* 324 U. S. 726, and *Federal Trade Comm'n* v. *Staley Mfg. Co.,* 324 U. S. 746. In the *Corn Products* case, dealing with a basing point scheme for delivered prices, this Court merely said at p. 741:

> "The only evidence said to rebut the prima facie case made by proof of the price discriminations was given by witnesses who had no personal knowledge of the transactions, and was limited to statements of each witness's assumption or conclusion that the price discriminations were justified by competition."

And then went on to use the language quoted at p. 244 of the Court's opinion. There was no occasion to consider the effect of a successful rebuttal. As authority for its statement, we there cited the *Staley* case.

That citation included these words at pp. 752–753:

> "Prior to the Robinson-Patman amendments, § 2 of the Clayton Act provided that nothing contained in

> it 'shall prevent' discriminations in price 'made in good faith to meet competition.' The change in language of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination. See the Conference Report, H. Rep. No. 2951, 74th Cong., 2d Sess., pp. 6–7; see also the statement of Representative Utterbach [*sic*], the Chairman of the House Conference Committee, 80 Cong. Rec. 9418."

After that statement, which it should be noted relies upon Mr. Utterback's interpretation quoted at note 14 of this opinion, the Court in the *Staley* case goes on to say that there was no evidence to show that Staley adopted a lower price to meet an equally low price of a competitor. Again there was no occasion for this Court to meet the present issue. We think our citation in *Staley,* quoted above, shows the then position of this Court.[16]

There are arguments available to support the contrary position. No definite statement appears in the committee reports that "meeting competition" is henceforth to be only a rebuttal of a prima facie case and not a full justification for discrimination in price. The proviso of § 2 (b) can be read as having the same substantive effect as the provisos of § 2 (a). The earlier provisos are treated by the Commission as complete defenses. Perhaps there is an implication favorable to the petitioner's position in Representative Patman's omission to state the Federal Trade Commission interpretation on the floor. See n. 12, *supra.*

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[16] The Court's opinion in this case refers, p. 244, notes 10 and 11, to the opinions of the Court of Appeals for the Seventh Circuit in *Corn Products* and *Staley,* 144 F. 2d 211 and 221. But that court reversed its position in the opinion below, 173 F. 2d 210, 216. It is fair to assume that reversal was because of our opinions in *Corn Products* and *Staley.*

The underlying congressional purpose to curtail methods of avoiding limitations on price discriminations, however, considered with the more specific matters discussed herein, satisfies us that we should adopt the conclusion of the Commission and the Court of Appeals.[17] We believe that good faith meeting of a competitor's price only rebuts the prima facie case of violation established by showing the price discrimination. Whether the proven price discrimination is of a character that violates § 2 (a) then becomes a matter for the determination of the Commission on a showing that there may be injury to competition.

III.

Conclusion. In view of the Court's ruling, we will not enlarge this dissent by discussing other problems raised by the case. We have said enough to show that we would affirm the decree below in principle, even though we should conclude some amendment might be required in the wording of the order.

THE CHIEF JUSTICE and MR. JUSTICE BLACK join in this dissent.

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[17] It is hardly necessary to note that the wisdom of the enactment is not for the Commission nor the courts in enforcing the Act. The Commission recently has advised Congress that while "on balance it would be preferable to make the good-faith meeting of competition a complete defense," it "does not strongly urge either view upon the Congress." Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on S. 1008, 81st Cong., 1st Sess., June 8 and 14, 1949, p. 61. Compare *Standard Oil Co.* v. *United States,* 337 U. S. 293, 311. This statement confirmed the Commission's position taken in this case. There were other officials of the Commission who have taken the view adopted by the Court.

NIEMOTKO *v.* MARYLAND.

NO. 17. APPEAL FROM THE CIRCUIT COURT OF HARFORD COUNTY, MARYLAND.*

Argued October 17, 1950.—Decided January 15, 1951.

Appellants' applications to a City Council for permits to use a city park for Bible talks were denied, for no apparent reason except the Council's dislike for appellants and disagreement with their views. For attempting to hold public meetings and make speeches in the park without permits, they were convicted on charges of disorderly conduct, although there was no evidence of disorder, threat of violence or riot, and they had conducted themselves in a manner beyond reproach. There was no ordinance prohibiting or regulating the use of the park and there were no established standards for the granting of permits; but permits customarily had been granted for similar purposes, including meetings of religious and fraternal organizations. *Held:* Appellants were denied equal protection of the laws, in the exercise of freedom of speech and religion, contrary to the First and Fourteenth Amendments. Pp. 269–273.

(a) The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body. P. 272.

(b) A contention that state and city officials should have the power to exclude religious groups, as such, from the use of public parks was no justification when permits had always been issued for the use of the park by religious organizations. Pp. 272–273.

(c) A contention that the park was designated as a sanctuary for peace and quiet was no justification when its use for patriotic celebrations by fraternal organizations was permitted. P. 273.

(d) The lack of standards in the license-issuing "practice" renders that "practice" a prior restraint in contravention of the Fourteenth Amendment, and the completely arbitrary and discriminatory refusal to grant the permits was a denial of equal protection. P. 273.

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*Together with No. 18, *Kelley* v. *Maryland*, also on appeal from the same court.

(e) Since the convictions were based upon the lack of permits which were denied unconstitutionally, the convictions cannot stand. P. 273.

— Md. —, 71 A. 2d 9, reversed.

For attempts to hold religious meetings in a public park without permits, appellants were convicted of disorderly conduct under Flack's Md. Ann. Code, 1939 (1947 Supp.), Art. 27, § 131. The Maryland Court of Appeals declined to review their convictions. — Md. —, 71 A. 2d 9. On appeal to this Court, *reversed,* p. 273.

Hayden C. Covington argued the cause and filed a brief for appellants.

Kenneth C. Proctor, Assistant Attorney General of Maryland, argued the cause for appellee. With him on the brief was *Hall Hammond,* Attorney General.

Mr. Chief Justice Vinson delivered the opinion of the Court.

Appellants are two members of the religious group known as Jehovah's Witnesses. At the invitation of local coreligionists, they scheduled Bible talks in the public park of the city of Havre de Grace, Maryland. Although there is no ordinance prohibiting or regulating the use of this park, it has been the custom for organizations and individuals desiring to use it for meetings and celebrations of various kinds to obtain permits from the Park Commissioner. In conformity with this practice, the group requested permission of the Park Commissioner for use of the park on four consecutive Sundays in June and July, 1949. This permission was refused.

Having been informed that an Elks' Flag Day ceremony was scheduled for the first Sunday, the applicants did not pursue their request for the use of the park for that particular day, but, instead, filed a written request with the City Council for the following three Sundays. This

request was filed at the suggestion of the Mayor, it appearing that under the custom of the municipality there is a right of appeal to the City Council from the action of the Park Commissioner. The Council held a hearing at which the request was considered. At this hearing the applicants and their attorney appeared. The request was denied.

Because they were awaiting the decision of the Council on their application, the applicants took no further steps on the second Sunday, but, after the denial of the request, they proceeded to hold their meeting on the third Sunday. No sooner had appellant Niemotko opened the meeting and commenced delivering his discourse, than the police, who had been ordered to the park by the Mayor, arrested him. At the meeting held in the park on the fourth and following Sunday, appellant Kelley was arrested before he began his lecture.

Appellants were subsequently brought to trial before a jury on a charge of disorderly conduct under the Maryland disorderly conduct statute. Flack's Md. Ann. Code, 1939 (1947 Cum. Supp.), Art. 27, § 131. They were convicted and each fined $25 and costs. Under the rather unique Maryland procedure, the jury is the judge of the law as well as the facts. Md. Const., Art. XV, § 5; see opinion below, —— Md. ——, ——, 71 A. 2d 9, 11. This means that there is normally no appellate review of any question dependent on the sufficiency of the evidence. Relying on this Maryland rule, the Court of Appeals declined to review the case under its normal appellate power, and further declined to take the case on certiorari, stating that the issues were not "matters of public interest" which made it desirable to review. Being of opinion that the case presented substantial constitutional issues, we noted probable jurisdiction, the appeal being properly here under 28 U. S. C. § 1257 (2).

In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded. See *Feiner* v. *New York,* decided this day, *post,* p. 315. A brief recital of the facts as they were adduced at this trial will suffice to show why these convictions cannot stand. At the time of the arrest of each of these appellants, there was no evidence of disorder, threats of violence or riot. There was no indication that the appellants conducted themselves in a manner which could be considered as detrimental to the public peace or order. On the contrary, there was positive testimony by the police that each of the appellants had conducted himself in a manner beyond reproach. It is quite apparent that any disorderly conduct which the jury found must have been based on the fact that appellants were using the park without a permit, although, as we have indicated above, there is no statute or ordinance prohibiting or regulating the use of the park without a permit.

This Court has many times examined the licensing systems by which local bodies regulate the use of their parks and public places. See *Kunz* v. *New York,* decided this day, *post,* p. 290. See also *Saia* v. *New York,* 334 U. S. 558 (1948); *Hague* v. *C. I. O.,* 307 U. S. 496 (1939); *Lovell* v. *Griffin,* 303 U. S. 444 (1938). In those cases this Court condemned statutes and ordinances which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a prior restraint on freedom of speech, press and religion, and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid. See *Kunz* v. *New York, post,* p. 290. In the instant case we are met with no ordinance or statute regulating or prohibiting the use of the park; all that is here is an amor-

910798 O—51——24

phous "practice," whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served. It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here.

This case points up with utmost clarity the wisdom of this doctrine. For the very possibility of abuse, which those earlier decisions feared, has occurred here. Indeed, rarely has any case been before this Court which shows so clearly an unwarranted discrimination in a refusal to issue such a license. It is true that the City Council held a hearing at which it considered the application. But we have searched the record in vain to discover any valid basis for the refusal. In fact, the Mayor testified that the permit would probably have been granted if, at the hearing, the applicants had not started to "berate" the Park Commissioner for his refusal to issue the permit. The only questions asked of the Witnesses at the hearing pertained to their alleged refusal to salute the flag, their views on the Bible, and other issues irrelevant to unencumbered use of the public parks. The conclusion is inescapable that the use of the park was denied because of the City Council's dislike for or disagreement with the Witnesses or their views. The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body.

In this Court, it is argued that state and city officials should have the power to exclude religious groups, as such, from the use of the public parks. But that is not this case. For whatever force this contention could possibly have is lost in the light of the testimony of the Mayor

at the trial that within his memory permits had always been issued for religious organizations and Sunday-school picnics. We might also point out that the attempt to designate the park as a sanctuary for peace and quiet not only does not defeat these appellants, whose own conduct created no disturbance, but this position is also more than slightly inconsistent, since, on the first Sunday here involved, the park was the situs for the Flag Day ceremony of the Order of Elks.

It thus becomes apparent that the lack of standards in the license-issuing "practice" renders that "practice" a prior restraint in contravention of the Fourteenth Amendment, and that the completely arbitrary and discriminatory refusal to grant the permits was a denial of equal protection. Inasmuch as the basis of the convictions was the lack of the permits, and that lack was, in turn, due to the unconstitutional defects discussed, the convictions must fall.

Reversed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE FRANKFURTER, concurring in the result.*

The issues in these cases concern living law in some of its most delicate aspects. To smother differences of emphasis and nuance will not help its wise development. When the way a result is reached may be important to results hereafter to be reached, law is best respected by individual expression of opinion.

These cases present three variations upon a theme of great importance. Legislatures, local authorities, and the courts have for years grappled with claims of the right to disseminate ideas in public places as against claims of an effective power in government to keep the

*[In this case, No. 50, *Kunz* v. *New York*, *post*, p. 290, and No. 93, *Feiner* v. *New York*, *post*, p. 315.]

peace and to protect other interests of a civilized community. These cases are of special interest because they show the attempts of three communities to meet the problem in three different ways. It will, I believe, further analysis to use the three situations as cross-lights on one another.

I.

1. *Nos. 17 and 18.*—Havre de Grace, Maryland, sought to solve this tangled problem by permitting its park commissioner and city council to act as censors. The city allowed use of its park for public meetings, including those of religious groups, but by custom a permit was required. In this case, the city council questioned the representatives of Jehovah's Witnesses, who had requested a license, about their views on saluting the flag, the Catholic Church, service in the armed forces, and other matters in no way related to public order or public convenience in use of the park. The Mayor testified that he supposed the permit was denied "because of matters that were brought out at [the] meeting." When Niemotko and Kelley, Jehovah's Witnesses, attempted to speak, they were arrested for disturbing the peace. There was no disturbance of the peace and it is clear that they were arrested only for want of a permit.

2. *No. 50.*—New York City set up a licensing system to control the use of its streets and parks for public religious services. The New York Court of Appeals construed the city's ordinance so as to sanction the right of the Police Commissioner to revoke or refuse a license for street-preaching if he found the person was likely to "ridicule" or "denounce" religion. In 1946, after hearings before a Fourth Deputy Police Commissioner, Kunz's license was revoked because he had "ridiculed" and "denounced" religion while speaking in one of New York's crowded centers, and it was thought likely that he would continue

to do so. In 1947 and 1948 he was refused a license on the sole ground of the determination made in 1946. In September of 1948 he was arrested for speaking at Columbus Circle without a license.

3. *No. 93.*—Syracuse, New York, did not set up a licensing system but relied on a statute which is in substance an enactment of the common-law offense of breach of the peace. Feiner, the defendant, made a speech near the intersection of South McBride and Harrison Streets in Syracuse. He spoke from a box located on the parking between the sidewalk and the street, and made use of sound amplifiers attached to an automobile. A crowd of 75 to 80 persons gathered around him, and several pedestrians had to go into the highway in order to pass by. Two policemen observed the meeting. In the course of his speech, Feiner referred to the Mayor of Syracuse as a "champagne-sipping bum," to the President as a "bum," and to the American Legion as "Nazi Gestapo agents." Feiner also indicated in an excited manner that Negroes did not have equal rights and should rise up in arms. His audience included a number of Negroes.

One man indicated that if the police did not get the speaker off the stand, he would do it himself. The crowd, which consisted of both those who opposed and those who supported the speaker, was restless. There was not yet a disturbance but, in the words of the arresting officer whose story was accepted by the trial judge, he "stepped in to prevent it from resulting in a fight. After all there was angry muttering and pushing." Having ignored two requests to stop speaking, Feiner was arrested.

II.

Adjustment of the inevitable conflict between free speech and other interests is a problem as persistent as it is perplexing. It is important to bear in mind that this Court can only hope to set limits and point the way. It

falls to the lot of legislative bodies and administrative officials to find practical solutions within the frame of our decisions. There are now so many of these decisions, arrived at by the *ad hoc* process of adjudication, that it is desirable to make a cruise of the timber.

In treating the precise problem presented by the three situations before us—how to reconcile the interest in allowing free expression of ideas in public places with the protection of the public peace and of the primary uses of streets and parks—we should first set to one side decisions which are apt to mislead rather than assist. Contempt cases and convictions under State and Federal statutes aimed at placing a general limitation upon what may be said or written, bring additional factors into the equation. Cases like *Near* v. *Minnesota,* 283 U. S. 697, and *Grosjean* v. *American Press Co.,* 297 U. S. 233, are rooted in historic experience regarding prior restraints on publication. They give recognition to the role of the press in a democracy, a consideration not immediately pertinent. The picketing cases are logically relevant since they usually involve, in part, dissemination of information in public places. But here also enter economic and social interests outside the situations before us. See *Hughes* v. *Superior Court,* 339 U. S. 460, 464–465.

The cases more exclusively concerned with restrictions upon expression in its divers forms in public places have answered problems varying greatly in content and difficulty.

1. The easiest cases have been those in which the only interest opposing free communication was that of keeping the streets of the community clean. This could scarcely justify prohibiting the dissemination of information by handbills or censoring their contents. In *Lovell* v. *Griffin,* 303 U. S. 444, an ordinance requiring a permit to distribute pamphlets was held invalid where the licensing standard was "not limited to ways which might be

regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets." *Id.*, at 451. In *Hague* v. *C. I. O.*, 307 U. S. 496, a portion of the ordinance declared invalid prohibited the distribution of pamphlets. In *Schneider* v. *State,* 308 U. S. 147, three of the four ordinances declared invalid by the Court prohibited the distribution of pamphlets. In *Jamison* v. *Texas,* 318 U. S. 413, the Court again declared invalid a municipal ordinance prohibiting the distribution of all handbills.

2. In a group of related cases, regulation of solicitation has been the issue. Here the opposing interest is more substantial—protection of the public from fraud and from criminals who use solicitation as a device to enter homes. The fourth ordinance considered in *Schneider* v. *State, supra,* allowed the chief of police to refuse a permit if he found, in his discretion, that the canvasser was not of good character or was canvassing for a project not free from fraud. The ordinance was found invalid because the officer who could, in his discretion, make the determinations concerning "good character" and "project not free from fraud" in effect held the power of censorship. In *Cantwell* v. *Connecticut,* 310 U. S. 296, conviction was, in part, under a State statute requiring a permit for religious solicitation. The statute was declared invalid because the licensing official could determine what causes were religious, allowing a "censorship of religion." *Id.*, at 305. Again, in *Largent* v. *Texas,* 318 U. S. 418, an ordinance requiring a permit from the mayor, who was to issue the permit only if he deemed it "proper or advisable," was declared invalid as creating an administrative censorship. The Court has also denied the right of those in control of a company town or Government housing project to prohibit solicitation by Jehovah's Witnesses. *Marsh* v. *Alabama,*

326 U. S. 501; *Tucker* v. *Texas,* 326 U. S. 517. In *Thomas* v. *Collins,* 323 U. S. 516, the solicitation was in the interest of labor rather than religion. There a State statute requiring registration of labor organizers was found unconstitutional when invoked to enjoin a speech in a public hall. The interest of the State in protecting its citizens through the regulation of vocations was deemed insufficient to support the statute.

3. Whether the sale of religious literature by Jehovah's Witnesses can be subjected to nondiscriminatory taxes on solicitation has introduced another opposing interest—the right of the community to raise funds for the support of the government. In *Jones* v. *Opelika,* 319 U. S. 103, vacating 316 U. S. 584, and in *Murdock* v. *Pennsylvania,* 319 U. S. 105, the Court held that imposition of the tax upon itinerants was improper. In *Follett* v. *McCormick,* 321 U. S. 573, the Court went further to hold unconstitutional the imposition of a flat tax on book agents upon a resident who made his living selling religious books.

4. *Martin* v. *Struthers,* 319 U. S. 141, represents another situation. An ordinance of the City of Struthers, Ohio, forbade knocking on the door or ringing the doorbell of a residence in order to deliver a handbill. Prevention of crime and assuring privacy in an industrial community where many worked on night shifts, and had to obtain their sleep during the day, were held insufficient to justify the ordinance in the case of handbills distributed on behalf of Jehovah's Witnesses.

5. In contrast to these decisions, the Court held in *Prince* v. *Massachusetts,* 321 U. S. 158, that the application to Jehovah's Witnesses of a State statute providing that no boy under 12 or girl under 18 should sell periodicals on the street was constitutional. Claims of immunity from regulation of religious activities were subordinated to the interest of the State in protecting its children.

6. Control of speeches made in streets and parks draws on still different considerations—protection of the public peace and of the primary uses of travel and recreation for which streets and parks exist.

(a) The pioneer case concerning speaking in parks and streets is *Davis* v. *Massachusetts,* 167 U. S. 43, in which this Court adopted the reasoning of the opinion below written by Mr. Justice Holmes, while on the Massachusetts Supreme Judicial Court. *Commonwealth* v. *Davis,* 162 Mass. 510, 39 N. E. 113. The Boston ordinance which was upheld required a permit from the mayor for any person to "make any public address, discharge any cannon or firearm, expose for sale any goods, . . ." on public grounds. This Court respected the finding that the ordinance was not directed against free speech but was intended as "a proper regulation of the use of public grounds." 162 Mass. at 512, 39 N. E. at 113.

An attempt to derive from *dicta* in the *Davis* case the right of a city to exercise any power over its parks, however arbitrary or discriminatory, was rejected in *Hague* v. *C. I. O., supra.* The ordinance presented in the *Hague* case required a permit for meetings on public ground, the permit to be refused by the licensing official only "for the purpose of preventing riots, disturbances or disorderly assemblage." *Id.,* at 502. The facts of the case, however, left no doubt that the licensing power had been made an "instrument of arbitrary suppression of free expression of views on national affairs." *Id.,* at 516. And the construction given the ordinance in the State courts gave the licensing officials wide discretion. See *Thomas* v. *Casey,* 121 N. J. L. 185, 1 A. 2d 866. The holding of the *Hague* case was not that a city could not subject the use of its streets and parks to reasonable regulation. The holding was that the licensing officials could not be given power arbitrarily to suppress free expression, no matter under what cover of law they purported to act.

Cox v. *New Hampshire,* 312 U. S. 569, made it clear that the United States Constitution does not deny localities the power to devise a licensing system if the exercise of discretion by the licensing officials is appropriately confined. A statute requiring a permit and license fee for parades had been narrowly construed by the State courts. The license could be refused only for "considerations of time, place and manner so as to conserve the public convenience," and the license fee was "to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed." *Id.,* at 575–576, 577. The licensing system was sustained even though the tax, ranging from a nominal amount to $300, was determined by the licensing officials on the facts of each case.

(b) Two cases have involved the additional considerations incident to the use of sound trucks. In *Saia* v. *New York,* 334 U. S. 558, the ordinance required a license from the chief of police for use of sound amplification devices in public places. The ordinance was construed not to prescribe standards to be applied in passing upon a license application. In the particular case, a license to use a sound truck in a small city park had been denied because of complaints about the noise which resulted when sound amplifiers had previously been used in the park. There was no indication that the license had been refused because of the content of the speeches. Nevertheless, the Court held the ordinance unconstitutional. In *Kovacs* v. *Cooper,* 336 U. S. 77, part of the Court construed the ordinance as allowing conviction for operation of any sound truck emitting "loud and raucous" noises, and part construed the ordinance to ban all sound trucks. The limits of the decision of the Court upholding the ordinance are therefore not clear, but the result in any event does not leave the *Saia* decision intact.

(c) On a few occasions the Court has had to pass on a limitation upon speech by a sanction imposed after the event rather than by a licensing statute. In *Cantwell* v. *Connecticut, supra,* one of the convictions was for common-law breach of the peace. The problem was resolved in favor of the defendant by reference to *Schenck* v. *United States,* 249 U. S. 47, 52, in view of the inquiry whether, on the facts of the case, there was "such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question." 310 U. S. at 311.

In *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, a State statute had enacted the common-law doctrine of "fighting words": "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name . . . ." The State courts had previously held the statute applicable only to the use in a public place of words directly tending to cause a breach of the peace by the persons to whom the remark was addressed. The conviction of a street speaker who called a policeman a "damned racketeer" and "damned Fascist" was upheld.

7. One other case should be noted, although it involved a conviction for breach of peace in a private building rather than in a public place. In *Terminiello* v. *Chicago,* 337 U. S. 1, the holding of the Court was on an abstract proposition of law, unrelated to the facts in the case. A conviction was overturned because the judge had instructed the jury that "breach of the peace" included speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance . . . ." The holding apparently was that breach of the peace may not be defined in such broad terms, certainly as to speech in a private hall.

The results in these multifarious cases have been expressed in language looking in two directions. While the Court has emphasized the importance of "free speech," it has recognized that "free speech" is not in itself a touchstone. The Constitution is not unmindful of other important interests, such as public order, if interference with free expression of ideas is not found to be the overbalancing consideration. More important than the phrasing of the opinions are the questions on which the decisions appear to have turned.

(1) What is the interest deemed to require the regulation of speech? The State cannot of course forbid public proselyting or religious argument merely because public officials disapprove the speaker's views. It must act in patent good faith to maintain the public peace, to assure the availability of the streets for their primary purposes of passenger and vehicular traffic, or for equally indispensable ends of modern community life.

(2) What is the method used to achieve such ends as a consequence of which public speech is constrained or barred? A licensing standard which gives an official authority to censor the content of a speech differs *toto cælo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like. Again, a sanction applied after the event assures consideration of the particular circumstances of a situation. The net of control must not be cast too broadly.

(3) What mode of speech is regulated? A sound truck may be found to affect the public peace as normal speech does not. A man who is calling names or using the kind of language which would reasonably stir another to violence does not have the same claim to protection as one whose speech is an appeal to reason.

(4) Where does the speaking which is regulated take place? Not only the general classifications—streets, parks, private buildings—are relevant. The location and

size of a park; its customary use for the recreational, esthetic and contemplative needs of a community; the facilities, other than a park or street corner, readily available in a community for airing views, are all pertinent considerations in assessing the limitations the Fourteenth Amendment puts on State power in a particular situation.[1]

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[1] In *M'Ara* v. *Magistrates of Edinburgh,* 1913 S. C. 1059, a street orator who was arrested for speaking without a license in the streets of Edinburgh, contrary to the Magistrates' proclamation, challenged the arrest. The Court of Session affirmed a holding that Magistrates had no authority to issue the proclamation because the Act of 1606 granting them authority was in desuetude. However, in his judgment, Lord Dunedin, one of the most trenchant minds in modern Anglo-American judicial history, dealt with the argument that there is an absolute right to speak in public places. Although he was applying Scots law, not a written constitution, Lord Dunedin's remarks are apposite here:

"Now the right of free speech undoubtedly exists, and the right of free speech is to promulgate your opinions by speech so long as you do not utter what is treasonable or libellous, or make yourself obnoxious to the statutes that deal with blasphemy and obscenity. But the right of free speech is a perfectly separate thing from the question of the place where that right is to be exercised. You may say what you like provided it is not obnoxious in the ways I have indicated, but that does not mean that you may say it anywhere.

"I am not going to deal with what may be the case in open spaces or public places. It seems to me that no general pronouncement upon that subject could be made, because, although for convenience sake one often speaks of open spaces or of public places, the truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular place. For example, there may be certain places which are dedicated to certain uses, . . . and things that otherwise were lawful might be restrained if they interfered with the purposes of that dedication. Each of those cases must be dealt with when it arises. Here we are dealing with a street proper, because this place at the Mound is just one of the streets of the city. It is a thoroughfare, although, probably, not a very much used thoroughfare at that particular corner. In such a place there is not the slightest right in anyone to hold a meeting as such. . . ." *Id.* at 1073–1074.

III.

Due regard for the interests that were adjusted in the decisions just canvassed affords guidance for deciding the cases before us.

1. In the *Niemotko* case, neither danger to the public peace, nor consideration of time and convenience to the public, appears to have entered into denial of the permit. Rumors that there would be violence by those opposed to the meeting appeared only after the Council made its decision, and in fact never materialized. The city allowed other religious groups to use the park. To allow expression of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment.

2. The *Kunz* case presents a very different situation. We must be mindful of the enormous difficulties confronting those charged with the task of enabling the polyglot millions in the City of New York to live in peace and tolerance. Street-preaching in Columbus Circle is done in a milieu quite different from preaching on a New England village green. Again, religious polemic does not touch the merely ratiocinative nature of man, and the ugly facts disclosed by the record of this case show that Kunz was not reluctant to offend the deepest religious feelings of frequenters of Columbus Circle. Especially in such situations, this Court should not substitute its abstract views for the informed judgment of local authorities confirmed by local courts.

I cannot make too explicit my conviction that the City of New York is not restrained by anything in the Constitution of the United States from protecting completely the community's interests in relation to its streets. But if a municipality conditions holding street meetings on the granting of a permit by the police, the basis which

guides licensing officials in granting or denying a permit must not give them a free hand, or a hand effectively free when the actualities of police administration are taken into account. It is not for this Court to formulate with particularity the terms of a permit system which would satisfy the Fourteenth Amendment. No doubt, finding a want of such standards presupposes some conception of what is necessary to meet the constitutional requirement we draw from the Fourteenth Amendment. But many a decision of this Court rests on some inarticulate major premise and is none the worse for it. A standard may be found inadequate without the necessity of explicit delineation of the standards that would be adequate, just as doggerel may be felt not to be poetry without the need of writing an essay on what poetry is.

Administrative control over the right to speak must be based on appropriate standards, whether the speaking be done indoors or out-of-doors. The vice to be guarded against is arbitrary action by officials. The fact that in a particular instance an action appears not arbitrary does not save the validity of the authority under which the action was taken.

In the present case, Kunz was not arrested for what he said on the night of arrest, nor because at that time he was disturbing the peace or interfering with traffic. He was arrested because he spoke without a license, and the license was refused because the police commissioner thought it likely on the basis of past performance that Kunz would outrage the religious sensibilities of others. If such had been the supportable finding on the basis of fair standards in safeguarding peace in one of the most populous centers of New York City, this Court would not be justified in upsetting it. It would not be censorship in advance. But here the standards are defined neither by language nor by settled construction to preclude discriminatory or arbitrary action by officials. The ordi-

nance, as judicially construed, provides that anyone who, in the judgment of the licensing officials, would "ridicule" or "denounce" religion creates such a danger of public disturbance that he cannot speak in any park or street in the City of New York. Such a standard, considering the informal procedure under which it is applied, too readily permits censorship of religion by the licensing authorities. *Cantwell* v. *Connecticut,* 310 U. S. 296. The situation here disclosed is not, to reiterate, beyond control on the basis of regulation appropriately directed to the evil.[2]

[2] This is the second time that the ordinance which gave rise to Kunz's conviction has been before the Court. That fact is relevant however only for the purpose of appreciating that the context in which and the circumstances under which the Court considered the ordinance the first time are quite different from the conditions underlying the present appeal. The first time the Court had to consider the ordinance was on an appeal from *People* v. *Smith,* 263 N. Y. 255, 188 N. E. 745. In that case the New York Court of Appeals sustained a conviction for expounding atheism in the street without a permit. The appeal to this Court was based solely on the argument that regulation of speakers on religion without regulating other speakers was an unreasonable classification. Responding to this issue, the Court summarily dismissed the appeal, 292 U. S. 606, citing three cases: *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144; *Silver* v. *Silver,* 280 U. S. 117, 123; and *Sproles* v. *Binford,* 286 U. S. 374, 396. All three concern the problem of reasonable classification and in no wise bear on the issue now before us. The difference in the issues between the *Smith* case and the *Kunz* case is strikingly manifested by the fact that the conviction of Smith was affirmed by a unanimous Court of Appeals of New York, whereas in the present case the conviction was affirmed by the narrowest division in that court.

It must also be borne in mind that the *Smith* case was disposed of in 1934, before the series of decisions beginning with *Lovell* v. *Griffin,* 303 U. S. 444, allowing much less scope to local officials in the control of public utterances than had theretofore been taken for granted. Compare the language of *Davis* v. *Massachusetts,* 167 U. S. 43, as well as the atmosphere which it generated. So far as the special circumstances relating to the City of New York are concerned, it is pertinent to note that all three dissenting judges below are residents of New York City, whereas not one of the four constituting

3. Feiner was convicted under New York Penal Law, § 722, which provides:

> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> . . . . . .
>
> "2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; . . . ."

A State court cannot of course preclude review of due process questions merely by phrasing its opinion in terms of an ultimate standard which in itself satisfies due process. *Watts* v. *Indiana,* 338 U. S. 49, 50; *Baumgartner* v. *United States,* 322 U. S. 665, 670–671; *Norris* v. *Alabama,* 294 U. S. 587, 589–590. Compare *Appleby* v. *City of New York,* 271 U. S. 364, 379–380. But this Court should not re-examine determinations of the State courts on "those matters which are usually termed issues of fact." *Watts* v. *Indiana, supra,* at 50. And it should not overturn a fair appraisal of facts made by State courts in the light of their knowledge of local conditions.

Here, Feiner forced pedestrians to walk in the street by collecting a crowd on the public sidewalk, he attracted additional attention by using sound amplifiers, he indulged in name-calling, he told part of his audience that it should rise up in arms. In the crowd of 75 to 80 persons, there was angry muttering and pushing. Under these circumstances, and in order to prevent a disturbance of the peace, an officer asked Feiner

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the majority is a denizen of that City. The three New York City dissenting judges are presumably as alive to the need for securing peace among the various racial and religious groups in New York, and to the opportunity of achieving it within the constitutional limits, as one who has only a visitor's acquaintance with the tolerant and genial communal life of New York City.

910798 O—51——25

to stop speaking. When he had twice ignored the request, Feiner was arrested. The trial judge concluded that "the officers were fully justified in feeling that a situation was developing which could very, very easily result in a serious disorder." His view was sustained by an intermediate appellate court and by a unanimous decision of the New York Court of Appeals. 300 N .Y. 391, 91 N. E. 2d 316. The estimate of a particular local situation thus comes here with the momentum of the weightiest judicial authority of New York.

This Court has often emphasized that in the exercise of our authority over state court decisions the Due Process Clause must not be construed in an abstract and doctrinaire way by disregarding local conditions. In considering the degree of respect to be given findings by the highest court of a State in cases involving the Due Process Clause, the course of decisions by that court should be taken into account. Particularly within the area of due process colloquially called "civil liberties," it is important whether such a course of decisions reflects a cavalier attitude toward civil liberties or real regard for them. Only unfamiliarity with its decisions and the outlook of its judges could generate a notion that the Court of Appeals of New York is inhospitable to claims of civil liberties or is wanting in respect for this Court's decisions in support of them. It is pertinent, therefore, to note that all members of the New York Court accepted the finding that Feiner was stopped not because the listeners or police officers disagreed with his views but because these officers were honestly concerned with preventing a breach of the peace. This unanimity is all the more persuasive since three members of the Court had dissented, only three months earlier, in favor of Kunz, a man whose vituperative utterances must have been highly offensive to them.

As was said in *Hague* v. *C. I. O., supra,* uncontrolled official suppression of the speaker "cannot be made a substi-

tute for the duty to maintain order." 307 U. S. at 516. Where conduct is within the allowable limits of free speech, the police are peace officers for the speaker as well as for his hearers. But the power effectively to preserve order cannot be displaced by giving a speaker complete immunity. Here, there were two police officers present for 20 minutes. They interfered only when they apprehended imminence of violence. It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd, whatever its size and temper, and not against the speaker.

It is true that breach-of-peace statutes, like most tools of government, may be misused. Enforcement of these statutes calls for public tolerance and intelligent police administration. These, in the long run, must give substance to whatever this Court may say about free speech. But the possibility of misuse is not alone a sufficient reason to deny New York the power here asserted or so limit it by constitutional construction as to deny its practical exercise.

KUNZ *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 50. Argued October 17, 1950.—Decided January 15, 1951.

1. A city ordinance which prescribes no appropriate standard for administrative action and gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the city streets is invalid under the First and Fourteenth Amendments. Pp. 290–295.
2. In 1946, appellant obtained from the city Police Commissioner a permit to hold religious meetings on the streets of New York City during that year only. It was revoked on evidence that he had ridiculed and denounced other religious beliefs, in violation of a criminal provision of the ordinance under which the permit was issued. The ordinance contained no provision for revocation of such permits and no standard to guide administrative actions in granting or denying permits. In 1948, appellant's application for a similar permit was denied and he was convicted for holding a religious meeting on the streets without a permit. *Held:* The conviction is reversed. Pp. 290–295.

300 N. Y. 273, 90 N. E. 2d 455, reversed.

Appellant was convicted for holding a religious meeting on the city streets without a permit in violation of Administrative Code of N. Y. City, c. 18, § 435–7.0. The Court of Appeals of New York affirmed. 300 N. Y. 273, 90 N. E. 2d 455. On appeal to this Court, *reversed,* p. 295.

Osmond K. Fraenkel argued the cause and filed a brief for appellant.

Seymour B. Quel argued the cause for appellee. With him on the brief were *John P. McGrath* and *Joseph J. Lucchi.*

Mr. Chief Justice Vinson delivered the opinion of the Court.

New York City has adopted an ordinance which makes it unlawful to hold public worship meetings on the streets

without first obtaining a permit from the city police commissioner.[1] Appellant, Carl Jacob Kunz, was convicted and fined $10 for violating this ordinance by holding a religious meeting without a permit. The conviction was

[1] Section 435–7.0 of chapter 18 of the Administrative Code of the City of New York reads as follows:

"a. Public worship.—It shall be unlawful for any person to be concerned or instrumental in collecting or promoting any assemblage of persons for public worship or exhortation, or to ridicule or denounce any form of religious belief, service or reverence, or to preach or expound atheism or agnosticism, or under any pretense therefor, in any street. A clergyman or minister of any denomination, however, or any person responsible to or regularly associated with any church or incorporated missionary society, or any lay-preacher, or lay-reader may conduct religious services, or any authorized representative of a duly incorporated organization devoted to the advancement of the principles of atheism or agnosticism may preach or expound such cause, in any public place or places specified in a permit therefor which may be granted and issued by the police commissioner. This section shall not be construed to prevent any congregation of the Baptist denomination from assembling in a proper place for the purpose of performing the rites of baptism, according to the ceremonies of that church.

"b. Interference with street services.—It shall be unlawful for any person to disturb, molest or interrupt any clergyman, minister, missionary, lay-preacher or lay-reader, who shall be conducting religious services by authority of a permit, issued hereunder, or any minister or people who shall be performing the rite of baptism as permitted herein, nor shall any person commit any riot or disorder in any such assembly.

"c. Violations.—Any person who shall violate any provision of this section, upon conviction thereof, shall be punished by a fine of not more than twenty-five dollars, or imprisonment for thirty days, or both."

This ordinance was previously challenged in *People* v. *Smith*, 263 N. Y. 255, 188 N. E. 745, appeal dismissed for want of a substantial federal question, *Smith* v. *New York*, 292 U. S. 606 (1934). Smith, who had not applied for a permit under the ordinance, argued that the regulation of religious speakers alone constituted an unreasonable classification. None of the questions involved in the instant appeal were presented in the previous case.

affirmed by the Appellate Part of the Court of Special Sessions, and by the New York Court of Appeals, three judges dissenting, 300 N. Y. 273, 90 N. E. 2d 455 (1950). The case is here on appeal, it having been urged that the ordinance is invalid under the Fourteenth Amendment.

Appellant is an ordained Baptist minister who speaks under the auspices of the "Outdoor Gospel Work," of which he is the director. He has been preaching for about six years, and states that it is his conviction and duty to "go out on the highways and byways and preach the word of God." In 1946, he applied for and received a permit under the ordinance in question, there being no question that appellant comes within the classes of persons entitled to receive permits under the ordinance.[2] This permit, like all others, was good only for the calendar year in which issued. In November, 1946, his permit was revoked after a hearing by the police commissioner. The revocation was based on evidence that he had ridiculed and denounced other religious beliefs in his meetings.

Although the penalties of the ordinance apply to anyone who "ridicules and denounces other religious beliefs," the ordinance does not specify this as a ground for permit revocation. Indeed, there is no mention in the ordinance of any power of revocation. However, appellant did not seek judicial or administrative review of the revocation proceedings, and any question as to the propriety of the revocation is not before us in this case. In any event, the revocation affected appellant's rights to speak in 1946 only. Appellant applied for another permit in 1947, and again in 1948, but was notified each time that his application was "disapproved," with no reason for the disapproval being given. On September 11, 1948, appellant

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[2] The New York Court of Appeals has construed the ordinance to require that all initial requests for permits by eligible applicants must be granted. 300 N. Y. at 276, 90 N. E. 2d at 456.

was arrested for speaking at Columbus Circle in New York City without a permit. It is from the conviction which resulted that this appeal has been taken.

Appellant's conviction was thus based upon his failure to possess a permit for 1948. We are here concerned only with the propriety of the action of the police commissioner in refusing to issue that permit. Disapproval of the 1948 permit application by the police commissioner was justified by the New York courts on the ground that a permit had previously been revoked "for good reasons." [3] It is noteworthy that there is no mention in the ordinance of reasons for which such a permit application can be refused. This interpretation allows the police commissioner, an administrative official, to exercise discretion in denying subsequent permit applications on the basis of his interpretation, at that time, of what is deemed to be conduct condemned by the ordinance. We have here, then, an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights.

In considering the right of a municipality to control the use of public streets for the expression of religious views, we start with the words of Mr. Justice Roberts that "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *C. I. O.*, 307 U. S. 496, 515 (1939). Although this Court has recognized that a statute may be enacted which prevents

[3] The New York Court of Appeals said: "The commissioner had no reason to assume, and no promise was made, that defendant wanted a new permit for any uses different from the disorderly ones he had been guilty of before." 300 N. Y. at 278, 90 N. E. 2d at 457.

serious interference with normal usage of streets and parks, *Cox* v. *New Hampshire,* 312 U. S. 569 (1941), we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places. In *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), this Court held invalid an ordinance which required a license for soliciting money for religious causes. Speaking for a unanimous Court, Mr. Justice Roberts said: "But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." 310 U. S. at 307. To the same effect are *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Hague* v. *C. I. O.,* 307 U. S. 496 (1939); *Largent* v. *Texas,* 318 U. S. 418 (1943). In *Saia* v. *New York,* 334 U. S. 558 (1948), we reaffirmed the invalidity of such prior restraints upon the right to speak: "We hold that § 3 of this ordinance is unconstitutional on its face, for it establishes a previous restraint on the right of free speech in violation of the First Amendment which is protected by the Fourteenth Amendment against State action. To use a loudspeaker or amplifier one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion." 334 U. S. at 559–560.

The court below has mistakenly derived support for its conclusion from the evidence produced at the trial that appellant's religious meetings had, in the past, caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence. "In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment." *Near*

v. *Minnesota,* 283 U. S. 697, 715 (1931). We do not express any opinion on the propriety of punitive remedies which the New York authorities may utilize. We are here concerned with suppression—not punishment. It is sufficient to say that New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action.

Reversed.

MR. JUSTICE BLACK concurs in the result.

[For opinion of MR. JUSTICE FRANKFURTER, concurring in the result, see *ante,* p. 273.]

MR. JUSTICE JACKSON, dissenting.

Essential freedoms are today threatened from without and within. It may become difficult to preserve here what a large part of the world has lost—the right to speak, even temperately, on matters vital to spirit and body. In such a setting, to blanket hateful and hate-stirring attacks on races and faiths under the protections for freedom of speech may be a noble innovation. On the other hand, it may be a quixotic tilt at windmills which belittles great principles of liberty. Only time can tell. But I incline to the latter view and cannot assent to the decision.

I.

To know what we are doing, we must first locate the point at which rights asserted by Kunz conflict with powers asserted by the organized community. New York City has placed no limitation upon any speech Kunz may choose to make on private property, but it does require a permit to hold religious meetings in its streets. The ordinance, neither by its terms nor as it has been

applied, prohibited Kunz,[1] even in street meetings, from preaching his own religion or making any temperate criticism or refutation of other religions; indeed, for the year 1946, he was given a general permit to do so. His meetings, however, brought "a flood of complaints" to city authorities that he was engaging in scurrilous attacks on Catholics and Jews. On notice, he was given a hearing at which eighteen complainants appeared. The Commissioner revoked his permit and applications for 1947 and 1948 were refused. For a time he went on holding meetings without a permit in Columbus Circle, where in September, 1948, he was arrested for violation of the ordinance. He was convicted and fined ten dollars.

At these meetings, Kunz preached, among many other things of like tenor, that "The Catholic Church makes merchandise out of souls," that Catholicism is "a religion of the devil," and that the Pope is "the anti-Christ." The Jews he denounced as "Christ-killers," and he said of them, "All the garbage that didn't believe in Christ should have been burnt in the incinerators. It's a shame they all weren't."

These utterances, as one might expect, stirred strife and threatened violence. Testifying in his own behalf, Kunz stated that he "became acquainted with" one of the complaining witnesses, whom he thought to be a Jew, "when he happened to sock one of my Christian boys in the puss." Kunz himself complained to the authorities, charging a woman interrupter with disorderly

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[1] Kunz is within the classifications of persons to whom such permits may issue. Hence, we have here no challenge based on its exclusions. If an excluded person made appropriate challenge on equal protection grounds, I should very much doubt if the ordinance could be sustained. See, however, *Railway Express Agency* v. *New York*, 336 U. S. 106, which sustains the power of New York City to classify printed communications it will permit on its streets on a basis that seems more remote from any traffic effect than a street meeting.

conduct. He also testified that when an officer is not present at his meetings "I have trouble then," but "with an officer, no trouble."

The contention which Kunz brings here and which this Court sustains is that such speeches on the streets are within his constitutional freedom and therefore New York City has no power to require a permit. He does not deny that this has been and will continue to be his line of talk.[2] He does not claim that he should have been granted a permit; he attacks the whole system of control of street meetings and says the Constitution gives him permission to speak and he needs none from the City.

II.

The speeches which Kunz has made and which he asserts he has a *right* to make in the future were properly held by the courts below to be out of bounds for a street meeting and not constitutionally protected. This Court, without discussion, makes a contrary assumption which is basic to its whole opinion. It says New York has given "an administrative official discretionary power to control in advance *the right* of citizens to speak on religious matters on the streets." Again, it says that "prior restraint on the exercise of First Amendment *rights*" invalidates the ordinance. (Emphasis supplied.) This seems to take the last step first, assuming as a premise what is in question. Of course, if Kunz is only exercising

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[2] "Q. It is your religious conviction that this is the way you are to practice your religion?

"A. Yes. I feel this way, that the Holy Bible is the word of God. And whether the Holy Bible, the word of God, ridicules or denounces any man's religion, I am going to preach it. I feel I have a perfect right."

If there were otherwise any doubt that Kunz proposes to resume these attacks, it should be dispelled by the letters he has addressed to members of this Court asserting his right to do so and assailing, on religious grounds, judges who decided his case below.

his constitutional *rights,* then New York can neither restrain nor punish him. But I doubt that the Court's assumption will survive analysis.

This Court today initiates the doctrine that language such as this, in the environment of the street meeting, is immune from prior municipal control. We would have a very different question if New York had presumed to say that Kunz could not speak his piece in his own pulpit or hall. But it has undertaken to restrain him only if he chooses to speak at street meetings. There is a world of difference. The street preacher takes advantage of people's presence on the streets to impose his message upon what, in a sense, is a captive audience. A meeting on private property is made up of an audience that has volunteered to listen. The question, therefore, is not whether New York could, if it tried, silence Kunz, but whether it must place its streets at his service to hurl insults at the passer-by.

What Mr. Justice Holmes said for a unanimous Court in *Schenck* v. *United States,* 249 U. S. 47, 52, has become an axiom: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." This concept was applied in one of its few unanimous decisions in recent years, when, through Mr. Justice Murphy, the Court said: "There are certain well-defined and narrowly limited classes of speech, *the prevention and punishment* of which *have never been thought to raise any Constitutional problem.* These include the lewd and obscene, the profane, the libelous, and *the insulting or 'fighting' words*—those which by their very utterance inflict injury or *tend to incite* an immediate breach of the peace. . . ." (Emphasis supplied.) *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572.

There held to be "insulting or 'fighting' words" were calling one a "God damned racketeer" and a "damned

Fascist." Equally inciting and more clearly "fighting words," when thrown at Catholics and Jews who are rightfully on the streets of New York, are statements that "The Pope is the anti-Christ" and the Jews are "Christ-killers." These terse epithets come down to our generation weighted with hatreds accumulated through centuries of bloodshed. They are recognized words of art in the profession of defamation. They are not the kind of insult that men bandy and laugh off when the spirits are high and the flagons are low. They are not in that class of epithets whose literal sting will be drawn if the speaker smiles when he uses them. They are always, and in every context, insults which do not spring from reason and can be answered by none. Their historical associations with violence are well understood, both by those who hurl and those who are struck by these missiles. Jews, many of whose families perished in extermination furnaces of Dachau and Auschwitz, are more than tolerant if they pass off lightly the suggestion that unbelievers in Christ should all have been burned. Of course, people might pass this speaker by as a mental case, and so they might file out of a theatre in good order at the cry of "fire." But in both cases there is genuine likelihood that someone will get hurt.

This Court's prior decisions, as well as its decisions today, will be searched in vain for clear standards by which it does, or lower courts should, distinguish legitimate speaking from that acknowledged to be outside of constitutional protection. One reason for this absence is that this Court has had little experience in deciding controversies over city control of street meetings. As late as 1922, this Court declared, ". . . neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' . . . ." *Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530, 543. But with the

expanded authority recently assumed under the Due Process Clause of the Fourteenth Amendment, we must, unless we are to review a multitude of police-court cases, declare standards by which they may be decided below.

What evidences that a street speech is so provocative, insulting or inciting as to be outside of constitutional immunity from community interference? Is it determined by the actual reaction of the hearers? Or is it a judicial appraisal of the inherent quality of the language used? Or both?

I understand, though disagree with, the minority in the *Feiner* case, who, so far as I can see, would require no standards since they recognize no limits at all, considering that some rioting is the price of free speech and that the city must allow all speech and pay the price. But every juristic or philosophic authority recognized in this field admits that there are some speeches one is not free to make.[3] The problem, on which they disagree, is how and where to draw the line.

It is peculiar that today's opinion makes no reference to the "clear and present danger" test which for years

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[3] One of these latter is Prof. Meiklejohn, who would go so far as to discard the "clear and present danger" formula, at least as a restriction on political discussion, which he says ". . . stands on the record of the court as a peculiarly inept and unsuccessful attempt to formulate an exception to the principle of the freedom of speech." Meiklejohn, Free Speech And Its Relation to Self-Government, p. 50. But even he does not support unlimited speech. He says, ". . . No one can doubt that, in any well-governed society, the legislature has both the right and the duty to prohibit certain forms of speech. Libellous assertions may be, and must be, forbidden and punished. So too must slander. Words which incite men to crime are themselves criminal and must be dealt with as such. Sedition and treason may be expressed by speech or writing. And, in those cases, decisive repressive action by the government is imperative for the sake of the general welfare. All these necessities that speech be limited are recognized and provided for under the Constitution. . . ." *Id.*, at 18.

has played some part in free-speech cases. Cf. *American Communications Assn.* v. *Douds,* 339 U. S. 382, 393. If New York has benefit of the rule as Mr. Justice Holmes announced it, *Schenck* v. *United States, supra,* at 52, it would mean that it could punish or prevent speech if "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils" that the City has a right to prevent, among which I should suppose we would list street fighting or riots. As I have pointed out, the proof in this case leaves no doubt that Kunz's words, in the environment of the streets, have and will result in that, unless a police escort attends to awe the hearers into submission.

A hostile reception of his subject certainly does not alone destroy one's right to speak. A temperate and reasoned criticism of Roman Catholicism or Judaism might, and probably would, cause some resentment and protest. But in a free society all sects and factions, as the price of their own freedom to preach their views, must suffer that freedom in others. Tolerance of unwelcome, unorthodox ideas or information is a constitutionally protected policy not to be defeated by persons who would break up meetings they do not relish.

But emergencies may arise on streets which would become catastrophes if there was not immediate police action. The crowd which should be tolerant may be prejudiced and angry or malicious. If the situation threatens to get out of hand for the force present, I think the police may require the speaker, even if within his rights, to yield his right temporarily to the greater interest of peace. Of course, the threat must be judged in good faith to be real, immediate and serious. But silencing a speaker by authorities as a measure of mob control is like dynamiting a house to stop the spread of a conflagration. It may be justified by the overwhelming community

interest that flames not be fed as compared with the little interest to be served by continuing to feed them. But this kind of disorder does not abridge the right to speak except for the emergency and, since the speaker was within his constitutional right to speak, it could not be grounds for revoking or refusing him a permit or convicting him of any offense because of his utterance. If he resisted an officer's reasonable demand to cease, he might incur penalties.

And so the matter eventually comes down to the question whether the "words used are used in such circumstances and are of such a nature" that we can say a reasonable man would anticipate the evil result. In this case the Court does not justify, excuse, or deny the inciting and provocative character of the language, and it does not, and on this record could not, deny that when Kunz speaks he poses a "clear and present" danger to peace and order. Why, then, does New York have to put up with it?

It is well to be vigilant to protect the right of Kunz to speak, but is he to be sole judge as to how far he will carry verbal attacks in the public streets? Is official action the only source of interference with religious freedom? Does the Jew, for example, have the benefit of these freedoms when, lawfully going about, he and his children are pointed out as "Christ-killers" to gatherings on public property by a religious sectarian sponsored by a police bodyguard?

We should weigh the value of insulting speech against its potentiality for harm. Is the Court, when declaring Kunz has the *right* he asserts, serving the great end for which the First Amendment stands?

The purpose of constitutional protection of speech is to foster peaceful interchange of all manner of thoughts, information and ideas. Its policy is rooted in faith in the force of reason. This Court wisely has said, "Resort

to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." *Cantwell* v. *Connecticut,* 310 U. S. 296, 309–310. "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." So said we all in *Chaplinsky* v. *New Hampshire, supra,* at 572. It would be interesting if the Court would expose its reasons for thinking that Kunz's words are of more social value than those of Chaplinsky.

III.

It is worthwhile to note that the judicial technique by which this Court strikes down the ordinance is very different from that employed by the New York Court of Appeals, which sustained it. The contrary results appear to be largely due to this dissimilarity.

The Court of Appeals did not treat the ordinance as existing in a vacuum but considered all the facts of the controversy. While it construed the ordinance "as *requiring* the commissioner to give an annual permit for street preaching, *to anyone* who, like defendant, is a minister of religion," 300 N. Y. 273, 276, 90 N. E. 2d 455, 456 (emphasis supplied), it held on the facts that when, as here, the applicant "claims a constitutional right to incite riots, and a constitutional right to the services of policemen to quell those riots," then a permit need not be issued. *Id.* at 278, 90 N. E. 2d at 457.

This Court, however, refuses to take into consideration Kunz's "past" conduct or that his meetings have "caused some disorder." Nor does it deny that disorders will probably occur again. It comes close to rendering an advisory opinion when it strikes down this ordinance without evaluating the factual situation which has caused

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it to come under judicial scrutiny. If it were not for these characteristics of the speeches by Kunz, this ordinance would not be before us, yet it is said that we can hold it invalid without taking into consideration either what he has done or what he asserts a right to do.

It may happen that a statute will disclose by its very language that it is impossible of construction in a manner consistent with First Amendment rights. Such is the case where it aims to control matters patently not a proper subject of the police power. *Lovell* v. *Griffin,* 303 U. S. 444, 451. Cf. *Hague* v. *C. I. O.,* 307 U. S. 496; *Thornhill* v. *Alabama,* 310 U. S. 88; *Saia* v. *New York,* 334 U. S. 558. Usually, however, the only proper approach takes into consideration both the facts of the case and the construction which the State has placed on the challenged law. *Near* v. *Minnesota,* 283 U. S. 697, 708; *Cantwell* v. *Connecticut, supra,* at 303; *Kovacs* v. *Cooper,* 336 U. S. 77; *Terminiello* v. *Chicago,* 337 U. S. 1. And in the absence of facts in the light of which the statute may be construed, we have said the proper procedure is not to pass on whether it conflicts with First Amendment rights. *United States* v. *Petrillo,* 332 U. S. 1. That the approach will determine the result is indicated by comparison of the *Saia* case, in which an ordinance was held void on its face, with the *Kovacs* case, in which a similar ordinance, when tested as construed and applied, was held valid. The vital difference, as this case demonstrates, is that it is very easy to read a statute to permit some hypothetical violation of civil rights but difficult to draft one which will not be subject to the same infirmity.

This Court has not applied, and, I venture to predict, will not apply, to federal statutes the standard that they are unconstitutional if it is possible that they may be unconstitutionally applied. We should begin consideration of this case by deciding whether the opportunity to

repeat his vituperative street speeches is within Kunz's constitutional rights, and here he must win on the strength of his own right.[4]

IV.

The question remains whether the Constitution prohibits a city from control of its streets by a permit system which takes into account dangers to public peace and order. I am persuaded that it does not do so, provided, of course, that the city does not so discriminate as to deny equal protection of the law or undertake a censorship of utterances that are not so defamatory, insulting, inciting, or provocative as to be reasonably likely to cause disorder and violence.

The Court does not hold that New York has abused the permit system by discrimination or actual censorship, nor does it deny the abuses on Kunz's part. But neither, says the Court, matters, holding that any prior restraint is bad, regardless of how fairly administered or what abuses it seeks to prevent.

It strikes rather blindly at permit systems which indirectly may affect First Amendment freedoms. Cities throughout the country have adopted permit requirements to control private activities on public streets and for other purposes.[5] The universality of this type of regu-

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[4] Brandeis, J., concurring, in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 347.

[5] New York, for example, has found a permit system the practical means of controlling meetings in its parks. This Court, as presently constituted, only last Term dismissed an attack on the park permit system "for want of a substantial federal question," JUSTICES BLACK and DOUGLAS dissenting. *Hass* v. *New York*, 338 U. S. 803. New York also has used the requirement of a permit for assemblages which mask their faces to suppress the Ku Klux Klan, without stopping harmless masquerade balls and the like. Penal Law § 710. The permit system is used in many other situations where conceivable civil liberties are involved.

lation demonstrates a need and indicates widespread opinion in the profession that it is not necessarily incompatible with our constitutional freedoms. Is everybody out of step but this Court?

Until recently this custom of municipalities was regarded by this Court as consistent with the Constitution. It approved this identical ordinance in *Smith* v. *New York,* 292 U. S. 606.[6] This decision is now overruled. Although the ordinance was then attacked as a denial of equal protection of the law for failure to prescribe a reasonable classification, I cannot attribute to that decision as narrow an interpretation as the Court. Would this Court sustain an ordinance as providing a reasonable classification if the purpose of the classification was void on its face?

In the *Chaplinsky* case, *prevention* as well as *punishment* of "limited classes of speech . . . have never been thought to raise *any* Constitutional problem." (Emphasis supplied.) Mr. Justice Holmes pointed out in the *Schenck* case that the Constitution would not protect one from an injunction against uttering words that lead to riot. In *Cox* v. *New Hampshire,* 312 U. S. 569, 577–578, Chief Justice Hughes, for a unanimous Court, dis-

[6] The issue was drawn for them with clarity by Chief Judge Pound in *People* v. *Smith,* 263 N. Y. 255, 188 N. E. 745. The Court of Appeals unanimously said: " 'It is too well settled by judicial decisions in both the State and Federal courts that a municipality may pass an ordinance making it unlawful to hold public meetings upon the public streets without a permit therefor to require discussion. . . .' This ordinance is not aimed against free speech. It is directed towards the manner in which the street may be used. . . . The passion, rancor and malice sometimes aroused by sectarian religious controversies and attacks on religion seem to justify especial supervision over those who would conduct such meetings on the public streets." 263 N. Y. at 257, 188 N. E. at 745. And this Court held that holding presented no constitutional question of substance.

tinguished the requirement of a license for a parade or procession from other cases now relied on by this Court. He found requirement of a permit there constitutional and observed that such authority "has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend." *Id.*, at 574. The concept of civil liberty without order is the contribution of later-day jurists.

The Court, as authority for stripping New York City of control of street meetings, resurrects *Saia* v. *New York, supra,* which I, like some who now rely on it, had supposed was given decent burial by *Kovacs* v. *Cooper, supra.* Must New York, if it is to avoid chaos in its streets, resort to the sweeping prohibitions sanctioned in *Kovacs,* instead of the milder restraints of this permit system? Compelling a choice between allowing all meetings or no meetings is a dubious service to civil liberties.

Of course, as to the press, there are the best of reasons against any licensing or prior restraint. Decisions such as *Near* v. *Minnesota, supra,* hold any licensing or prior restraint of the press unconstitutional, and I heartily agree. But precedents from that field cannot reasonably be transposed to the street-meeting field. The impact of publishing on public order has no similarity with that of a street meeting. Publishing does not make private use of public property. It reaches only those who choose to read, and, in that way, is analogous to a meeting held in a hall where those who come do so by choice. Written words are less apt to incite or provoke to mass action than spoken words, speech being the primitive and direct communication with the emotions. Few are the riots caused by publication alone, few are the mobs that have not had their immediate origin in harangue. The vulnerability of various forms of communication to community control

must be proportioned to their impact upon other community interests.

It is suggested that a permit for a street meeting could be required if the ordinance would prescribe precise standards for its grant or denial. This defect, if such it be, was just as apparent when, in the *Smith* case, this Court upheld the ordinance as it is today. The change must be found in the Court, not in the ordinance.

And what, in terms of its philosophy of decision, is this change? It is to require more severe and exacting standards of state and local statutes than of federal statutes. As this case exemplifies, local acts are struck down, not because in practical application they have actually invaded anyone's protected freedoms, but because they do not set up standards which would make such invasion impossible. However, with federal statutes, we say they must stand unless they require, or in application are shown actually to have resulted in, an invasion of a protected freedom.[7]

Of course, standards for administrative action are always desirable, and the more exact the better. But I do not see how this Court can condemn municipal ordinances for not setting forth comprehensive First Amendment standards. This Court never has announced what those standards must be, it does not now say what they are, and it is not clear that any majority could agree on them. In no field are there more numerous individual opinions among the Justices. The Court as an institution not infrequently disagrees with its former self or relies on distinctions that are not very substantial. Compare *Jones* v. *Opelika* of 1942, 316 U. S. 584, with *Jones* v. *Opelika* of 1943, 319 U. S. 103; *Minersville School District* v. *Gobitis* of 1940, 310 U. S. 586, with *Board of Education* v. *Barnette* of 1943, 319 U. S. 624; *Saia* v. *New*

[7] *United States* v. *Petrillo, supra.*

York of 1948, *supra,* with *Kovacs* v. *Cooper* of 1949, *supra.* It seems hypercritical to strike down local laws on their faces for want of standards when we have no standards.[8] And I do not find it required by existing authority. I think that where speech is outside of constitutional immunity the local community or the State is left a large measure of discretion as to the means for dealing with it.

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[8] It seems fair to contrast the precision which the Court imposes on municipalities with the standards set forth in the recent Act "Relating to the policing of the building and grounds of the Supreme Court of the United States." 63 Stat. 616. That makes it unlawful to "make any harangue or oration, or utter loud, threatening, or abusive language in the Supreme Court Building or grounds." § 5. It forbids display of any "flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." § 6. Compare with *Thornhill* v. *Alabama,* 310 U. S. 88. Moreover, it authorizes the Marshal to "prescribe such regulations, approved by the Chief Justice of the United States, as may be deemed necessary for the adequate protection of the Supreme Court Building and grounds and of persons and property therein, and for the maintenance of suitable order and decorum within the Supreme Court Building and grounds." § 7. Violation of these provisions or regulations is an offense punishable by fine and imprisonment.

Section 10 provides that, "In order to permit the observance of authorized ceremonies" within the building or grounds, the Marshal "may suspend for such occasions so much of the prohibitions," including those above, "as may be necessary for the occasion, but only if responsible officers shall have been appointed, and arrangements determined which are adequate, in the judgment of the Marshal, for the maintenance of suitable order and decorum in the proceedings, and for the protection of the Supreme Court Building and grounds and of persons and property therein."

Here is exalted artistry in declaring crime without definitive and authorizing permits without standards for use of public property for speaking. Of course, the statute would not be reported by the Judiciary Committees without at least informal approval of the Justices. The contrast between the standards set up for cities and those for ourselves suggests that our theorizing may be imposing burdens upon municipal authorities which are impossible or at least impractical to comply with.

V.

If the Court is deciding that the permit system for street meetings is so unreasonable as to deny due process of law, it would seem appropriate to point out respects in which it is unreasonable. This I am unable to learn, from this or any former decision. The Court holds, however, that Kunz must not be required to get permission, the City must sit by until some incident, perhaps a sanguinary one, occurs and then there are unspecified "appropriate public remedies." We may assume reference is to the procedure of the *Feiner* case which, with one-third of the Court dissenting, is upheld.[9] This invites com-

[9] I join in *Feiner* v. *New York*, *post*, p. 315. When in a colored neighborhood Feiner urged the colored people to rise up in arms and fight, he was using words which may have been "rhetorical," but it was the rhetoric of violence. Of course, we cannot tell, from a cold record, whether the action taken was the wisest way of dealing with the situation. But some latitude for honest judgment must be left to the locality. It is a startling proposition to me that serious public utterance which advises, encourages, or incites to a crime may not be made a crime because within constitutional protection. As Mr. Justice Holmes for a unanimous Court in *Frohwerk* v. *United States*, 249 U. S. 204, 206, said:

". . . the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. *Robertson* v. *Baldwin*, 165 U. S. 275, 281. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."

However, the case of *Niemotko* v. *Maryland*, *ante*, p. 268, illustrates the danger of abuse of the permit system which the Court should be alert to prevent. There is no evidence that those applicants were, ever had been, or threatened to be, disorderly or abusive in speech or manner, or that their speaking would be likely to incite or provoke any disorder. The denial of permission for the meeting was charged and appears to have been due to applicants' religious belief that they should not salute any flag, which they may not be compelled to do,

parison of the merits of the two methods both as to impact on civil liberties and as to achieving the ends of public order.

City officials stopped the meetings of both Feiner and Kunz. The process by which Feiner was stopped was the order of patrolmen, put into immediate effect without hearing. Feiner may have believed there would be no interference but Kunz was duly warned by refusal of a permit. He was advised of charges, given a hearing, confronted by witnesses, and afforded a chance to deny the charges or to confess them and offer to amend his ways. The decision of revocation was made by a detached and responsible administrative official and Kunz could have had the decision reviewed in court.

The purpose of the Court is to enable those who feel a call to proselytize to do so by street meetings. The means is to set up a private right to speak in the city streets without asking permission.[10] Of course, if Kunz may speak without a permit, so may anyone else. If he may speak whenever and wherever he may elect, I know of no way in which the City can silence the heckler, the interrupter, the dissenter, the rivals with missionary fervor, who have an equal right at the same time and place to lift their voices. And, of course, if the City may not stop

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and their conscientious objections to bearing arms in war, which Congress has accepted as a valid excuse from combat duty. In the courts of Maryland, this denial, so based, was conclusive against the right to speak. This was use of the permit system for censorship, and the convictions cannot stand.

[10] Do we so quickly forget that one of the chief reasons for prohibiting use of "released time" of school students for religious instruction was that the Constitution will not suffer tax-supported property to be used to propagate religion? *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203. How can the Court now order use of tax-supported property for the purpose? In other words, can the First Amendment today mean a city cannot stop what yesterday it meant no city could allow?

Kunz from uttering insulting and "fighting" words, neither can it stop his adversaries, and the discussion degenerates to a name-calling contest without social value and, human nature being what it is, to a fight or perhaps a riot. The end of the Court's method is chaos.

But if the Court conceives, as *Feiner* indicates, that upon uttering insulting, provocative or inciting words the policeman on the beat may stop the meeting, then its assurance of free speech in this decision is "a promise to the ear to be broken to the hope," if the patrolman on the beat happens to have prejudices of his own.

Turning then to the permit system as applied by the Court of Appeals, whose construction binds us, we find that issuance the first time is required. Denial is warranted only in such unusual cases as where an applicant has had a permit which has been revoked for cause and he asserts the right to continue the conduct which was cause for revocation. If anything less than a reasonable certainty of disorder was shown, denial of a permit would be improper. The procedure by which that decision is reached commends itself to the orderly mind—complaints are filed, witnesses are heard, opportunity to cross-examine is given, and decision is reached by what we must assume to be an impartial and reasonable administrative officer, and, if he denies the permit, the applicant may carry his cause to the courts. He may thus have a civil test of his rights without the personal humiliation of being arrested as presenting a menace to public order. It seems to me that this procedure better protects freedom of speech than to let everyone speak without leave, but subject to surveillance and to being ordered to stop in the discretion of the police.

It is obvious that a permit is a source of security and protection for the civil liberties of the great number who are entitled to receive them. It informs the police of the time and place one intends to speak, which allows

necessary steps to insure him a place to speak where overzealous police officers will not order everyone who stops to listen to move on, and to have officers present to insure an orderly meeting. Moreover, disorder is less likely, for the speaker knows that if he provokes disorder his permit may be revoked, and the objector may be told that he has a remedy by filing a complaint and does not need to take the law in his own hands. Kunz was not arrested in 1946, when his speeches caused serious objections, nor was he set upon by the crowd. Instead, they did the orderly thing and made complaints which resulted in the revocation of his permit. This is the method that the Court frustrates today.

Of course, emergencies may arise either with or without the permit system. A speaker with a permit may go beyond bounds and incite violence, or a mob may undertake to break up an authorized and properly conducted meeting. In either case, the policeman on the spot must make the judgment as to what measures will most likely avoid violent disorders. But these emergencies seem less likely to occur with the permit system than if every man and his adversary take the law in their own hands.

The law of New York does not segregate, according to their diverse nationalities, races, religions, or political associations, the vast hordes of people living in its narrow confines. Every individual in this frightening aggregation is legally free to live, to labor, to travel, when and where he chooses. In streets and public places, all races and nationalities and all sorts and conditions of men walk, linger and mingle. Is it not reasonable that the City protect the dignity of these persons against fanatics who take possession of its streets to hurl into its crowds defamatory epithets that hurt like rocks?

If any two subjects are intrinsically incendiary and divisive, they are race and religion. Racial fears and hatreds have been at the root of the most terrible riots

that have disgraced American civilization. They are ugly possibilities that overhang every great American city. The "consecrated hatreds of sect" account for more than a few of the world's bloody disorders. These are the explosives which the Court says Kunz may play with in the public streets, and the community must not only tolerate but aid him. I find no such doctrine in the Constitution.

In this case there is no evidence of a purpose to suppress speech, except to keep it in bounds that will not upset good order. If there are abuses of censorship or discrimination in administering the ordinance, as well there may be, they are not proved in this case. This Court should be particularly sure of its ground before it strikes down, in a time like this, the going, practical system by which New York has sought to control its street-meeting problem.

Addressing himself to the subject, "Authority and the Individual," one of the keenest philosophers of our time observes: "The problem, like all those with which we are concerned, is one of balance; too little liberty brings stagnation, and too much brings chaos." [11] Perhaps it is the fever of our times that inclines the Court today to favor chaos. My hope is that few will take advantage of the license granted by today's decision. But life teaches one to distinguish between hope and faith.

[11] Russell, Authority and the Individual, 25.

FEINER *v.* NEW YORK.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 93. Argued October 17, 1950.—Decided January 15, 1951.

Petitioner made an inflammatory speech to a mixed crowd of 75 or 80 Negroes and white people on a city street. He made derogatory remarks about President Truman, the American Legion, and local political officials; endeavored to arouse the Negroes against the whites; and urged that Negroes rise up in arms and fight for equal rights. The crowd, which blocked the sidewalk and overflowed into the street, became restless; its feelings for and against the speaker were rising; and there was at least one threat of violence. After observing the situation for some time without interference, police officers, in order to prevent a fight, thrice requested petitioner to get off the box and stop speaking. After his third refusal, and after he had been speaking over 30 minutes, they arrested him, and he was convicted of violating § 722 of the Penal Code of New York, which, in effect, forbids incitement of a breach of the peace. The conviction was affirmed by two New York courts on review. *Held:* The conviction is sustained against a claim that it violated petitioner's right of free speech under the First and Fourteenth Amendments. Pp. 316–321.

(a) Petitioner was neither arrested nor convicted for the making or the content of his speech but for the reaction which it actually engendered. Pp. 319–320.

(b) The police cannot be used as an instrument for the suppression of unpopular views; but, when a speaker passes the bounds of argument or persuasion and undertakes incitement to riot, the police are not powerless to prevent a breach of the peace. P. 321.

300 N. Y. 391, 91 N. E. 2d 316, affirmed.

The case is stated in the first paragraph of the opinion. The decision below is *affirmed,* p. 321.

Sidney H. Greenberg and *Emanuel Redfield* argued the cause for petitioner. *Mr. Greenberg* filed a brief for petitioner.

Dan J. Kelly argued the cause and filed a brief for respondent.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

Petitioner was convicted of the offense of disorderly conduct, a misdemeanor under the New York penal laws, in the Court of Special Sessions of the City of Syracuse and was sentenced to thirty days in the county penitentiary. The conviction was affirmed by the Onondaga County Court and the New York Court of Appeals, 300 N. Y. 391, 91 N. E. 2d 316 (1950). The case is here on certiorari, 339 U. S. 962 (1950), petitioner having claimed that the conviction is in violation of his right of free speech under the Fourteenth Amendment.

In the review of state decisions where First Amendment rights are drawn in question, we of course make an examination of the evidence to ascertain independently whether the right has been violated. Here, the trial judge, who heard the case without a jury, rendered an oral decision at the end of the trial, setting forth his determination of the facts upon which he found the petitioner guilty. His decision indicated generally that he believed the state's witnesses, and his summation of the testimony was used by the two New York courts on review in stating the facts. Our appraisal of the facts is, therefore, based upon the uncontroverted facts and, where controversy exists, upon that testimony which the trial judge did reasonably conclude to be true.

On the evening of March 8, 1949, petitioner Irving Feiner was addressing an open-air meeting at the corner of South McBride and Harrison Streets in the City of Syracuse. At approximately 6:30 p. m., the police received a telephone complaint concerning the meeting, and two officers were detailed to investigate. One of these officers went to the scene immediately, the other arriving some twelve minutes later. They found a crowd of about seventy-five or eighty people, both Negro and white, filling the sidewalk and spreading out into the street. Pe-

titioner, standing on a large wooden box on the sidewalk, was addressing the crowd through a loud-speaker system attached to an automobile. Although the purpose of his speech was to urge his listeners to attend a meeting to be held that night in the Syracuse Hotel, in its course he was making derogatory remarks concerning President Truman, the American Legion, the Mayor of Syracuse, and other local political officials.

The police officers made no effort to interfere with petitioner's speech, but were first concerned with the effect of the crowd on both pedestrian and vehicular traffic. They observed the situation from the opposite side of the street, noting that some pedestrians were forced to walk in the street to avoid the crowd. Since traffic was passing at the time, the officers attempted to get the people listening to petitioner back on the sidewalk. The crowd was restless and there was some pushing, shoving and milling around. One of the officers telephoned the police station from a nearby store, and then both policemen crossed the street and mingled with the crowd without any intention of arresting the speaker.

At this time, petitioner was speaking in a "loud, high-pitched voice." He gave the impression that he was endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights. The statements before such a mixed audience "stirred up a little excitement." Some of the onlookers made remarks to the police about their inability to handle the crowd and at least one threatened violence if the police did not act. There were others who appeared to be favoring petitioner's arguments. Because of the feeling that existed in the crowd both for and against the speaker, the officers finally "stepped in to prevent it from resulting in a fight." One of the officers approached the petitioner, not for the purpose of arresting him, but to get him to break up the crowd. He asked petitioner to get down

off the box, but the latter refused to accede to his request and continued talking. The officer waited for a minute and then demanded that he cease talking. Although the officer had thus twice requested petitioner to stop over the course of several minutes, petitioner not only ignored him but continued talking. During all this time, the crowd was pressing closer around petitioner and the officer. Finally, the officer told petitioner he was under arrest and ordered him to get down from the box, reaching up to grab him. Petitioner stepped down, announcing over the microphone that "the law has arrived, and I suppose they will take over now." In all, the officer had asked petitioner to get down off the box three times over a space of four or five minutes. Petitioner had been speaking for over a half hour.

On these facts, petitioner was specifically charged with violation of § 722 of the Penal Law of New York, the pertinent part of which is set out in the margin.[1] The bill of particulars, demanded by petitioner and furnished by the State, gave in detail the facts upon which the prosecution relied to support the charge of disorderly conduct. Paragraph C is particularly pertinent here: "By ignoring and refusing to heed and obey reasonable police orders issued at the time and place mentioned in the Information to regulate and control said crowd and to prevent a breach or breaches of the peace and to prevent injury to pedes-

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[1] Section 722. "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

"1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;

"2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

"3. Congregates with others on a public street and refuses to move on when ordered by the police; . . . ."

trians attempting to use said walk, and being forced into the highway adjacent to the place in question, and prevent injury to the public generally."

We are not faced here with blind condonation by a state court of arbitrary police action. Petitioner was accorded a full, fair trial. The trial judge heard testimony supporting and contradicting the judgment of the police officers that a clear danger of disorder was threatened. After weighing this contradictory evidence, the trial judge reached the conclusion that the police officers were justified in taking action to prevent a breach of the peace. The exercise of the police officers' proper discretionary power to prevent a breach of the peace was thus approved by the trial court and later by two courts on review.[2] The courts below recognized petitioner's right to hold a street meeting at this locality, to make use of loud-speaking equipment in giving his speech, and to make derogatory remarks concerning public officials and the American Legion. They found that the officers in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions. Petitioner was thus neither arrested nor convicted for the

[2] The New York Court of Appeals said: "An imminent danger of a breach of the peace, of a disturbance of public order, perhaps even of riot, was threatened. . . . the defendant, as indicated above, disrupted pedestrian and vehicular traffic on the sidewalk and street, and, with intent to provoke a breach of the peace and with knowledge of the consequences, so inflamed and agitated a mixed audience of sympathizers and opponents that, in the judgment of the police officers present, a clear danger of disorder and violence was threatened. Defendant then deliberately refused to accede to the reasonable request of the officer, made within the lawful scope of his authority, that the defendant desist in the interest of public welfare and safety." 300 N. Y. 391, 400, 402, 91 N. E. 2d 316, 319, 321.

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making or the content of his speech. Rather, it was the reaction which it actually engendered.

The language of *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), is appropriate here. "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious." 310 U. S. at 308. The findings of the New York courts as to the condition of the crowd and the refusal of petitioner to obey the police requests, supported as they are by the record of this case, are persuasive that the conviction of petitioner for violation of public peace, order and authority does not exceed the bounds of proper state police action. This Court respects, as it must, the interest of the community in maintaining peace and order on its streets. *Schneider* v. *State,* 308 U. S. 147, 160 (1939); *Kovacs* v. *Cooper,* 336 U. S. 77, 82 (1949). We cannot say that the preservation of that interest here encroaches on the constitutional rights of this petitioner.

We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings. "A State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." *Cantwell* v. *Connecticut, supra,* at

308. But we are not faced here with such a situation. It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace. Nor in this case can we condemn the considered judgment of three New York courts approving the means which the police, faced with a crisis, used in the exercise of their power and duty to preserve peace and order. The findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech.

Affirmed.

[For opinion of MR. JUSTICE FRANKFURTER, concurring in the result, see *ante*, p. 273.]

MR. JUSTICE BLACK, dissenting.

The record before us convinces me that petitioner, a young college student, has been sentenced to the penitentiary for the unpopular views he expressed [1] on matters of public interest while lawfully making a street-corner

[1] The trial judge framed the question for decision as follows: "The question here, is what was said and what was done? And it doesn't make any difference whether whatever was said, was said with a loud speaker or not. There are acts and conduct an individual can engage in when you don't even have to have a crowd gathered around which would justify a charge of disorderly conduct. The question is, what did this defendant say and do at that particular time and the Court must determine whether those facts, concerning what the defendant did or said, are sufficient to support the charge." There is no suggestion in the record that petitioner "did" anything other than (1) speak and (2) continue for a short time to invite people to a public meeting after a policeman had requested him to stop speaking.

speech in Syracuse, New York.[2] Today's decision, however, indicates that we must blind ourselves to this fact because the trial judge fully accepted the testimony of the prosecution witnesses on all important points.[3] Many times in the past this Court has said that despite findings below, we will examine the evidence for ourselves to ascertain whether federally protected rights have been denied; otherwise review here would fail of its purpose in safeguarding constitutional guarantees.[4] Even a par-

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[2] There was no charge that any city or state law prohibited such a meeting at the place or time it was held. Evidence showed that it was customary to hold public gatherings on that same corner every Friday night, and the trial judge who convicted petitioner admitted that he understood the meeting was a lawful one. Nor did the judge treat the lawful meeting as unlawful because a crowd congregated on the sidewalk. Consequently, any discussion of disrupted pedestrian and vehicular traffic, while suggestive coloration, is immaterial under the charge and conviction here.

It is implied in a concurring opinion that the use of sound amplifiers in some way caused the meeting to become less lawful. This fact, however, had nothing to do with the conviction of petitioner. In sentencing him the trial court said: "You had a perfect right to appear there and to use that implement, the loud speaker. You had a right to have it in the street." See also note 1, *supra*.

[3] The trial court made no findings of fact as such. A decision was rendered from the bench in which, among other things, the trial judge expressed some views on the evidence. See note 11, *infra*.

[4] In *Norris* v. *Alabama*, 294 U. S. 587, the evidence as to whether Negroes had been discriminated against in the selection of grand juries was conflicting. Chief Justice Hughes, writing for the Court, said at pages 589–590: "The question is of the application of this established principle [equal protection] to the facts disclosed by the record. That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a con-

tial abandonment of this rule marks a dark day for civil liberties in our Nation.

But still more has been lost today. Even accepting every "finding of fact" below, I think this conviction makes a mockery of the free speech guarantees of the First and Fourteenth Amendments. The end result of the affirmance here is to approve a simple and readily available technique by which cities and states can with impunity subject all speeches, political or otherwise, on streets or elsewhere, to the supervision and censorship of the local police. I will have no part or parcel in this holding which I view as a long step toward totalitarian authority.

Considering only the evidence which the state courts appear to have accepted, the pertinent "facts" are: Syracuse city authorities granted a permit for O. John Rogge, a former Assistant Attorney General, to speak in a public school building on March 8, 1948 on the subject of racial discrimination and civil liberties. On March 8th, how-

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clusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." This same rule has been announced in the following cases as well as in numerous others: *Truax* v. *Corrigan,* 257 U. S. 312, 324; *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 659; *Chambers* v. *Florida,* 309 U. S. 227, 228; *Pierre* v. *Louisiana,* 306 U. S. 354, 358; *Pennekamp* v. *Florida,* 328 U. S. 331, 335; *Patton* v. *Mississippi,* 332 U. S. 463, 466; *Craig* v. *Harney,* 331 U. S. 367, 373; *Oyama* v. *California,* 332 U. S. 633, 636; *Pollock* v. *Williams,* 322 U. S. 4, 13; *Fay* v. *New York,* 332 U. S. 261, 272; *Akins* v. *Texas,* 325 U. S. 398, 401; *Kansas City Southern R. Co.* v. *Albers Comm'n Co.,* 223 U. S. 573, 591; *First National Bank* v. *Hartford,* 273 U. S. 548, 552; *Fiske* v. *Kansas,* 274 U. S. 380, 385; *Great Northern R. Co.* v. *Washington,* 300 U. S. 154, 165–167. This Court has used varying phraseology in stating the circumstances under which it would review state court findings of fact, but it has not hesitated to make such review when necessary to protect a federal right. Compare *Great Northern R. Co.* v. *Washington, supra,* with *Taylor* v. *Mississippi,* 319 U. S. 583, 585–586.

ever, the authorities cancelled the permit. The Young Progressives under whose auspices the meeting was scheduled then arranged for Mr. Rogge to speak at the Hotel Syracuse. The gathering on the street where petitioner spoke was held to protest the cancellation and to publicize the meeting at the hotel. In this connection, petitioner used derogatory but not profane language with reference to the city authorities, President Truman and the American Legion. After hearing some of these remarks, a policeman, who had been sent to the meeting by his superiors, reported to Police Headquarters by telephone. To whom he reported or what was said does not appear in the record, but after returning from the call, he and another policeman started through the crowd toward petitioner. Both officers swore they did not intend to make an arrest when they started, and the trial court accepted their statements. They also said, and the court believed, that they heard and saw "angry mutterings," "pushing," "shoving and milling around" and "restlessness." Petitioner spoke in a "loud, high pitched voice." He said that colored people "don't have equal rights and they should rise up *in arms* and fight for them." [5] One man who heard this told the officers that if they did not take that "S . . . O . . . B . . ." off the box, he would. The officers then approached petitioner for the first time.

[5] I am accepting this although I believe the record demonstrates rather conclusively that petitioner did not use the phrase "in arms" in the manner testified to by the officers. Reliable witnesses swore that petitioner's statement was that his listeners "could rise up and fight for their rights by going arm in arm to the Hotel Syracuse, black and white alike, to hear John Rogge." The testimony of neither of the two officers contained the phrase "in arms" when they first testified on this subject; they added it only after counsel for the prosecution was permitted by the court, over petitioner's objection, to propound leading and suggestive questions. In any event, the statement ascribed to petitioner by the officers seems clearly rhetorical when read in context.

One of them first "asked" petitioner to get off the box, but petitioner continued urging his audience to attend Rogge's speech. The officer next "told" petitioner to get down, but he did not. The officer finally "demanded" that petitioner get down, telling him he was under arrest. Petitioner then told the crowd that "the law had arrived and would take over" and asked why he was arrested. The officer first replied that the charge was "unlawful assembly" but later changed the ground to "disorderly conduct." [6]

The Court's opinion apparently rests on this reasoning: The policeman, under the circumstances detailed, could reasonably conclude that serious fighting or even riot was imminent; therefore he could stop petitioner's speech to prevent a breach of peace; accordingly, it was "disorderly conduct" for petitioner to continue speaking in disobedience of the officer's request. As to the existence of a dangerous situation on the street corner, it seems far-fetched to suggest that the "facts" show any imminent threat of riot or uncontrollable disorder.[7] It

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[6] "A charge of using language likely to cause a breach of the peace is a convenient catchall to hold unpopular soapbox orators." Chafee, Free Speech in the United States, 524. The related charge of conducting a "disorderly house" has also been used to suppress and punish minority views. For example, an English statute of 1799 classified as disorderly houses certain unlicensed places ("House, Room, Field, or other Place") in which "any Lecture or Discourse shall be publickly delivered, or any publick Debate shall be had on any Subject . . ." or which was used "for the Purpose of reading Books, Pamphlets, Newspapers, or other Publications . . . ." 39 Geo. III, c. 79, § 15.

[7] The belief of the New York Court of Appeals that the situation on the street corner was critical is not supported by the record and accordingly should not be given much weight here. Two illustrations will suffice: The Court of Appeals relied upon a specific statement of one policeman that he interfered with Feiner at a time when the crowd was "getting to the point where they would be unruly." But this testimony was so patently inadmissible that it was excluded by

is neither unusual nor unexpected that some people at public street meetings mutter, mill about, push, shove, or disagree, even violently, with the speaker. Indeed, it is rare where controversial topics are discussed that an outdoor crowd does not do some or all of these things. Nor does one isolated threat to assault the speaker forebode disorder. Especially should the danger be discounted where, as here, the person threatening was a man whose wife and two small children accompanied him and who, so far as the record shows, was never close enough to petitioner to carry out the threat.

Moreover, assuming that the "facts" did indicate a critical situation, I reject the implication of the Court's opinion that the police had no obligation to protect petitioner's constitutional right to talk. The police of course have power to prevent breaches of the peace. But if, in the name of preserving order, they ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him.[8] Here the policemen did not even pretend to try to protect petitioner. According to the officers' testimony, the crowd was restless but there is

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the trial judge in one of the rare instances where the defendant received a favorable ruling. Secondly, the Court of Appeals stated that after Feiner had been warned by the police, he continued to "blare out his provocative utterances over loud speakers to a milling, restless throng . . . ." I am unable to find anything in the record to support this statement unless the unsworn arguments of the assistant district attorney are accepted as evidence. The principal prosecution witness testified that after he asked Feiner to get down from the box, Feiner merely "kept telling [the audience] to go to the Syracuse Hotel and hear John Rogge." And this same witness even answered "No" to the highly suggestive question which immediately followed, "Did he say anything more about arming and fighting at that time?"

[8] Cf. *Hague* v. *C. I. O.*, 307 U. S. 496; *Terminiello* v. *Chicago*, 337 U. S. 1; *Sellers* v. *Johnson*, 163 F. 2d 877; see also, summary of Brief for Committee on the Bill of Rights of the American Bar Association as *amicus curiae*, *Hague* v. *C. I. O.*, *supra*, reprinted at 307 U. S. 678–682.

no showing of any attempt to quiet it; pedestrians were forced to walk into the street, but there was no effort to clear a path on the sidewalk; one person threatened to assault petitioner but the officers did nothing to discourage this when even a word might have sufficed. Their duty was to protect petitioner's right to talk, even to the extent of arresting the man who threatened to interfere.[9] Instead, they shirked that duty and acted only to suppress the right to speak.

Finally, I cannot agree with the Court's statement that petitioner's disregard of the policeman's unexplained request amounted to such "deliberate defiance" as would justify an arrest or conviction for disorderly conduct. On the contrary, I think that the policeman's action was a "deliberate defiance" of ordinary official duty as well as of the constitutional right of free speech. For at least where time allows, courtesy and explanation of commands are basic elements of good official conduct in a democratic society. Here petitioner was "asked" then "told" then "commanded" to stop speaking, but a man making a lawful address is certainly not required to be silent merely

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[9] In *Schneider* v. *State*, 308 U. S. 147, we held that a purpose to prevent littering of the streets was insufficient to justify an ordinance which prohibited a person lawfully on the street from handing literature to one willing to receive it. We said at page 162, "There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." In the present case as well, the threat of one person to assault a speaker does not justify suppression of the speech. There are obvious available alternative methods of preserving public order. One of these is to arrest the person who threatens an assault. Cf. *Dean Milk Co.* v. *Madison*, 340 U. S. 349, decided today, in which the Court invalidates a municipal health ordinance under the Commerce Clause because of a belief that the city could have accomplished its purposes by reasonably adequate alternatives. The Court certainly should not be less alert to protect freedom of speech than it is to protect freedom of trade.

because an officer directs it. Petitioner was entitled to know why he should cease doing a lawful act. Not once was he told. I understand that people in authoritarian countries must obey arbitrary orders. I had hoped that there was no such duty in the United States.

In my judgment, today's holding means that as a practical matter, minority speakers can be silenced in any city. Hereafter, despite the First and Fourteenth Amendments, the policeman's club can take heavy toll of a current administration's public critics.[10] Criticism of public officials will be too dangerous for all but the most courageous.[11] This is true regardless of the fact that in

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[10] Today the Court characterizes petitioner's speech as one designed to incite riot and approves suppression of his views. There is an alarming similarity between the power thus possessed by the Syracuse (or any other) police and that possessed by English officials under an act passed by Parliament in 1795. In that year Justices of the Peace were authorized to arrest persons who spoke in a manner which could be characterized as "inciting and stirring up the People to Hatred or Contempt . . ." of the King or the Government. 36 Geo. III, c. 8, § 7. This statute "was manifestly intended to put an end for ever to all popular discussions either on political or religious matters." 1 Buckle, History of Civilization in England (2d London ed.) 350.

[11] That petitioner and the philosophy he espoused were objects of local antagonism appears clearly from the printed record in this case. Even the trial judge in his decision made no attempt to conceal his contempt for petitioner's views. He seemed outraged by petitioner's criticism of public officials and the American Legion. Moreover, the judge gratuitously expressed disapproval of O. John Rogge by quoting derogatory statements concerning Mr. Rogge which had appeared in the Syracuse press. The court approved the view that freedom of speech should be denied those who pit "class against class . . . and religion against religion." And after announcing its decision, the court persistently refused to grant bail pending sentence.

Although it is unnecessary for me to reach the question of whether the trial below met procedural due process standards, I cannot agree with the opinion of the Court that "Petitioner was accorded a full, fair trial."

two other cases decided this day, *Kunz* v. *New York,* 340 U. S. 290; *Niemotko* v. *Maryland,* 340 U. S. 268, a majority, in obedience to past decisions of this Court, provides a theoretical safeguard for freedom of speech. For whatever is thought to be guaranteed in *Kunz* and *Niemotko* is taken away by what is done here. The three cases read together mean that while previous restraints probably cannot be imposed on an unpopular speaker, the police have discretion to silence him as soon as the customary hostility to his views develops.

In this case I would reverse the conviction, thereby adhering to the great principles of the First and Fourteenth Amendments as announced for this Court in 1940 by Mr. Justice Roberts:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell* v. *Connecticut,* 310 U. S. 296, 310.

I regret my inability to persuade the Court not to retreat from this principle.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MINTON concurs, dissenting.

Feiner, a university student, made a speech on a street corner in Syracuse, New York, on March 8, 1949. The purpose of the speech was to publicize a meeting of the

Young Progressives of America to be held that evening. A permit authorizing the meeting to be held in a public school auditorium had been revoked and the meeting shifted to a local hotel.

Feiner delivered his speech in a small shopping area in a predominantly colored residential section of Syracuse. He stood on a large box and spoke over loudspeakers mounted on a car. His audience was composed of about 75 people, colored and white. A few minutes after he started two police officers arrived.

The speech was mainly devoted to publicizing the evening's meeting and protesting the revocation of the permit. It also touched on various public issues. The following are the only excerpts revealed by the record:

"Mayor Costello (of Syracuse) is a champagne-sipping bum; he does not speak for the negro people."

"The 15th Ward is run by corrupt politicians, and there are horse rooms operating there."

"President Truman is a bum."

"Mayor O'Dwyer is a bum."

"The American Legion is a Nazi Gestapo."

"The negroes don't have equal rights; they should rise up in arms and fight for their rights."

There was some pushing and shoving in the crowd and some angry muttering. That is the testimony of the police. But there were no fights and no "disorder" even by the standards of the police. There was not even any heckling of the speaker.

But after Feiner had been speaking about 20 minutes a man said to the police officers, "If you don't get that son of a bitch off, I will go over and get him off there myself." It was then that the police ordered Feiner to stop speaking; when he refused, they arrested him.

Public assemblies and public speech occupy an important role in American life. One high function of

the police is to protect these lawful gatherings so that the speakers may exercise their constitutional rights. When unpopular causes are sponsored from the public platform, there will commonly be mutterings and unrest and heckling from the crowd. When a speaker mounts a platform it is not unusual to find him resorting to exaggeration, to vilification of ideas and men, to the making of false charges. But those extravagances, as we emphasized in *Cantwell* v. *Connecticut,* 310 U. S. 296, do not justify penalizing the speaker by depriving him of the platform or by punishing him for his conduct.

A speaker may not, of course, incite a riot any more than he may incite a breach of the peace by the use of "fighting words." See *Chaplinsky* v. *New Hampshire,* 315 U. S. 568. But this record shows no such extremes. It shows an unsympathetic audience and the threat of one man to haul the speaker from the stage. It is against that kind of threat that speakers need police protection. If they do not receive it and instead the police throw their weight on the side of those who would break up the meetings, the police become the new censors of speech. Police censorship has all the vices of the censorship from city halls which we have repeatedy struck down. See *Lovell* v. *City of Griffin,* 303 U. S. 444; *Hague* v. *C. I. O.,* 307 U. S. 496; *Cantwell* v. *Connecticut, supra; Murdock* v. *Pennsylvania,* 319 U. S. 105; *Saia* v. *New York,* 334 U. S. 558.

BLAU *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 21. Argued November 7, 1950.—Decided January 15, 1951.

Petitioner, a witness before a federal grand jury in response to a summons, declined to answer questions concerning activities and records of the Communist Party in Colorado, claiming his constitutional privilege against self-incrimination. Asserting his privilege against disclosing confidential communications between husband and wife, he also refused to reveal the whereabouts of his wife, who was wanted by the grand jury as a witness in connection with the same investigation. It was undisputed that he obtained his knowledge of his wife's whereabouts by communication from her. The District Court overruled both claims of privilege and sentenced petitioner to imprisonment for contempt of court. *Held:*

1. Failure to sustain petitioner's claim of privilege against self-incrimination was error. *Blau* v. *United States,* 340 U. S. 159. P. 333.

2. Petitioner was entitled to rely on his privilege against disclosing confidential communications between husband and wife because the Government failed to overcome the presumption that the communications were confidential. Pp. 333–334.

179 F. 2d 559, reversed.

The District Court sentenced petitioner to imprisonment for contempt of court, for refusing to answer questions before a federal grand jury. The Court of Appeals affirmed. 179 F. 2d 559. This Court granted certiorari. 339 U. S. 956. *Reversed,* p. 334.

Samuel D. Menin argued the cause and filed a brief for petitioner.

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Assistant Attorney General McInerney, John F. Davis* and *J. F. Bishop.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was summoned to appear before a federal district grand jury in Denver, Colorado. Both before that body and before the district judge where he was later taken, petitioner declined to answer questions concerning the activities and records of the Communist Party of Colorado, claiming his constitutional privilege against self-incrimination. He also refused to reveal the whereabouts of his wife, who was wanted by the grand jury as a witness in connection with the same investigation. As to this refusal to testify, petitioner asserted his privilege against disclosing confidential communications between husband and wife. The district judge overruled both claims of privilege and sentenced petitioner to six months in prison for contempt of court. The Court of Appeals for the Tenth Circuit affirmed. 179 F. 2d 559.

For the reasons set out in our recent opinion in *Patricia Blau* v. *United States,* 340 U. S. 159, we hold it was error to fail to sustain the claim of privilege against self-incrimination.

This leaves for consideration the validity of the sentence insofar as it rests on the failure of petitioner to disclose the whereabouts of his wife. In *Wolfle* v. *United States,* 291 U. S. 7, this Court recognized that a confidential communication between husband and wife was privileged. It is not disputed in the present case that petitioner obtained his knowledge as to where his wife was by communication from her. Nevertheless, the Government insists that he should be denied the benefit of the privilege because he failed to prove that the information was privately conveyed. This contention ignores the rule that marital communications are presumptively confidential. *Wolfle* v. *United States, supra,* at 14; Wigmore, Evidence, § 2336. The Government made no effort to overcome the presumption. In this case, more-

over, the communication to petitioner was of the kind likely to be confidential. Petitioner's wife, according to the district judge, knew that she and a number of others were "wanted" as witnesses by the grand jury but she "hid out, apparently so that the process . . . could not be served upon her."[1] Several of the witnesses who appeared were put in jail for contempt of court. Under such circumstances, it seems highly probable that Mrs. Blau secretly told her husband where she could be found. Petitioner's refusal to betray his wife's trust therefore was both understandable and lawful. We have no doubt that he was entitled to claim his privilege.[2]

Reversed.

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

MR. JUSTICE MINTON, with whom MR. JUSTICE JACKSON joins, dissenting.

If a communication between husband and wife is made under circumstances obviously not intended to be confidential, it is not privileged. *Wolfle* v. *United States,* 291 U. S. 7, 14.

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[1] Petitioner's wife, when apprehended, was sentenced to one year's imprisonment for contempt, *Patricia Blau* v. *United States, supra,* although other witnesses who refused to testify received shorter sentences. In sentencing Mrs. Blau, the judge stated: "I haven't much sympathy for this lady because, as I said, she defied the Court by avoiding the process of the Court when she knew very well that she was wanted here, and yet she hid out, apparently so that the process of this court could not be served upon her."

[2] In view of our decision on this phase of the case, it is unnecessary to reach the question whether the single *conviction* for contempt (which was based on the refusal to give incriminating testimony *and* on the refusal to reveal a confidential marital communication) would be valid if petitioner were entitled to claim one, but not both, of the privileges.

Where the privilege suppresses relevant testimony, as it did here, it should "be allowed only when it is plain that marital confidence can not otherwise reasonably be preserved." *Id.*, at 17.

Unless the wife is in concealment, which does not appear to be the case here, the disclosure of her whereabouts to the husband is obviously not intended to be confidential and therefore is not privileged. Not every communication between husband and wife is blessed with the privilege. The general rule of evidence is competency. Incompetency is the exception, and to bring one within the exception, one must come within the reason for the exception. The reason here is protection of marital confidence, not merely of communication between spouses. It seems to me clear that all that is shown here is communication. The circumstances of confidence are absent; what all may know is certainly not confidential.

For refusal to divulge his wife's whereabouts, petitioner was in contempt. Since the sentence he received was such as he might have received for that single act of contempt, his conviction is valid. Cf. *Pinkerton* v. *United States,* 328 U. S. 640, 641, n. 1; *Hirabayashi* v. *United States,* 320 U. S. 81, 85. If petitioner conceived his sentence to be illegal, he would not be without remedy, for he might seek a reduction thereof on remand of this case under Rule 35 of the Federal Rules of Criminal Procedure. I intimate nothing as to that issue.

I would affirm the conviction.

910798 O—51——28

NIAGARA HUDSON POWER CORP. *v.* LEVENTRITT.

NO. 211. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued December 5, 1950.—Decided January 15, 1951.

The Securities and Exchange Commission approved a plan of reorganization as "fair and equitable" within the meaning of § 11 of the Public Utility Holding Company Act of 1935, although the plan made no provision for participation of outstanding stock option warrants relating to common stock of the company to be reorganized. The warrants represented options to purchase, at any time, for a specified price, shares of the company's common stock. The Commission found that there was no reasonable expectation, within the foreseeable future, that the market price of the common stock would exceed the exercise price of the warrants, and that, upon consideration of all the circumstances, there was no justification for recognizing any present value in the warrants at the expense of the common stock. *Held:* The District Court properly ordered enforcement of the plan. Pp. 338–348.

1. The fact that the plan provides for no participation by the outstanding warrants despite their conceded, but low, market value does not preclude the Commission, as a matter of law, from concluding that the plan is "fair and equitable" within the meaning of § 11 (e) of the Act when informed estimates of future earnings indicate that they have no investment value. Pp. 340–348.

2. The fact that the options in the warrants were exercisable "at any time (without limit)" and thus had a "perpetual feature" did not require that the Commission, as a matter of law, recognize some present value in the warrants. Pp. 344–345.

3. The fact that a purchaser may be willing to pay a nominal price for a warrant which has no investment value, on the mere chance that it may be saleable in a rising market, is not an adequate basis for allowing a value to the warrants, at the expense of the common stock, in a reorganization under the Act. Pp. 345–346.

4. In determining the fairness and equity of compensation to be allowed holders of warrants, the Commission is not bound as a matter of law, any more than in the case of other securities, to

*Together with No. 212, *Securities & Exchange Commission* v. *Leventritt*, also on certiorari to the same court.

limit itself precisely to the values which the market recognizes. P. 346.

5. The informed judgment of the Commission, rather than that of the market, is the appropriate guide to fairness and equity under the Act; and that informed judgment looks for investment values on a going-concern basis measured primarily by the Commission's estimate of earnings within the foreseeable future. Pp. 346–347.

6. In the absence of abuse of its discretion, the Commission's approval of a plan is as lawful and binding when it recognizes a value of zero for a security as when it selects any other figure. P. 347.

7. In this case the Act does not require proof that the warrants are wholly worthless and without any market value in order to sustain the Commission's judgment that the plan is "fair and equitable" though denying them participation. It is enough that the Commission, within its discretion, has given the warrants careful consideration, and, under all the circumstances, including the market value of the warrants, has found the plan to be "fair and equitable" within the meaning of § 11 of the Act. P. 347.

179 F. 2d 615, reversed.

The District Court ordered enforced a plan of reorganization approved by the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935. 86 F. Supp. 697. The Court of Appeals reversed that part of the order relating to stock option warrants, and remanded the cause to the District Court for further proceedings. 179 F. 2d 615. This Court granted certiorari. 340 U. S. 809. *Reversed,* p. 348.

Randall J. LeBoeuf, Jr. argued the cause for petitioner in No. 211. With him on the brief were *Craigh Leonard* and *Lauman Martin.*

Roger S. Foster argued the cause for petitioner in No. 212. With him on the brief were *Solicitor General Perlman* and *John F. Davis.*

T. Roland Berner and *M. Victor Leventritt* argued the cause for respondent. With them on the brief was *Aaron Lewittes.*

MR. JUSTICE BURTON delivered the opinion of the Court.

These cases test the validity of the Securities and Exchange Commission's finding that a plan of reorganization is "fair and equitable" within the meaning of § 11 of the Public Utility Holding Company Act of 1935,[1] although the plan makes no provision for the participation of outstanding stock option warrants relating to the common stock of the company to be reorganized. The basis

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[1] "SEC. 11. (a) . . . .

"(b) It shall be the duty of the Commission . . . :

. . . . . .

"(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not *unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders,* of such holding-company system. . . .

. . . . . .

"(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, *necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan;* and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. . . ." (Emphasis added.) 49 Stat. 820, 821, 822, 15 U. S. C. § 79k (b) and (e).

for the Commission's conclusion is that it cannot find that there is a reasonable expectation, within the foreseeable future, that the market price of the common stock will exceed the exercise price of the warrants and that, upon consideration of all the circumstances, including the market for the warrants, the Commission cannot find justification for recognizing any present value in the warrants at the expense of the common stock. For the reasons hereinafter stated, we sustain the Commission.

The Niagara Hudson Power Corporation, petitioner in No. 211, is a registered public utility holding company, incorporated under the laws of New York, whose dissolution is contemplated under the reorganization.[2] It has outstanding notes in the amount of $20,000,000; 378,875 shares of first preferred stock, of $100 par value; 105,930 shares of second preferred stock, of $100 par value; 9,580,988½ shares of common stock, of $1 par value; and Class B stock option warrants. The warrants represent options to purchase, at any time, up to 497,191⅜ shares of common stock, each warrant entitling the holder to subscribe to 1⅛ shares of common stock upon payment of $50, which is at the rate of approximately $42.86 per share.[3]

The proposed reorganization includes a dissolution plan which is conditioned upon the consummation of a

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[2] For a summary of the proceedings since 1942 under § 11 (b) (2) of the Act, relating to the Niagara Hudson system, and at first relating to 26 corporate entities, see *Niagara Hudson Power Corp.*, Holding Company Act Release No. 9270, pp. 7–8.

[3] It appears from the warrant certificates that the holder of each "is entitled to purchase at any time (without limit)" shares of common stock at the price stated. It also appears from the certificates that the warrants are a second generation of warrants, having been issued in exchange for warrants of two predecessor corporations "for the purpose of preserving and continuing, as nearly as may be, the rights of the holders of said option warrants, existing at the date of consolidation, according to their respective terms."

consolidation plan, now consummated. The Commission found both plans to be "necessary to effectuate the provisions of Section 11 (b) (2) of the Act [§ 15 U. S. C. § 79k (b) (2)] and fair and equitable to the persons affected thereby . . . ." Holding Company Act Releases No. 9270, pp. 1, 57; No. 9295, p. 2. Over an objection made by the respondent, M. Victor Leventritt, as a warrant holder, the United States District Court for the Northern District of New York approved the plans and ordered them enforced. 86 F. Supp. 697. On appeal by the respondent, the Court of Appeals for the Second Circuit reversed that part of the order which relates to the warrants, and remanded the cause to the District Court for further proceedings. 179 F. 2d 615. A rehearing was denied, one judge dissenting. The Court of Appeals for the Third Circuit thereafter reached a substantially contrary result in *In re Commonwealth & Southern Corp.*, 184 F. 2d 81. Because of the conflicting nature of the decisions in the Courts of Appeals and the importance of the issue in the application of the Public Utility Holding Company Act, we granted the petitions for certiorari filed separately by the company in No. 211 and the Commission in No. 212. 340 U. S. 809.

At every stage of this proceeding opportunity has been afforded the holders of the warrants to present their claims and they have been fully presented. Respondent has not, however, brought up the record which was made before the Commission and cannot question the sufficiency of the evidence in support of the Commission's findings as to the intrinsic or investment value of the common stock or as to that of the warrants based on the likelihood of their exercise within the foreseeable future.[4] The appeal

[4] Such findings "are not subject to reexamination by the court unless they are not supported by substantial evidence or were not arrived at 'in accordance with legal standards.'" *Securities & Exchange Comm'n* v. *Central-Illinois Corp.*, 338 U. S. 96, 126.

attacks the authority of the Commission, as a matter of law, to conclude that, under the circumstances found by it, the dissolution plan is "fair and equitable" within the meaning of § 11 (e) of the Act, where the plan provides for no participation by the outstanding warrants despite their conceded, but low, market value. The Court of Appeals sustained that attack and said: "we cannot agree that there was any evidence 'substantial' or insubstantial to support the finding that these 'warrants' were wholly worthless." 179 F. 2d at 618.

The Commission's answer to the attack is that, within the meaning of § 11 (e) of this Act, it has discretion to approve a plan as "fair and equitable to the persons affected by such plan," without providing for the participation of the holders of any security that has no recognizable intrinsic or investment value, although it may have a market value which the Commission considers too small "as a practical matter" to be recognized. The Commission stated its conclusions in its original order as follows:

> "5. *Fairness to the Holders of the Class B Stock Option Warrants of Niagara Hudson*
>
> "Under the plans, no provision is made for participation of the Class B stock option warrants of Niagara Hudson and all rights represented by such warrants will terminate upon the dissolution of that company.
>
> "The option warrants entitle their holders to purchase at any time 497,191⅔ shares of Niagara Hudson common stock, each warrant entitling the holder to 1⅙ shares upon payment of $50. This is equivalent to an exercise price of $42.86 for one share. Since 1932, the Niagara Hudson or predecessor company common stock has never sold at a price higher than

18¼ and has sold as low as ⅞. During the same period, the option warrants have never sold higher than 5 and have been as low as ⅛. [Appendix F attached to the Commission's opinion shows that in 1943 they dropped further to 1/16, and in 1941 and 1942 to 1/32.] In 1948, the prices for the option warrants ranged from a high of 1 to a low of ⅛, and in 1949, from a high of ¼ to a low of ⅛.

"In considering the participation to which option warrant holders may be entitled, the test is basically the same as that applied with respect to the other types of securities, that is, what value, if any, is being given up by the surrender of the rights attaching to that security. The price of $42.86, which a holder of an option warrant would have to pay for one share of Niagara Hudson common stock, is more than 30 times the estimate we have used of $1.39 as foreseeable earnings which would be applicable to that stock on the basis of present investment if Niagara Hudson were to continue. That price is about 3.5 times the recent high market prices for the Niagara Hudson common stock of around 12 per share.

"If we were to assume that Niagara Hudson were to continue and its common stock were to sell in the future at a ratio of 15 times consolidated earnings, which would appear to be a very liberal assumption, it would require per share earnings of $2.86 to result in a price of $42.86 per share. Such earnings would represent an increase of 106% over the approximately $1.39 of earnings which we have found attributable to the present investment. On the basis of the more likely assumption that the price-earnings ratio at which the Niagara Hudson common stock would sell would be something less than 15 times,

an even greater increase in earnings would be required to attain a per share price of $42.86.

"Under all the circumstances, we cannot find that there is a reasonable expectation that the market price of Niagara Hudson's common stock would exceed the exercise price of the option warrants within the foreseeable future. Accordingly, we find that such option warrants have no recognizable value [59] and that the plans satisfy the standard of fairness and equity with respect to such option warrants in excluding them from any participation in the reorganization of Niagara Hudson." Holding Company Act Release No. 9270, pp. 46–47.

In its foregoing statement the Commission is consistent with the position it has taken as to the preferred and common stock. In accordance with the principles established in *Securities & Exchange Comm'n* v. *Central-Illinois Corp.*, 338 U. S. 96, and in *Otis & Co.* v. *Securities & Exchange Comm'n,* 323 U. S. 624, it has estimated future earnings as a guide for its determination of the intrinsic and investment value of those stocks. It has satisfied itself that the holders of them will receive, in cash or securities, an equitable equivalent of that value. The Commission's comparable duty in relation to the warrants is first to determine the extent to which they reflect the value of the common stock upon which they have an option. If, for example, the market value of the common

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"[59] We recognize that the holders of the option warrants have a right to purchase common stock at any time, and that this perpetual feature has some present value no matter how remote or speculative the exercise of the right might be. The value to be accorded that right, however, in this case, is so small that as a practical matter we would not be justified in recognizing it for the purposes of a Section 11 reorganization. *Cf. Electric Power & Light Corporation,* — S. E. C. — (1949), Holding Company Act Release No. 8889."

stock closely approaches the exercise price stated in the warrants, or if there is ground for a reasonable expectation that the two may coincide within the foreseeable future, then the warrants would have an intrinsic and investment value directly related to the common stock. Under those circumstances, we assume no plan of reorganization would be fair or equitable within the meaning of § 11 (e) of the Act that did not recognize that value and provide an equitable equivalent for it.[5]

On the other hand, if the market value of the common stock is less than $15 per share and there is no ground for a reasonable expectation that, within the foreseeable future, the value will exceed $15 per share, then an option to buy it at, for example, $1,000 per share obviously would be worthless if the measure of its value depends only upon its convertibility into common stock. With such facts, it is difficult to see how the Commission could justify either the continuance of the warrants or any compensation for them at the expense of the existing common stock. The difference between the example last given and the facts of this case is merely one of degree. Where the line is to be drawn is a matter for the expert judgment of the Commission. The limits of its discretion are also narrowed here by the fact that the future earnings of a public utility company are limited by law to a conservative rate of return upon a governmentally ascertained rate base.

Respondent's objection in this case is not primarily to the Commission's computation of the investment value of

[5] In *In re Electric Power & Light Corp.*, Holding Company Act Release No. 8889, aff'd 176 F. 2d 687, the Commission approved a plan allocating shares of common stock to the warrant holders at a ratio of one share of stock for three warrants, in recognition of estimated earnings which indicated the value of the stock in the foreseeable future as between $25 and $30 per share, whereas the exercise price for it stated in the warrants was $25 per share.

the warrants insofar as that value is based upon the relationship between their exercise price and the value of the common stock. His claim is rather that the Commission must, as a matter of law, give greater recognition than it has to the market value of the warrants themselves. He contends that the warrants have a valuable "perpetual feature" because the options in the warrants may be exercised "at any time (without limit)." From this premise he reasons that the Commission, as a matter of law, must recognize some present value in the warrants because of the infinite possibilities which inhere in any option that reaches into the infinite future. His premise is partially false because the option in the warrants does not extend beyond the life of the common stock and there is no guaranty of the length of that life. On the other hand, the "perpetual feature" of the option does afford ground for anticipating its survival beyond the short period which limits ordinary estimates of investment values. It reaches beyond the foreseeable into the unexpected and the unpredictable.

The value of this "perpetual feature" may be called the premium value of the warrants as distinguished from their investment value. It takes into account such possibilities as that of a runaway inflation, an unprecedented accumulation of undistributed surplus earnings, an unlikely liberalization of standards of public utility regulation, a surprise discovery of oil on company property, etc. These are considerations which a buyer of "perpetual" warrants on the open market might consider as a basis for speculation in them. Furthermore, because warrants are among the lowest priced of all securities and because their market price tends to fluctuate with the market price of the stock to which they are related, they permit speculation on market trends with a minimum

investment.[6] A purchaser thus may be willing to pay a nominal price for a warrant which has no investment value, on the mere chance that it may be saleable in a rising market.[7] This, however, does not provide an adequate reason for allowing a value to the warrants, at the expense of the common stock, in a reorganization under this Act.

This reorganization of a registered public utility holding company is one brought about in the interest of the public. The company is subjected to it by its status as a public utility and by its registration as a holding company under the Act. In determining the fairness and equity of compensation to be allowed holders of warrants, the Commission is not bound as a matter of law, any more than in the case of other securities, to limit itself precisely to the values which the market recognizes. The informed judgment of the Commission, rather than that of the

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[6] See 1 Dewing, The Financial Policy of Corporations (4th ed. 1941), 254; Graham & Dodd, Security Analysis (1934), 258–259, 548–550; Hoagland, Corporation Finance (2d ed. 1938), 177.

[7] What a trader is willing to pay for a warrant is determined by his own estimate of the "prospects of *change*." Graham & Dodd, Security Analysis (1934), 547. "The privilege [conferred by a warrant upon its holder] constitutes a call upon the future prosperity of the company, and its value will depend upon the hope that the market price of the stock will rise above the stipulated subscription price before the right expires." Guthmann & Dougall, Corporate Financial Policy (2d ed. 1948), 145.

Berle & Means, in The Modern Corporation and Private Property (1932), stress the difficulty of fixing a value for warrants. "[T]hey maintain market values, which to the uninitiated seem inexplicable." P. 183. Market quotations for warrants have led "certain observers in the New York market to suggest that the real result of an option warrant is to create a pure gambling counter . . . ." P. 184. "[A]t the time when the stock purchase warrants are issued, particularly if they are perpetual, it is almost beyond human wisdom to set any fair price on such options." *Ibid.* To the same effect, see Graham & Dodd, pp. 568–570.

market, has been designated by the Act as the appropriate guide to fairness and equity within the meaning of the Act. Under the standards approved by this Court, that informed judgment looks for investment values on a going-concern basis measured primarily by the Commission's estimates of earnings within the foreseeable future. In the *Otis* case, *supra,* this Court accepted the Commission's approval of participation by common stock in a reorganization under the Act, even though the assets of the company to be reorganized were insufficient to satisfy the charter liquidation preference of the preferred stock. This Court there accepted the Commission's estimate that in approximately 15 years the corporation's earnings would be sufficient to pay dividends on the common stock. On the other hand, in the *Central-Illinois* case, *supra,* we expressly rejected the "colloquial equity" approach of the District Court, which placed special emphasis upon market history.

In the absence of abuse of its discretion, the Commission's approval of a plan is as lawful and binding when it recognizes a value of zero for a security as when it selects any other figure. The cash allowance it gives to one security it must take from another. In each case, it must determine the fairness and equity of the plan to all who are affected. We conclude, therefore, that in the present instance the Act does not require proof that the warrants are wholly worthless and without all market value in order to sustain the Commission's judgment that the plan is fair and equitable when it denies participation to them. It is enough that the Commission, within its discretion, has given the warrants careful consideration and that under all the circumstances, including their market value, has found the plan to be fair and equitable within the meaning of § 11 of the Act. Moreover, we find no lack of authority in analogous fields of reorganization for sustaining the general principle that a class of

securities may go unrecognized in a reorganization when informed estimates of future earnings indicate that they have no investment value.[8]

The judgment of the Court of Appeals, accordingly, is reversed and that of the District Court is affirmed.

Reversed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BLACK joins, dissenting.

I would have the Securities and Exchange Commission take another look, for the reasons indicated in Judge Learned Hand's opinion below, 179 F. 2d 615.

MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

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[8] In *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, the Court approved a railroad reorganization under § 77 of the Bankruptcy Act, 49 Stat. 911, 11 U. S. C. § 205, in which preferred and common shareholders were wiped out because their equity was not justified by earnings prospects. And in reorganizations under former § 77B of the Bankruptcy Act, 48 Stat. 912, "The criterion of earning capacity is the essential one . . . ." *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510, 526. See 6 Collier on Bankruptcy (14th ed. 1947), 3849–3859.

DEAN MILK CO. *v.* CITY OF MADISON ET AL.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 258. Argued December 7, 1950.—Decided January 15, 1951.

1. An ordinance of a Wisconsin municipality forbids the sale of milk in the city as pasteurized unless it has been pasteurized and bottled at an approved pasteurization plant within five miles of the center of the city. Appellant, an Illinois corporation engaged in gathering and distributing milk from farms in Illinois and Wisconsin, was denied a license to sell its products within the city solely because its pasteurization plants were more than five miles away. *Held:* The ordinance unjustifiably discriminates against interstate commerce, in violation of the Commerce Clause of the Federal Constitution. Pp. 350–357.

   (a) Even in the exercise of its unquestioned power to protect the health and safety of its people, a municipality may not erect an economic barrier protecting a major local industry against competition from without the state, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available. P. 354.

   (b) In view of the reasonable and adequate alternatives which are available for the protection of the health and safety of the people of the municipality, the discrimination against interstate commerce inherent in the ordinance violates the Commerce Clause. Pp. 354–356.

2. A second provision of the ordinance in question forbids the sale of milk, or the importation, receipt or storage of milk for sale, within the city except from a source of supply possessing a permit issued after inspection by city officials; and expressly relieves the city officials from any duty to inspect farms located beyond twenty-five miles from the city. Appellant's attack on the constitutional validity of this provision was dismissed by the state court for want of a justiciable controversy. *Held:* As to the issue thus presented, the cause is remanded for further proceedings not inconsistent with the principles announced in the opinion of this Court. Pp. 350–351, 356–357.

257 Wis. 308, 43 N. W. 2d 480, reversed.

An ordinance of a Wisconsin municipality regulating the sale of milk was sustained by the State Supreme Court,

over appellant's objections to its validity under the Federal Constitution. 257 Wis. 308, 43 N. W. 2d 480. On appeal to this Court, *reversed and remanded,* p. 357.

George S. Geffs and *Jacob Geffs* argued the cause and filed a brief for appellant. *J. Arthur Moran* was also of counsel.

Walter P. Ela and *Harold E. Hanson* argued the cause and filed a brief for appellees.

MR. JUSTICE CLARK delivered the opinion of the Court.

This appeal challenges the constitutional validity of two sections of an ordinance of the City of Madison, Wisconsin, regulating the sale of milk and milk products within the municipality's jurisdiction. One section in issue makes it unlawful to sell any milk as pasteurized unless it has been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of Madison.[1] Another section, which prohibits the sale of milk, or the importation, receipt or storage of milk for sale, in Madison unless from a source of supply possessing a permit issued after inspection by Madison officials, is attacked insofar as it expressly relieves municipal authorities from any duty to inspect farms

[1] General Ordinances of the City of Madison, 1949, § 7.21 provides as follows:

"It shall be unlawful for any person, association or corporation to sell, offer for sale or have in his or its possession with intent to sell or deliver in the City of Madison, any milk, cream or milk products as pasteurized unless the same shall have been pasteurized and bottled in the manner herein provided within a radius of five miles from the central portion of the City of Madison otherwise known as the Capitol Square, at a plant housing the machinery, equipment and facilities, all of which shall have been approved by the Department of Public Health."

located beyond twenty-five miles from the center of the city.[2]

Appellant is an Illinois corporation engaged in distributing milk and milk products in Illinois and Wisconsin. It contended below, as it does here, that both the five-mile limit on pasteurization plants and the twenty-five-mile limit on sources of milk violate the Commerce Clause and the Fourteenth Amendment to the Federal Constitution. The Supreme Court of Wisconsin upheld the five-mile limit on pasteurization.[3] As to the twenty-five-mile limitation the court ordered the complaint dismissed for want of a justiciable controversy. 257 Wis. 308, 43 N. W. 2d 480 (1950). This appeal, contesting both rulings, invokes the jurisdiction of this Court under 28 U. S. C. § 1257 (2).

The City of Madison is the county seat of Dane County. Within the county are some 5,600 dairy farms with total

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[2] *Id.*, § 7.11, provides in pertinent part as follows:

"It shall be unlawful for any person to bring into or receive into the City of Madison, Wisconsin, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product as defined in this ordinance from a source not possessing a permit from the Health Commissioner of the City of Madison, Wisconsin.

"Only a person who complies with the requirements of this ordinance shall be entitled to receive and retain such a permit.

"On the filing of an application for a permit with the Health Commissioner, he shall cause the source of supply named therein to be inspected and shall cause all other necessary inspections and investigations to be made. The Department of Public Health shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison otherwise known as the Capitol Square. . . ."

[3] In upholding § 7.21, note 1, *supra*, the court relied upon the principles announced by it in *Dyer* v. *City Council of Beloit*, 250 Wis. 613, 27 N. W. 2d 733 (1947), judgment vacated, 333 U. S. 825 (1948).

910798 O—51——29

raw milk production in excess of 600,000,000 pounds annually and more than ten times the requirements of Madison. Aside from the milk supplied to Madison, fluid milk produced in the county moves in large quantities to Chicago and more distant consuming areas, and the remainder is used in making cheese, butter and other products. At the time of trial the Madison milkshed was not of "Grade A" quality by the standards recommended by the United States Public Health Service, and no milk labeled "Grade A" was distributed in Madison.

The area defined by the ordinance with respect to milk sources encompasses practically all of Dane County and includes some 500 farms which supply milk for Madison. Within the five-mile area for pasteurization are plants of five processors, only three of which are engaged in the general wholesale and retail trade in Madison. Inspection of these farms and plants is scheduled once every thirty days and is performed by two municipal inspectors, one of whom is full-time. The courts below found that the ordinance in question promotes convenient, economical and efficient plant inspection.

Appellant purchases and gathers milk from approximately 950 farms in northern Illinois and southern Wisconsin, none being within twenty-five miles of Madison. Its pasteurization plants are located at Chemung and Huntley, Illinois, about 65 and 85 miles respectively from Madison. Appellant was denied a license to sell its products within Madison solely because its pasteurization plants were more than five miles away.

It is conceded that the milk which appellant seeks to sell in Madison is supplied from farms and processed in plants licensed and inspected by public health authorities of Chicago, and is labeled "Grade A" under the Chicago ordinance which adopts the rating standards recommended by the United States Public Health Serv-

ice. Both the Chicago and Madison ordinances, though not the sections of the latter here in issue, are largely patterned after the Model Milk Ordinance of the Public Health Service. However, Madison contends and we assume that in some particulars its ordinance is more rigorous than that of Chicago.

Upon these facts we find it necessary to determine only the issue raised under the Commerce Clause, for we agree with appellant that the ordinance imposes an undue burden on interstate commerce.

This is not an instance in which an enactment falls because of federal legislation which, as a proper exercise of paramount national power over commerce, excludes measures which might otherwise be within the police power of the states. See *Currin* v. *Wallace,* 306 U. S. 1, 12–13 (1939). There is no pertinent national regulation by the Congress, and statutes enacted for the District of Columbia indicate that Congress has recognized the appropriateness of local regulation of the sale of fluid milk. D. C. Code, 1940, §§ 33–301 *et seq.* It is not contended, however, that Congress has authorized the regulation before us.

Nor can there be objection to the avowed purpose of this enactment. We assume that difficulties in sanitary regulation of milk and milk products originating in remote areas may present a situation in which "upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities . . . ." *Parker* v. *Brown,* 317 U. S. 341, 362–363 (1943); see *H. P. Hood & Sons* v. *Du Mond,* 336 U. S. 525, 531–532 (1949). We also assume that since Congress has not spoken to the contrary, the subject matter of the ordinance lies within the sphere of state regulation even though interstate com-

merce may be affected. *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346 (1939); see *Baldwin* v. *Seelig, Inc.,* 294 U. S. 511, 524 (1935).

But this regulation, like the provision invalidated in *Baldwin* v. *Seelig, Inc., supra,* in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois. "The importer . . . may keep his milk or drink it, but sell it he may not." *Id.,* at 521. In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce.[4] This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available. Cf. *Baldwin* v. *Seelig, Inc., supra,* at 524; *Minnesota* v. *Barber,* 136 U. S. 313, 328 (1890). A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods. Cf. *H. P. Hood & Sons* v. *Du Mond, supra.* Our issue then is whether the discrimination inherent in the Madison ordinance can be justified in view of the character of the local interests and the available methods of protecting them. Cf. *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 211 (1944).

It appears that reasonable and adequate alternatives are available. If the City of Madison prefers to rely upon its own officials for inspection of distant milk

[4] It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce. Cf. *Brimmer* v. *Rebman,* 138 U. S. 78, 82–83 (1891).

sources, such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors. Cf. *Sprout* v. *City of South Bend,* 277 U. S. 163, 169 (1928); see *Miller* v. *Williams,* 12 F. Supp. 236, 242, 244 (D. Md. 1935). Moreover, appellee Health Commissioner of Madison testified that as proponent of the local milk ordinance he had submitted the provisions here in controversy and an alternative proposal based on § 11 of the Model Milk Ordinance recommended by the United States Public Health Service. The model provision imposes no geographical limitation on location of milk sources and processing plants but excludes from the municipality milk not produced and pasteurized conformably to standards as high as those enforced by the receiving city.[5] In implementing such an ordinance, the importing city obtains milk ratings based on uniform standards and established by health authorities in the jurisdiction where production and processing occur. The receiving city may

[5] Section 11 of the United States Public Health Service Milk Ordinance as recommended in 1939 provides:

"Milk and milk products from points beyond the limits of routine inspection of the city of ..... may not be sold in the city of ....., or its police jurisdiction, unless produced and/or pasteurized under provisions equivalent to the requirements of this ordinance; provided that the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions."

The following comment on this section is contained in the Public Health Service Milk Code:

"It is suggested that the health officer approve milk or milk products from distant points without his inspection if they are produced and processed under regulations equivalent to those of this ordinance, and if the milk or milk products have been awarded by the State control agency a rating of 90 percent or more on the basis of the Public Health Service rating method." Federal Security Agency, Public Health Bulletin No. 220 (1939), 145.

determine the extent of enforcement of sanitary standards in the exporting area by verifying the accuracy of safety ratings of specific plants or of the milkshed in the distant jurisdiction through the United States Public Health Service, which routinely and on request spot checks the local ratings. The Commissioner testified that Madison consumers "would be safeguarded adequately" under either proposal and that he had expressed no preference. The milk sanitarian of the Wisconsin State Board of Health testified that the State Health Department recommends the adoption of a provision based on the Model Ordinance. Both officials agreed that a local health officer would be justified in relying upon the evaluation by the Public Health Service of enforcement conditions in remote producing areas.

To permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause. Under the circumstances here presented, the regulation must yield to the principle that "one state in its dealings with another may not place itself in a position of economic isolation." *Baldwin* v. *Seelig, Inc., supra,* at 527.

For these reasons we conclude that the judgment below sustaining the five-mile provision as to pasteurization must be reversed.

The Supreme Court of Wisconsin thought it unnecessary to pass upon the validity of the twenty-five-mile limitation, apparently in part for the reason that this issue was made academic by its decision upholding the five-mile section. In view of our conclusion as to the latter provision, a determination of appellant's contention as to the other section is now necessary. As to this

issue, therefore, we vacate the judgment below and remand for further proceedings not inconsistent with the principles announced in this opinion.

It is so ordered.

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

Today's holding invalidates § 7.21 of the Madison, Wisconsin, ordinance on the following reasoning: (1) the section excludes wholesome milk coming from Illinois; (2) this imposes a discriminatory burden on interstate commerce; (3) such a burden cannot be imposed where, as here, there are reasonable, nondiscriminatory and adequate alternatives available. I disagree with the Court's premises, reasoning, and judgment.

(1) This ordinance does not exclude wholesome milk coming from Illinois or anywhere else. It does require that all milk sold in Madison must be pasteurized within five miles of the center of the city. But there was no finding in the state courts, nor evidence to justify a finding there or here, that appellant, Dean Milk Company, is unable to have its milk pasteurized within the defined geographical area. As a practical matter, so far as the record shows, Dean can easily comply with the ordinance whenever it wants to. Therefore, Dean's personal preference to pasteurize in Illinois, not the ordinance, keeps Dean's milk out of Madison.

(2) Characterization of § 7.21 as a "discriminatory burden" on interstate commerce is merely a statement of the Court's result, which I think incorrect. The section does prohibit the sale of milk in Madison by interstate and intrastate producers who prefer to pasteurize over five miles distant from the city. But both state courts below found that § 7.21 represents a good-faith attempt to safeguard public health by making adequate sanitation

inspections possible. While we are not bound by these findings, I do not understand the Court to overturn them. Therefore, the fact that § 7.21, like all health regulations, imposes some burden on trade, does not mean that it "discriminates" against interstate commerce.

(3) This health regulation should not be invalidated merely because the Court believes that alternative milk-inspection methods might insure the cleanliness and healthfulness of Dean's Illinois milk. I find it difficult to explain why the Court uses the "reasonable alternative" concept to protect trade when today it refuses to apply the same principle to protect freedom of speech. *Feiner* v. *New York,* 340 U. S. 315. For while the "reasonable alternative" concept has been invoked to protect First Amendment rights, *e. g., Schneider* v. *State,* 308 U. S. 147, 162, it has not heretofore been considered an appropriate weapon for striking down local health laws. Since the days of Chief Justice Marshall, federal courts have left states and municipalities free to pass bona fide health regulations subject only "to the paramount authority of Congress if it decides to assume control . . . ." *The Minnesota Rate Cases,* 230 U. S. 352, 406; *Gibbons* v. *Ogden,* 9 Wheat. 1, 203, 204; *Mintz* v. *Baldwin,* 289 U. S. 346, 349–350; and see *Baldwin* v. *Seelig,* 294 U. S. 511, 524. This established judicial policy of refusing to invalidate genuine local health laws under the Commerce Clause has been approvingly noted even in our recent opinions measuring state regulation by stringent standards. See, *e. g., Hood & Sons* v. *Du Mond,* 336 U. S. 525, 531–532. No case is cited, and I have found none, in which a bona fide health law was struck down on the ground that some other method of safeguarding health would be as good as, or better than, the one the Court was called on to review. In my view, to use this ground now elevates the right to traffic in commerce for profit above

the power of the people to guard the purity of their daily diet of milk.

If, however, the principle announced today is to be followed, the Court should not strike down local health regulations unless satisfied beyond a reasonable doubt that the substitutes it proposes would not lower health standards. I do not think that the Court can so satisfy itself on the basis of its judicial knowledge. And the evidence in the record leads me to the conclusion that the substitute health measures suggested by the Court do not insure milk as safe as the Madison ordinance requires.

One of the Court's proposals is that Madison require milk processors to pay reasonable inspection fees at the milk supply "sources." Experience shows, however, that the fee method gives rise to prolonged litigation over the calculation and collection of the charges. *E. g., Sprout* v. *South Bend,* 277 U. S. 163; *Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542. To throw local milk regulation into such a quagmire of uncertainty jeopardizes the admirable milk-inspection systems in force in many municipalities. Moreover, nothing in the record before us indicates that the fee system might not be as costly to Dean as having its milk pasteurized in Madison. Surely the Court is not resolving this question by drawing on its "judicial knowledge" to supply information as to comparative costs, convenience, or effectiveness.

The Court's second proposal is that Madison adopt § 11 of the "Model Milk Ordinance." The state courts made no findings as to the relative merits of this inspection ordinance and the one chosen by Madison. The evidence indicates to me that enforcement of the Madison law would assure a more healthful quality of milk than that which is entitled to use the label of "Grade A" under the Model Ordinance. Indeed, the United States Board of Public Health, which drafted the Model Ordinance, sug-

gests that the provisions are "minimum" standards only. The Model Ordinance does not provide for continuous investigation of all pasteurization plants as does § 7.21 of the Madison ordinance. Under § 11, moreover, Madison would be required to depend on the Chicago inspection system since Dean's plants, and the farms supplying them with raw milk, are located in the Chicago milkshed. But there is direct and positive evidence in the record that milk produced under Chicago standards did not meet the Madison requirements.

Furthermore, the Model Ordinance would force the Madison health authorities to rely on "spot checks" by the United States Public Health Service to determine whether Chicago enforced its milk regulations. The evidence shows that these "spot checks" are based on random inspection of farms and pasteurization plants: the United States Public Health Service rates the ten thousand or more dairy farms in the Chicago milkshed by a sampling of no more than two hundred farms. The same sampling technique is employed to inspect pasteurization plants. There was evidence that neither the farms supplying Dean with milk nor Dean's pasteurization plants were necessarily inspected in the last "spot check" of the Chicago milkshed made two years before the present case was tried.

From what this record shows, and from what it fails to show, I do not think that either of the alternatives suggested by the Court would assure the people of Madison as pure a supply of milk as they receive under their own ordinance. On this record I would uphold the Madison law. At the very least, however, I would not invalidate it without giving the parties a chance to present evidence and get findings on the ultimate issues the Court thinks crucial—namely, the relative merits of the Madison ordinance and the alternatives suggested by the Court today.

NATIONAL LABOR RELATIONS BOARD *v.* GULLETT GIN CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 122. Argued November 29, 1950.—Decided January 15, 1951.

Under § 10 (c) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, the Board did not exceed its power or abuse its discretion in refusing to deduct sums paid to employees as unemployment compensation by a state agency when the Board found that they were discharged in violation of the Act and ordered their reinstatement with back pay. Pp. 362–366.

(a) Since no consideration is given to collateral losses in ordering reimbursement of wrongfully discharged employees for their lost earnings, no consideration need be given to collateral benefits which they may have received. P. 364.

(b) Unemployment compensation payments made by a state out of funds derived from taxation are collateral benefits, since they were not made to discharge any liability or obligation of the employer but to carry out a policy of social betterment for the benefit of the entire state. Pp. 364–365.

(c) A different result is not required by the fact that, under the state law, the unemployment compensation payments incidentally affect adversely the employer's experience-rating record and prevent him from qualifying for a lower tax rate. P. 365.

(d) The conclusion here reached is supported by the fact that the Board had for many years been following the practice of disallowing deductions for collateral benefits such as unemployment compensation, and Congress did not require any change in that practice when it amended the National Labor Relations Act in 1947. Pp. 365–366.

179 F. 2d 499, reversed.

The case is stated in the opinion. The judgment below is *reversed,* p. 366.

A. Norman Somers argued the cause for petitioner. *Solicitor General Perlman, David P. Findling* and *Mozart G. Ratner* filed a brief for petitioner.

Conrad Meyer, III, argued the cause for respondent. With him on the brief was *Robert R. Rainold.*

MR. JUSTICE MINTON delivered the opinion of the Court.

The question presented here is whether the National Labor Relations Board must deduct from back-pay awards to discriminatorily discharged employees sums paid to them as unemployment compensation by a state agency.

The Board found that respondent Gullett Gin Company had discharged certain employees in violation of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. (Supp. III) §§ 141 *et seq.*, and ordered their reinstatement with back pay. Although the order provided for deduction of the employees' net earnings and willful losses of wages, if any, the Board refused to deduct certain payments made by the State of Louisiana as unemployment compensation. The Court of Appeals for the Fifth Circuit held such payments must be deducted, and modified the order accordingly. 179 F. 2d 499. We granted certiorari because of the importance of the question presented in the administration of the Act. 340 U. S. 806.

In issuing the challenged order the Board acted under § 10 (c) of the Act, 61 Stat. 147, 29 U. S. C. (Supp. III) § 160 (c), which provides that upon finding an unfair labor practice, the Board shall issue a cease and desist order requiring the guilty party "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . ."

To effectuate the policies of the Act the Board has broad but not unlimited discretion. *Republic Steel Corp.* v. *Labor Board,* 311 U. S. 7, 11. "[T]he power to command affirmative action is remedial, not punitive." *Id.,* at 12. We must not, however, be more mindful of the limits of the Board's discretion than we are of our own

limited function in reviewing Board orders. In an opinion dealing with a related matter the Court cautioned:

> "There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194.

In effectuating the policies of the Act, the Board clearly may award back pay to discriminatorily discharged employees. This means that employees may be reimbursed for earnings lost by reason of the wrongful discharge, from which should be deducted net earnings of employees from other employment during the back-pay period, *Republic Steel* case, *supra,* and also sums which they failed without excuse to earn, *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 197–198.

In *Marshall Field & Co.* v. *Labor Board,* 318 U. S. 253, this Court held that the benefits received by employees under a state unemployment compensation act were plainly not earnings which, under the Board's order in that case, could be deducted from the back pay awarded. The question of whether the Board had the power to

make such an order was not reached for the reason that the question had not been presented to the Board as required by § 10 (e) of the National Labor Relations Act, 49 Stat. 454, 29 U. S. C. § 160 (e). The question is here on this record, and we hold that the Board had the power to enter the order in this case refusing to deduct the unemployment compensation payments from back pay, and that in so doing the Board did not abuse its discretion.

Such action may reasonably be considered to effectuate the policies of the Act. To decline to deduct state unemployment compensation benefits in computing back pay is not to make the employees more than whole, as contended by respondent. Since no consideration has been given or should be given to collateral *losses* in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received.

But respondent argues that the benefits paid from the Louisiana Unemployment Compensation Fund were not collateral but direct benefits. With this theory we are unable to agree. Payments of unemployment compensation were not made to the employees by respondent but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state. See Dart's La. Gen. Stat., 1939, § 4434.1; *In re Cassaretakis,* 289 N. Y. 119, 126, 44 N. E. 2d 391, 394–395, aff'd *sub nom. Standard Dredging Co.* v. *Murphy,* 319 U. S. 306; *Unemployment Compensation Commission* v. *Collins,* 182 Va. 426, 438, 29 S. E. 2d 388, 393. We think these facts plainly show the benefits to be collateral. It is thus apparent from what we have already said that failure to take them into account in order-

ing back pay does not make the employees more than "whole" as that phrase has been understood and applied.[1]

Finally, respondent urges that the Board's order imposes upon it a penalty which is beyond the remedial powers of the Board because, to the extent that unemployment compensation benefits were paid to its discharged employees, operation of the experience-rating record formula under the Louisiana Act, Dart's La. Gen. Stat., 1939 (Cum. Supp. 1949) §§ 4434.1 *et seq.,* will prevent respondent from qualifying for a lower tax rate. We doubt that the validity of a back-pay order ought to hinge on the myriad provisions of state unemployment compensation laws. Cf. *Labor Board* v. *Hearst Publications,* 322 U. S. 111, 122–124. However, even if the Louisiana law has the consequence stated by respondent, which we assume *arguendo,* this consequence does not take the order without the discretion of the Board to enter. We deem the described injury to be merely an incidental effect of an order which in other respects effectuates the policies of the federal Act. It should be emphasized that any failure of respondent to qualify for a lower tax rate would not be primarily the result of federal but of state law, designed to effectuate a public policy with which it is not the Board's function to concern itself. *Republic Steel* case, *supra.*

Our holding is supported by the fact that when Congress amended the National Labor Relations Act in 1947, the Board had for many years been following the practice of disallowing deduction for collateral benefits such as unemployment compensation.[2] During this period the

[1] We note that some states permit recoupment of benefits paid during a period for which the National Labor Relations Board subsequently awards back pay. *E. g., In re Skutnik,* 268 App. Div. 357, 51 N. Y. S. 2d 711. Recoupment in such situations is a matter between the State and the employees.

[2] 3 N. L. R. B. Ann. Rep. 202, n. 11 (1938); 4 N. L. R. B. Ann. Rep. 100, n. 25 (1939); 11 N. L. R. B. Ann. Rep. 50 (1946).

Board's practice had been challenged before the courts in only two cases, and in both the Board's position was sustained. *Labor Board* v. *Marshall Field & Co.*, 129 F. 2d 169; *Labor Board* v. *Brashear Freight Lines*, 127 F. 2d 198. In the course of adopting the 1947 amendments Congress considered in great detail the provisions of the earlier legislation as they had been applied by the Board.[3] Under these circumstances it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the courts. See *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 114–115; *Brewster* v. *Gage*, 280 U. S. 327, 337; *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U. S. 294, 313–315.

The judgment is reversed and the case remanded for enforcement of the Board's order without the objectionable modification.

It is so ordered.

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

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[3] Ample evidence of this may be found in the Committee reports accompanying the bills which were the basis of the comprehensive 1947 Act. See H. R. Rep. No. 245, 80th Cong., 1st Sess.; S. Rep. No. 105, 80th Cong., 1st Sess.

ROGERS *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 20. Argued November 7, 1950.—Decided February 26, 1951.

Under subpoena, petitioner appeared before a federal grand jury and testified without objection that she had been Treasurer of the Communist Party of Denver, had been in possession of its records, and had turned them over to another person; but she refused to identify the person to whom she had delivered the records, giving as her only reason her wish not to subject another person to what she was going through. She was committed to the custody of the marshal until the next day and advised of her right to counsel. On the next day, her counsel informed the court that, on his advice, petitioner would answer the question to purge herself of contempt. Upon her reappearance before the grand jury, she again refused to answer the question. Brought back into court and charged with contempt, she then, for the first time, asserted her privilege against self-incrimination. Her claim of privilege was overruled and she was convicted of contempt. *Held:* The conviction is sustained. Pp. 368–375.

(a) Since the privilege against self-incrimination is solely for the benefit of the witness, petitioner's original refusal to answer could not be justified by a desire to protect another from punishment, much less to protect another from interrogation by a grand jury. P. 371.

(b) Books and records kept in a representative, rather than a personal, capacity cannot be the subject of the personal privilege against self-incrimination, even though production of them might tend to incriminate their keeper personally. Pp. 371–372.

(c) Having freely answered self-incriminating questions relating to her connection with the Communist Party, petitioner could not refuse to answer further questions which would not subject her to a real danger of further incrimination. Pp. 372–375.

(d) Questions relating to activities in the Communist Party are incriminating, both as to a violation of the Smith Act and as to a conspiracy to violate that Act, *Blau* v. *United States*, 340 U. S. 159. P. 375.

179 F. 2d 559, affirmed.

910798 O—51——30

In a federal district court, petitioner was convicted of contempt for refusal to answer questions asked by a federal grand jury. The Court of Appeals affirmed. 179 F. 2d 559. This Court granted certiorari. 339 U. S. 956. *Affirmed,* p. 375.

Samuel D. Menin argued the cause and filed a brief for petitioner.

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Assistant Attorney General McInerney, John F. Davis* and *J. F. Bishop.*

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

This case arises out of an investigation by the regularly convened grand jury of the United States District Court for the District of Colorado. The books and records of the Communist Party of Denver were sought as necessary to that inquiry and were the subject of questioning by the grand jury. In September, 1948, petitioner, in response to a subpoena, appeared before the grand jury. She testified that she held the position of Treasurer of the Communist Party of Denver until January, 1948, and that, by virtue of her office, she had been in possession of membership lists and dues records of the Party. Petitioner denied having possession of the records and testified that she had turned them over to another. But she refused to identify the person to whom she had given the Party's books, stating to the court as her only reason: "I don't feel that I should subject a person or persons to the same thing that I'm going through." [1] The court thereupon committed petitioner to the custody of the marshal

[1] Transcript, p. 39 (September 21, 1948):

"The Court: Now, what is the question?

"Mr. Goldschein: Who has the books and records of the Communist

until ten o'clock the next morning, expressly advising petitioner of her right to consult with counsel.[2]

The next day, counsel for petitioner informed the court that he had read the transcript of the prior day's proceedings and that, upon his advice, petitioner would answer the questions to purge herself of contempt.[3] However,

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Party of Denver now. Who did Mrs. Rogers give those books up to as she says she gave them up in January of this year.

"The Court: Do you care to answer that question, madam?

"Mrs. Rogers: I do not.

"The Court: What?

"Mrs. Rogers: I do not, and that's what I told them.

"The Court: Why won't you answer?

"Mrs. Rogers: I don't feel that I should subject a person or persons to the same thing that I'm going through.

"The Court: It is the order or finding of the Court that you should answer those questions. Now, will you do that?

"Mrs. Rogers: No."

[2] Transcript, p. 40 (September 21, 1948):

"The Court: You will be detained until tomorrow morning until ten o'clock. In the meantime, you may consult counsel and have a hearing tomorrow morning at ten o'clock on your reasons for refusal to answer questions.

"Mrs. Rogers: I can consult counsel between now and then?

"The Court: Yes, but you will be in the custody of the marshal all the time. Get your counsel and bring him over here if you want to, but you will have to be in the custody of the marshal and spend the night in jail, I'm afraid."

[3] Transcript, pp. 43, 49 (September 22, 1948):

"Mr. Menin [After entering his appearance on behalf of petitioner]: In regard to the witness Rogers, I've read the transcript of what has transpired in court here yesterday; and I believe that upon my advice she will answer questions which were propounded to her.

. . . . . .

"Mr. Menin: As to the witness Jane Rogers, I think she will purge herself of her contempt by answering the questions.

"The Court: In the case of the witness Rogers, then, the order of the Court is that she return to the Grand Jury room and if she purges herself of contempt, then upon bringing the matter back to the Court, she will be discharged. In the meantime, she will remain in custody."

upon reappearing before the grand jury, petitioner again refused to answer the question. The following day she was again brought into court. Called before the district judge immediately after he had heard oral argument concerning the privilege against self-incrimination in another case, petitioner repeated her refusal to answer the question, asserting this time the privilege against self-incrimination.[4] After ruling that her refusal was not privileged, the district judge imposed a sentence of four months for contempt. The Court of Appeals for the Tenth Circuit affirmed, 179 F. 2d 559 (1950), and we granted certiorari, 339 U. S. 956 (1950).

If petitioner desired the protection of the privilege against self-incrimination, she was required to claim it.

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[4] "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U. S. Const., Amend. V. The proceedings leading to the claim of privilege by petitioner appear at Transcript, pp. 77–78 (September 23, 1948):

"The Court: . . . Madam, do you still persist in not answering these questions?

"Mrs. Rogers: Well, on the basis of Mr. Menin's statements this morning—

"The Court: Will you please answer the question yes or no?

"Mrs. Rogers: Well, I think that's rather undemocratic[.] I'm a very honest person. Would you mind letting me consider—

"The Court: Make any statement you wish.

"Mrs. Rogers: Well, as I said before, I'm a very honest person and I'm not acquainted with the tricks of legal procedure, but I understand from the reading of these cases this morning that I am—and I do have a right to refuse to answer these questions, on the basis that they would tend to incriminate me, and you read it yourself, that I have a right to decide that.

"The Court: You have not the right to say.

"Mrs. Rogers: According to what you read, I do. I stand on that.

"The Court: All right. If you will make no changes, it is the judgment and sentence of the court you be confined to the custody of the Attorney General for four months. Call the next case."

United States v. *Monia,* 317 U. S. 424, 427 (1943). The privilege "is deemed waived unless invoked." *United States* v. *Murdock,* 284 U. S. 141, 148 (1931).[5] Furthermore, the decisions of this Court are explicit in holding that the privilege against self-incrimination "is solely for the benefit of the witness," [6] and "is purely a personal privilege of the witness." [7] Petitioner expressly placed her original declination to answer on an untenable ground, since a refusal to answer cannot be justified by a desire to protect others from punishment,[8] much less to protect another from interrogation by a grand jury. Petitioner's claim of the privilege against self-incrimination was pure afterthought. Although the claim was made at the time of her second refusal to answer in the presence of the court, it came only after she had voluntarily testified to her status as an officer of the Communist Party of Denver. To uphold a claim of privilege in this case would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony.

The privilege against self-incrimination, even if claimed at the time the question as to the name of the person to whom petitioner turned over the Party records was asked, would not justify her refusal to answer. As a preliminary matter, we note that petitioner had no privilege with respect to the books of the Party, whether it

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[5] Citing *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 113 (1927). See *Smith* v. *United States,* 337 U. S. 137, 147 (1949); Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 1, 198–199 (1930).

[6] *United States* v. *Murdock,* 284 U. S. 141, 148 (1931).

[7] *Hale* v. *Henkel,* 201 U. S. 43, 69 (1906). *McAlister* v. *Henkel,* 201 U. S. 90, 91 (1906).

[8] *Brown* v. *Walker,* 161 U. S. 591, 609 (1896); *Hale* v. *Henkel,* 201 U. S. 43, 69–70 (1906).

be a corporation[9] or an unincorporated association.[10] Books and records kept "in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate [their keeper] personally." *United States* v. *White,* 322 U. S. 694, 699 (1944).[11] Since petitioner's claim of privilege cannot be asserted in relation to the books and records sought by the grand jury, the only claim for reversal of her conviction rests on the ground that mere disclosure of the name of the recipient of the books tends to incriminate.

In *Patricia Blau* v. *United States,* 340 U. S. 159 (1950), we held that questions as to connections with the Communist Party are subject to the privilege against self-incrimination as calling for disclosure of facts tending to criminate under the Smith Act.[12] But petitioner's conviction stands on an entirely different footing, for she had freely described her membership, activities and office in the Party. Since the privilege against self-incrimination

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[9] *Wilson* v. *United States,* 221 U. S. 361 (1911); *Wheeler* v. *United States,* 226 U. S. 478 (1913); *Grant* v. *United States,* 227 U. S. 74 (1913); *Essgee Co.* v. *United States,* 262 U. S. 151 (1923).

[10] *Brown* v. *United States,* 276 U. S. 134 (1928); *United States* v. *White,* 322 U. S. 694 (1944). Cf. *United States* v. *Fleischman,* 339 U. S. 349, 358 (1950).

[11] See also the cases cited in notes 7 and 8, *supra.* The privilege does not attach to the books of an organization, whether or not the books in question are "required records" of the type considered in *Shapiro* v. *United States,* 335 U. S. 1 (1948).

[12] Membership in the Communist Party was not, of itself, a crime at the time the questions in this case were asked. And Congress has since expressly provided, in the Internal Security Act of 1950, Act of Sept. 23, 1950, 64 Stat. 987, 992, § 4 (f), that "neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." We, of course, express no opinion as to the implications of this legislation upon the issues presented by these cases.

presupposes a real danger of legal detriment arising from the disclosure, petitioner cannot invoke the privilege where response to the specific question in issue here would not further incriminate her. Disclosure of a fact waives the privilege as to details. As this Court stated in *Brown* v. *Walker,* 161 U. S. 591, 597 (1896):

> "Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure." [13]

Following this rule, federal courts have uniformly held that, where criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details.[14] The decisions of this Court in *Arndstein* v. *McCarthy,* 254 U. S. 71 (1920), and *McCarthy* v. *Arndstein,* 262 U. S. 355 (1923), further support the conviction in this case for, in sustaining the privilege on each appeal, the Court stressed the absence of any previous "admission of guilt *or incriminating facts,*" [15] and relied particularly upon *Brown* v. *Walker, supra,* and *Foster* v. *People,* 18 Mich. 266 (1869). The holding of the Michigan court is entirely apposite here:

> "[W]here a witness has voluntarily answered as to materially criminating facts, it is held with uniformity

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[13] Quoted with approval in *Powers* v. *United States,* 223 U. S. 303, 314 (1912).

[14] *United States* v. *St. Pierre,* 132 F. 2d 837 (C. A. 2d Cir., 1942); *Buckeye Powder Co.* v. *Hazard Powder Co.,* 205 F. 827, 829 (D. C. Conn., 1913).

[15] 262 U. S. at 359 (emphasis supplied). The *Arndstein* appeals, like the present case, arose out of an involuntary examination. The Court reserved, as we do here, the problems arising out of a possible abuse of the privilege against self-incrimination in adversary proceedings. Compare state court decisions collected in 147 A. L. R. 255 (1943).

> that he cannot then stop short and refuse further explanation, but must disclose fully what he has attempted to relate." 18 Mich. at 276.[16]

Requiring full disclosure of details after a witness freely testifies as to a criminating fact does not rest upon a further "waiver" of the privilege against self-incrimination. Admittedly, petitioner had already "waived" her privilege of silence when she freely answered criminating questions relating to her connection with the Communist Party. But when petitioner was asked to furnish the name of the person to whom she turned over Party records, the court was required to determine, as it must whenever the privilege is claimed, whether the question presented a reasonable danger of further crimination in light of all the circumstances, including any previous disclosures. As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a "real danger" of further crimination.[17] After petitioner's admission that she held the office of Treasurer of the Communist Party of Denver, disclosure of acquaintance with her successor presents no more than

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[16] VIII Wigmore, Evidence (1940), § 2276, quotes from *Foster* v. *People*, 18 Mich. 266 (1869), as authoritative and summarizes the law as follows:

"The case of the *ordinary witness* can hardly present any doubt. He may waive his privilege; this is conceded. He waives it by exercising his option of answering; this is conceded. Thus the only inquiry can be whether, by *answering as to fact X, he waived it for fact Y*. If the two are related facts, parts of a whole fact forming a single relevant topic, then his waiver as to a part is a waiver as to the remaining parts; because the privilege exists for the sake of the criminating fact as a whole." (Emphasis in original.)

[17] *Heike* v. *United States*, 227 U. S. 131, 144 (1913). *Brown* v. *Walker*, 161 U. S. 591, 600 (1896).

a "mere imaginary possibility" [18] of increasing the danger of prosecution.[19]

Petitioner's contention in the Court of Appeals and in this Court has been that, conceding her prior voluntary crimination as to one element of proof of a Smith Act violation, disclosure of the name of the recipient of the Party records would tend to incriminate as to the different crime of conspiracy to violate the Smith Act. Our opinion in *Patricia Blau* v. *United States, supra,* at 161, explicitly rejects petitioner's argument for reversal here in its holding that questions relating to activities in the Communist Party are criminating both as to "violation of (or conspiracy to violate) the Smith Act." Of course, at least two persons are required to constitute a conspiracy, but the identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown.[20]

Affirmed.

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

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

Some people are hostile to the Fifth Amendment's provision unequivocally commanding that no United States

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[18] *Mason* v. *United States,* 244 U. S. 362, 366 (1917).

[19] *United States* v. *St. Pierre,* 132 F. 2d 837 (C. A. 2d Cir., 1942), presented a closer question since the "detail" which St. Pierre was required to divulge would identify a person without whose testimony St. Pierre could not have been convicted of a crime. We, of course, do not here pass upon the precise factual question there decided by the Court of Appeals.

[20] *Browne* v. *United States,* 145 F. 1, 13 (C. A. 2d Cir., 1905); *Donegan* v. *United States,* 287 F. 641, 648 (C. A. 2d Cir., 1922); *Pomerantz* v. *United States,* 51 F. 2d 911, 913 (C. A. 3d Cir., 1931);

official shall compel a person to be a witness against himself. They consider the provision as an outmoded relic of past fears generated by ancient inquisitorial practices that could not possibly happen here. For this reason the privilege to be silent is sometimes accepted as being more or less of a constitutional nuisance which the courts should abate whenever and however possible. Such an end could be achieved by two obvious judicial techniques: (1) narrow construction of the scope of the privilege; (2) broad construction of the doctrine of "waiver." Any attempt to use the first of these methods, however, runs afoul of approximately 150 years of precedent. See *Patricia Blau* v. *United States,* 340 U. S. 159, and cases there cited. This Court has almost always construed the Amendment broadly [1] on the view that compelling a person to convict himself of crime is "contrary to the principles of a free government" and "abhorrent to the instincts of an American"; that while such a coercive practice "may suit the purposes of despotic power . . . it cannot abide the pure atmosphere of political liberty and personal freedom." *Boyd* v. *United States,* 116 U. S. 616, 632, but cf. *United States* v. *Murdock,* 284 U. S. 141.

The doctrine of waiver seems to be a more palatable but equally effective device for whittling away the protection afforded by the privilege, although I think today's application of that doctrine cannot be supported by our past decisions. Of course, it has never been doubted that

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Grove v. *United States,* 3 F. 2d 965, 967 (C. A. 4th Cir., 1925); *McDonald* v. *United States,* 9 F. 2d 506, 507 (C. A. 8th Cir., 1925); *Rosenthal* v. *United States,* 45 F. 2d 1000, 1003 (C. A. 8th Cir., 1930); *Didenti* v. *United States,* 44 F. 2d 537, 538 (C. A. 9th Cir., 1930). See also *Feder* v. *United States,* 257 F. 694, 697 (C. A. 2d Cir., 1919); *Worthington* v. *United States,* 64 F. 2d 936, 939 (C. A. 7th Cir., 1933).

[1] "This provision [against self-incrimination] must have a broad construction in favor of the right which it was intended to secure." *Counselman* v. *Hitchcock,* 142 U. S. 547, 562.

a constitutional right could be *intentionally* relinquished and that such an intention might be found from a "course of conduct." *Shepard* v. *Barron,* 194 U. S. 553, 568. But we have said that intention to waive the privilege against self-incrimination is not "lightly to be inferred" and that vague and uncertain evidence will not support a finding of waiver. *Smith* v. *United States,* 337 U. S. 137, 150, relying on *Johnson* v. *Zerbst,* 304 U. S. 458, 464, and cases there cited. In the case of this petitioner, there is no evidence that she intended to give up her privilege of silence concerning the persons in possession of the Communist Party records. To the contrary, the record—as set out in the Court's opinion—shows she intended to avoid answering the question on whatever ground might be available and asserted the privilege against self-incrimination at the first moment she became aware of its existence.[2] This fact and the cases which make it crucial are ignored in the decision today.

Apparently, the Court's holding is that at some uncertain point in petitioner's testimony, regardless of her intention, admission of associations with the Communist Party automatically effected a "waiver" of her constitutional protection as to all related questions.[3] To adopt such a rule for the privilege against self-incrimination,

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[2] While it has been held that failure specifically to invoke the privilege prior to final judgment constituted a waiver, *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 113; *United States* v. *Murdock,* 284 U. S. 141, 148, such cases are not controlling here. Before final judgment was entered against this petitioner, she asserted the privilege not to incriminate herself under federal law, and was sentenced for standing on this ground. See Appendix following this opinion, p. 381.

[3] The Court's reliance on *Brown* v. *Walker,* 161 U. S. 591, as indicating that the privilege can be waived unintentionally is misplaced. For in the *Brown* case, it was said that "if the witness himself *elects* to waive his privilege, . . . he is not permitted to stop, but must go on and make a full disclosure." (Emphasis supplied.) *Id.,* at 597.

when other constitutional safeguards must be knowingly waived, relegates the Fifth Amendment's privilege to a second-rate position. Moreover, today's holding creates this dilemma for witnesses: On the one hand, they risk imprisonment for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question. The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it.[4] In this very case, it never occurred to the trial judge that petitioner waived anything.[5] And even if voluntary testimony can under some circumstances work a waiver, it did not do so here because what petitioner stated to the grand jury "standing alone did not amount to an admission of guilt or furnish clear proof of crime . . . ." *Arndstein* v. *McCarthy,* 254 U. S. 71, 72.[6]

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[4] The practical difficulties inherent in the rule announced by the Court are made apparent by a reading of the opinions in *United States* v. *St. Pierre,* 132 F. 2d 837.

[5] See note 11 and accompanying text, *infra.*

[6] Today's opinion seeks to derive a looser test from certain negative language in the subsequent case of *McCarthy* v. *Arndstein,* 262 U. S. 355, 359, where it was said that if "the previous disclosure by an ordinary witness is not an actual admission of guilt or incriminating facts, he is not deprived of the privilege of stopping short . . . ." In that very case, however, the Court quoted with approval the minimum rule it had previously announced. *Id.,* at 358. Moreover, in stating the reason why Arndstein had *not* waived his privilege, the Court said: "And since we find that none of the answers which had been voluntarily given by Arndstein, either by way of denials or partial disclosures, amounted to an admission or showing of guilt, we are of opinion that he was entitled to decline to answer further questions when so to do might tend to incriminate him." *Id.,* at 359–360.

It is also suggested that the Michigan case of *Foster* v. *People,* 18 Mich. 266, was adopted as the federal rule by this Court in *McCarthy* v. *Arndstein, supra,* at 359. Although the *Foster* case was there cited, no acceptance was intended of the language in the Michigan

Furthermore, unlike the Court, I believe that the question which petitioner refused to answer did call for additional incriminating information. She was asked the names of the persons to whom she had turned over the Communist Party books and records. Her answer would not only have been relevant in any future prosecution of petitioner for violation of the Smith Act but also her conviction might depend on testimony of the witnesses she was thus asked to identify. For these reasons the question sought a disclosure which would have been incriminating to the highest degree. Certainly no one can say that the answer "[could not] possibly be used as a basis for, or in aid of, a criminal prosecution against the witness . . . ." *Brown* v. *Walker,* 161 U. S. 591, 597.[7]

The records in this and in the companion cases [8] reveal a flagrant disregard of the constitutional privileges of petitioner and others called before the grand jury. The Special United States Attorney in charge made unwar-

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decision which a majority quotes today. That the Court would not have accepted this quotation is shown by the fact that it placed reliance on an English case, *Regina* v. *Garbett,* 2 C. & K. 474, 495, which was summarized as holding the following: "[I]t makes no difference in the right of a witness to protection from incriminating himself that he has already answered in part, he being 'entitled to claim the privilege at any stage of the inquiry.'" *McCarthy* v. *Arndstein, supra,* at 359.

[7] I do not understand the Court's holding to rely on the statement in the opinion that "petitioner had no privilege with respect to the books of the Party . . . ." This statement of course is not relevant in the present case where there is no issue of compelling petitioner to turn over unprivileged documents in her possession. But if the Court does intend to suggest that a witness is not privileged in refusing to answer incriminating *questions* merely because those questions relate to unprivileged documents, then I must point out that the decision in this case is entirely inconsistent with our recent unanimous decision in *Patricia Blau* v. *United States,* 340 U. S. 159, note 1.

[8] *Patricia Blau* v. *United States, supra; Irving Blau* v. *United States,* 340 U. S. 332.

ranted assurances that might well have misled witnesses unable to match legal wits with him into making self-incriminating admissions.[9] Although petitioner had been allowed on a previous day to consult with counsel, at the time she was brought before the District Court for final consideration of her case the judge arbitrarily refused to permit counsel to speak in her behalf, summarily commanding the attorney to sit down, and almost immediately thereafter sentenced petitioner to four months' imprisonment.[10] In convicting her, the district judge neither held nor intimated that the privilege against self-incrimination had been waived.[11] His erroneous belief was that intimate association with the Communist Party was not an incriminating fact. Therefore, although the Court now describes petitioner's claim of privilege as

[9] Although the Court of Appeals upheld the convictions of most of the witnesses called before the grand jury, it made the following comment concerning the conduct of the Special United States Attorney: "[His] stock statement to the witness that she was not under investigation and that the grand jury was not proceeding against her, was not warranted. It was not for him to say what the scope of the grand jury's investigation was; neither was his statement a substitute for her constitutional protection." *Rogers* v. *United States,* 179 F. 2d 559, 563. Other "irregularities" in the proceedings below were also pointed out. *Id.,* at 561. Conduct of the same prosecutor during a similar grand jury investigation in Los Angeles was criticized by judges of the Ninth Circuit in *Alexander* v. *United States,* 181 F. 2d 480. There it was said that the government attorney "pursued the same tactics tending to put the witness off his guard . . . ." *Id.,* at 482.

[10] The transcript of this portion of the proceedings below is set out in the Appendix, *post,* p. 381.

[11] The district judge's sole reference to "waiver" was not made in the case of petitioner. In addressing one of the other witnesses, however, the judge said, "Of course, anything you testify to, unless you *signed* a waiver, can't be used against you in any trial hereafter. That's the law, isn't it?" (Emphasis supplied.) The conviction of this witness, Nancy Wertheimer, was the only one reversed by the Court of Appeals. *Rogers* v. *United States,* 179 F. 2d 559.

an "afterthought," it seems to me that the real "afterthought" in this case is the affirmance of the judgment below on a "waiver" or equivalent theory. More important, however, I believe that today's expansion of the "waiver" doctrine improperly limits one of the Fifth Amendment's great safeguards.[12]

I would reverse the judgment of conviction.

APPENDIX TO OPINION OF MR. JUSTICE BLACK.

The following is the full transcript of proceedings at the time the judgment now under review was entered:

"The Court: . . . What is the next case? Can we dispose of these ladies now?

"Mr. Goldschein [Special United States Attorney]: Mrs. Jane Rogers.

"The Court: Is she here?

"Mr. Goldschein: She is here, yes, sir. Now, may it please Your Honor—

"The Court: Step over here, madam. What is the status of her case?

"Mr. Goldschein: Mrs. Rogers refuses to answer the questions propounded to her in the grand jury room. She was brought back on yesterday, but says that she will answer one question but will not answer any others, and was advised that it would be necessary for her to answer all questions propounded except those which would incriminate her for the violation of a federal offense, and she says she won't answer any.

"The Court: Is that your position, madam?

"Mr. Menin [counsel for petitioner]: I think there has been a misunderstanding.

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[12] For a description of the abuses which led to the incorporation of the privilege against self-incrimination in the Bill of Rights, see Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va. L. Rev. 763.

"The Court: Just a minute. Will you please be seated, Mr. Menin? Please be seated.

"Mr. Menin: Well, I represent this lady.

"The Court: Just a moment. Please be seated.

"Mr. Menin: Very well.

"The Court: I'll hear you in due course[.] Madam, do you still persist in not answering these questions?

"Mrs. Rogers: Well, on the basis of Mr. Menin's statements this morning—

"The Court: Will you please answer the question yes or no?

"Mrs. Rogers: Well, I think that's rather undemocratic[.] I'm a very honest person. Would you mind letting me consider—

"The Court: Make any statement you wish.

"Mrs. Rogers: Well, as I said before, I'm a very honest person and I'm not acquainted with the tricks of legal procedure, but I understand from the reading of these cases this morning that I am—and I do have a right to refuse to answer these questions, on the basis that they would tend to incriminate me, and you read it yourself, that I have a right to decide that.

"The Court: You have not the right to say.

"Mrs. Rogers: According to what you read, I do. I stand on that.

"The Court: All right. If you will make no changes, it is the judgment and sentence of the court you be confined to the custody of the Attorney General for four months. Call the next case." Transcript of Record, pp. 76–78 (September 23, 1948).

Syllabus.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, ET AL. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD.

NO. 329. CERTIORARI TO THE SUPREME COURT OF WISCONSIN.*

Argued January 9–10, 1951.—Decided February 26, 1951.

The Wisconsin Public Utility Anti-Strike Law, which makes it a misdemeanor for any group of public utility employees to engage in a strike which would cause an interruption of an essential public-utility service, as applied in these cases, conflicts with the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, and is invalid under the Supremacy Clause of the Federal Constitution. Pp. 385–399.

1. By the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, safeguarding the right of employees to strike, Congress occupied this field and closed it to state regulation; and any concurrent state regulation of peaceful strikes for higher wages is invalid. *Automobile Workers* v. *O'Brien,* 339 U. S. 454. Pp. 389–390.

2. The Federal Act applies to a privately-owned public utility whose business and activities are carried on wholly within a single state. *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197. Pp. 391–393.

3. The result finds further support in the 1947 amendments, whereby Congress provided special procedures to deal with strikes which might create national emergencies. Pp. 393–396.

4. The questions of policy raised here are for legislative determination and have been resolved by Congress adversely to respondents. This Court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and declare invalid state regulation which impinges on that legislation. Pp. 397–398.

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*Together with No. 438, *United Gas, Coke & Chemical Workers of America, C. I. O., et al.* v. *Wisconsin Employment Relations Board,* also on certiorari to the same court.

910798 O—51——31

5. As applied in this case, the Wisconsin Act is in direct conflict with the Federal Act and therefore is invalid under the Supremacy Clause of the Federal Constitution. Pp. 398–399.

257 Wis. 43, 42 N. W. 2d 471; 258 Wis. 1, 44 N. W. 2d 547, reversed.

The cases are stated in the second and third paragraphs of the opinion. The judgments below are *reversed,* p. 399.

David Previant argued the cause and filed a brief for petitioners in No. 329.

Arthur J. Goldberg argued the cause for petitioners in No. 438. With him on the brief were *Thomas E. Harris* and *Max Raskin.*

Malcolm L. Riley and *Beatrice Lampert,* Assistant Attorneys General of Wisconsin, argued the cause for respondent. With *Mr. Riley* on the brief were *Vernon W. Thomson,* Attorney General, *Thomas E. Fairchild,* then Attorney General, and *Stewart G. Honeck,* Deputy Attorney General.

Briefs of *amici curiae* urging reversal were filed by *Solicitor General Perlman, David P. Findling* and *Mozart G. Ratner* for the National Labor Relations Board; and *J. Albert Woll, James A. Glenn* and *Herbert S. Thatcher* for the American Federation of Labor.

Briefs of *amici curiae* urging affirmance were filed by *Harold R. Fatzer,* Attorney General, for the State of Kansas; *Clarence S. Beck,* Attorney General, and *Bert L. Overcash,* Assistant Attorney General, for the State of Nebraska; *Theodore D. Parsons,* Attorney General, and *Benjamin C. Van Tine* for the State of New Jersey; and *Charles J. Margiotti,* then Attorney General, and *M. Louise Rutherford,* Deputy Attorney General, for the State of Pennsylvania.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

In these cases, the constitutionality of labor legislation of the State of Wisconsin known as the Public Utility Anti-Strike Law,[1] has been drawn in question.

Petitioners in No. 329 are the union and its officers who represent the employees of the Milwaukee Electric Railway and Transport Company of Milwaukee, Wisconsin, for collective-bargaining purposes.[2] For many years, the transit workers entered into collective-bargaining agreements with the transit company without resorting to strike. In 1948, however, the collective agreement was terminated when the parties were unable to agree on wages, hours and working conditions and the transit workers' union called a strike to enforce union demands. The respondent Wisconsin Employment Relations Board secured immediately an *ex parte* order from a State Circuit Court restraining the strike and, in compliance with that order, the union postponed its strike. Thereafter, the same Circuit Court entered a judgment under which petitioners are "perpetually restrained and enjoined from calling a strike . . . which would cause an interruption of the passenger service of the [transit company]." The Wisconsin Supreme Court affirmed the judgment, 257 Wis. 43, 42 N. W. 2d 471 (1950), and we granted certiorari, 340 U. S. 874 (1950), to review the important questions decided below.

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[1] Wis. Stat., 1949, §§ 111.50 *et seq.*

[2] The National Labor Relations Board has exercised jurisdiction over the transit company and its employees in conducting a so-called union shop election pursuant to § 9 (e) (1) of the Labor Management Relations Act of 1947, 29 U. S. C. (Supp. III) § 159 (e) (1). The National Labor Relations Board is presently investigating a charge filed by the transit workers' union in respect to an alleged unfair labor practice said to have been committed in respect to the controversy out of which this case arose.

Petitioners in No. 438 are the union and its officers who represent employees of the Milwaukee Gas Light Company and its subsidiary, the Milwaukee Solvay Coke Company, both of Milwaukee, Wisconsin, pursuant to a certification of the National Labor Relations Board.[3] In 1949, the collective agreement between petitioners and the gas company was terminated and, upon failure of further bargaining and conciliation to resolve the dispute, a strike was called and the gas workers left their jobs. Respondent Wisconsin Employment Relations Board obtained forthwith an *ex parte* restraining order from a State Circuit Court requiring that petitioners "absolutely desist and refrain from calling a strike [or] going out on strike . . . which would cause an interruption of the service of the [gas company]" and ordering petitioners to "take immediate steps to notify all employes called out on strike to resume service forthwith." Although the strike was settled soon thereafter, the Circuit Court found that petitioners had not obeyed the restraining order and entered a judgment of contempt, imposing fines of $250 upon each petitioner. The Wisconsin Supreme Court affirmed that judgment, 258 Wis. 1, 44 N. W. 2d 547 (1950), and we granted certiorari, 340 U. S. 903 (1950), since this case raises the same substantial questions as those before the Court in No. 329.

The injunctions were issued in each case upon the complaint of the Wisconsin Employment Relations Board, charged by statute with the enforcement of the Public Utility Anti-Strike Law. That act vests in the state

[3] *Milwaukee Gas Light Co.*, 50 N. L. R. B. 809, as amended, 52 N. L. R. B. 1213 (1943). The N. L. R. B. has also conducted a union shop election under § 9 (e) (1) of the Federal Act, *supra*, note 2, in respect to the supervisory employees of the gas company. And a union complaint that the gas company committed an unfair labor practice in respect to the dispute out of which this proceeding arose has been filed with the N. L. R. B.

circuit courts jurisdiction to enjoin violations of the act, Wis. Stat., 1949, § 111.63, the substantive provision involved in these cases providing as follows:

> "It shall be unlawful for any group of employes of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employes when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employes acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor." Wis. Stat., 1949, § 111.62.[4]

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[4] Under Wis. Stat., 1949, § 111.64, the following is applicable to the above provision:

"Nothing in this subchapter shall be construed to require any individual employe to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employe to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employes of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employes, where such acts would cause an interruption of essential service."

We have before us, then, a statute aimed only at "concerted" activities of public utility employees.

This provision is part of a statutory pattern designed to become effective whenever collective bargaining results in an "impasse and stalemate" likely to cause interruption of the supply of an "essential public utility service," Wis. Stat., 1949, § 111.50, that service including water, heat, gas, electric power, public passenger transportation and communications. *Id.*, § 111.51. Whenever such an "impasse" occurs, the Wisconsin Employment Relations Board is empowered to appoint a conciliator to meet with the parties in an effort to settle the dispute. *Id.*, § 111.54. In the event of a failure of conciliation, the Board is directed to select arbitrators who shall "hear and determine" the dispute. *Id.*, § 111.55. The act establishes standards to govern the decision of the arbitrators, *id.*, §§ 111.57–111.58, and provides that the order of the arbitrators shall be final and binding upon the parties, *id.*, § 111.59, subject to judicial review, *id.*, § 111.60. In summary, the act substitutes arbitration upon order of the Board for collective bargaining whenever an impasse is reached in the bargaining process. And, to insure conformity with the statutory scheme, Wisconsin denies to utility employees the right to strike.

In upholding the constitutionality of the Public Utility Anti-Strike Act, the Wisconsin Supreme Court stressed the importance of utility service to the public welfare and the plenary power which a state is accustomed to exercise over such enterprises. Petitioners' claim that the Wisconsin law conflicts with federal legislation enacted under the Commerce Clause of the Constitution (Art. I, § 8) was overruled, as were petitioners' contentions that the Wisconsin Act violates the Due Process Clause of the Fourteenth Amendment and the Thirteenth Amendment. Respondents controvert each of these contentions and, apart from the questions of *res judicata* discussed in No. 302, decided this day, *post*, p. 411, raise no other grounds in support of the judgments below. We deal only with

the question of conflicting federal legislation as we have found that issue dispositive of both cases.

First. We have recently examined the extent to which Congress has regulated peaceful strikes for higher wages in industries affecting commerce. *Automobile Workers* v. *O'Brien,* 339 U. S. 454 (1950). We noted that Congress, in § 7 of the National Labor Relations Act of 1935,[5] as amended by the Labor Management Relations Act of 1947,[6] expressly safeguarded for employees in such industries the "right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection," [7] "e. g., to strike." [8] We also listed the qualifications and regulations which Congress itself has imposed upon its guarantee of the right to strike,

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[5] 49 Stat. 449, 29 U. S. C. § 151 *et seq.*

[6] 61 Stat. 136, 29 U. S. C. (Supp. III) § 141 *et seq.*

[7] Section 7 of both acts, 29 U. S. C. (Supp. III) § 157. See also §§ 2 (3) and 13, 29 U. S. C. (Supp. III) §§ 152 (3), 163; S. Rep. No. 573, 74th Cong., 1st Sess. 8–9 (1935); House Conf. Rep. No. 510, 80th Cong., 1st Sess. 38 (1947).

In the "Declaration of Policy" of the Labor Management Relations Act of 1947, Congress stated:

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce . . . ." 29 U. S. C. (Supp. III) § 141 (b).

The "Findings and Policies" of the National Labor Relations Act provides, *inter alia:*

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 49 Stat. 449, 29 U. S. C. (Supp. III) § 151.

[8] H. R. Rep. No. 245, 80th Cong., 1st Sess. 26 (1947).

including requirements that notice be given prior to any strike upon termination of a contract,[9] prohibitions on strikes for certain objectives declared unlawful by Congress,[10] and special procedures for certain strikes which might create national emergencies.[11] Upon review of these federal legislative provisions, we held, 339 U. S. at 457:

> "None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation. *Plankinton Packing Co.* v. *Wisconsin Board,* 338 U. S. 953 (1950); *La Crosse Telephone Corp.* v. *Wisconsin Board,* 336 U. S. 18 (1949); *Bethlehem Steel Co.* v. *New York Labor Board,* 330 U. S. 767 (1947); *Hill* v. *Florida,* 325 U. S. 538 (1945)." [12]

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[9] Section 8 (d) of the 1947 Act, 29 U. S. C. (Supp. III) § 158 (d). Petitioners in both cases had complied with all notice requirements before strike action was taken.

[10] Section 8 (b) (4) of the 1947 Act, 29 U. S. C. (Supp. III) § 158 (b) (4). See also §§ 10 (j) and 10 (l), 29 U. S. C. (Supp. III) §§ 160 (j), 160 (l), empowering and directing the N. L. R. B. to obtain injunctive relief against such unlawful strikes.

[11] Sections 206–210 of the 1947 Act, 29 U. S. C. (Supp. III) §§ 176–180.

[12] Our decision in *O'Brien, supra,* followed shortly after our reversal, *per curiam,* in *Plankinton Packing Co., supra,* where the Wisconsin Employment Relations Board had, with the approval of the State Supreme Court, ordered reinstatement of an employee discharged because of his failure to join a union, even though his employment was not covered by a union shop or similar contract. Section 7 of the Labor Management Relations Act not only guarantees the right of self-organization and the right to strike, but also guarantees to individual employees the "right to refrain from any or all of such activities," at least in the absence of a union shop or similar contractual arrangement applicable to the individual. Since the N. L. R. B. was given jurisdiction to enforce the rights of the employees, it was clear that the Federal Act had occupied this field to the

Second. The Wisconsin court sought to distinguish *Automobile Workers* v. *O'Brien, supra,* on the ground that the industry to which Michigan applied its notice and strike-vote provisions was a national manufacturing organization rather than a local public utility. Congress drew no such distinction but, instead, saw fit to regulate labor relations to the full extent of its constitutional power under the Commerce Clause, *Labor Board* v. *Fainblatt,* 306 U. S. 601, 607 (1939). Ever since the question was fully argued and decided in *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197 (1938), it has been clear that federal labor legislation, encompassing as it does all industries "affecting commerce," applies to a privately owned public utility whose business and activities are carried on wholly within a single state. The courts of appeal have uniformly held enterprises similar to and no more important to interstate commerce than the Milwaukee gas and transit companies before us in these cases subject to the provisions of the federal labor law.[13] No

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exclusion of state regulation. *Plankinton* and *O'Brien* both show that states may not regulate in respect to rights guaranteed by Congress in § 7.

[13] *E. g., Labor Board* v. *Baltimore Transit Co.,* 140 F. 2d 51, 53–54 (C. A. 4th Cir., 1944) (local transit company); *Pueblo Gas & Fuel Co.* v. *Labor Board,* 118 F. 2d 304, 305–306 (C. A. 10th Cir., 1941) (local gas company); *Labor Board* v. *Western Massachusetts Electric Co.,* 120 F. 2d 455, 456–457 (C. A. 1st Cir., 1941); *Labor Board* v. *Gulf Public Service Co.,* 116 F. 2d 852, 854 (C. A. 5th Cir., 1941); *Consumers Power Co.* v. *Labor Board,* 113 F. 2d 38, 39–41 (C. A. 6th Cir., 1940); *Southern Colorado Power Co.* v. *Labor Board,* 111 F. 2d 539, 541–543 (C. A. 10th Cir., 1940) (local power companies). See also *Virginia Elec. & Power Co.* v. *Labor Board,* 115 F. 2d 414, 415–416 (C. A. 4th Cir., 1940), upheld on the question of jurisdiction in *Labor Board* v. *Virginia Elec. & Power Co.,* 314 U. S. 469, 476 (1941).

The question of the applicability of the federal labor laws to local utilities is rarely litigated today. The Milwaukee Gas Light Com-

distinction between public utilities and national manufacturing organizations has been drawn in the administration of the Federal Act,[14] and, when separate treatment for public utilities was urged upon Congress in 1947, the suggested differentiation was expressly rejected.[15] Cre-

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pany, employer in No. 438, conceded before the N. L. R. B. that it is engaged in commerce within the meaning of the Federal Act. 50 N. L. R. B. 809, 810 (1943).

In 1947, it was proposed that the coverage of the Federal Act be limited so as to exclude utilities and other enterprises whose productive effort did not extend across state lines. H. R. 1095, 80th Cong., 1st Sess., § 2 (b). Congress did not adopt any such limitation on the application of the National Labor Relations Act, but, instead, amended that Act with full appreciation of the extent of its coverage. See H. R. Rep. No. 245, 80th Cong., 1st Sess. 40, 44 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 26 (1947); H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60 (1947).

[14] The N. L. R. B. has specifically rejected the suggestion that in granting the right to strike or in the other provisions of the Federal Act Congress intended that there be any distinction between public utility employees and those otherwise employed. *El Paso Electric Co.*, 13 N. L. R. B. 213, 240 (1939), enforced in *El Paso Electric Co.* v. *Labor Board*, 119 F. 2d 581 (C. A. 5th Cir., 1941).

In a recent statement of policy, the N. L. R. B. declared that, in view of the "important impact on commerce," jurisdiction will be exercised in "all cases" involving the type of public utilities before us in these cases. *Local Transit Lines*, 91 N. L. R. B. 623, 26 LRR Man. 1547 (1950).

[15] 93 Cong. Rec. 3835 (1947), statement of Senator Taft, quoted in note 21, *infra*. The Case Bill, H. R. 4908, 79th Cong., 2d Sess. (1946), passed by both Houses of Congress during the session immediately preceding the enactment of the Labor Management Relations Act of 1947, proposed special techniques, including a temporary denial of the right to strike, in connection with "labor dispute[s] affecting commerce, involving a public utility whose rates are fixed by some governmental agency." § 6 (a). In his veto message, the President criticized the special treatment accorded to public utilities, 92 Cong. Rec. 6674, 6676, (1946). Congress did not override the veto and, while such special treatment for public utilities was again proposed in 1947, note 16, *infra*, no such distinction is found in the 1947 legislation as finally enacted by Congress.

ation of a special classification for public utilities is for Congress, not for this Court.

Third. As we have noted, in 1947 Congress enacted special procedures to deal with strikes which might create national emergencies.[16] Respondents rely upon that action as showing a congressional intent to carve out a separate field of "emergency" labor disputes and, pointing to the fact that Congress acted only in respect to "national emergencies," respondents ask us to hold that Congress intended, by silence, to leave the states free to regulate "local emergency" disputes. However, the Wisconsin Act before us is not "emergency" legislation but a comprehensive code for the settlement of labor disputes between public-utility employers and employees.[17] Far from being limited to "local emergencies," the

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[16] Sections 206–210 of the 1947 Act, 29 U. S. C. (Supp. III) §§ 176–180. These so-called national emergency provisions call for the appointment of a board of inquiry to report the facts of the dispute, followed by a vote of the employees on whether to strike. An injunction to maintain the status quo for a limited period pending the exhaustion of these remedies is authorized by the Act.

The House version of the Labor Management Relations Act of 1947, H. R. 3020, 80th Cong., 1st Sess., contained a broader provision calling for a temporary prohibition on strikes whenever interstate commerce in an essential public service was threatened, during which time an advisory settlement board would recommend specific terms for settlement. A similar plan was proposed on a temporary basis in H. R. 2861, 80th Cong., 1st Sess., and approved by H. R. Rep. No. 235, 80th Cong., 1st Sess. (1947). This plan was rejected in favor of the Senate version which permitted a temporary injunction against strikes only when the "national health or safety" was imperiled and then only while a board of inquiry sifted the facts without making recommendations. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 63–64 (1947).

[17] The Wisconsin Act applies generally to "labor disputes between public utility employers and their employes which cause or threaten to cause an interruption in the supply of an essential public utility service." Wis. Stat., 1949, § 111.50.

act has been applied to disputes national in scope,[18] and application of the act does not require the existence of an "emergency." [19] In any event, congressional imposition of certain restrictions on petitioners' right to strike, far from supporting the Wisconsin Act, shows that Congress has closed to state regulation the field of peaceful strikes in industries affecting commerce. *Automobile Workers* v. *O'Brien, supra,* at 457. And where, as here, the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the state legislation is in conflict with federal law.

Like the majority strike-vote provision considered in *O'Brien,* a proposal that the right to strike be denied, together with the substitution of compulsory arbitration in cases of "public emergencies," local or national, was before Congress in 1947.[20] This proposal, closely resembling the pattern of the Wisconsin Act, was rejected by Congress as being inconsistent with its policy in respect

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[18] *Communications Workers of America, C. I. O., Div. 23,* and *Wisconsin Telephone Co.,* Wis. E. R. B. Decision No. 2358–C (1950), (arbitrators appointed to determine the Wisconsin phase of the national telephone strike threatened in the spring of 1950).

[19] Far from being legislation aimed at "emergencies," the Wisconsin Act has been invoked to avert a threatened strike of clerical workers of a utility. *Wisconsin Telephone Clerical Union* and *Wisconsin Telephone Co.,* Wis. E. R. B. Case No. 2273 PU–9 (1949). See *Wisconsin Telephone Co.* v. *Wisconsin E. R. B.,* 253 Wis. 584, 34 N. W. 2d 844 (1948), where the Wisconsin Supreme Court refused to set aside the Board order appointing a conciliator in the same proceeding on the ground that the order was not appealable.

[20] H. R. 17; H. R. 34; H. R. 68; H. R. 75; H. R. 76, all of the 80th Cong., 1st Sess. In addition to granting federal authority to ban strikes under certain circumstances, § 6 (a) of each act would have permitted the operation of state anti-strike legislation. This

to enterprises covered by the Federal Act, and not because of any desire to leave the states free to adopt it.[21] Michigan, in *O'Brien,* sought to impose conditions on the right to strike and now Wisconsin seeks to abrogate that right

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legislative proposal is discussed by Representative Case in 93 Cong. Rec. A1007–A1009 (1947).

See also the other proposals before the same Session of Congress to deny the right to strike in specified instances. H. R. 90 and H. R. 1095, both of the 80th Cong., 1st Sess.

[21] The reasoning behind the congressional rejection of any proposals similar to the Wisconsin Act was stated by Senator Taft as follows, 93 Cong. Rec. 3835–3836 (1947):

"Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. In the long run, I do not believe that that right will be abused. In the past few disputes finally reached the point where there was a direct threat to and defiance of the rights of the people of the United States.

"We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices, and working conditions. But if we impose compulsory arbitration, or if we give the Government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy. If we give the Government power to fix wages, I do not see how we can take from the Government the power to fix prices; and if the Government fixes wages and prices, we soon reach the point where all industry is under Government control, and finally there is a complete socialization of our economy.

"I feel very strongly that so far as possible we should avoid any system which attempts to give to the Government this power finally to fix the wages of any man. Can we do so constitutionally? Can we say to all the people of the United States, 'You must work at wages fixed by the Government'? I think it is a long step from free-

altogether insofar as petitioners are concerned.[22] Such state legislation must yield as conflicting with the exercise of federally protected labor rights.

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dom and a long step from a free economy to give the Government such a right.

"It is suggested that we might do so in the case of public utilities; and I suppose the argument is stronger there, because we fix the rates of public utilities, and we might, I suppose, fix the wages of public-utility workers. Yet we have hesitated to embark even on that course, because if we once begin a process of the Government fixing wages, it must end in more and more wage fixing and finally Government price fixing. It may be a popular thing to do. Today people seem to think that all that it is necessary to do is to forbid strikes, fix wages, and compel men to continue working, without consideration of the human and constitutional problems involved in that process.

"If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation.

. . . . .

"We did not feel that we should put into the law, as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona-fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided."

See also S. Rep. No. 105, 80th Cong., 1st Sess. 13–14, 28 (1947).

[22] Congress demonstrated its ability to deny in express terms the right to strike when it so desired. See § 305 of the 1947 Act, 29 U. S. C. (Supp. III) § 188, making it unlawful for employees of the United States or its agencies to participate in any strike.

Fourth. Much of the argument generated by these cases has been considerably broader than the legal questions presented.

The utility companies, the State of Wisconsin and other states as *amici* stress the importance of gas and transit service to the local community and urge that predominantly local problems are best left to local governmental authority for solution. On the other hand, petitioners and the National Labor Relations Board, as *amicus,* argue that prohibition of strikes with reliance upon compulsory arbitration for ultimate solution of labor disputes destroys the free collective bargaining declared by Congress to be the bulwark of the national labor policy. This, it is said, leads to more labor unrest and disruption of service than is now experienced under a system of free collective bargaining accompanied by the right to strike. The very nature of the debatable policy questions raised by these contentions convinces us that they cannot properly be resolved by the Court. In our view, these questions are for legislative determination and have been resolved by Congress adversely to respondents.

When it amended the Federal Act in 1947, Congress was not only cognizant of the policy questions that have been argued before us in these cases, but it was also well aware of the problems in balancing state-federal relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co.* v. *New York Labor Board,* 330 U. S. 767 (1947), and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states.[23] Congress

[23] Section 10 (a) of the 1947 Act, 29 U. S. C. (Supp. III) § 160 (a). A proviso of § 10 (a) authorizes cession of jurisdiction to the states only where the state law is consistent with the federal legislation. This insures that the national labor policy will not be thwarted even

knew full well that its labor legislation "preempts the field that the act covers insofar as commerce within the meaning of the act is concerned" [24] and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative.[25] This Court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and declare invalid state regulation which impinges on that legislation.

Fifth. It would be sufficient to state that the Wisconsin Act, in forbidding peaceful strikes for higher wages in industries covered by the Federal Act, has forbidden the exercise of rights protected by § 7 of the Federal Act. In addition, it is not difficult to visualize situations in which application of the Wisconsin Act would work at cross-purposes with other policies of the National Act. But we content ourselves with citation of examples of direct conflict found in the records before us. In the case of the transit workers, the union agreed to continue collective bargaining after the strike became imminent, whereas the company insisted upon invocation of the compulsory arbitration features of the Wisconsin Act. That act requires that collective bargaining continue until an "impasse" is reached, Wis. Stat., 1949, § 111.52, whereas the Federal

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in the predominantly local enterprises to which the proviso applies. S. Rep. No. 105, 80th Cong., 1st Sess. 26 (1947). See also minority views to same report, *id.*, pt. 2, 38, agreeing as to this feature of the legislation.

[24] H. R. Rep. No. 245, 80th Cong., 1st Sess. 44 (1947).

[25] See §§ 8 (d), 14 (b), 202 (c) and 203 (b), 29 U. S. C. (Supp. III) §§ 158 (d), 164 (b), 172 (c), and 173 (b), in addition to § 10 (a) of the 1947 Act for examples of congressional direction as to the role that states were to play in the area of labor regulation covered by the Federal Act. And §§ 2 (2) and 2 (3) of the Federal Act, 29 U. S. C. (Supp. III) §§ 152 (2), 152 (3), specifically exclude from its operation the employees of "any State or political subdivision thereof."

Act requires that both employer and employees continue to bargain collectively,[26] even though a strike may actually be in progress. *Labor Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345 (1938). Further, the transit company was able to avoid entirely any determination of certain union demands when the arbitrators, in accordance with Wis. Stat., 1949, § 111.58, ruled that the matter of assigning of workers to certain shifts "infringe[s] upon the right of the employer to manage his business." Yet similar problems of work scheduling and shift assignment have been held to be appropriate subjects for collective bargaining under the Federal Act as administered by the National Labor Relations Board. See *Woodside Cotton Mills Co.*, 21 N. L. R. B. 42, 54–55 (1940); *American National Ins. Co.*, 89 N. L. R. B. 185 (1950), and cases cited therein.

The National Labor Relations Act of 1935 and the Labor Management Relations Act of 1947, passed by Congress pursuant to its powers under the Commerce Clause, are the supreme law of the land under Art. VI of the Constitution. Having found that the Wisconsin Public Utility Anti-Strike Law conflicts with that federal legislation, the judgments enforcing the Wisconsin Act cannot stand.

Reversed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BURTON and MR. JUSTICE MINTON join, dissenting.

Wisconsin has provided that labor disputes in public utilities shall be resolved by conciliation or compulsory arbitration if:

(1) after exerting "every reasonable effort to settle labor disputes" by collective bargaining, the parties have reached a "state of impasse and stalemate," and

[26] §§ 8 (a) (5) and 8 (b) (3); 29 U. S. C. (Supp. III) §§ 158 (a) (5), 158 (b) (3).

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(2) the labor dispute, if not settled, is "likely to cause interruption of the supply of an essential public utility service." Wis. Stat., 1949, §§ 111.50–111.65.[1]

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[1] Section 111.50 states the policy of the statute in the following terms:

"It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employes which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employes, and to provide settlement procedures for labor disputes between public utility employers and their employes in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare."

"Public utility employer" is defined as any employer "engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication . . . ." § 111.51.

Section 111.52 imposes a duty on employers and employees to bargain collectively. If collective bargaining fails, the statute provides for a conciliation procedure. § 111.54. If the conciliator is unable to effect a settlement within 15 days, the dispute is submitted to arbitration. § 111.55. Existing wages, hours, and conditions of employment are to be maintained during conciliation and arbitration. § 111.56.

Standards for the arbitrator are set forth in the statute, § 111.57, and he is forbidden to make an award which "would infringe upon the right of the employer to manage his business" or "would interfere with the internal affairs of the union." § 111.58. The arbitrator's award becomes binding on the parties "together with such agreements as the parties may themselves have reached." § 111.59. It may be

In the cases before us, the statute has been applied to prevent a halt in service by two utility companies.[2] One furnishes heating and illuminating gas to the general public in the City and County of Milwaukee. The other provides bus and streetcar transportation in the same area. Both these companies give utility service only within the State of Wisconsin but have been found subject to the Taft-Hartley Act because their activities "affect commerce." Compare *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197; *La Crosse Telephone Corp.* v. *Wisconsin Board,* 336 U. S. 18. The question is whether the Wisconsin statute, so applied, conflicts with the Taft-

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changed by "mutual consent or agreement of the parties," § 111.59, and is subject to judicial review. § 111.60.

The statute makes it unlawful for any group of public-utility employees "acting in concert" to call a strike or go out on strike or cause a work stoppage or slowdown which would cause an interruption of an essential service. The statute also makes it unlawful for a public utility employer to lock out his employees if such action would cause an interruption of essential service. § 111.62. Such unlawful action on the part of either employer or employees may be enjoined in an action instituted by the State Board. § 111.63. Section 111.64 makes clear that only a concerted refusal to work is made unlawful, and provides that no court shall issue process "to compel an individual employe to render labor or service or to remain at his place of employment without his consent."

[2] The situation before us involves solely the interruption in essential services of a public utility. Any attempt by Wisconsin to apply its arbitral scheme to a labor dispute that does not clearly involve such an essential utility operation is not now in issue. This makes it unnecessary for us to consider whether the Wisconsin law might be constitutionally applied to a strike of clerical employees such as that involved in *Wisconsin Telephone Co.* v. *Wisconsin Board,* 253 Wis. 584, 34 N. W. 2d 844. In that case the Wisconsin Court did not uphold application of the statute to the particular dispute. It held only that the State Board's action in appointing a conciliator was a preliminary order and hence, under principles of administrative law, not reviewable.

Hartley Act, 61 Stat. 136, 29 U. S. C. (Supp. III) §§ 141 *et seq.*

A claim of conflict between State and federal labor legislation presents a familiar problem. On eight occasions this Court has considered whether the Taft-Hartley Act, or its predecessor, the Wagner Act, 49 Stat. 449, so collided with State law as to displace it. We have sustained State laws which dealt with mass picketing and intermittent work stoppages. *Allen-Bradley Local* v. *Wisconsin Board,* 315 U. S. 740; *International Union, United Automobile Workers* v. *Wisconsin Board,* 336 U. S. 245. We have also upheld a State law which required a two-thirds vote for a maintenance-of-membership clause in collective agreements. *Algoma Plywood Co.* v. *Wisconsin Board,* 336 U. S. 301.

On the other hand, we have found in five cases that the State law could not consistently stand with the federal law. In *Hill* v. *Florida,* 325 U. S. 538, the State was found to have interfered with the freedom in selecting bargaining agents as guaranteed by the federal act. In *Bethlehem Steel Co.* v. *New York Board,* 330 U. S. 767, the State recognized a foremen's union contrary to established policy of the National Board. In *La Crosse Telephone Corp.* v. *Wisconsin Board, supra,* a conflict was found in the bargaining units determined under the State and federal acts. In *Plankinton Packing Co.* v. *Wisconsin Board,* 338 U. S. 953, a State superimposed upon federal outlawry of conduct as an "unfair labor practice" its own finding of unfairness. In *International Union of United Automobile Workers* v. *O'Brien,* 339 U. S. 454, a State act covering all industry permitted strikes at a different time than the federal act and required, unlike federal law, a majority authorization for any strike. Also, these provisions were applied to only that portion of a bargaining unit, already determined under the federal act, located within the State of Michigan.

"The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' " Chief Justice Hughes in *Kelly* v. *Washington,* 302 U. S. 1, 10. It is clear from the decisions just canvassed that the States are not precluded from enacting laws on labor relations merely because Congress has—to use the conventional phrase—entered the field. It is equally clear that the boundaries within which a State may act are determined by the terrain and not by abstract projection. Emphasis in the opinions has varied, but the guiding principle is still that set out in the first in the series of immediately relevant cases: whether "the state system of regulation, as construed and applied here, can be reconciled with the federal Act and . . . the two as focused in this case can consistently stand together . . . ." *Allen-Bradley Local* v. *Wisconsin Board, supra,* at 751. The adjustment thus called for between State and National interests is not attained by reliance on uncritical generalities or rhetorical phrases unnourished by the particularities of specific situations.

At the outset it should be noted that the Taft-Hartley Act does not, in specific terms, deal with the problem of local strikes in public utilities even though such strikes, as a matter of constitutional law, may be brought under federal control. Congress considered and rejected special provision for settling public-utility disputes under federal law. See statement of Senator Taft, 93 Cong. Rec. 3835. So far as the statute and its legislative history indicate, however, Congress decided no more than that it did not wish to subject local utilities to the control of the Federal Government. Due regard for basic elements in our federal system makes it appropriate that Congress be explicit if it desires to remove from the orbit of State regulation

matters of such intimate concern to a locality as the continued maintenance of services on which the decent life of a modern community rests.

The real issue before the Court is whether the Wisconsin legislation so conflicts with the specific terms or the policy fairly attributable to the provisions of the federal statute that the two cannot stand together. We are first met with the provisions of the Taft-Hartley Act concerning the "right" to strike. Section 7 provides: "Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, ..." Section 13 provides: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." The word "right" is "one of the most deceptive of pitfalls." Mr. Justice Holmes, in *American Bank & Trust Co.* v. *Federal Bank,* 256 U. S. 350, 358. We have several times rejected an invitation to decide cases upon the basis of an absolute right to strike. In *International Union, United Automobile Workers* v. *Wisconsin Board, supra,* we found there was no "right" to strike in violation of a State law construed to prohibit intermittent work stoppages. In *Southern Steamship Co.* v. *Labor Board,* 316 U. S. 31, we found there was no "right" to strike in violation of a federal mutiny statute. In two other cases we held that employees who strike in violation of a collective agreement or engage in "sit-down" strikes are not protected under the federal statute. *Labor Board* v. *Sands Mfg. Co.,* 306 U. S. 332; *Labor Board* v. *Fansteel Corp.,* 306 U. S. 240. May the "right" to strike be also limited by an otherwise valid State statute aimed at preventing a breakdown of public-utility service?

"Public utility employer" is defined in the Wisconsin Act to mean an employer "engaged in the business of

furnishing water, light, heat, gas, electric power, public passenger transportation or communication . . . ." § 111.51. Labor relations in such utilities have traditionally been subjected to regulation in a way that those in other industries have not. See *Wilson* v. *New,* 243 U. S. 332, 349. Compare Conspiracy, and Protection of Property Act, 38 & 39 Vict., c. 86, par. 4 (1875). The range of control over business generally has been greatly extended by modern law. But the historic amenability to legal control of public callings is rooted deep. See *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522, 543. A stoppage in utility service so clearly involves the needs of a community as to evoke instinctively the power of government. This Court should not ignore history and economic facts in construing federal legislation that comes within the area of interacting State and federal control. To derive from the general language of the federal act a "right" to strike in violation of a State law regulating public utilities is to strip from words the limits inherent in their context.

An attempt by a State to impose upon industry as a whole a drastic limitation upon the right to strike would conflict with the federal law. Compare *United Automobile Workers* v. *O'Brien, supra.* And even as to emergency disputes—those involving the obvious public services—it may be urged that the prospect of settlement by arbitration may tend to make one or both parties reluctant to reach an agreement by bargaining. See Kennedy, The Handling of Emergency Disputes, Proceedings of Second Annual Meeting of Industrial Relations Research Assn. 14, 21–22 (1949).

But the principle of hands-off collective bargaining is no more absolute than the right to strike. The "national emergency" provisions in the Taft-Hartley Act are an affirmative indication that the force of collective bargain-

ing may be limited in emergency situations. Title II of the Taft-Hartley Act provides for special mediation procedures, a cooling-off period, and ballot by employees on the final offer of the employer, in order to prevent a strike or lockout in "an entire industry or a substantial part thereof" if necessary to avoid peril to "the national health or safety." § 206. And Congress apparently expected that additional laws would be enacted if necessary.[3] The "national emergency" provisions were aimed at strikes of nation-wide significance. They have been applied in eight disputes from 1947 to 1950: twice in industry-wide or coast-wide maritime negotiations; three times in industry-wide bituminous-coal negotiations; and in disputes arising in the meat-packing industry, the national telephone industry, and the atomic-energy installation at Oak Ridge. U. S. Dept. of Labor, Bureau of Labor Statistics, Federal Fact-Finding Boards and Boards of Inquiry (1950) 2.

Title II would be available for settlement of the disputes involved in the cases before us only if they were a part of a nation-wide utility dispute creating a national emergency.[4] But the careful consideration given to the prob-

[3] See S. Rep. No. 105, 80th Cong., 1st Sess. 15: "In most instances the force of public opinion should make itself sufficiently felt in [the] 80-day period [during which the strike is enjoined] to bring about a peaceful termination of the controversy. Should this expectation fail, the bill provides for the President laying the matter before Congress for whatever legislation seems necessary to preserve the health and safety of the Nation in the crisis." The reference is to § 210 of the Taft-Hartley Act, which provides that if the injunction is discharged, "the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action."

[4] It is clear that the national emergency provisions were not meant to cover local strikes such as those involved in the cases now before

lem of meeting nation-wide emergencies and the failure to provide for emergencies other than those affecting the Nation as a whole do not imply paralysis of State police power. Rather, they imply that the States retain the power to protect the public interest in emergencies economically and practically confined within a State. It is not reasonable to impute to Congress the desire to leave States helpless in meeting local situations when Congress restricted national intervention to national emergencies.

Only one other of the petitioners' arguments raises a substantial question of conflict.[5] Section 111.58 of the

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us. See S. Rep. No. 105, 80th Cong., 1st Sess. 14: "While the committee is of the opinion that in most labor disputes the role of the Federal Government should be limited to mediation, we recognize that the repercussions from stoppages in certain industries are occasionally so grave that the national health and safety is imperiled. An example is the recent coal strike in which defiance of the President by the United Mine Workers Union compelled the Attorney General to resort to injunctive relief in the courts. The committee believes that only in national emergencies of this character should the Federal Government be armed with such power."

There might of course be a conflict if the Wisconsin Act were held applicable by her courts to a threatened strike which was only a part of a nation-wide utility dispute to which the provisions of Title II had been applied. But our task is to decide the case before us and not to conjure up difficulties that may never arise. See *Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740, 746.

The Wisconsin statute is not in conflict with the provisions of Title II of the Taft-Hartley Act creating a mediation and conciliation service. The federal act takes account of state mediation facilities, and the federal officials are directed "to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties." § 203 (b).

[5] A further argument is based upon § 111.56 of the Wisconsin Act which requires that the *status quo* as to terms of employment be maintained during conciliation and arbitration. The Taft-Hartley Act requires the parties to continue terms of an existing contract for only 60 days after notice of termination has been given or until the

Wisconsin Act prohibits the arbitrator from making an award "which would infringe upon the right of the employer to manage his business." In No. 330, *post*, p. 416, the Wisconsin court affirmed the Board's order refusing to make an award dealing with the composition of shifts. It is argued that this construction of the Wisconsin statute brings it in conflict with the Board position that parties must bargain on such an issue. See *American National Insurance Co.*, 89 N. L. R. B. 185; *Woodside Cotton Mills*, 21 N. L. R. B. 42, 54–55. The term in the Wisconsin statute deals not with the scope of bargaining, but with the power of an arbitrator to make an award after bargaining has failed. The State law does nothing

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expiration date of the contract, whichever is later. § 8 (d) (4). The additional restriction of the Wisconsin Act is imposed in order to assure the effectiveness of the arbitration system and presents no problem of conflict in administration of the two statutes. The only objections to the *status quo* provisions are the arguments against the incompatibility of the federal act and any system of compulsory arbitration. These have been discussed in the text.

Two additional arguments are based upon hypothetical conflicts not raised by the present cases. Section 111.52 of the Wisconsin Act requires that the parties "exert every reasonable effort" in order to settle the labor dispute. It is claimed that this language may be construed to require the parties to make concessions during the bargaining process—something which § 8 (d) of the Taft-Hartley Act says they do not have to do. The second argument is that, from § 111.57 of the Wisconsin Act, it appears that arbitration might be required where negotiations were underway to amend an existing contract. Under § 8 (d) of the Taft-Hartley Act, there is no duty to bargain concerning amendment of a contract still in effect. It is a sufficient answer to these contentions to note the broad separability provision in § 111.65 of the Wisconsin Act, and repeat what we said in *Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740, 746: "We deal . . . not with the theoretical disputes but with concrete and specific issues raised by actual cases. . . . Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress."

to relieve the employer of his duty to bargain under the federal act, nor is there any indication that the duty to bargain under the State act differs from that under the federal act.

Whether the State chose wisely in adopting arbitration rather than taking no measure or taking a more forceful measure to protect the public interest is not for us to decide. Seizure or martial law or other affirmative action by the State might be just as deleterious to collective bargaining as enforced arbitration, apart from raising other contentious issues. If there is legislative choice it is not for us to demand that what is chosen should commend itself to our private notions of wise policy. As to strikes creating a nation-wide emergency, the provisions of the Taft-Hartley Act indicate that the principle of collective bargaining may to some extent be subordinated to the interest of the public. I find no indication in the statute that the States are not equally free to protect the public interest in State emergencies.

The claim that the Wisconsin statute violates the Due Process Clause of the Fourteenth Amendment was for me definitively answered thirty years ago by Mr. Justice Brandeis:

> "Because I have come to the conclusion that both the common law of a State and a statute of the United States [the Clayton Act] declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not

for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat." *Duplex Co.* v. *Deering*, 254 U. S. 443, 488 (dissenting).

ST. JOHN ET AL. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 302. Argued January 9–10, 1951.—Decided February 26, 1951.

Appellants sued in a Wisconsin State Court for a declaratory judgment that the Wisconsin Public Utility Anti-Strike Law contravened the Due Process Clause of the Federal Constitution and was invalid as in conflict with federal labor legislation. The state trial court decided against appellants on all issues. On appeal, the Wisconsin Supreme Court affirmed, but on the ground that a decision on the federal constitutional questions would be premature in the absence of a concrete factual record. Appellants did not petition this Court for certiorari. Subsequently, when a strike was in progress, appellants sued in a federal district court for declaratory and injunctive relief holding the Wisconsin Act invalid as in conflict with federal labor legislation. The Federal District Court held that the suit was barred by the doctrine of *res judicata.* In another suit involving the same parties and presenting the same issues, however, the State Supreme Court sustained the constitutionality of the Wisconsin Act; and its judgment is this day reversed by this Court, *ante,* p. 383. *Held:*

1. The District Court's interpretation of the state law as to *res judicata* in this particular case was erroneous. P. 414.

2. This Court having declared the Wisconsin law to be invalid under the Federal Constitution, *ante,* p. 383, a federal court judgment restraining its enforcement as prayed in this suit is neither necessary nor appropriate. Pp. 414–415.

90 F. Supp. 347, judgment vacated.

The case is stated in the opinion. The judgment below is *vacated and cause remanded,* p. 415.

Max Raskin argued the cause and filed a brief for appellants.

Malcolm Riley and *Beatrice Lampert,* Assistant Attorneys General of Wisconsin, argued the cause for the Wisconsin Employment Relations Board et al., appellees.

With *Mr. Riley* on the brief were *Vernon W. Thomson,* Attorney General, *Thomas E. Fairchild,* then Attorney General, and *Stewart G. Honeck,* Deputy Attorney General.

J. Gilbert Hardgrove argued the cause for the Milwaukee Gas Light Company, appellee. With him on the brief were *Vernon A. Swanson* and *Arthur W. Fairchild.*

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

The parties to this case are the same gas workers' union, many of the same officers of that union, the same gas companies and the Wisconsin Employment Relations Board involved in No. 438, decided this day, *ante,* p. 383. The instant proceeding began when, at the time of the strike described in No. 438, appellant gas workers filed suit in a federal district court against the Wisconsin Employment Relations Board and the gas company for declaratory and injunctive relief to the end that the Wisconsin Public Utility Anti-Strike Law be adjudged invalid for the reasons successfully advanced in No. 438.

The District Court of three judges, convened under 28 U. S. C. § 2281, did not reach the substantive issues, but relied on principles of *res judicata,* holding that a prior state court judgment to which appellants were party conclusively barred them from raising any issues pertaining to the constitutionality of the Wisconsin Act. In that prior state court action, brought to test the statute before any strike had been threatened, appellants sought a declaratory judgment that the Wisconsin Act contravened the State Constitution and the Federal Due Process Clause and was in conflict with federal labor legislation. Except for the question of undue delegation of power under the state constitution, the issues sought to be raised in the state declaratory proceeding were the same as those raised

in No. 438, *ante,* p. 383, and in the instant proceeding. In the prior state court action, the Circuit Court entered judgment against appellants on the merits on all issues. On appeal, the Wisconsin Supreme Court affirmed, but reached the merits only in respect to the delegation-of-power issue. As to the issues common to that case, the instant case and No. 438, the State Supreme Court held that a decision on the constitutional questions presented would be premature in the absence of a concrete factual record, and that courts should not decide constitutional issues in the abstract or as hypothetical questions. *United Gas, Coke & Chemical Workers of America, Local 18, C. I. O.* v. *Wisconsin Employment Relations Board,* 255 Wis. 154, 38 N. W. 2d 692 (1949). Certiorari to that decision was not sought in this Court, appellants contending that such a step would have been futile in view of the adequacy of the state grounds supporting the Wisconsin court's refusal to adjudicate the issues presented.

Following this abortive attempt to secure a final adjudication of the federal questions, there occurred a strike and a state circuit court issued a restraining order, as described in the opinion in No. 438, *ante,* p. 383. In the resulting contempt proceeding, before us in No. 438, appellants attack the validity of the Wisconsin Act, raising the Due Process and Commerce Clause questions. Appellees urged in that case, as they do in this case, that the prior state declaratory judgment proceeding barred appellants' further attack upon the act under the doctrine of *res judicata.* Appellees reason that since the State Circuit Court judgment in the prior action went against appellants on the merits and since the Wisconsin Supreme Court ordered that judgment "affirmed" the judgment barred further attack on the statute by appellants without regard to what the Wisconsin Supreme Court might have said in its opinion. The Federal District Court adopted

this line of reasoning as to *res judicata* and held, one judge dissenting, that appellants are barred from attacking the Wisconsin Public Utility Anti-Strike Law. 90 F. Supp. 347 (1950). The case is properly here on appeal. 28 U. S. C. § 1253.

We need not linger over the propriety of invoking the doctrine of *res judicata* in this type of case, for we have a direct holding of the Wisconsin Supreme Court to show us that the District Court's interpretation of the state law as to *res judicata* in this particular case was erroneous. The State Circuit Court, in the contempt proceedings before this Court in No. 438, adopted the same theory of *res judicata* as did the District Court. That theory was urged upon the Wisconsin Supreme Court on appeal. Yet the highest state court did not hesitate in reaching and deciding on the merits the very issues which the State Circuit Court in that case and the District Court below held could not be raised by appellants. *Wisconsin Employment Relations Board* v. *Milwaukee Gas Light Co.*, 258 Wis. 1, 44 N. W. 2d 547 (1950). This is the decision which we reversed this day in No. 438, *ante,* p. 383. Under such circumstances, justice requires that the judgment of the court below barring appellants from attacking the validity of the Wisconsin Public Utility Anti-Strike Law be vacated.

But there remains the question as to whether appellants are entitled to a federal court judgment restraining enforcement of the Wisconsin Act as prayed. Appellants seek only injunctive and declaratory relief looking to the future. In view of today's decisions in Nos. 329 and 438, *ante,* p. 383, the latter case involving the very parties to this action, "we find no ground for supposing that the intervention of a federal court, in order to secure [appellants'] constitutional rights, will be either necessary or appropriate." *Douglas* v. *Jeannette,* 319 U. S. 157, 165

(1943). For this reason, the judgment below is vacated and the case remanded to the District Court with instructions to dismiss the complaint.

It is so ordered.

MR. JUSTICE FRANKFURTER, MR. JUSTICE BURTON, and MR. JUSTICE MINTON agree that the judgment of the State Court was not *res judicata,* but insofar as vacating the judgment below derives from the decisions in Nos. 329 and 438 they dissent for the reasons set forth in their dissenting opinion, *ante,* p. 399.

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AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, ET AL. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

No. 330. Argued January 9–10, 1951.—Decided February 26, 1951.

This is a proceeding to review a judgment of a Wisconsin State Court sustaining an arbitrators' award under the Wisconsin Public Utility Anti-Strike Law. The award was for one year only and that time has elapsed. *Held:*

1. There being no subject matter upon which the judgment of this Court can operate, the cause is moot. Pp. 417–418.

2. Whether or not it is the practice of the Wisconsin courts to decide questions of importance where a case has become moot, this Court is without power to decide moot questions. P. 418.

257 Wis. 53, 42 N. W. 2d 477, judgment vacated.

The case is stated in the opinion. Judgment below *vacated and cause remanded,* p. 418.

David Previant argued the cause and filed a brief for petitioners.

Malcolm L. Riley and *Beatrice Lampert,* Assistant Attorneys General of Wisconsin, argued the cause for the Wisconsin Employment Relations Board et al., respondents. With *Mr. Riley* on the brief were *Vernon W. Thomson,* Attorney General, *Thomas E. Fairchild,* then Attorney General, and *Stewart G. Honeck,* Deputy Attorney General.

Martin R. Paulsen argued the cause for the Milwaukee Electric Railway & Transport Company, respondent. With him on the brief was *Van B. Wake.*

Briefs of *amici curiae* urging reversal were filed by *Solicitor General Perlman, David P. Findling* and *Mozart*

G. Ratner for the National Labor Relations Board; and *J. Albert Woll, James A. Glenn* and *Herbert S. Thatcher* for the American Federation of Labor.

Briefs of *amici curiae* urging affirmance were filed by *Harold R. Fatzer,* Attorney General, for the State of Kansas; *Clarence S. Beck,* Attorney General, and *Bert L. Overcash,* Assistant Attorney General, for the State of Nebraska; and *Theodore D. Parsons,* Attorney General, and *Benjamin C. Van Tine* for the State of New Jersey.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

The parties to this case are the same transit workers, the same transit company, and the Wisconsin Employment Relations Board before the Court in No. 329, decided this day, *ante,* p. 383. This action arises out of the same threatened strike discussed in that case. After a restraining order had led to postponement of the strike, the Wisconsin Board appointed arbitrators to "hear and determine" the dispute in accordance with the terms of the Wisconsin Public Utility Anti-Strike Law. Wis. Stat., 1949, § 111.55. Upon the filing of the arbitrators' award, petitioners filed an action in a state circuit court to review that award. *Id.,* § 111.60. That court affirmed the award and the Wisconsin Supreme Court affirmed, 257 Wis. 53, 42 N. W. 2d 477 (1950). We granted certiorari in this case together with No. 329, 340 U. S. 874 (1950).

In the courts below and in this Court, petitioners attack the arbitration award on the same grounds urged against the Wisconsin Act as a whole in No. 329, and, in addition, raise issues peculiar to the arbitration phase of that act. But we do not reach these issues since it is clear that this case has become moot.*

*It has also been argued that No. 329 and No. 438 are moot by reason of the settlement of the immediate dispute which led to

The arbitration award became effective on April 11, 1949. Under the Wisconsin Act, that award "shall continue effective for one year from that date," unless sooner terminated by agreement of the parties. Wis. Stat., 1949, § 111.59. We are informed that this award was superseded by agreement, and, in any event, the one-year period has elapsed. There being no subject matter upon which the judgment of this Court can operate, the cause is moot.

It is argued that the Wisconsin courts have adopted a practice of deciding questions of importance even though the case has become moot, and we are urged to follow that same practice. But whatever the practice in Wisconsin courts, "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 115–16, and cases cited; *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 475–77." *St. Pierre* v. *United States*, 319 U. S. 41, 42 (1943).

It appearing that the cause has become moot, the judgment of the Supreme Court of Wisconsin is vacated without costs and the cause is remanded for such proceedings as by that court may be deemed appropriate.

It is so ordered.

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the strike action in each case. The injunction before us in No. 329 is "perpetual" by its terms so that the action does not become moot even though the decree be obeyed. *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, 334 (1944); *Federal Trade Comm'n* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260 (1938), and cases cited therein. As to No. 438, the judgment below imposes fines upon petitioners. No question of mootness can be raised so long as enforcement of that judgment is sought.

UNITED STATES ET AL. *v.* ROCK ISLAND MOTOR TRANSIT CO. ET AL.

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

No. 25. Argued November 7, 1950.—Decided February 26, 1951.

1. The Interstate Commerce Commission authorized a railroad's motor-carrier affiliate to acquire two other motor carriers. The first acquisition was approved by the Commission under § 213 (now § 5) of the Interstate Commerce Act, and a certificate of convenience and necessity was issued under § 207. The certificate contained the condition that the Commission might impose such further restrictions as may be necessary to insure that the service should be auxiliary or supplementary to the train service of the railroad. The second acquisition was approved under § 5 of the Act by a report and order which did not contain this condition, but no certificate of convenience and necessity had been issued under § 207. *Held:* The Commission had power, in a subsequent proceeding not under § 212, to modify the certificate covering operations under the first acquisition, and to impose like conditions on the certificate to be granted in respect of the second acquisition, so as to confine the motor carrier operations to service auxiliary to, and supplemental of, rail service. Pp. 422–436, 444–448.

(a) The Commission has power at the time of its approval of an application to limit the authority to be granted by certificates of convenience and necessity for the operation of motor carriers, whether the certificate is issued on an original application under § 207 or after acquisition under § 5 of the Interstate Commerce Act. P. 430.

(b) At the time of issuance of a certificate, if the Commission reasonably deems the restriction useful in protecting competition, or for other statutory purposes, the Commission may require a railroad-affiliated motor carrier to perform only those services that are auxiliary and supplemental to the rail service. Pp. 430–431.

(c) The restriction of a railroad motor-carrier affiliate to operations which are auxiliary and supplemental to rail service is a logical method to insure the maximum development of the two transportation agencies—rail and motor—as coordinate transpor-

tation services in accordance with the Declaration of Policy in the Motor Carrier Act of 1935 and with the National Transportation Policy. P. 431.

(d) Specific statutory authority for such restriction is found in the requirements of the proviso in § 213 (a) of the Motor Carrier Act of 1935 and § 5 of the Interstate Commerce Act as amended in 1940. Pp. 431, 436.

(e) Since competition, public interest in the preservation of the inherent advantages of rails and motors, and use of motor service by railroads in their operations, are the basis for allowing acquisitions of motor routes by railroads under the National Transportation Policy, it is consonant with that policy to reserve the right to make further limitations, restrictions or modifications to insure that the service remain auxiliary or supplemental. Pp. 434–435.

(f) Such reservation of power in the Commission to modify the certificate does not offend against the provision of § 212 that a certificate "shall remain in effect until suspended or terminated" under that section. P. 435.

(g) The specific requirement of the National Transportation Policy that the inherent advantages of all modes of transportation be retained, or of § 5 that acquisition of motor routes by railroads shall require special findings and may be subject to special conditions, is not overridden by the general provisions of §§ 208, 216 (c) and 217 (a). Pp. 435–436.

2. The Commission ordered that the certificate covering the first acquisition be modified so that future operations thereunder would be subject in substance to the following conditions: (1) the service of the motor carrier shall be limited to service which is auxiliary to, or supplemental of, train service of the railroad; (2) the motor carrier shall not render any service to or from any point not on a rail line of the railroad; (3) no shipments shall be transported by the motor carrier between any of the designated "key points," or through, or to, or from, more than one of said points; (4) all contracts between the motor carrier and the railroad shall be subject to revision by the Commission; (5) the Commission may impose such further conditions as it may find to be necessary to insure that the service shall be auxiliary or supplemental to rail service. *Held:* The new conditions are within the limits covered by the reservation of power in the certificate to impose such further limitations as might be found necessary "to insure that the service shall be auxiliary or supplementary to the train service" of the railroad. Pp. 436–444.

(a) Such added conditions are not changes in or revocations of a certificate in whole or in part, but a carrying out of the reservation in the certificate. *United States* v. *Seatrain Lines,* 329 U. S. 424, distinguished. Pp. 442–443.

(b) The meaning of auxiliary and supplemental is not limited by the Commission's practice at any particular time, but embraces such requirements as may fairly be said to fall within the meaning which the Commission has given to the terms. P. 443.

3. The Commission had the power also to place in the certificate to be issued in connection with the second acquisition the modified conditions of the certificate covering the first acquisition, since the order approving the second acquisition was not a final order. Pp. 444–448.

(a) The certificate is the final act or order that validates the operation, and until its form and contents are fixed by delivery to the applicant, the power to frame it in accordance with statutory directions persists. P. 448.

4. In view of the National Transportation Policy and § 5 of the Interstate Commerce Act, approval of the acquisition of a motor carrier by a railroad may be conditioned by the Commission on the purchaser's willingness to accept a narrower certificate than that possessed by the seller. Pp. 448–449.

5. By the Commission's modification of the certificate of the railroad's motor-carrier affiliate, to insure that its operations would be auxiliary and supplemental to rail service, the motor carrier was not deprived of property without due process of law. P. 449.

90 F. Supp. 516, reversed.

A three-judge District Court set aside and permanently enjoined enforcement of an order of the Interstate Commerce Commission. 90 F. Supp. 516. On appeal to this Court, *reversed,* p. 449.

Daniel W. Knowlton argued the cause for the United States and the Interstate Commerce Commission, appellants. With him on the brief were *Solicitor General Perlman, Acting Assistant Attorney General Underhill* and *Edward M. Reidy.*. *Allen Crenshaw* was also of counsel for the Interstate Commerce Commission.

Harry E. Boe argued the cause for the Rock Island Motor Transit Company, appellee. With him on the brief were *Martin L. Cassell, W. F. Peter* and *A. B. Enoch.*

Ernest Porter and *Bert F. Wisdom* submitted on brief for the Iowa State Commerce Commission, appellee. *George Cosson, Jr.* was also of counsel.

Einar Viren submitted on brief for the Omaha Chamber of Commerce, appellee.

MR. JUSTICE REED delivered the opinion of the Court.

Questions of the power of the Interstate Commerce Commission to tighten the restrictions on operations of a railroad's motor-carrier affiliate are raised by this appeal. In the Commission's view the operations must be modified in order to make them truly auxiliary to or supplemental of the rail service. They are conducted (1) under a certificate of convenience and necessity issued in 1941 under § 207 of the Interstate Commerce Act, and (2) under an order of 1944 approving the acquisition of another motor carrier. The certificate contains the condition that the Commission might impose other terms to restrict the holder's operation to service which is auxiliary to or supplemental of rail service. The order contains neither this condition nor any other relating to the specific operating rights of the carrier.

The issues involve a basic power of the Commission to regulate the operations of motor carriers affiliated with railroads so as to assure that at all times the motor operations shall be consonant with the National Transportation Policy, 54 Stat. 899. The Commission has decided that that policy requires the motor operations of railroads and their affiliates to be auxiliary to and supplemental of train service. This raises questions as to how the planned

auxiliary and supplemental service is to be achieved. Differences also exist as to what phases of motor-carrier operations are auxiliary to and supplemental of rail or train service.

The Rock Island Motor Transit Company, a wholly-owned corporate subsidiary of the Chicago, Rock Island and Pacific Railroad Company and its predecessors, is a common carrier by motor vehicle engaged in transporting property in inter- and intrastate commerce, exclusively, for all practical purposes, along the rail lines of its parent corporation in Arkansas, Illinois, Indiana, Iowa, Minnesota, Missouri, Nebraska, Tennessee, Texas and Kansas. Many of Transit's operations alongside its parent are in different localities and under other I. C. C. authorities than the certificate and order here involved.

This appeal deals with additional operating restrictions placed subsequent to the Commission's formal approval of Transit's purchase and operation, upon two of Transit's acquisitions. The first is a segment of the so-called White Line Purchase. The Line was in process of perfecting its "grandfather rights" under § 206 (a), Motor Carrier Act, at the time of appellees' agreement to purchase. The order directing issue of the certificate to Rock Island recognized this. This purchase was authorized under § 213, Motor Carrier Act of 1935, 49 Stat. 555, April 1, 1938, Docket No. MC–F–445; reported 5 M. C. C. 451, 15 M. C. C. 763. The segments of the White Line Purchase here involved are those between Des Moines, Iowa, and Omaha, Nebraska, and Des Moines, Iowa, and Silvis, Illinois, included in Transit's certificate of convenience and necessity issued in No. MC 29130, December 3, 1941. That certificate had only the following provisions in any way applicable to this controversy:

> "Service is authorized to and from the intermediate points on the above-specified routes which are

also stations on the lines of The Chicago, Rock Island and Pacific Railway Company.

. . . . . .

"The operations authorized on the above-specified routes are subject to such further limitations, restrictions, or modifications as we may find it necessary to impose or make in order to insure that the service shall be auxiliary or supplementary to the train service of The Chicago, Rock Island and Pacific Railway Company and shall not unduly restrain competition."

The second acquisition is the so-called Frederickson Purchase, authorized November 28, 1944, Docket No. MC–F–2327, under § 5, Interstate Commerce Act, 54 Stat. 905, by which Transit acquired, from the holders of a certificate of convenience and necessity, a route between Atlantic, Iowa, and Omaha, Nebraska. Neither the report nor the order contained provisions alike or akin to these just quoted from the White Line certificate. No order for a certificate has yet been entered and no certificate has been issued.

The routes here involved are a major part of the Rock Island's truck route between Chicago and Omaha. The eastern end of that route from Silvis, Illinois, to Chicago is operated under other I. C. C. authority.

Transit has been operating the above routes since their respective dates. Under those authorities, Transit states it has engaged in trucking service as follows:

"(a) a coordinated rail-service, at rail rates auxiliary to the existing service of appellee's affiliated railroad; (b) a motor service in substitution of rail service, at rail rates; and (c) a motor common carrier service at rates and tariffs observed and applied by appellee's predecessors, as modified from time to time."

On February 5, 1945, the Commission directed reopening of the dockets to give reconsideration to the above certificate and order,

> "solely to determine (a) the conditions or restrictions, if any appear necessary, which should be imposed to insure that the motor carrier service performed by The Rock Island Motor Transit Company is limited to that which is auxiliary to, or supplemental of, rail service, and (b) the condition, if any appears necessary, which should be imposed so as to make the authority granted to The Rock Island Motor Transit Company subject to such further conditions or restrictions as the Commission may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, rail service."

At the end of that reconsideration, an order was entered to modify the White Purchase certificate and the Frederickson order in the following respects:

> "1. The service to be performed by The Rock Island Motor Transit Company shall be limited to service which is auxiliary to, or supplemental of, train service of The Chicago, Rock Island and Pacific Railroad Company, hereinafter called the Railroad.
>
> "2. The Rock Island Motor Transit Company shall not render any service to or from any point not a station on a rail line of the Railroad.
>
> "3. No shipments shall be transported by The Rock Island Motor Transit Company between any of the following points, or through, or to, or from, more than one of said points: Omaha, Nebr., Des Moines, Iowa, and collectively Davenport and Bettendorf, Iowa, and Rock Island, Moline, and East Moline, Ill.
>
> "4. All contractual arrangements between The Rock Island Motor Transit Company and the Railroad shall be reported to us and shall be subject to

revision, if and as we find it to be necessary, in order that such arrangements shall be fair and equitable to the parties.

"5. Such further specific conditions as we, in the future, find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service." *Rock Island Motor Transit Co.*, 55 M. C. C. 567, 597–598, affirming 40 M. C. C. 457.

It is from those modifications that Transit sought relief through §§ 1336 and 2325 of 28 U. S. C. from a three-judge district court. The relief was granted and the orders were annulled and their enforcement enjoined. 90 F. Supp. 516. The United States and the Interstate Commerce Commission appealed under 28 U. S. C. § 1253. We noted probable jurisdiction.

Transit's objection to the order modifying the provisions under which it operates these routes may be generalized as a contention that the Commission's order changes or revokes a part of Transit's operating authority, previously granted by the Commission, without any failure by Transit to comply with any term, condition or limitation of the Commission authority under which Transit functions. Changes or revocations may only be made under § 212 (a) of the Interstate Commerce Act, for such failures.[1]

The Commission, on the other hand, takes the position that there is no change in or revocation of its authoriza-

[1] Sec. 212 (a), 49 Stat. 555, 52 Stat. 1238, 54 Stat. 924:

"Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole

tion to operate as a motor common carrier. It looks upon the certificate for the White Line route and the order for the Frederickson Purchase as being controlled by the Interstate Commerce Act and Transit's applications for purchase approval. The Commission understands the Declaration of Policy, § 202 (a) of the Motor Carrier Act, enacted at the inception of federal regulation of motor carriers in 1935, 49 Stat. 543, as directing it to preserve the inherent advantages of such transportation in the public interest. It finds support for this view in the National Transportation Policy set out in the 1940 amendments to the Interstate Commerce Act, 54 Stat. 899, declaring that the Act should be administered so as to recognize and preserve the inherent advantages of rail, motor and water transportation.[2] It treats § 213 of the Motor Carrier Act of 1935 and present § 5 of the Interstate Commerce Act as authorizing mergers, consolidations and acquisitions between rail and motor carriers

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or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: . . . ."

[2] 40 M. C. C. 457, 473:

"It is our opinion, originally indicated in the *Kansas City Southern* case and confirmed by nearly a decade of experience in motor-carrier regulations, that the preservation of the inherent advantages of motor-carrier service and of healthy competition between railroads and motor carriers and the promotion of economical and efficient transportation service by all modes of transportation and of sound conditions in the transportation and among the several carriers, in short the accomplishment of the purposes forming the national transportation policy, require that, except where unusual circumstances prevail, every grant to a railroad or to a railroad affiliate of authority to operate as a common carrier by motor vehicle or to acquire such authority by purchase or otherwise should be so conditioned as definitely to limit the future service by motor vehicle to that which is auxiliary to, or supplemental of, train service."

only within the Transportation Policy.[3] Although § 207, providing for the issuance of certificates of convenience and necessity, has no clause requiring special justification for railroads to receive motor-carrier operating rights, such as appears in the proviso in former § 213 and present § 5, the Commission applies the rules of the National Transportation Policy so as to read the proviso into § 207 in order to preserve the inherent advantages of motor-carrier service.[4]

The trial court accepted Transit's argument. 90 F. Supp. at 519. The court found the undisputed fact to be

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[3] § 213 (a), 49 Stat. 556:

"*Provided, however,* That if a carrier other than a motor carrier is an applicant, or any person which is controlled by such a carrier other than a motor carrier or affiliated therewith within the meaning of section 5 (8) of part I, the Commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

This proviso remains in the Interstate Commerce Act, § 5 (2) (b). 54 Stat. 906.

[4] "We appreciate, of course, that section 207, unlike section 5, does not require of a railroad, undertaking to prove that public convenience and necessity require a motor service which it proposes, any greater measure of proof than is required of any other applicant. But this does not mean that it is as easy for one applicant, as for another, to prove need for a proposed service or that this Commission considering an application by a railroad for authority to perform an all-motor service, not in aid of its rail service but in competition therewith and with other motor carriers, can ignore the circumstance that such applicant is a railroad whose operation as proposed would ordinarily be inconsi[s]tent with the principles underlying the national transportation policy. In other words, a railroad applicant for authority to operate as a common carrier by motor vehicle, though required to do no more than prove, as any other applicant, that its service is required by public convenience and necessity, has a special burden, not by reason of any attitude or action on our part, but by reason of the very circumstance that it is a railroad. Where it fails

that the Commission, in this modification proceeding, was not acting under § 212 of the Interstate Commerce Act, authorizing changes or revocations in operating authority, but under claimed power subsequently to impose conditions to insure that the operations would be auxiliary to, or supplemental of, rail service; that Transit's operations were at all times auxiliary and supplemental to rail service within the Commission's definition of that service when the acquisitions were approved, and could not be changed or revoked except under § 212; that such restrictions as were proposed would interfere with the full motor common-carrier rights of Transit's predecessors guaranteed to them by the "grandfather clause," § 206, and transferred to Transit by a purchase approved by the Interstate Commerce Commission.

A glance at the proposed restrictions, *supra,* pp. 425–426, shows the practical disadvantages to Transit. It cannot carry on a general all-motor operation on its own billings or under motor rates, joint or local.[5] It cannot haul through motor traffic at rail tariffs between the "key points," Omaha, Des Moines and the Bettendorf-Rock Island-Moline center. Furthermore, Transit rests under the threat of possible future restrictions as need may be shown for their application to hold its operations, under changing conditions, to those then reasonably determined by the Commission to be needed to keep Transit's motor

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to show special circumstances negativing any disadvantage to the public from this fact, a grant of authority to supply motor service other than service auxiliary to and supplemental of train service is not justified." *Rock Island Motor Transit Co.,* 40 M. C. C. 457, 471, 473–474; cf. *Kansas City Southern Transport Co.,* 10 M. C. C. 221, 237.

[5] Appellees deduce these limitations from the new condition (1), p. 425, *supra.* As the Commission does not challenge the statement, and the record shows that the Commission so treats such conditions, we accept that interpretation. 55 M. C. C. 567, 581 ff. See 41 M. C. C. 721, 726; text at n. 19, *infra.*

service auxiliary and supplemental to its parent's rail service. Transit alleges that the restrictions would bar it from participation in traffic on the affected routes that now produce a gross revenue of more than a million dollars a year. As damage to Transit, if the Commission order is enforced, was admitted, proof of the amount was dispensed with.

With the situation as above stated in mind, we take up the question of the validity of the Commission's action in this case.

Statutory Authority.—The Commission has power at the time of its approval of an application to limit the authority to be granted by certificates of convenience and necessity for the operation of motor carriers, whether the certificate is issued on an original application under § 207 or after acquisition under § 213 of the Motor Carrier Act, § 5 (2) Interstate Commerce Act. Section 206 requires a certificate. Section 207 gives discretion to the Commission according to the statutory standards of convenience and necessity to authorize a part or all of the requested operations. The service must be performed according to the "requirements, rules, and regulations of the Commission."

The practice of the Commission from the beginning of motor-carrier regulation has been to restrict motor-carrier operations both geographically [6] and functionally.[7] The same was true of railroad motor-carrier affiliates. We think that at the time of issuance of the certificate, if the Commission reasonably deems the restriction useful in protecting competition, or for other statutory purposes,

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[6] § 207: "*Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

[7] *Crescent Express Lines* v. *United States,* 320 U. S. 401.

the Commission may require the railroad-affiliated motor carrier to perform only those services that are auxiliary and supplemental to the rail service. That the railroads made use of motor carriage primarily in such fashion was known to the Congress before the enactment of any regulatory legislation in the field.[8] Such a restriction is a logical method to insure the maximum development of the two transportation agencies—rails and motors—as coordinate transportation services in accordance with the Declaration of Policy, § 202 (a) of the Motor Carrier Act of 1935, 49 Stat. 543, later incorporated into the National Transportation Policy, prefixed to the Interstate Commerce Act of 1940, 54 Stat. 899. Specific statutory authority is found in the requirements of the proviso in § 213 (a) of the Motor Carrier Act of 1935 and § 5 of the Interstate Commerce Act as amended in 1940, quoted in note 3, *supra*. Railroad operations as motor carriers are forbidden by that acquisition section except to enable a railroad "to use service by motor vehicle to public advantage in its operations." [9]

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[8] *Motor Bus and Motor Truck Operation,* 140 I. C. C. 685, 721, 745, 749; *Coordination of Motor Transportation,* 182 I. C. C. 263, 336 ff.; and see Report of the Federal Coordinator of Transportation on the Regulation of Transportation Agencies other than Railroads, S. Doc. No. 152, 73d Cong., 2d Sess. 15 ff., 35. Report of the Federal Coordinator of Transportation on Transportation Legislation, H. R. Doc. No. 89, 74th Cong., 1st Sess. 6.

[9] Proviso to § 5. See Commissioner Eastman, Hearings before Subcommittee of the Committee on Interstate Commerce, United States Senate, on S. 3606, 75th Cong., 3d Sess. 23:

"The reason for that proviso was that at the time when this act was under consideration by your committee, there was a feeling on the part of many that railroads, for example, ought not be permitted to acquire motor carriers at all. It was pointed out, in opposition to that view, that there were many cases where railroads could use motor vehicles to great advantage in their operations, in substitution for rail service, as many of them are now doing. Many railroad men, for example, feel that the operation of way trains has become

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A spate of cases can be cited to support the practice, some of which were specifically called to Congress' attention prior to the enactment of the 1940 Act.[10] With this knowledge that the Commission was granting certificates when it deemed the proposed railroad motor-carrier affiliates would operate as auxiliary to and supplemental of railroad service, Congress reenacted § 213 of the Motor Carrier Act in § 5 (2) of the Transportation Act of 1940. Such limitation was in furtherance of the National Transportation Policy, for otherwise the resources of railroads might soon make over-the-road truck competition impossible, as unregulated truck transport, it was feared, might have crippled some railroads. Motor transportation then would be an adjunct to rail transportation, and hoped-for advancements in land transportation from supervised competition between motors and rails would not materialize. The control of the bulk of rail and motor transportation would be concentrated in one type of operation.

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obsolete; that the motor vehicle can handle such traffic between small stations much more economically and conveniently than can be done by a way train; and the motor vehicles are being used in that way by many railroads. The same is true of many terminal operations. The motor vehicle is a much more flexible unit than a locomotive switching cars, and it can be used to great advantage and with great economy in many railroad operations."

And see statements of Sen. Wheeler, 79 Cong. Rec. 5655, and Rep. Sadowski, 79 Cong. Rec. 12206. Cf. *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60. See also § 212 (b).

[10] *E. g., Kansas City Southern Transport Co.*, 10 M. C. C. 221, 53d Annual Report of the Interstate Commerce Commission 107, November 1, 1939; *Pennsylvania Truck Lines, Inc.*, 5 M. C. C. 9, 51st Annual Report 68–69. The Commission, in Appendix B to its brief in Nos. 38 and 39, *United States* v. *Texas & Pacific Motor Transport Co.*, decided today, *post*, page 450, has collected 120 cases, beginning in 1936 with vol. 1 of the Motor Carrier Reports, dealing with the issuance of certificates to motor subsidiaries of rail carriers. The great bulk of these cases makes specific reference to the auxiliary and supplemental standard.

Complete rail domination was not envisaged as a way to preserve the inherent advantages of each form of transportation.[11]

As indicated above in the text just preceding note 4, the Commission reads into § 207 the same requirement. Thus a consistent attitude toward the use of motors by railroads is maintained. It also relies on its understanding of the directions of the National Transportation Policy "to recognize and preserve the inherent advantages of each," rail, motor, and water; and its reliance on that Policy is further justified by the Whittington amendment stating that "all the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 54 Stat. 899.

But power in the Commission, before issuance of a certificate or approval of acquisition, to limit railroad motor operations so as to make them auxiliary and supplemental

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[11] See Meck and Bogue, Federal Regulation of Motor Carrier Unification, 50 Yale L. J. 1376, 1408 ff. The Commission's view is evidenced in *Pennsylvania Truck Lines, Inc.*, 1 M. C. C. 101, 111:

"While we have no doubt that the railroad could, with the resources at its command, expand and improve the partnership service and that, so far as numbers are concerned, there is now an ample supply of independent operators in the territory for the furnishing of competitive service, we are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of section 213, above quoted, is evidence that Congress was not convinced that this should be done. Truck service would not, in our judgment, have developed to the extraordinary extent to which it has developed if it had been under railroad control. Improvement in the particular service now furnished by the partnership might flow from control by the railroad, but the question involved is broader than that and concerns the future of truck service generally. The financial and soliciting resources of the railroads could easily be so used in this field that the development of independent service would be greatly hampered and restricted, and with ultimate disadvantage to the public."

to rail service does not necessarily imply power to change the conditions designed to bring about the desired coordination, after issuance of the certificate. The parent railroad may have acquired or developed its motor affiliate in reliance on the conditions stated in the certificate. So far as the present case is concerned, there is a provision, quoted above, pp. 423–424, making the certificate for the White Line operation subject to further limitations, restrictions or modifications the Commission might find necessary to insure a continuance of auxiliary and supplemental operation and to avoid undue restraint on competition. It was a clause like this in *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60, that occasioned the comment that "if the Commission later determines that the balance of public convenience and necessity shifts through competition or otherwise, so that injury to the public from impairment of the inherent advantages of motor transportation exceeds the advantage to the public of efficient rail transportation, the Commission may correct the tendency by restoration of the rail movement requirement or otherwise." *Id.* at 71–72. As the issue in the *Parker* case was the right to issue certificates to railway subsidiaries when existing over-the-road motor carriage might have been utilized, no determination was made there as to whether or not such a reservation was valid. Its effect on the present issues comes from the ruling there made that the Commission had power to balance the public interests in the different methods of transportation so as to preserve the inherent advantages of each, even though its action might bring some disadvantage to one system or the other. This duty was said to have been imposed upon the Commission by the National Transportation Policy. *Id.* at p. 66.

When competition, public interest in the preservation of the inherent advantages of rails and motors, and use of motor service by railroads in their operations are the basis, as they are (see National Transportation Policy,

54 Stat. 899 and § 5 (2) (b)), for allowing acquisitions of motor routes by railroads, we think it consonant with that policy to reserve the right to make further limitations, restrictions or modifications to insure that the service remain auxiliary or supplemental. Congress could not have expected the Commission to be able to determine once and for all the provisions essential to maintain the required balance. Such a reservation, of course, does not provide unfettered power in the Commission to change the certificate at will. That would violate § 212, allowing suspension, change or revocation only for the certificate holders' willful failure to comply with the Act or lawful orders or regulations of the Commission. The reservation by its terms does not offend against the provision of § 212 that a certificate "shall remain in effect until suspended or terminated," as § 212 provides. The Commission asserts the modifications were made in accordance with the certificate. The reservation would not authorize changes in operation or service unconnected with the plan of coordinated operation; and indeed Transit was not originally authorized to operate independently and at large. What the reservation does allow are changes to insure that the operations will continue as auxiliary or supplemental to the train service.

The consolidation section, § 5 (2), permits a railroad to purchase a motor carrier only "with the approval and authorization of the Commission." That approval is contingent upon a finding of public advantage and lack of undue restraint on competition. Then approval is to be made "upon the terms and conditions, and with the modifications, so found to be just and reasonable."

We note the directions of § 208 as to the certificate, requiring that it "shall specify the service to be rendered" and that "there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public conven-

ience and necessity may . . . require." We note also §§ 216 (c) and 217 (a) with their provisions allowing common carriers by motor to establish through routes and joint rates with other carriers, motor or otherwise. Sections 208, 216 (c) and 217 (a) with their general provisions do not in our opinion override the specific requirement of the National Transportation Policy that the inherent advantages of all modes of transportation be retained, or of § 5 that acquisition of motor routes by railroads shall require the above special findings and may be subject to special conditions. Section 208 does not seem to conflict with § 5 (b), and § 216 (c) is based on voluntary action. And we need not pause over the contention that limitations placed upon rail-owned motor carriers transform them from common into contract carriers under the definitions in § 203.

The language of the proviso of § 5 (2) (b), we hold, gives the Commission power to enforce the reservation in the certificate set out on pp. 423–424, *supra*. We turn then to the question whether the five directed modifications of the certificate, pp. 425–426, *supra*, fairly may be said to be of a character auxiliary to or supplemental of train service and not such a change or revocation in part as is contemplated by the procedure of § 212, for failure to comply with statutory or regulatory provisions.

Auxiliary and Supplemental.—The Interstate Commerce Act sets out only generally requirements that must be met by railroad applicants for motor-carrier certificates. In acquisition cases under § 5 (2) the certificate is not to be issued without the statutory findings discussed above that the proposed merger or consolidation will be in the "public interest" and that the railroad can use the motor service "to public advantage in its operations." [12]

[12] In original applications under § 207, the fact that the applicant is a railroad brings up other questions of transportation policy. See note 4, *supra*.

The words "auxiliary to or supplemental of" [13] are not taken from the Act. There is no such specific limitation for railroad operation of motor carriers. Their connotation is to be gathered from the context in which they have been employed by the Commission. The certificate, pp. 423–424, *supra,* used the phrase to avoid undue restraint on competition. That has been its use from the beginning. The only competition at which the limitation was directed was full railroad competition with over-the-road motor carriers. Appellees urge that the meaning of the words is limited by its application through the restrictions on the certificates at the time it was issued, December 3, 1941.

Appellees assert that under their certificate they could and did transport at either rail or truck billing and rates, with no restriction of movement along the route. The auxiliary and supplemental requirement, they argue, is adequately complied with by restricting the service to points "which are also stations on the lines of The Chicago, Rock Island and Pacific Railway Company." The Commission, appellees contend, was functioning with this geographical concept of auxiliary and supplemental in mind when, in 1941, reservation was made in Transit's certificate. To support this assertion, appellees call attention to the case in which the phrase "auxiliary and supplementary" was first applied to authorize motor service of railroad affiliates, *Pennsylvania Truck Lines, Inc.—Barker Motor Freight,* 1 M. C. C. 101 at 113, October 8, 1936.[14] Later, in 5 M. C. C. 9, March 6, 1937, the form

[13] The variant "auxiliary to or supplementary to" appears to be used interchangeably with "auxiliary to and supplemental of."

[14] "2. That the service to be rendered by the Barker Motor Freight, Incorporated, in the event the pertinent applications now pending before the Commission are subsequently approved by us, be confined to service auxiliary and supplementary to that performed by the Pennsylvania Railroad Company in its rail operations and in territory parallel and adjacent to its rail lines."

was changed as shown below.[15] That this authorization permitted general motor-carrier service along the rail lines, appellee states, is shown by *Pennsylvania Truck Lines, Inc., Extension—Lebanon, Ohio,* 47 M. C. C. 837, decided January 6, 1948.[16] See also, *Southern Pacific Company—Valley Motor Lines, Inc.,* 39 M. C. C. 441, 447.[17]

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[15] "Provided, however, (1) that operations under the authority herein granted shall be confined between the points and over the routes described in the appendix, (2) that the authority herein granted shall not be construed to include the right of rendering service from or to, or the interchanging of traffic at, any point other than a station of the Pennsylvania Railroad Company, ..." 5 M. C. C. at 15.

[16] "Under the Barker certificate applicant performs two distinct types of service; (1) substituted service for the railroad, and (2) independent motor carrier service for the general public. The latter service involves the transportation of general commodities, in any quantity, under motor carrier bills of lading and tariffs and at motor carrier rates. . . . Substituted service was being performed by applicant at the time of the hearing in January, 1945, over several routes most of which radiate out of Pittsburgh and Columbus. Independent service also was being performed at that time only over regular routes extending principally between the following points: . . . . Applicant has its own agents and representatives who deal with the shippers in the performance of the independent service. In January 1945, 200 units of equipment were being used in independent service and 500 in substituted service."

[17] "The only definite restriction on the operating authority which was imposed in the *Barker case* and later cases has been designed to confine the motor-carrier operations acquired to the territory of the railroad through limiting the rights so as to authorize service only at stations on the railroad. Although, at times, a condition formerly was sometimes included in acquisition cases to the effect that service to be rendered should be 'auxiliary and supplementary' to the railroad's service, there has been no indication in the reports that such condition was intended to prohibit rendition of all motor-carrier service directly for the shipping public under the operating rights in *addition to,* in *substitution for,* and in *lieu of,* the parent railroad's service, or to restrict the operation *solely* to one in combination with the railroad's operation; nor is it our understanding that it has been so construed by the carriers."

The Commission asserts that the meaning of "auxiliary and supplemental" as used in the Barker Purchase and thereafter was not geographical. This, it says, is shown by the explanation in 5 M. C. C. at p. 11, a later Barker report and order.[18] In 1943, after the certificate here in question was issued, the Commission defined "auxiliary and supplemental" in the *Texas & Pacific Motor Transport Company Application*, 41 M. C. C. 721.[19] The Com-

[18] "The scope of the operations proposed to be retained is broader than intended by the conditions we stated in our prior report. Hence, it will be of advantage to the parties in this and later proceedings if we here amplify the meaning of those conditions. Approved operations are those which are auxiliary or supplementary to train service. Except as hereinafter indicated, nonapproved operations are those which otherwise compete with the railroad itself, those which compete with an established motor carrier, or which invade to a substantial degree a territory already adequately served by another rail carrier.

"Approved operations are best illustrated by the substitution of trucks for peddler or way-freight service in what is commonly called 'station-to-station' service."

[19] "Condition 1 [same as condition 1, p. 425, *supra*] limits the character of service to be performed by the petitioner to that which is auxiliary to or supplemental of the rail service of the railway. It limits the service to be performed by truck to the transportation of the rail traffic of the railway. It permits the public to receive an improved rail service through the use of trucks instead of trains as a means of fulfilling the railway's undertaking to transport. Petitioner's status as a common carrier by motor vehicle is not dependent upon its having direct dealings with the shipping public. *Willett Co. of Indiana, Inc., Extension—Ill., Ind., and Ky.*, 21 M. C. C. 405. Its service is necessarily limited to points served by the railway, hence condition 2. Condition 1 permits all-motor movements in the handling of rail traffic at railroad rates and on railroad bills of lading. To and from certain points on segments of the rail lines, the improved service was to be accomplished by performing the movements partly by train and partly by motor vehicle, an auxiliary or supplemental service coordinated with the train service, hence condition 3. Since petitioner's certificates limit the service to be performed to that which is auxiliary to or supplemental of the rail service of the railway, it is without authority to engage in operations unconnected with the

mission notes that the *Valley* case, *supra,* came after *Texas & Pacific,* and now considers it disapproved by a subsequent denial of reconsideration of *Texas & Pacific.* 55 M. C. C. 567, 584–585. The question has evidently produced a difference of opinion in the Commission.[20]

Appellees charged that the Commission had tightened its "concept of what is auxiliary to, or supplemental of, rail service." 55 M. C. C. 567, 583. The Commission refused to accept that assumption and therefore did not

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rail service and, accordingly, may not properly be a party to tariffs containing all-motor or joint rates, nor participate in a directory providing for the substitution of train service for motor-vehicle service at its option. To the extent petitioner is performing or participating in all-motor movements on the bills of lading of a motor carrier and at all-motor rates, it is performing a motor service in competition with the rail service and the service of existing motor carriers; and, to the extent it is substituting rail service for motor-vehicle service, the rail service is auxiliary to or supplemental of the motor-vehicle service rather than the motor-vehicle service being auxiliary to or supplemental of rail service." P. 726.

[20] See *Kansas City Southern Transport Co.,* 28 M. C. C. 5, 24; *Rock Island Motor Transit Co. Extension, Eldon, Iowa,* 33 M. C. C. 349, 361; *Rock Island Motor Transit Co.—Purchase—White Line,* 40 M. C. C. 457, 478.

"As previously stated, from the date of the decision in the *Barker* case to shortly before enactment of the Transportation Act, 1940, the principles there recognized and applied, controlled the disposition of practically every rail-motor acquisition case. However, beginning with *Frisco Transp. Co.—Purchase—Reddish,* 35 M. C. C. 132, and continuing until quite recently, the practice of specifically reserving the right later to impose such restrictions as might be necessary to insure that future operations under the acquired authority should be limited to the rendition of service auxiliary to, or supplemental of, train service was not followed. With such departure from the former practice there also appears to have developed a tendency in rail-motor acquisition proceedings to treat the *Barker* case restrictions as geographical or territorial only in their intent rather than as substantive limitations upon the character of the *service* which might be rendered by a railroad or its affiliate under any acquired right." 40 M. C. C. at 469.

discuss the necessity of proceeding under § 212 in changing or partially revoking the certificate. It held:

> "We conclude that approval of the acquisition by Transit was solely for the purpose of enabling Transit to perform a service auxiliary to and supplemental of rail service; that such intent or purpose was adequately evidenced by the report of division 5 including the reservation of a right specifically to restrict if need should be found; that Transit has no cause for any complaint that it was misled to its prejudice and that our concept at the time of the original decision herein, as to what constitutes service auxiliary to or supplemental of rail service, though now described in greater detail, has not been revised to Transit's prejudice; and that there is no element of unfairness in our exercise now of any authority which we have to restrict future operations." 55 M. C. C. 567, 585.

It is to be noted also that the examiner's report on the White Line Purchase in 1938 recommended "that no truck service shall be conducted at other than rail rates." On objection by appellee this requirement was eliminated. 5 M. C. C. 451, 458; 55 M. C. C. 567, 576 ff.; 90 F. Supp. 516, 518. Furthermore, the Commission required the appellee to file tariffs for truck rates and truck billing with the Commission. 90 F. Supp. 516, 518. The District Court concluded as a matter of law as follows:

> "3. Prior to and at the time of the approval of the White Line transaction and the issuance in said proceeding of plaintiff's certificate, and at the time of the approval of the acquisition of the Frederickson certificate, the term, 'auxiliary to and supplemental of train service' did not prohibit the rendition of all-motor service directly for the shipping public at all-motor rates in addition to service at rail rates in

substitution for and in lieu of the rail service of plaintiff's affiliated railroad."

What was in the Commission's mind as to the meaning of auxiliary and supplemental at the time it issued its certificate, we cannot be sure. At present a motor service is auxiliary and supplemental to rail service, in the Commission's view, when the railroad-affiliated motor carrier in a subordinate capacity aids the railroad in its rail operations by enabling the railroad to give better service or operate more cheaply rather than independently competing with other motor carriers. Undoubtedly the Commission has not consistently required each rail-affiliated motor carrier to forego motor billings or tariffs. Key points to break traffic are relatively new. 28 M. C. C. 5. Rail affiliates have been permitted to leave the line of the railroad to serve communities without other transportation service.[21] Those divergences, however, are an exercise of the discretionary and supervisory power with which Congress has endowed the Commission. It is because Congress could not deal with the multitudinous and variable situations that arise that the Commission was given authority to adjust services within the limits of the Motor Carrier Act. § 208. The Commission has continually evidenced, as indicated above, by opinion and certification its intention to have rail-owned motor carriers serve in auxiliary and supplemental capacity to the railroads.

Appellees urge that the new conditions mark a new Commission policy; that it is such a change in the certificate as was condemned in the case of water carriers by *United States* v. *Seatrain Lines,* 329 U. S. 424, 428. Without relying upon the statutory differences between Commission power over motor and water carriers, pp. 429–

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[21] *Rock Island Motor Transit Co. Extension—Wellman, Iowa,* 31 M. C. C. 643. See 55 M. C. C. 567, 584.

432, we believe that case is inapplicable to these circumstances. In *Seatrain* a certificate was granted to carry "commodities generally." For the Commission then to modify this to "in railroad cars only" or "except in railroad cars" would limit the freight authorized to be carried by the certificate. Transit's certificate, on the other hand, required service auxiliary and supplemental to rails, and the modification was not a change of policy as to that but an additional requirement to insure coordinated service. The new conditions, pp. 425–426, *supra,* are of a character that aids rail operation and minimizes competition with over-the-road motor carriers. Such added conditions are not changes in or revocations of a certificate in whole or in part but a carrying out of the reservation in the certificate.

The Commission has expressed its policy to limit rail affiliates to services in aid of rail transportation by the phrase, perhaps too summary, auxiliary and supplemental. Though the phrase is difficult to define precisely, its general content is set out in *Texas & Pacific Motor Transport Co. Application,* 41 M. C. C. 721, 726, quoted n. 19, *supra.* While the practice of the Commission has varied in the conditions imposed, the purpose to have rail-connected motor carriers act in coordination with train service has not. Circumstances change. Different conditions are required under different circumstances to maintain the balance between rail and motor carriage. We do not think the meaning of auxiliary and supplemental is limited to the Commission's practice at any particular time. So long as it may fairly be said that the practice required from the motor carrier falls within the meaning the Commission has given to auxiliary and supplemental, the condition is valid.

Such restrictions hamper railroad companies in the use of their physical facilities—stations, terminals, warehouses—their personnel and their capital in the development of their transportation enterprises to encompass all

or as much of motor transportation as the roads may desire. The announced transportation policy of Congress did not permit such development.[22] We hold that the new conditions are within the limits covered by the reservation of power to impose such further limitations as might be found necessary "to insure that the service shall be auxiliary or supplementary to the train service" of The Chicago, Rock Island and Pacific Railway Company.

Frederickson Purchase.—The statement of facts at the beginning of this opinion shows the Fredericksons possessed certificates issued under the proviso of § 206, the "grandfather clause." Transit agreed to purchase these rights subject to the approval of the Commission. This approval was given by a report and order. The order approved the purchase of the "operating rights and property . . . subject to the terms and conditions set out in the findings in said report." The findings complied with § 5 (2) (a) and (b) of the Transportation Act. They stated, "The Rock Island Motor Transit Company will be entitled to a certificate covering the previously-described portion of rights granted in Nos. MC–530 and MC–530

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[22] And cf. National Resources Planning Board, Transportation and National Policy (1942), H. R. Doc. 883, 77th Cong., 2d Sess., pp. 155, 156:

"In the present highly dynamic state of the transportation industry, it would be national folly to place the agencies in any kind of strait jacket. Each mode needs an opportunity to grow and change with the times. No drastic move to allocate traffic arbitrarily or to achieve a similar end by indirect means should be permitted private concerns or forced upon them by Government. The public has struggled long and taxed itself heavily to develop the newer agencies and to revive the old for the purpose of weakening the monopolistic position once occupied by the railroads and of improving and expanding the services offered to users. It would be unfortunate if public policy or private practice were now employed to halt and reverse this trend, and thus to turn back the hands of the transportation clock to an earlier time."

(Sub–No. 1), which rights are herein authorized to be unified with rights otherwise confirmed in The Rock Island Motor Transit Company, with duplications eliminated; . . . ." The words "previously-described portion of rights granted" cover the Frederickson certificates as "a motor-vehicle common carrier of general commodities over regular routes between" named points. The Frederickson certificates also covered irregular routes for certain commodities. These latter rights were not purchased. The rights purchased were over-the-road motor-carrier rights. Neither those certificates nor the report or order on the purchase application contained anything specifically limiting the operations to service auxiliary to and supplemental of the Rock Island train service. There was a finding, in the words of the proviso to § 5 (2) (b), that the purchase "will enable The Chicago, Rock Island and Pacific Railway Company . . . to use service by motor vehicle to public advantage in its operations." The transaction was consummated in January 1945, over six years after the approval of the White Line Purchase and over three years after the issue of that original certificate, hereinbefore discussed.

The basic question posed as to this purchase is similar to that in the White Line Purchase. Has the Commission power to place in the Frederickson certificates the modifications ordered for the White Line certificate? We will solve the problem by determining that the order approving the purchase has not the finality of a certificate but is rather only a tentative approach to the consummation of the purchase subject to changes in conditions and requirements. The power to issue the certificate with the White Line modified conditions follows, *a priori,* from what we have said in the foregoing division of this decision. This leaves unanswered the question of the power of the Commission to modify a railroad-affiliated motor carrier's certificate so as to make its operation auxiliary to and sup-

plemental of the rail service, when no reservation for or restriction to that effect has been placed in the order directing the issue of the certificate or the certificate itself. If any such procedure should be undertaken by the Commission, that answer should await a fully developed statement and argument by the interests affected. Our reasons for holding that the Commission may validly insert the proposed limitations in the certificate follow.

Closings of loans and purchases involve nice timing adjustments. The transportation industry is familiar with the complexities of closings involving clearances or impositions of prior and underlying mortgages and partition of obligations among syndicates of lenders or purchasers, from rail system mortgages to secure various classes of obligees in reorganizations to simple borrowings for trusteed equipment. It understands the business risks of purchase or sale ahead of final commitment by a separate entity. A request for a statement of the terms of the proposed certificate of convenience and necessity would doubtless have been complied with by the Commission. If not, the closing with Frederickson could have been made by escrow or otherwise simultaneously with the issue of the certificate.

Transit had had experience with the problems of coordination between rail and motor service.[23] In this application it objected to a limitation on freight of immediately prior or immediately subsequent rail carriage.

[23] "Certain of Transit's present freight operations are subject to the limitation that service shall be solely that which is auxiliary to and supplemental of the train service of the railroad, and either that freight so handled shall have an immediately prior or subsequent rail haul by the railroad, or that it shall not be transported from, to, or between more than one of specified key points. However, its route between Atlantic and Omaha, Nebr., over U. S. Highway 6, serving all points which are stations on the railroad, is part of a route to and from Chicago, Ill., via Des Moines, acquired pursuant to

The limitation was not put in the report as a condition. While the report stressed the rail operating advantages of the use of trucks, it did not deal with the terms auxiliary and supplemental. If the problem of limitation of the certificate to motor service in rail operation occurred to the applicant or the Commission, precedents from the *Barker* case to the White Line application would have indicated an inclusion in the certificate of a limitation of auxiliary to and supplemental of rail service.

Transit maintains that the order is final; that the result is the same as though the service requirements of the order of approval were written into the operating certificate as directed by the statute. § 208. "The decisions of the Commission," argues Transit, reflect "finality of action." [24] Neither of the latter two cases in the note bear in any way on the present point. In both, certificates had been issued and the Commission said, in so many words, the certificates are final. In the *Smith Bros.* case, it added:

> "We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of

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authority granted in *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 5 M.C.C. 451, and is not so restricted." *Chicago, Rock Island & Pac. R. Co.—Purchase—J. H. Frederickson, etc.*, 39 M. C. C. 824 (no printed report).

[24] *United States* v. *Seatrain Lines*, 329 U. S. 424; *Boulevard Transit Lines* v. *United States*, 77 F. Supp. 594, 595; *Smith Bros., Revocation of Certificate*, 33 M. C. C. 465, 472.

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> the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding." P. 472.

What slight bearing *Seatrain* has weighs on the side of the interlocutory character of the approval order. The sentence referred to reads:

> "But, as the Commission has said as to motor carrier certificates, while the procedural 'orders' antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding." P. 432.

As under the statute, §§ 206, 207, 208, motor carriers must have certificates authorizing their operations, we conclude that the certificate is the final act or order that validates the operation. Until its form and content are fixed by delivery to the applicant, the power to frame it in accordance with statutory directions persists.

It may be said that, as the order permitted Transit to purchase the Frederickson "operating rights," it must have freedom to use all the seller's motor-carrier privileges; that the absence of a reservation defeats Commission power to insert "auxiliary and supplemental" restrictions in the certificate. Since we hold the order of approval is not the final order, we reject the premise.

Other Objections.—A number of other objections to the enforcement of the orders were presented by appellees and considered by the Court. We comment briefly on those we think merit notice. "Grandfather rights" under § 206 of the Transportation Act were the basis of the White and Frederickson applications for certificates of convenience and necessity. Transit acquired the sellers' rights to certificates. Appellees contend that as the sellers were entitled to broader operating rights than are allowed the purchaser under the modified certificate, the

right to "substantial parity between future operations and prior *bona fide* operations" guaranteed by § 206 is infringed by limiting the motor service to that auxiliary and supplemental to rail service.[25] A railroad purchaser does not necessarily receive all rights a certificate holder possesses. Because of the National Transportation Policy and § 5, making a railroad's purchase subject to conditions, as hereinbefore described, approval may be conditioned by the Commission on the railroad purchaser's willingness to accept a narrower certificate than that possessed by the seller.

Finally, the appellee asserts that its certificate is property akin to a franchise; that it has invested large sums in the acquisition and equipment of its routes and service, and that what it alleges is revocation deprives it of property without due process of law. We think that our previous holding in this decision that Transit took its certificate and obtained approval of its acquisitions to operate in the aid of the railroad, auxiliary and supplemental thereto, makes it obvious that Transit had nothing of which it was deprived by the contested order.

The judgment of the three-judge District Court is reversed and the proceeding is remanded with directions to dismiss the complaint.

Reversed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE JACKSON and MR. JUSTICE BURTON dissent and would affirm the District Court's opinion. They are of the opinion that the Commission partially revoked the certificates involved in a manner not authorized by the Interstate Commerce Act.

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[25] The phrase is derived from *Alton R. Co.* v. *United States,* 315 U. S. 15, 22, followed in *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, 481.

UNITED STATES ET AL. *v.* TEXAS & PACIFIC MOTOR TRANSPORT CO.

NO. 38. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.*

Argued November 7–8, 1950.—Decided February 26, 1951.

Under § 213 (now § 5) of the Interstate Commerce Act, providing for the acquisition of operating rights from other carriers, and under § 207, providing for new operations, the Interstate Commerce Commission had issued certificates of convenience and necessity to a motor carrier affiliate of a railroad. In each of the certificates, the Commission reserved the right to impose further restrictions to confine the motor carrier's operations to service "auxiliary to, or supplemental of, rail service." *Held:* The Commission had power, in subsequent proceedings, to modify the certificates so as in substance to bar the motor carrier from issuing its own bills of lading or performing all-motor service under all-motor local rates or all-motor joint rates with connecting motor carriers, from substituting rail service for motor service, and from participating in motor-carrier tariffs. *United States* v. *Rock Island Motor Transit Co., ante,* p. 419. Pp. 451–458.

1. The action of the Commission in thus modifying the certificates was not invalid as in conflict with § 216 of the Transportation Act of 1940; nor invalid as not complying with the revocation procedure prescribed by § 212 of the Interstate Commerce Act; nor unconstitutional as confiscatory. Pp. 457–458.

2. In a certificate issued to a motor-carrier affiliate of a railroad, the Commission may reserve the right to impose further restrictions to confine the motor carrier's operations to service which is auxiliary to, and supplemental of, rail service, whether the certificate be issued under § 207 for a new operation or in acquisition proceedings under §§ 5 and 213. Pp. 458–459.

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*Together with No. 39, *Regular Common Carrier Conference of American Trucking Associations, Inc.* v. *Texas & Pacific Motor Transport Co.*, also on appeal to the same court.

3. The order of the Commission was not without support in the evidence. Pp. 459–460.

4. In the hearing by the Commission, the motor carrier was not denied procedural due process. Pp. 460–461.

87 F. Supp. 107, reversed.

In a proceeding to set aside two orders of the Interstate Commerce Commission, the three-judge District Court set aside the orders and entered a permanent injunction. 87 F. Supp. 107. The United States and the Interstate Commerce Commission (No. 38) and an intervenor (No. 39) appealed. *Reversed,* p. 461.

Daniel W. Knowlton argued the cause for the United States and the Interstate Commerce Commission, appellants in No. 38. With him on the brief were *Solicitor General Perlman, Acting Assistant Attorney General Underhill* and *H. L. Underwood.*

Frank C. Brooks argued the cause and filed a brief for appellant in No. 39.

J. T. Suggs argued the cause for appellee. With him on the brief were *R. Granville Curry, W. O. Reed, Claude Williams, Robert Thompson* and *D. L. Case.*

MR. JUSTICE REED delivered the opinion of the Court.

These appeals, by the Interstate Commerce Commission, and by the intervenor, Regular Common Carrier Conference of American Trucking Associations, Inc., from the judgment of a three-judge federal district court setting aside two orders of the Interstate Commerce Commission, and entering a permanent injunction, raise questions similar to those discussed in No. 25, *United States* v. *Rock Island Motor Transit Co., ante,* p. 419, decided today. The questions relate to the power of the Commission to ban service practices theretofore permitted under certificates of public convenience and necessity previously issued

to a common carrier by motor vehicle. The Commission acted under authority reserved in the certificate to impose additional restrictions to insure that the motor carrier's operations will be auxiliary to or supplemental of the operations of its parent common carrier by rail.

The Texas and Pacific Motor Transport Company is a wholly owned subsidiary of the Texas and Pacific Railway, operating a system of regular routes for the carriage of freight, from New Orleans to El Paso, Texas, and Lovington, New Mexico, roughly paralleling the lines of the railway and its subsidiaries. Transport was organized in 1929 to provide a local pick-up and delivery service in connection with rail transportation between points on the lines of the railway. Its first over-the-road common-carrier operation, between Monahans, Texas, and Lovington, New Mexico, was inaugurated just before the effective date of the Motor Carrier Act of 1935. It extended its operations by obtaining certificates of convenience and necessity from the Commission, both under § 213 of the 1935 Act, now § 5 of the Interstate Commerce Act, providing for acquisition of established rights by purchase from other carriers ("grandfather" rights); and under § 207 of the Interstate Commerce Act, providing for new operations.

Between July 1939 and November 1942, the Commission issued sixteen certificates to Transport, covering various segments of its presently operating routes.[1] In all the certificates the Commission reserved the right to

[1] Sixteen proceedings are covered by I. C. C. docket number MC–50544, and various subnumbers, set out in Appendix A to *Texas & Pacific Motor Transport Co. Common Carrier Application,* 47 M. C. C. 753, 764. Transport was also operating under certain temporary authorities, Nos. MC–50544 (Sub-Nos. 21–TA, 24–TA, and 30–TA), which expired before the issuance of the Commission's orders under consideration here.

impose further restrictions in order to confine Transport's operation to service "auxiliary to, or supplemental of, rail service." This condition was expressed in either one of the two forms set out in the margin.[2] In addition, each certificate contained one or more, usually more, further conditions: (1) That the service to be performed was to be "auxiliary to, or supplemental of" the rail service.[3] (2) That only railway station points were to be served.[4] (3) Either that (a) all shipments should be made on a through rail bill of lading, including a prior or subsequent rail movement; [5] or (b) that no shipments should be made between certain "key points" on the rail line, or through

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[2] "5. Such further specific conditions as we, in the future, may find it necessary to impose in order to restrict applicant's operation to service which is auxiliary to, or supplemental of, rail service.

"5A. The authority herein granted shall be subject to such further limitations or restrictions as the Commission may hereafter find it necessary to impose in order to restrict applicant's operation to service which is auxiliary to, or supplemental of, train service of the railway, and in order to insure that the service rendered shall not unduly restrain competition." 47 M. C. C. 753, 766.

[3] "1. The service to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, rail service of the Texas and Pacific Railway, or in certain cases of its subsidiary rail lines, (or of Texas-New Mexico Railway Company) herein called the railway." *Ibid.*

[4] "2. Applicant shall not serve, or interchange traffic at any point not a station on a rail line of the railway." *Ibid.*

[5] "3. Shipments transported by applicant shall be limited to those which it receives from or delivers to the railway under a through bill of lading covering, in addition to movement by applicant, a prior or subsequent movement by rail.

"3A. Shipments transported by applicant shall be limited to those which it receives from or delivers to the railway under a through bill of lading covering in addition to movement by applicant, a prior or subsequent movement by rail, and those which it transports as parts of through shipments prior or subsequent to movement by rail under appropriate transit rules." *Ibid.*

more than one of them.[6] And (4) that the contractual arrangements between Transport and Railway be subject to modification by the Commission.[7]

The irregular incidence of these conditions in the certificates may be accounted for by the segmentary fashion in which Transport built up its system of routes, over a period of several years. They were not reconsidered as a group by the Commission until 1943, when, in response to a petition by Transport, to determine what modification should be made in its certificate No. MC–50544 (Sub-No. 11), particularly in regard to service for freight between El Paso and Sierra Blanca, Texas, for the Texas and New Orleans Railroad Company, it reopened nine of the certificate proceedings to consider whether Transport could join with other motor carriers in rates, some of which provided for substituting rail service for motor service. The Commission held that

> "Since petitioner's certificates limit the service to be performed to that which is auxiliary to or supplemental of the rail service of the railway [in some the limitation was by reservation], it is without authority to engage in operations unconnected with the rail service and, accordingly, may not properly be a party to tariffs containing all-motor or joint rates, nor participate in a directory providing for the substitution of train service for motor-vehicle service at its option.

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[6] "3B. No shipments shall be transported by applicant as a common carrier by motor vehicle between any of the following points or through, or to, or from more than one of said points: Fort Worth, Tex., and Texarkana, Tex.-Ark.

"3C. No shipments shall be transported by applicant between any of the following points or through, or to, or from more than one of said points: El Paso and Pecos, Tex." *Ibid.*

[7] "4. All contractual arrangements between applicant and the railway shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and suitable to the parties." *Ibid.*

> To the extent petitioner is performing or participating in all-motor movements on the bills of lading of a motor carrier and at all-motor rates, it is performing a motor service in competition with the rail service and the service of existing motor carriers; and, to the extent it is substituting rail service for motor-vehicle service, the rail service is auxiliary to or supplemental of the motor-vehicle service rather than the motor-vehicle service being auxiliary to or supplemental of rail service." [8]

The Commission did not issue any affirmative order, but directed Transport to modify its service in accordance with the findings, within a reasonable time.

Transport and Railway then petitioned jointly for reconsideration, or for further hearings, including hearings on certain other certificates; and, although the two petitioners later attempted to withdraw their petition on the ground that permission to file a joint tariff had been granted, the Commission nevertheless ordered that the proceedings be reopened in all sixteen certificates, and three Temporary Authorities, "solely to determine what, if any, changes or modifications should be made in the conditions contained in the outstanding certificates of public convenience and necessity . . . ."

After a hearing at which Transport and Railway appeared, but refused to introduce any evidence, and after oral argument on the examiner's report, the Commission on January 22, 1948, ordered that all sixteen certificates be modified to include uniformly the substance of the five conditions set out above, specifically as follows:

> "1. The service to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, the train service of The Texas and Pacific Railway Company, The Weatherford, Min-

[8] 41 M. C. C. 721, 726.

eral Wells and Northwestern Railway Company, or Texas-New Mexico Railway Company, and, between El Paso and Sierra Blanca, Tex., the train service of Texas and New Orleans Railroad Company, hereinafter called the railways.

"2. Applicant shall not render any service to or from any point not a station on a rail line of the railways.

"3. No shipments shall be transported by applicant between any of the following points, or through, or to, or from, more than one of said points: New Orleans, Alexandria, and Shreveport, La., Texarkana, Tex.-Ark., Fort Worth-Dallas, (considered as one), Abilene, Monahans, and El Paso, Tex.

"4. All contractual arrangements between applicant and the railways shall be reported to us and shall be subject to revision if and as we find it to be necessary, in order that such arrangements shall be fair and equitable to the parties.

"5. Such further specific conditions as in the future we may find necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, the train service of the railways." [9]

The effect on appellee was to bar it from issuing its own bills of lading or performing all-motor service under all-motor local rates or all-motor joint rates with connecting motor carriers, or substituting rail service for motor service, and it could not be a party to such tariffs.[10] Prior to these proceedings the appellee had issued its own bills of lading and participated in motor-carrier tariffs. The

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[9] 47 M. C. C. 753, 763–764.

[10] 47 M. C. C. 753, 754, and Rules 30, 107 (a) and 107 (b) of Supp. No. 5 to I. C. C. Tariff Circular No. 20. See 41 M. C. C. 721, 726, excerpted at note 19, No. 25, *United States* v. *Rock Island Motor Transit Co.*, decided today, *ante*, p. 419.

District Court found the value of the certificates, $65,000, would be destroyed and $240,000 annual revenue lost.

A petition for reconsideration of this order, and for oral argument before the entire Commission, was denied on May 9, 1949. Transport thereupon brought this suit in the Federal District Court, seeking to set aside the Commission's orders of January 22, 1948, and May 9, 1949, and to enjoin their enforcement. In the District Court proceedings the Regular Common Carrier Conference of American Trucking Associations intervened on behalf of the Commission. After hearing, the District Court made findings of fact and conclusions of law, and entered a judgment setting aside the Commission's orders, and permanently enjoining it from imposing any condition on Transport's certificates "in such manner as will prohibit petitioner from:

> "a. Filing, publishing and maintaining common carrier motor rates as provided by statute in the case of common carrier motor carriers generally;
>
> "b. Interchanging traffic with other common carrier motor carriers on joint motor rates;
>
> "c. Issuing its own bills of lading and tendering its service to the public generally on its own contracts of shipment;
>
> "d. Transporting traffic to, through, from or between any so-called 'key points' on that part of its route covered by interstate certificates of public convenience and necessity, to which no 'key point' restriction attached on issuance of such certificates,

or in such manner as will restrict petitioner to ship on rail rates or on railroad bills of lading."

From this judgment the Commission and the intervenor, Common Carrier Conference, appeal here.

The District Court, 87 F. Supp. 107, 112, reasoned that the operations of Transport were at all times and in all

ways auxiliary to and supplemental of the rail operations and therefore could not be restricted as attempted. The connotation of auxiliary and supplementary to the trial court was only a restriction limiting service to rail points. Without dealing specifically with the reservation to impose further conditions restricting the motor carrier's service to coordinated rail service, the District Court decided that the Commission's order restricting the service could not be valid in view of § 216, Transportation Act of 1940, 49 Stat. 558, 54 Stat. 924. That section allows motor common carriers to establish through routes, joint rates, practices and division of charges with other carriers by motor, rail or water.[11] It held, too, that the Commission's action was in essence a revocation in part of a certificate and unlawful except under conditions prescribed by § 212, 49 Stat. 555, 54 Stat. 924, and unconstitutional because confiscatory.

Transport here supports the soundness of the reasons given by the three-judge District Court for its injunction and supplements them by contentions that the Commission's order was without support in the evidence and that Transport was not accorded due process of law at the hearing of October 17, 1944, 47 M. C. C. 753, 755. In view of our decision of today upholding the Commission in No. 25, *United States* v. *Rock Island Motor Transit Co.*, *ante*, p. 419, all reasons for affirming the judgment below may be promptly rejected.

So far as the above issues relied upon by the District Court for its injunction are concerned, they seem to have been resolved in favor of the Government by our opinion in the *Rock Island* case. This proceeding involves certifi-

[11] "Thus, while the Commission might prescribe the points to be served, it could not forbid the participation in joint rates and through routes for the simple reason that such a provision would be inconsistent with the wording of Sec. 216 of the Act." 87 F. Supp. 107, 112.

cates for new routes under § 207. No such certificates or applications were in that case. The opinion, however, considered the Commission's practice in § 207 proceedings and stated that it was the same as in §§ 5 and 213 acquisition proceedings. We now hold that the same considerations justify the reservation in issue here. See n. 2, *supra.*

Transport's position that the order in question was without support in the evidence is based on the theory that as evidence was taken in the original applications that resulted in the necessary findings under §§ 213 of the Motor Carrier Act and 5 of the Transportation Act of 1940 for certificates to railroad motor carrier affiliates, changes in practices cannot now be made without evidence that the formerly permitted practices had been inconsistent with the public interest and did unduly restrain competition. *American Trucking Associations, Inc.* v. *United States,* 326 U. S. 77, 86, and *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, 91.[12]

The *Louisville & Nashville* case required a full hearing and the privilege of introducing testimony before the road's rates were set aside as unreasonable. The Commission was taking the position that the Hepburn Act allowed it to set aside rates after a "hearing" without evidence. The *American Trucking* case dealt with the issuance of a series of certificates by the Commission to a railroad-affiliated motor carrier after refusal to admit evidence of the flow of truck traffic between various localities along the parent railroad, and of the effect of the existing

[12] Several Commission decisions on the general necessity of evidence to support rulings are added. *Greyhound Corporation—Control,* 50 M. C. C. 237, 242; *Scannell—Control,* 50 M. C. C. 535, 541; *C. & D. Motor Delivery Company—Purchase—Hubert C. Elliott,* 38 M. C. C. 547, 553; *Joint N. E. Motor Carrier Assn., Inc.* v. *Rose and Welloff,* 43 M. C. C. 487, 488. None bear on such a situation as this. They relate to restrictions on the issue or transfer of certificates and revocation.

and prospective railroad-affiliated motor carriers on the over-the-road carriers. On appeal from an affirmance by a district court, we reversed the Commission.

This situation, however, differs from those referred to by Transport in that the Commission has reopened the proceedings, after they were started by Transport for an interpretation of its right to file and maintain a motor common-carrier tariff. Hearings were had in 1942 at Dallas, at which appellee's witnesses gave testimony as to the freight interchange between appellee and other motor carriers and the existence of tariffs, etc. After the report of the Commission referred to on pp. 454–455, Transport and the Texas and Pacific Railway petitioned for reconsideration by the Commission, setting out the facts of their current operations, and addressing themselves particularly to the elimination of the prior or subsequent rail-haul condition. Thereafter the proceedings were reopened to determine what changes or modifications should be made. Another hearing was held, October 17, 1944, and report made. At that hearing Transport appeared but refused to introduce evidence. The examiner examined an official of Transport as to the nature and extent of Transport's operations. This evidence developed the fact that Transport operated both on motor-carrier and rail rates under its own bills of lading in full competition with other motor carriers. Thus there appears in the record adequate evidence of the circumstances of Transport's operations.

Upon the due-process point we approve the ruling of the Commission. It follows:

> "Applicant argues that the notice setting the proceedings for further hearing did not inform it or the other parties of the nature of the issues to be met, or give them sufficient time to prepare to meet the issues; and that the hearing, in view of the request

for its cancellation, was in the nature of an ex parte proceeding. We are not impressed with applicant's argument that it was unable to foresee the issues. The notice in question stated that the further hearing was for the purpose of determining what changes, if any, should be made in the conditions, and thus placed the conditions themselves in issue. One of these is condition 5 or 5A, which in itself was adequate notice to applicant and the other parties that the primary purpose of the further hearing would be to determine, as provided for in that condition, whether it is necessary to change or modify the existing conditions or to add others so as effectively to restrict applicant's operations to service which is auxiliary to or supplemental of rail service. Applicant was given the opportunity of presenting evidence to show that no need exists for a change in its present conditions; however, not only did it choose not to offer such evidence, but it objected to the receipt of any evidence with respect thereto. In the circumstances, the examiner properly denied its motion to discontinue the further hearing and to withdraw its witness, and properly overruled its objection to the adduction of testimony through such witness." [13]

The judgment of the three-judge District Court is reversed and the proceedings remanded with directions to dismiss the complaint.

Reversed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE JACKSON and MR. JUSTICE BURTON dissent.

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[13] 47 M. C. C. 753, 756.

UNITED STATES EX REL. TOUHY *v.* RAGEN, WARDEN, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 83. Argued November 27–28, 1950.—Decided February 26, 1951.

1. Pursuant to Department of Justice Order No. 3229, issued by the Attorney General under 5 U. S. C. § 22, a subordinate official of the Department of Justice refused, in a habeas corpus proceeding by a state prisoner, to obey a subpoena *duces tecum* requiring him to produce papers of the Department in his possession. *Held:* Order No. 3229 is valid and the subordinate official properly refused to produce the papers. Pp. 463–468.
2. The trial court not having questioned the subordinate official on his willingness to submit the material "to the court for determination as to its materiality to the case" and whether it should be disclosed, the issue of how far the Attorney General could or did waive any claimed privilege against disclosure is here immaterial. P. 468.
3. Order No. 3229 was a valid exercise by the Attorney General of his authority under 5 U. S. C. § 22 to prescribe regulations not inconsistent with law for "the custody, use, and preservation of the records, papers and property appertaining to" the Department of Justice. *Boske* v. *Comingore,* 177 U. S. 459. Pp. 468–470.

180 F. 2d 321, affirmed.

In a habeas corpus proceeding by a state prisoner, the District Court adjudged a subordinate official of the Department of Justice guilty of contempt for refusal to produce papers required by a subpoena *duces tecum.* The Court of Appeals reversed. 180 F. 2d 321. This Court granted certiorari. 340 U. S. 806. *Affirmed,* p. 470.

Robert B. Johnstone argued the cause for petitioner. With him on the brief were *Edward M. Burke* and *Howard B. Bryant.*

Robert S. Erdahl argued the cause for McSwain, respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney, Stanley M. Silverberg* and *Philip R. Monahan.*

MR. JUSTICE REED delivered the opinion of the Court.

This proceeding brings here the question of the right of a subordinate official of the Department of Justice of the United States to refuse to obey a subpoena *duces tecum* ordering production of papers of the Department in his possession. The refusal was based upon a regulation [1] issued by the Attorney General under 5 U. S. C. § 22.[2]

Petitioner, Roger Touhy, an inmate of the Illinois State penitentiary, instituted a habeas corpus proceeding in the United States District Court for the Northern District of Illinois against the warden, alleging he was restrained in violation of the Due Process Clause of the Federal

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[1] Department of Justice Order No. 3229, filed May 2, 1946, 11 Fed. Reg. 4920, reads:

"Pursuant to authority vested in me by R.S. 161 U.S. Code, Title 5, Section 22), *It is hereby ordered:*

"All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.

"Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified there in, on the

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Constitution. In the course of that proceeding a subpoena *duces tecum* was issued and served upon George R. McSwain, the agent in charge of the Federal Bureau of Investigation at Chicago, requiring the production of cer-

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ground that the disclosure of such records is prohibited by this regulation."

Supplement No. 2 to that order, dated June 6, 1947, provides in part:

"TO ALL UNITED STATES ATTORNEYS

"PROCEDURE TO BE FOLLOWED UPON RECEIVING A SUBPOENA DUCES TECUM

"Whenever an officer or employee of the Department is served with a subpoena duces tecum to produce any official files, documents, records or information he should at once inform his superior officer of the requirement of the subpoena and ask for instructions from the Attorney General. If, in the opinion of the Attorney General, circumstances or conditions make it necessary to decline in the interest of public policy to furnish the information, the officer or employee on whom the subpoena is served will appear in court in answer thereto and courteously state to the court that he has consulted the Department of Justice and is acting in accordance with instructions of the Attorney General in refusing to produce the records. . . .

. . . . . .

". . . It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files. If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safe-keeping near the court room. Under no circumstances should the name of any confidential informant be divulged."

[2] "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

tain records which, petitioner Touhy claims, contained evidence establishing that his conviction was brought about by fraud.[3] At the hearing that considered the duty of submission of the subpoenaed papers, the U. S. Attorney made representations to the court and to opposing counsel as to how far the Attorney General was willing for his subordinates to go in the production of the subpoenaed papers. The suggestions were not accepted. Mr. McSwain was then placed upon the witness stand and ordered to bring in the papers. He personally declined to produce the records in these words:

> "I must respectfully advise the Court that under instructions to me by the Attorney General that I must respectfully decline to produce them, in accordance with Department Rule No. 3229." [4]

Thereupon, the judge found Mr. McSwain guilty of contempt of court in refusing to produce the records referred to in the subpoena and sentenced him to be committed to the custody of the Attorney General of the United States or his authorized representative until he obeyed the order of the court or was discharged by due process of law.

On appeal, the Court of Appeals reversed on the ground that Department of Justice Order No. 3229 was authorized by the statute and

> "confers upon the Department of Justice the privilege of refusing to produce unless there has been a waiver of such privilege." 180 F. 2d 321 at 327.

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[3] The subpoena was also addressed to the Attorney General. There is no contention, however, that the Attorney General was personally served with the subpoena; nor did he appear. See Fed. Rules Civ. Proc., 45.

[4] We take this answer to refer to both the original Department of Justice Order No. 3229 and the supplement.

The court then considered whether or not the privilege of nondisclosure was waived. It quoted from Supplement No. 2 to Order No. 3229 this language:

> "If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safekeeping near the court room. Under no circumstances should the name of any confidential informant be divulged." 180 F. 2d at 328.

The Court of Appeals said that "this language contemplates some circumstances when the material called for must be submitted 'to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed.' " The court found, however, that no such limited disclosure was requested but that Mr. McSwain was called upon "to produce all documents and material called for in the subpoena without limitation and that at no time was he questioned" as to his willingness to submit the papers for determination as to materiality and best public interests. Consequently, he was not guilty of contempt unless the law required the witness to make unlimited production. The court thought that, since this last would mean there was no privilege in the Department to refuse production, such a holding should not be made. It said:

> "Submission could only have been required to the extent the privilege had been waived by the Attorney General and for the purpose and in the specific manner designated." 180 F. 2d at 328.

We granted certiorari, 340 U. S. 806, to determine the validity of the Department of Justice Order No. 3229.

Among the questions duly presented by the petition for certiorari was whether it is permissible for the Attorney General to make a conclusive determination not to produce records and whether his subordinates in accordance with the order may lawfully decline to produce them in response to a subpoena *duces tecum*.

We find it unnecessary, however, to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his possession, for the case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal. The Attorney General was not before the trial court. It is true that his subordinate, Mr. McSwain, acted in accordance with the Attorney General's instructions and a department order. But we limit our examination to what this record shows, to wit, a refusal by a subordinate of the Department of Justice to submit papers to the court in response to its subpoena *duces tecum* on the ground that the subordinate is prohibited from making such submission by his superior through Order No. 3229.[5] The validity of the superior's action is in issue only insofar as we must determine whether the Attorney General can validly withdraw from his subordinates the power to release department papers. Nor are we here concerned with the effect of a refusal to produce in a prosecution by the United States [6] or with

[5] Although in this record there are indications that the U. S. Attorney was willing to submit the papers to the judge alone for his determination as to their materiality, the judge refused to accept the papers for examination on that basis. There is also in the record indication that the U. S. Attorney thought of submitting the papers to the court and opposing counsel in chambers but changed his mind. For our conclusion none of these facts are material, as the final order adjudging Mr. McSwain guilty of contempt was based, as above indicated, on a refusal by Mr. McSwain to produce, as instructed by the Attorney General in accordance with Department Order No. 3229.

[6] Cf. *United States* v. *Andolschek*, 142 F. 2d 503.

the right of a custodian of government papers to refuse to produce them on the ground that they are state secrets [7] or that they would disclose the names of informants.[8]

We think that Order No. 3229 is valid and that Mr. McSwain in this case properly refused to produce these papers. We agree with the conclusion of the Court of Appeals that since Mr. McSwain was not questioned on his willingness to submit the material "to the court for determination as to its materiality to the case" and whether it should be disclosed, the issue of how far the Attorney General could or did waive any claimed privilege against disclosure is not material in this case.

Department of Justice Order No. 3229, note 1, *supra,* was promulgated under the authority of 5 U. S. C. § 22. That statute appears in its present form in Revised Statutes § 161, and consolidates several older statutes relating to individual departments. See, *e. g.,* 16 Stat. 163. When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly obeyed or challenged is obvious. Hence, it was appropriate for the Attorney General, pursuant to the authority given him by 5 U. S. C. § 22, to prescribe regulations not inconsistent with law for "the custody, use, and preservation of the records, papers, and property appertaining to" the Department of Justice, to promulgate Order 3229.

Petitioner challenges the validity of the issue of the order under a legal doctrine which makes the head of a department rather than a court the determinator of the admissibility of evidence. In support of his argument

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[7] See Wigmore, Evidence (3d ed.), § 2378.

[8] See Wigmore, Evidence (3d ed.), § 2374.

that the Executive should not invade the Judicial sphere, petitioner cites Wigmore, Evidence (3d ed.), § 2379, and *Marbury* v. *Madison,* 1 Cranch 137. But under this record we are concerned only with the validity of Order No. 3229. The constitutionality of the Attorney General's exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the Government he may refuse to produce government papers under his charge must await a factual situation that requires a ruling.[9] We think Order No. 3229 is consistent with law. This case is ruled by *Boske* v. *Comingore,* 177 U. S. 459.[10]

That case concerned a collector of internal revenue adjudged in contempt for failing to file with his deposition copies of a distiller's reports in his possession as a subordinate officer of the Treasury. The information was needed in litigation in a state court to collect a state tax. The regulation upon which the collector relied for his refusal was of the same general character as Order No. 3229.[11] After referring to the constitutional authority for the enactment of R. S. § 161, the basis, as 5 U. S. C.

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[9] *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U. S. 549. For relatively recent consideration of the problem underlying governmental privilege against producing evidence, compare *Duncan* v. *Cammell, Laird & Co.,* [1942] A. C. 624, with *Robinson* v. *State of South Australia,* [1931] A. C. 704.

[10] That case has been generally followed. See, *e. g., Ex parte Sackett,* 74 F. 2d 922; *In re Valecia Condensed Milk Co.,* 240 F. 310; *Harwood* v. *McMurtry,* 22 F. Supp. 572; *Stegall* v. *Thurman,* 175 F. 813; *Walling* v. *Comet Carriers, Inc.,* 3 F. R. D. 442, 443.

[11] The following excerpts will show the similarity:

" 'Whenever such subpœnas shall have been served upon them, they will appear in court in answer thereto and respectfully decline to produce the records called for, on the ground of being prohibited therefrom by the regulations of this department. . . . In all cases where copies of documents or records are desired by or on behalf of parties to a suit, whether in a court of the United States or any other, such copies shall be furnished to the court only and on a rule of

§ 22, for the regulation now under consideration, this Court reached the question of whether the regulation centralizing in the Secretary of the Treasury the discretion to submit records voluntarily to the courts was inconsistent with law, p. 469. It concluded that the Secretary's reservation for his own determination of all matters of that character was lawful.

We see no material distinction between that case and this.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the judgment of the District Court should be affirmed.

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

MR. JUSTICE FRANKFURTER, concurring.

Issues of far-reaching importance that the Government deemed to be involved in this case are now expressly left undecided. But they are questions that lie near the judicial horizon. To avoid future misunderstanding, I deem it important to state my understanding of the opinion of the Court—what it decides and what it leaves wholly open—on the basis of which I concur in it.

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the court upon the Secretary of the Treasury requesting the same. Whenever such rule of the court shall have been obtained collectors are directed to carefully prepare a copy of the record or document containing the information called for and send it to this office, whereupon it will be transmitted to the Secretary of the Treasury with a request for its authentication, under the seal of the department, and transmission to the judge of the court calling for it, unless it should be found that circumstances or conditions exist which makes it necessary to decline, in the interest of the public service, to furnish such a copy.'" 177 U. S. 461.

"This case," the Court holds, "is ruled" by *Boske* v. *Comingore,* 177 U. S. 459. I agree. *Boske* v. *Comingore* decided that the Secretary of the Treasury was authorized, as a matter of internal administration in his Department, to require that his subordinates decline to produce Treasury records in their possession. In the case before us production of documents belonging to the Department of Justice was declined by virtue of an order of the Attorney General instructing his subordinates not to produce certain documents. The authority of the Attorney General to make such a regulation for the internal conduct of the Department of Justice is not less than the power of the Secretary of the Treasury to promulgate the order upheld in *Boske* v. *Comingore, supra.*

But in holding that that decision rules this, the context of the earlier decision and the qualifications which that context implies become important. The regulation in *Boske* v. *Comingore* provided: (1) that collectors should under no circumstances disclose tax reports or produce them in court, and (2) that reports could be obtained only "on a rule of the court upon the Secretary of the Treasury." 177 U. S. at 460–461. The regulation also stated that the reports would be disclosed by the Secretary of the Treasury "unless it should be found that circumstances or conditions exist which makes it necessary to decline, in the interest of the public service, to furnish such a copy." *Ibid.* This portion of the regulation was not in issue, however, for the Court was considering the failure of the collector to produce, not the failure of the Secretary of the Treasury. This is emphasized by the Government's suggestion that:

> "[I]f the reports themselves were to be used this could be secured by a subpœna duces tecum to the head of the Treasury Department, or someone under his direction, who would produce the original papers

> themselves in court for introduction as evidence in the trial of the cause." Brief for Appellee, p. 49, *Boske* v. *Comingore, supra.*

And the decision was strictly confined to the narrow issue before the Court. It is epitomized in the concluding paragraph of the *Boske* opinion:

> "In our opinion the Secretary, under the regulations as to the custody, use and preservation of the records, papers and property appertaining to the business of his Department, may take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue, and reserve for his own determination all matters of that character." 177 U. S. at 470.

There is not a hint in the *Boske* opinion that the Government can shut off an appropriate judicial demand for such papers.

I wholly agree with what is now decided insofar as it finds that whether, when and how the Attorney General himself can be granted an immunity from the duty to disclose information contained in documents within his possession that are relevant to a judicial proceeding are matters not here for adjudication. Therefore, not one of these questions is impliedly affected by the very narrow ruling on which the present decision rests. Specifically, the decision and opinion in this case cannot afford a basis for a future suggestion that the Attorney General can forbid every subordinate who is capable of being served by process from producing relevant documents and later contest a requirement upon him to produce on the ground that procedurally he cannot be reached. In joining the Court's opinion I assume the contrary—that the Attorney General can be reached by legal process.

Though he may be so reached, what disclosures he may be compelled to make is another matter. It will of course be open to him to raise those issues of privilege from testimonial compulsion which the Court rightly holds are not before us now. But unless the Attorney General's amenability to process is impliedly recognized we should candidly face the issue of the immunity pertaining to the information which is here sought. To hold now that the Attorney General is empowered to forbid his subordinates, though within a court's jurisdiction, to produce documents and to hold later that the Attorney General himself cannot in any event be procedurally reached would be to apply a fox-hunting theory of justice that ought to make Bentham's skeleton rattle.

UNIVERSAL CAMERA CORP. *v.* NATIONAL LABOR RELATIONS BOARD.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 40. Argued November 6–7, 1950.—Decided February 26, 1951.

The National Labor Relations Board ordered petitioner to reinstate with back pay an employee found to have been discharged because he gave certain testimony in another proceeding under the National Labor Relations Act. The evidence as to the reason for his discharge was conflicting; and the Board overruled its examiner's findings of fact and his recommendation that the proceedings be dismissed. In decreeing enforcement, the Court of Appeals held that the Board's findings of fact were "supported by substantial evidence on the record considered as a whole" within the meaning of § 10 (e) of the National Labor Relations Act, as amended in 1947. This holding was based partly on the view (1) that the 1947 amendments had not broadened the scope of judicial review, and (2) that the Board's rejection of its examiner's findings of fact was without relevance in determining whether the Board's findings were supported by substantial evidence. *Held:*

1. In the light of the legislative history, the standard of proof required under § 10 (e) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, to support a decision of the Labor Board on judicial review is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act. Pp. 477–487.

2. In amending § 10 (e) of the National Labor Relations Act so as to require that, on judicial review, the Board's findings of fact must be supported by substantial evidence "on the record considered as a whole," Congress made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view. Pp. 487–488.

3. When read in the light of their legislative history, the Administrative Procedure Act and the Labor Management Relations Act,

1947, require the courts to assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Pp. 488–490.

4. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the courts of appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. P. 491.

5. The Court of Appeals erred in holding that it was barred from taking into account the report of the examiner on questions of fact insofar as that report was rejected by the Board. Pp. 491–497.

(a) A trial examiner's findings are not as unassailable as a master's and may be reversed by the Board even when not clearly erroneous. P. 492.

(b) A reviewing court need not give a trial examiner's findings more weight than in reason and in the light of judicial experience they deserve; but they should be accorded the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial. Pp. 496–497.

6. The cause is remanded to the Court of Appeals, which is left free to grant or deny enforcement as it thinks the principles expressed in the opinion of this Court dictate. P. 497.

179 F. 2d 749, vacated and remanded.

The Court of Appeals decreed enforcement of an order of the National Labor Relations Board requiring petitioner to reinstate an employee with back pay and to cease and desist from discriminating against any employee who files charges or gives testimony under the National Labor Relations Act. 179 F. 2d 749. This Court granted certiorari. 339 U. S. 962. *Judgment vacated and cause remanded,* p. 497.

By special leave of Court, *Frederick R. Livingston, pro hac vice,* argued the cause for petitioner. With him on the brief was *James S. Hays.*

Mozart G. Ratner argued the cause for respondent. With him on the brief were *Solicitor General Perlman, David P. Findling* and *Bernard Dunau.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The essential issue raised by this case and its companion, *Labor Board* v. *Pittsburgh Steamship Co., post,* p. 498, is the effect of the Administrative Procedure Act and the legislation colloquially known as the Taft-Hartley Act on the duty of Courts of Appeals when called upon to review orders of the National Labor Relations Board.

The Court of Appeals for the Second Circuit granted enforcement of an order directing, in the main, that petitioner reinstate with back pay an employee found to have been discharged because he gave testimony under the Wagner Act and cease and desist from discriminating against any employee who files charges or gives testimony under that Act. The court below, Judge Swan dissenting, decreed full enforcement of the order. 179 F. 2d 749. Because the views of that court regarding the effect of the new legislation on the relation between the Board and the Courts of Appeals in the enforcement of the Board's orders conflicted with those of the Court of Appeals for the Sixth Circuit [1] we brought both cases here. 339 U. S. 951 and 339 U. S. 962. The clash of opinion obviously required settlement by this Court.

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[1] *Labor Board* v. *Pittsburgh Steamship Co.,* 180 F. 2d 731, affirmed, *post,* p. 498. The Courts of Appeals of five circuits have agreed with the Court of Appeals for the Second Circuit that no material change was made in the reviewing power. *Eastern Coal Corp.* v. *Labor Board,* 176 F. 2d 131, 134–136 (C. A. 4th Cir.); *Labor Board* v. *La Salle Steel Co.,* 178 F. 2d 829, 833–834 (C. A. 7th Cir.); *Labor Board* v. *Minnesota Mining & Mfg. Co.,* 179 F. 2d 323, 325–326 (C. A. 8th Cir.); *Labor Board* v. *Continental Oil Co.,* 179 F. 2d 552, 555 (C. A. 10th Cir.); *Labor Board* v. *Booker,* 180 F. 2d 727, 729 (C. A. 5th Cir.); but see *Labor Board* v. *Caroline Mills, Inc.,* 167 F. 2d 212, 213 (C. A. 5th Cir.).

I.

Want of certainty in judicial review of Labor Board decisions partly reflects the intractability of any formula to furnish definiteness of content for all the impalpable factors involved in judicial review. But in part doubts as to the nature of the reviewing power and uncertainties in its application derive from history, and to that extent an elucidation of this history may clear them away.

The Wagner Act provided: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." Act of July 5, 1935, § 10 (e), 49 Stat. 449, 454, 29 U. S. C. § 160 (e). This Court read "evidence" to mean "substantial evidence," *Washington, V. & M. Coach Co.* v. *Labor Board,* 301 U. S. 142, and we said that "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 229. Accordingly, it "must do more than create a suspicion of the existence of the fact to be established. . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Labor Board* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292, 300.

The very smoothness of the "substantial evidence" formula as the standard for reviewing the evidentiary validity of the Board's findings established its currency. But the inevitably variant applications of the standard to conflicting evidence soon brought contrariety of views and in due course bred criticism. Even though the whole record may have been canvassed in order to determine whether the evidentiary foundation of a determination by the Board was "substantial," the phrasing of this Court's process of review readily lent itself to the notion

that it was enough that the evidence supporting the Board's result was "substantial" when considered by itself. It is fair to say that by imperceptible steps regard for the fact-finding function of the Board led to the assumption that the requirements of the Wagner Act were met when the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board's findings. Compare *Labor Board* v. *Waterman Steamship Corp.*, 309 U. S. 206; *Labor Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318; and see *Labor Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105. This is not to say that every member of this Court was consciously guided by this view or that the Court ever explicitly avowed this practice as doctrine. What matters is that the belief justifiably arose that the Court had so construed the obligation to review.[2]

Criticism of so contracted a reviewing power reinforced dissatisfaction felt in various quarters with the Board's administration of the Wagner Act in the years preceding the war. The scheme of the Act was attacked as an inherently unfair fusion of the functions of prosecutor and judge.[3] Accusations of partisan bias were not wanting.[4] The "irresponsible admission and weighing of hearsay, opinion, and emotional speculation in place of factual evidence" was said to be a "serious menace."[5] No doubt

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[2] See the testimony of Dean Stason before the Subcommittee of the Senate Committee on the Judiciary in 1941. Hearings on S. 674, 77th Cong., 1st Sess. 1355–1360.

[3] See, for example, the remarks of Laird Bell, then Chairman of the Committee on Administrative Law of the Chicago Bar Association, writing in 1940 in the American Bar Association Journal. 26 A. B. A. J. 552.

[4] See Gall, The Current Labor Problem: The View of Industry, 27 Iowa L. Rev. 381, 382.

[5] This charge was made by the majority of the Special Committee of the House appointed in 1939 to investigate the National Labor Relations Board. H. R. Rep. No. 1902, 76th Cong., 3d Sess. 76.

some, perhaps even much, of the criticism was baseless and some surely was reckless.[6] What is here relevant, however, is the climate of opinion thereby generated and its effect on Congress. Protests against "shocking injustices" [7] and intimations of judicial "abdication" [8] with which some courts granted enforcement of the Board's orders stimulated pressures for legislative relief from alleged administrative excesses.

The strength of these pressures was reflected in the passage in 1940 of the Walter-Logan Bill. It was vetoed by President Roosevelt, partly because it imposed unduly rigid limitations on the administrative process, and partly because of the investigation into the actual operation of the administrative process then being conducted by an experienced committee appointed by the Attorney General.[9] It is worth noting that despite its aim to tighten control over administrative determinations of fact, the Walter-Logan Bill contented itself with the conventional formula that an agency's decision could be set aside if "the findings of fact are not supported by substantial evidence." [10]

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[6] Professor Gellhorn and Mr. Linfield reached the conclusion in 1939 after an extended investigation that "the denunciations find no support in fact." Gellhorn and Linfield, Politics and Labor Relations, 39 Col. L. Rev. 339, 394. See also Millis and Brown, From the Wagner Act to Taft-Hartley, 66–75.

[7] *Wilson & Co.* v. *Labor Board,* 126 F. 2d 114, 117.

[8] In *Labor Board* v. *Standard Oil Co.,* 138 F. 2d 885, 887, Judge Learned Hand said, "We understand the law to be that the decision of the Board upon that issue is for all practical purposes not open to us at all; certainly not after we have once decided that there was 'substantial' evidence that the 'disestablished' union was immediately preceded by a period during which there was a 'dominated' union. . . .

"[W]e recognize how momentous may be such an abdication of any power of review . . . ."

[9] 86 Cong. Rec. 13942–13943, reprinted as H. R. Doc. No. 986, 76th Cong., 3d Sess.

[10] S. 915, H. R. 6324, 76th Cong., 1st Sess., § 5 (a).

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The final report of the Attorney General's Committee was submitted in January, 1941. The majority concluded that "[d]issatisfaction with the existing standards as to the scope of judicial review derives largely from dissatisfaction with the fact-finding procedures now employed by the administrative bodies." [11] Departure from the "substantial evidence" test, it thought, would either create unnecessary uncertainty or transfer to courts the responsibility for ascertaining and assaying matters the significance of which lies outside judicial competence. Accordingly, it recommended against legislation embodying a general scheme of judicial review.[12]

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[11] Final Report, 92.

[12] Referring to proposals to enlarge the scope of review to permit inquiry whether the findings are supported by the weight of the evidence, the majority said:

"Assuming that such a change may be desirable with respect to special administrative determinations, there is serious objection to its adoption for general application.

"In the first place there is the question of how much change, if any, the amendment would produce. The respect that courts have for the judgments of specialized tribunals which have carefully considered the problems and the evidence cannot be legislated away. The line between 'substantial evidence' and 'weight of evidence' is not easily drawn—particularly when the court is confined to a written record, has a limited amount of time, and has no opportunity further to question witnesses on testimony which seems hazy or leaves some lingering doubts unanswered. 'Substantial evidence' may well be equivalent to the 'weight of evidence' when a tribunal in which one has confidence and which had greater opportunities for accurate determination has already so decided.

"In the second place the wisdom of a general change to review of the 'weight of evidence' is questionable. If the change would require the courts to determine independently which way the evidence preponderates, administrative tribunals would be turned into little more than media for transmission of the evidence to the courts. It would destroy the values of adjudication of fact by experts or specialists in the field involved. It would divide the responsibility for administrative adjudications." Final Report, 91–92.

Three members of the Committee registered a dissent. Their view was that the "present system or lack of system of judicial review" led to inconsistency and uncertainty. They reported that under a "prevalent" interpretation of the "substantial evidence" rule "if what is called 'substantial evidence' is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate—unless indeed the stage of arbitrary decision is reached. Under this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored." [13] Their view led them to recommend that Congress enact principles of review applicable to all agencies not excepted by unique characteristics. One of these principles was expressed by the formula that judicial review could extend to "findings, inferences, or conclusions of fact unsupported, upon the whole record, by substantial evidence." [14] So far as the

[13] *Id.*, 210–211.

[14] The minority enumerated four "existing deficiencies" in judicial review. These were (1) "the haphazard, uncertain, and variable results of the present system or lack of system of judicial review," (2) the interpretation permitting substantiality to be determined without taking into account conflicting evidence, (3) the failure of existing formulas "to take account of differences between the various types of fact determinations," and (4) the practice of determining standards of review by "case-to-case procedure of the courts." They recommended that

"Until Congress finds it practicable to examine into the situation of particular agencies, it should provide more definitely by general legislation for both the availability and scope of judicial review in order to reduce uncertainty and variability. As the Committee recognizes in its report, there are several principal subjects of judicial review—including constitutional questions, statutory interpretation, procedure, and the support of findings of fact by adequate evidence. The last of these should, obviously we think, mean support of all findings of

history of this movement for enlarged review reveals, the phrase "upon the whole record" makes its first appearance in this recommendation of the minority of the Attorney General's Committee. This evidence of the close relationship between the phrase and the criticism out of which it arose is important, for the substance of this formula for judicial review found its way into the statute books when Congress with unquestioning—we might even say uncritical—unanimity enacted the Administrative Procedure Act.[15]

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fact, including inferences and conclusion of fact, upon the *whole* record. Such a legislative provision should, however, be qualified by a direction to the courts to respect the experience, technical competence, specialized knowledge, and discretionary authority of each agency. We have framed such a provision in the appendix to this statement." *Id.*, 210–212.

The text of the recommended provision is as follows:

"(*e*) *Scope of review.*—As to the findings, conclusions, and decisions in any case, the reviewing court, regardless of the form of the review proceeding, shall consider and decide so far as necessary to its decision and where raised by the parties, all relevant questions of: (1) constitutional right, power, privilege, or immunity; (2) the statutory authority or jurisdiction of the agency; (3) the lawfulness and adequacy of procedure; (4) findings, inferences, or conclusions of fact unsupported, upon the whole record, by substantial evidence; and (5) administrative action otherwise arbitrary or capricious. *Provided, however,* That upon such review due weight shall be accorded the experience, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the discretionary authority conferred upon it." *Id.*, 246–247.

[15] 60 Stat. 237, 5 U. S. C. § 1001 *et seq.* The form finally adopted reads as follows:

"SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

. . . . . .

"(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreason-

One is tempted to say "uncritical" because the legislative history of that Act hardly speaks with that clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will. On the one hand, the sponsors of the legislation indicated that they were reaffirming the prevailing "substantial evidence" test.[16] But with equal clarity they expressed disapproval of the manner in which the courts were applying

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ably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the *whole* record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." 60 Stat. 243–244, 5 U. S. C. § 1009 (e). (Italics ours.)

In the form in which the bill was originally presented to Congress, clause (B) (5) read, "unsupported by competent, material, and substantial evidence upon the whole agency record as reviewed by the court in any case subject to the requirements of sections 7 and 8." H. R. 1203, 79th Cong., 1st Sess., quoted in S. Doc. No. 248, 79th Cong., 2d Sess. 155, 160. References to competency and materiality of evidence were deleted and the final sentence added by the Senate Committee. S. Rep. No. 752, 79th Cong., 1st Sess. 28; S. Doc. No. 248, *supra,* 39–40, 214. No reason was given for the deletion.

[16] A statement of the Attorney General appended to the Senate Report explained that the bill "is intended to embody the law as declared, for example, in *Consolidated Edison Co.* v. *National Labor Relations Board* (305 U. S. 197)." Section 10 (e) of Appendix B to S. Rep. No. 752, *supra,* reprinted in S. Doc. No. 248, *supra,* 230. Mr. McFarland, then Chairman of the American Bar Association Committee on Administrative Law, testified before the House Judiciary Committee to the same effect. *Id.,* 85–86.

their own standard. The committee reports of both houses refer to the practice of agencies to rely upon "suspicion, surmise, implications, or plainly incredible evidence," and indicate that courts are to exact higher standards "in the exercise of their independent judgment" and on consideration of "the whole record." [17]

Similar dissatisfaction with too restricted application of the "substantial evidence" test is reflected in the legislative history of the Taft-Hartley Act.[18] The bill as reported to the House provided that the "findings of the Board as to the facts shall be conclusive unless it is made to appear to the satisfaction of the court either (1) that the findings of fact are against the manifest weight of the

[17] The following quotation from the report of the Senate Judiciary Committee indicates the position of the sponsors. "The 'substantial evidence' rule set forth in section 10 (e) is exceedingly important. As a matter of language, substantial evidence would seem to be an adequate expression of law. The difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less—to rely upon suspicion, surmise, implications, or plainly incredible evidence. It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law. In the first instance, however, it will be the function of the agency to determine the sufficiency of the evidence upon which it acts—and the proper performance of its public duties will require it to undertake this inquiry in a careful and dispassionate manner. Should these objectives of the bill as worded fail, supplemental legislation will be required." S. Rep. No. 752, *supra*, 30–31. The House Committee Report is to substantially the same effect. H. R. Rep. No. 1980, 79th Cong., 2d Sess. 45. The reports are reprinted in S. Doc. No. 248, *supra*, 216–217, 279.

See also the response of Senator McCarran in debate, to the effect that the bill changed the "rule" that courts were "powerless to interfere" when there "was no probative evidence." *Id.*, 322. And see the comment of Congressman Springer, a member of the House Judiciary Committee, *id.*, 376.

[18] 61 Stat. 136, 29 U. S. C. (Supp. III) § 141 *et seq.*

evidence, or (2) that the findings of fact are not supported by substantial evidence." [19] The bill left the House with this provision. Early committee prints in the Senate provided for review by "weight of the evidence" or "clearly erroneous" standards.[20] But, as the Senate Committee Report relates, "it was finally decided to conform the statute to the corresponding section of the Administrative Procedure Act where the substantial evidence test prevails. In order to clarify any ambiguity in that statute, however, the committee inserted the words 'questions of fact, if supported by substantial evidence *on the record considered as a whole* . . . .'" [21]

This phraseology was adopted by the Senate. The House conferees agreed. They reported to the House: "It is believed that the provisions of the conference agree-

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[19] H. R. 3020, 80th Cong., 1st Sess., § 10 (e), reprinted in 1 Legislative History of the Labor Management Relations Act, 1947, p. 71.

[20] The history of the evolution of the Senate provision was given by Senator Morse. 93 Cong. Rec. 5108, reprinted in 2 Legislative History 1504–1505. The prints were not approved by the Committee.

[21] S. Rep. No. 105, 80th Cong., 1st Sess. 26–27, reprinted in 1 Legislative History 432–433. The Committee did not explain what the ambiguity might be; and it is to be noted that the phrase it italicized is indistinguishable in content from the requirement of § 10 (e) of the Administrative Procedure Act that "the court shall review the whole record or such portions thereof as may be cited by any party . . . ."

Senator Taft gave this explanation to the Senate of the meaning of the section: "In the first place, the evidence must be substantial; in the second place, it must still look substantial when viewed in the light of the entire record. That does not go so far as saying that a decision can be reversed on the weight of the evidence. It does not go quite so far as the power given to a circuit court of appeals to review a district-court decision, but it goes a great deal further than the present law, and gives the court greater opportunity to reverse an obviously unjust decision on the part of the National Labor Relations Board." 93 Cong. Rec. 3839, reprinted in 2 Legislative History 1014.

ment relating to the courts' reviewing power will be adequate to preclude such decisions as those in *N. L. R. B.* v. *Nevada Consol. Copper Corp.* (316 U. S. 105) and in the *Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation,* and *Le Tourneau,* etc. cases, supra, without unduly burdening the courts." [22] The Senate version became the law.

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[22] H. R. Rep. No. 510, 80th Cong., 1st Sess. 56, reprinted in 1 Legislative History 560. In *Labor Board* v. *Nevada Consolidated Copper Corp.,* 316 U. S. 105, 107, we reversed a judgment refusing to enforce a Board order because "upon an examination of the record we cannot say that the findings of fact of the Board are without support in the evidence." The sufficiency of evidence to support findings of fact is not involved in the three other decisions of this Court to which reference was made. *Labor Board* v. *Hearst Publications, Inc.,* 322 U. S. 111; *Republic Aviation Corp.* v. *Labor Board* and *Labor Board* v. *Le Tourneau Co.,* 324 U. S. 793. The language used by the court offers a probable explanation for including two of the decisions of Courts of Appeals. In *Wilson & Co.* v. *Labor Board,* 126 F. 2d 114, 117, the Court of Appeals for the Seventh Circuit sustained a finding that the employer dominated a company union after stating that it had "recognized (or tried to) that findings must be sustained, even when they are contrary to the great weight of the evidence, and we have ignored, or at least endeavored to ignore, the shocking injustices which such findings, opposed to the overwhelming weight of the evidence, produce." *Labor Board* v. *Columbia Products Corp.,* 141 F. 2d 687, 688, is a *per curiam* decision of the Court of Appeals for the Second Circuit sustaining a finding of discriminatory discharge. The court said of the Board's decision on a question of fact, "Though it may strain our credulity, if it does not quite break it down, we must accept it . . . ." The reason for disapproval of *Labor Board* v. *Union Pacific Stages,* 99 F. 2d 153, is not apparent. The Court of Appeals for the Ninth Circuit there enforced the portion of the Board's order directing the company to disavow a policy of discrimination against union members, on the ground that there appeared "to be evidence, although disputed," that some company officials had discouraged employees from joining. 99 F. 2d at 179. The bulk of the lengthy opinion, however, is devoted to a discussion of the facts to support the court's conclusion that the Board's findings of discriminatory discharges should not be sustained.

It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application. Enforcement of such broad standards implies subtlety of mind and solidity of judgment. But it is not for us to question that Congress may assume such qualities in the federal judiciary.

From the legislative story we have summarized, two concrete conclusions do emerge. One is the identity of aim of the Administrative Procedure Act and the Taft-Hartley Act regarding the proof with which the Labor Board must support a decision. The other is that now Congress has left no room for doubt as to the kind of scrutiny which a Court of Appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof.

It would be mischievous word-playing to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act. The Senate Committee which reported the review clause of the Taft-Hartley Act expressly indicated that the two standards were to conform in this regard, and the wording of the two Acts is for purposes of judicial administration identical. And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act.

Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation

definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment.

To be sure, the requirement for canvassing "the whole record" in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

There remains, then, the question whether enactment of these two statutes has altered the scope of review other than to require that substantiality be determined in the light of all that the record relevantly presents. A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of appli-

cation. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.

Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms.

Whatever changes were made by the Administrative Procedure and Taft-Hartley Acts are clearly within this area where precise definition is impossible. Retention of the familiar "substantial evidence" terminology indicates that no drastic reversal of attitude was intended.

But a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in. The legislative history of these Acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized. Of course it is a statute and not a committee report which we are interpreting. But the fair interpretation of a statute is often "the art of proliferating a purpose," *Brooklyn National Corp.* v. *Commissioner,* 157 F. 2d 450, 451, revealed more by the demonstrable forces that produced it than by its precise phrasing. The adoption in these statutes of the judicially-constructed "substantial evidence" test was a response to pressures for stricter and more uniform practice, not a reflection of approval of all existing practices.

To find the change so elusive that it cannot be precisely defined does not mean it may be ignored. We should fail in our duty to effectuate the will of Congress if we denied recognition to expressed Congressional disapproval of the finality accorded to Labor Board findings by some decisions of this and lower courts, or even of the atmosphere which may have favored those decisions.

We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

From this it follows that enactment of these statutes does not require every Court of Appeals to alter its practice. Some—perhaps a majority—have always applied the attitude reflected in this legislation. To explore whether a particular court should or should not alter its practice would only divert attention from the application of the standard now prescribed to a futile inquiry into the nature of the test formerly used by a particular court.

Our power to review the correctness of application of the present standard ought seldom to be called into action.

Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.

II.

Our disagreement with the view of the court below that the scope of review of Labor Board decisions is unaltered by recent legislation does not of itself, as we have noted, require reversal of its decision. The court may have applied a standard of review which satisfies the present Congressional requirement.

The decision of the Court of Appeals is assailed on two grounds. It is said (1) that the court erred in holding that it was barred from taking into account the report of the examiner on questions of fact insofar as that report was rejected by the Board, and (2) that the Board's order was not supported by substantial evidence on the record considered as a whole, even apart from the validity of the court's refusal to consider the rejected portions of the examiner's report.

The latter contention is easily met. It is true that two of the earlier decisions of the court below were among those disapproved by Congress.[23] But this disapproval, we have seen, may well have been caused by unintended intimations of judicial phrasing. And in any event, it is clear from the court's opinion in this case that it in fact did consider the "record as a whole," and did not deem itself merely the judicial echo of the Board's conclusion. The testimony of the company's witnesses was inconsistent, and there was clear evidence that the complaining

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[23] *Labor Board* v. *Standard Oil Co.*, 138 F. 2d 885; *Labor Board* v. *Columbia Products Corp.*, 141 F. 2d 687. See notes 8 and 22, *supra*.

employee had been discharged by an officer who was at one time influenced against him because of his appearance at the Board hearing. On such a record we could not say that it would be error to grant enforcement.

The first contention, however, raises serious questions to which we now turn.

III.

The Court of Appeals deemed itself bound by the Board's rejection of the examiner's findings because the court considered these findings not "as unassailable as a master's." [24] 179 F. 2d at 752. They are not. Section 10 (c) of the Labor Management Relations Act provides that "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact . . . ." 61 Stat. 147, 29 U. S. C. (Supp. III) § 160 (c). The responsibility for decision thus placed on the Board is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are "clearly erroneous." Such a limitation would make so drastic a departure from prior administrative practice that explicitness would be required.

The Court of Appeals concluded from this premise "that, although the Board would be wrong in totally disregarding his findings, it is practically impossible for a

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[24] Rule 53 (e) (2), Fed. Rules Civ. Proc., gives finality to the findings of a master unless they are clearly erroneous.

The court's ruling excluding from consideration disagreement between the Board and the examiner was in apparent conflict with the views of three other circuits. *Labor Board* v. *Ohio Calcium Co.*, 133 F. 2d 721, 724 (C. A. 6th Cir.); *A. E. Staley Mfg. Co.* v. *Labor Board*, 117 F. 2d 868, 878 (C. A. 7th Cir.); *Wilson & Co.* v. *Labor Board*, 123 F. 2d 411, 418 (C. A. 8th Cir.); cf. *International Assn. of Machinists* v. *Labor Board*, 71 App. D. C. 175, 180, 110 F. 2d 29, 34 (C. A. D. C. Cir.).

court, upon review of those findings which the Board itself substitutes, to consider the Board's reversal as a factor in the court's own decision. This we say, because we cannot find any middle ground between doing that and treating such a reversal as error, whenever it would be such, if done by a judge to a master in equity." 179 F. 2d at 753. Much as we respect the logical acumen of the Chief Judge of the Court of Appeals, we do not find ourselves pinioned between the horns of his dilemma.

We are aware that to give the examiner's findings less finality than a master's and yet entitle them to consideration in striking the account, is to introduce another and an unruly factor into the judgmatical process of review. But we ought not to fashion an exclusionary rule merely to reduce the number of imponderables to be considered by reviewing courts.

The Taft-Hartley Act provides that "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 61 Stat. 148, 29 U. S. C. (Supp. III) § 160 (e). Surely an examiner's report is as much a part of the record as the complaint or the testimony. According to the Administrative Procedure Act, "All decisions (including initial, recommended, or tentative decisions) shall become a part of the record . . . ." § 8 (b), 60 Stat. 242, 5 U. S. C. § 1007 (b). We found that this Act's provision for judicial review has the same meaning as that in the Taft-Hartley Act. The similarity of the two statutes in language and purpose also requires that the definition of "record" found in the Administrative Procedure Act be construed to be applicable as well to the term "record" as used in the Taft-Hartley Act.

It is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report. The conclusion

is confirmed by the indications in the legislative history that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform.

This aim was set forth by the Attorney General's Committee on Administrative Procedure:

> "In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown." [25]

Apparently it was the Committee's opinion that these recommendations should not be obligatory. For the bill which accompanied the Final Report required only that hearing officers make an initial decision which would become final in the absence of further agency action, and that agencies which differed on the facts from their examiners give reasons and record citations supporting their conclusion.[26] This proposal was further moderated by the Administrative Procedure Act. It permits agencies to use examiners to record testimony but not to evaluate it, and contains the rather obscure provision that an agency which reviews an examiner's report has "all the powers which it would have in making the initial decision." [27]

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[25] Final Report, 51.

[26] §§ 308 (1) and 309 (2) of the proposed bill, quoted in Final Report, 200, 201.

[27] § 8 (a), 60 Stat. 242, 5 U. S. C. § 1007 (a). The quoted provision did not appear in the bill in the form in which it was introduced into the Senate. S. 7, 79th Cong., 1st Sess., § 7. It was added by

But this refusal to make mandatory the recommendations of the Attorney General's Committee should not be construed as a repudiation of them. Nothing in the statutes suggests that the Labor Board should not be influenced by the examiner's opportunity to observe the witnesses he hears and sees and the Board does not. Nothing suggests that reviewing courts should not give to the examiner's report such probative force as it intrinsically commands. To the contrary, § 11 of the Administrative Procedure Act contains detailed provisions designed to maintain high standards of independence and competence in examiners. Section 10 (c) of the Labor Management Relations Act requires that examiners "shall issue . . . a proposed report, together with a recommended order." Both statutes thus evince a purpose to increase the importance of the role of examiners in the administrative process. High standards of public administration counsel that we attribute to the Labor Board's examiners both due regard for the responsibility which Congress imposes on them and the competence to discharge it.[28]

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the Senate Judiciary Committee. The Committee published its reasons for modifying the earlier draft, but gave no explanation for this particular change. See S. Doc. No. 248, *supra,* 32–33. It is likely that the sentence was intended to embody a clause in the draft prepared by the Attorney General's Committee, which provided that on review of a case decided initially by an examiner an agency should have jurisdiction to remand or to "affirm, reverse, modify, or set aside in whole or in part the decision of the hearing commissioner, or itself to make any finding which in its judgment is proper upon the record." § 309 (2), Final Report, 201. The substance of this recommendation was included in bills introduced into the House. H. R. 184, 79th Cong., 1st Sess., § 309 (2), and H. R. 339, 79th Cong., 1st Sess., § 7 (c), both quoted in S. Doc. No. 248, *supra,* 138, 143.

[28] Salaries of trial examiners range from $7,600 to $10,750 per year. See Appendix to the Budget of the United States Government for the fiscal year ending June 30, 1952, p. 47.

910798 O—51——38

The committee reports also make it clear that the sponsors of the legislation thought the statutes gave significance to the findings of examiners. Thus, the Senate Committee responsible for the Administrative Procedure Act explained in its report that examiners' decisions "would be of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing." [29] The House Report reflects the same attitude; [30] and the Senate Committee Report on the Taft-Hartley Act likewise indicates regard for the responsibility devolving on the examiner.[31]

We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult

[29] S. Rep. No. 752, *supra,* 24, reproduced in S. Doc. No. 248, *supra,* 210.

[30] H. R. Rep. No. 1980, 79th Cong., 2d Sess. 38–39, reprinted in S. Doc. No. 248, *supra,* 272–273. The House Report added that "In a broad sense the agencies' reviewing powers are to be compared with that of courts under section 10 (e) of the bill." The language of the statute offers no support for this statement.

[31] S. Rep. No. 105, 80th Cong., 1st Sess. 9, quoted in 1 Legislative History of the Labor Management Relations Act, 1947, p. 415.

than to heed the other factors which in sum determine whether evidence is "substantial."

The direction in which the law moves is often a guide for decision of particular cases, and here it serves to confirm our conclusion. However halting its progress, the trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything "logically probative of some matter requiring to be proved." Thayer, A Preliminary Treatise on Evidence, 530; *Funk* v. *United States,* 290 U. S. 371. This Court has refused to accept assumptions of fact which are demonstrably false, *United States* v. *Provident Trust Co.,* 291 U. S. 272, even when agreed to by the parties, *Swift & Co.* v. *Hocking Valley R. Co.,* 243 U. S. 281. Machinery for discovery of evidence has been strengthened; the boundaries of judicial notice have been slowly but perceptibly enlarged. It would reverse this process for courts to deny examiners' findings the probative force they would have in the conduct of affairs outside a courtroom.

We therefore remand the cause to the Court of Appeals. On reconsideration of the record it should accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial. But the court need not limit its reexamination of the case to the effect of that report on its decision. We leave it free to grant or deny enforcement as it thinks the principles expressed in this opinion dictate.

Judgment vacated and cause remanded.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur with parts I and II of this opinion but as to part III agree with the opinion of the court below, 179 F. 2d 749, 753.

NATIONAL LABOR RELATIONS BOARD *v.* PITTSBURGH STEAMSHIP CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 42. Argued November 6, 1950.—Decided February 26, 1951.

Prior to 1947, the National Labor Relations Board ordered respondent to reinstate a dismissed employee and to terminate what were found to be coercive and discriminatory labor practices. After 1947, the Court of Appeals made a painstaking review of the record and unanimously concluded that the inferences on which the Board's findings were based were so overborne by evidence calling for contrary inferences that the findings of the Board could not, "on the record considered as a whole," be deemed supported by "substantial" evidence within the meaning of § 10 (e) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947. Accordingly it denied enforcement of the Board's order. *Held:* The judgment below is affirmed. Pp. 499–503.

1. The Court of Appeals correctly held that the amendments made by the Labor Management Relations Act, 1947, broadened the scope of judicial review of the Board's orders beyond that required by the original National Labor Relations Act. *Universal Camera Corp.* v. *Labor Board, ante,* p. 474. P. 500.

2. The scope of the court's reviewing power was governed by the legislation in force at the time the power was exercised, even though the Board's order antedated such legislation. P. 500.

3. Congress has charged the courts of appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. P. 502.

4. In reviewing a decision of a court of appeals on the question whether an order of the Board is supported by substantial evidence on the record as a whole, this Court ought to do no more than decide whether the court of appeals has made a fair assessment of the record on the issue of substantiality. Pp. 502–503.

180 F. 2d 731, affirmed.

The Court of Appeals found an order of the National Labor Relations Board to be unsupported by substantial evidence within the meaning of § 10 (e) of the National

Labor Relations Act, as amended, and denied enforcement. 180 F. 2d 731. This Court granted certiorari. 339 U. S. 951. *Affirmed,* p. 503.

Robert L. Stern argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, David P. Findling* and *Mozart G. Ratner.*

Nathan L. Miller argued the cause for respondent. With him on the brief were *Lee C. Hinslea, Lucian Y. Ray* and *Roger M. Blough.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

We brought this case here because on an important phase in the administration of the National Labor Relations Act it was in conflict with *Universal Camera Corp.* v. *Labor Board,* 179 F. 2d 749, just decided, *ante,* p. 474. Our decision in that case controls this. Since the court below applied what we have found to be the requisite standard in reviewing an order of the Labor Board, there remains only the contention that in any event there was no justification for the court below to find the Board's order to be unsupported "by substantial evidence on the record considered as a whole." This is an issue that does not call for extended discussion.

The case is before us for the second time. It arises from the petition of the Pittsburgh Steamship Company to review an order of the Board, entered August 13, 1946, directing it to reinstate a dismissed employee and to terminate what were found to be coercive and discriminatory labor practices. 69 N. L. R. B. 1395. The Court of Appeals originally denied enforcement on its finding that the order was vitiated by an underlying bias on the part of the trial examiner. 167 F. 2d 126. On certiorari, we rejected the Court of Appeals' conclusion that resolution of every controverted fact in favor of the Board

established invalidating bias on the examiner's part. We also found that the record disclosed "evidence substantial enough under the Wagner Act." 337 U. S. 656, 661. That conclusion, it is proper to say, was reached on the assumption that under the Wagner Act substantiality was satisfied if there was evidence in the record in support of the Board's conclusions. But we remanded the case to the Court of Appeals to consider the effect on its reviewing duty of the Administrative Procedure and the Taft-Hartley Acts, both having come into force between the Board's order and the Court of Appeals decision. The Court of Appeals has now held, in accordance with our own view, that the scope of review had been extended "beyond the requirements of the Wagner Act," 180 F. 2d 731, 736, and that in the light of the new requirements the record considered as a whole disentitled enforcement of the order.

The Government concedes, we think rightly, that the scope of the court's reviewing power was governed by the legislation in force at the time that power was exercised even though the Board's order antedated such legislation. See *United States* v. *Hooe,* 3 Cranch 73, 79, and compare *Ex parte McCardle,* 7 Wall. 506.

The acts claimed to constitute unfair labor practices took place during the campaign of the National Maritime Union to organize the unlicensed employees of the respondent's 73 vessels, plying on the Great Lakes, during the winter and spring of 1944. The Board adopted the findings and conclusions of its trial examiner and held that the respondent had engaged for several months preceding the election in a deliberate course of antiunion conduct, thereby interfering with the rights of employees guaranteed by § 7 of the Wagner Act.

This conclusion was based in part on the discharge of a seaman who was one of the union organizers. The Board disbelieved some of the testimony justifying dis-

missal on the ground of incompetence and other evidence it deemed so insubstantial that it drew the "plain inference" that the discharge was "for reasons aside from the manner in which he performed his work." 69 N. L. R. B. at 1420. The Board also relied on the testimony of union organizers, partly corroborated, that officers of some of the respondent's ships had expressed hostility to the union, in conversation with members of crews or in their presence. Evidence of respondent's intent to coerce employees was also found in two letters of the president of the steamship company circulated among the crews. Each assured that union membership would not affect an employee's position in the company. But an officer of the union testified that some of the policies attributed to the union in the letters were inaccurate and the Board found that these letters, although "not unlawful *per se* . . . constitute an integral and inseparable part of the respondent's otherwise illegal course of conduct and when so viewed they assume a coercive character which is not privileged by the right of free speech." 69 N. L. R. B. at 1396.*

Since the court below had originally found that the Board's order was vitiated by the examiner's bias, we must take care that the court has not been influenced by that feeling, however unconsciously, on reconsidering the record now legally freed from such imputation. Consideration of the opinion below in light of a careful reading of the entire record convinces us that the momentum of its prior decision did not enter into the decision now under review. The opinion was written by a different

*Since we do not disturb the conclusion of the Court of Appeals that these letters are not substantial evidence of an unfair labor practice under the Wagner Act, we express no opinion on the possible effect of § 8 (c) of the Taft-Hartley Act. 61 Stat. 142, 29 U. S. C. (Supp. III) § 158 (c). This section provides that expression of views, argument or opinion shall not be evidence of an unfair practice.

judge, and the court was differently constituted. The new member was a judge well versed in matters of industrial relations and not likely to be unsympathetic with such findings as were here made by the Board. The court painstakingly reviewed the record and unanimously concluded that the inferences on which the Board's findings were based were so overborne by evidence calling for contrary inferences that the findings of the Board could not, on the consideration of the whole record, be deemed to be supported by "substantial" evidence.

Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. "The jurisdiction of the court [of appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari . . . ." Taft-Hartley Act, § 10 (e), 61 Stat. 148, 29 U. S. C. (Supp. III) § 160 (e). Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works,* 261 U. S. 387, 393; Revised Rules of the Supreme Court of the United States, Rule 38 (5). The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a

fair assessment when the case is here, as this is, on other legal issues.

This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Comm'n* v. *American Tobacco Co.*, 274 U. S. 543, 544.

Affirmed.

O'LEARY, DEPUTY COMMISSIONER, FOURTEENTH COMPENSATION DISTRICT, *v.* BROWN-PACIFIC-MAXON, INC. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 267. Argued December 7, 1950.—Decided February 26, 1951.

A contractor, engaged in construction work for the Navy on the Island of Guam, maintained for its employees a recreation center adjoining a channel so dangerous that swimming was forbidden and signs to that effect were erected. After spending the afternoon at the center, an employee was drowned while attempting to swim the channel in order to rescue two men in distress. Under the Longshoremen's and Harbor Workers' Compensation Act, extended to this employee by the Defense Bases Act, the Deputy Commissioner found as a "fact" that the employee's death arose out of and in the course of his employment and awarded a death benefit to his mother. *Held:* The award is sustained. Pp. 505–509.

1. Such a rescue attempt is not necessarily excluded from the coverage of the Act. Pp. 506–507.

2. Under the Administrative Procedure Act, the Deputy Commissioner's findings should be accepted unless they are unsupported by substantial evidence on the record considered as a whole. *Universal Camera Corp.* v. *Labor Board, ante,* p. 474. Pp. 507–508.

3. The evidence was sufficient to support the Deputy Commissioner's finding that the employee acted reasonably in attempting the rescue and that his death may fairly be attributed to the risks of his employment. Pp. 508–509.

182 F. 2d 772, reversed.

The District Court declined to set aside an award under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U. S. C. §§ 901 *et seq.* The Court of Appeals reversed. 182 F. 2d 772. This Court granted certiorari. 340 U. S. 849. *Reversed,* p. 509.

Morton Hollander argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Acting Assistant Attorney General Clapp* and *Morton Liftin.*

Edward S. Franklin argued the cause and filed a brief for respondents.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In this case we are called upon to review an award of compensation under the Longshoremen's and Harbor Workers' Compensation Act. Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.* The award was made on a claim arising from the accidental death of an employee of Brown-Pacific-Maxon, Inc., a government contractor operating on the island of Guam. Brown-Pacific maintained for its employees a recreation center near the shoreline, along which ran a channel so dangerous for swimmers that its use was forbidden and signs to that effect erected. John Valak, the employee, spent the afternoon at the center, and was waiting for his employer's bus to take him from the area when he saw or heard two men, standing on the reefs beyond the channel, signaling for help. Followed by nearly twenty others, he plunged in to effect a rescue. In attempting to swim the channel to reach the two men he was drowned.

A claim was filed by his dependent mother, based on the Longshoremen's Act and on an Act of August 16, 1941, extending the compensation provisions to certain employment in overseas possessions. 55 Stat. 622, 56 Stat. 1035, as amended, 42 U. S. C. § 1651. In due course of the statutory procedure, the Deputy Commissioner found as a "fact" that "at the time of his drowning and

death the deceased was using the recreational facilities sponsored and made available by the employer for the use of its employees and such participation by the deceased was an incident of his employment, and that his drowning and death arose out of and in the course of said employment . . . ." Accordingly, he awarded a death benefit of $9.38 per week. Brown-Pacific and its insurance carrier thereupon petitioned the District Court under § 21 of the Act to set aside the award. That court denied the petition on the ground that "there is substantial evidence . . . to sustain the compensation order." On appeal, the Court of Appeals for the Ninth Circuit reversed. It concluded that "The lethal currents were not a part of the recreational facilities supplied by the employer and the swimming in them for the rescue of the unknown man was not recreation. It was an act entirely disconnected from any use for which the recreational camp was provided and not in the course of Valak's employment." 182 F. 2d 772, 773. We granted certiorari, 340 U. S. 849, because the case brought into question judicial review of awards under the Longshoremen's Act in light of the Administrative Procedure Act.

The Longshoremen's and Harbor Workers' Act authorizes payment of compensation for "accidental injury or death arising out of and in the course of employment." § 2 (2), 44 Stat. 1425, 33 U. S. C. § 902 (2). As we read its opinion the Court of Appeals entertained the view that this standard precluded an award for injuries incurred in an attempt to rescue persons not known to be in the employer's service, undertaken in forbidden waters outside the employer's premises. We think this is too restricted an interpretation of the Act. Workmen's compensation is not confined by common-law conceptions of scope of employment. *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469, 481; *Matter of Waters* v. *Taylor Co.*, 218 N. Y. 248, 251, 112 N. E. 727, 728. The test of re-

covery is not a causal relation between the nature of employment of the injured person and the accident. *Thom* v. *Sinclair*, [1917] A. C. 127, 142. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose. *Ibid.* A reasonable rescue attempt, like pursuit in aid of an officer making an arrest, may be "one of the risks of the employment, an incident of the service, foreseeable, if not foreseen, and so covered by the statute." *Matter of Babington* v. *Yellow Taxi Corp.*, 250 N. Y. 14, 17, 164 N. E. 726, 727; *Puttkammer* v. *Industrial Comm'n*, 371 Ill. 497, 21 N. E. 2d 575. This is not to say that there are not cases "where an employee, even with the laudable purpose of helping another, might go so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment." *Matter of Waters* v. *Taylor Co.*, 218 N. Y. at 252, 112 N. E. at 728. We hold only that rescue attempts such as that before us are not necessarily excluded from the coverage of the Act as the kind of conduct that employees engage in as frolics of their own.

The Deputy Commissioner treated the question whether the particular rescue attempt described by the evidence was one of the class covered by the Act as a question of "fact." Doing so only serves to illustrate once more the variety of ascertainments covered by the blanket term "fact." Here of course it does not connote a simple, external, physical event as to which there is conflicting testimony. The conclusion concerns a combination of happenings and the inferences drawn from them. In part at least, the inferences presuppose applicable standards for assessing the simple, external facts. Yet the stand-

ards are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as "questions of law."

Both sides conceded that the scope of judicial review of such findings of fact is governed by the Administrative Procedure Act. Act of June 11, 1946, 60 Stat. 237, 5 U. S. C. § 1001 *et seq.* The standard, therefore, is that discussed in *Universal Camera Corp.* v. *Labor Board, ante,* p. 474. It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. The District Court recognized this standard.

When this Court determines that a Court of Appeals has applied an incorrect principle of law, wise judicial administration normally counsels remand of the cause to the Court of Appeals with instructions to reconsider the record. Compare *Universal Camera Corp.* v. *Labor Board, supra.* In this instance, however, we have a slim record and the relevant standard is not difficult to apply; and we think the litigation had better terminate now. Accordingly we have ourselves examined the record to assess the sufficiency of the evidence.

We are satisfied that the record supports the Deputy Commissioner's finding. The pertinent evidence was presented by the written statements of four persons and the testimony of one witness. It is, on the whole, consistent and credible. From it the Deputy Commissioner could rationally infer that Valak acted reasonably in attempting the rescue, and that his death may fairly be attributable to the risks of the employment. We do not mean that the evidence compelled this inference; we do not suggest that had the Deputy Commissioner decided against the claimant, a court would have been justified in

disturbing his conclusion. We hold only that on this record the decision of the District Court that the award should not be set aside should be sustained.

Reversed.

MR. JUSTICE MINTON, with whom MR. JUSTICE JACKSON and MR. JUSTICE BURTON join, dissenting.

Liability accrues in the instant case only if the death arose out of and in the course of the employment. This is a statutory provision common to all Workmen's Compensation Acts. There must be more than death and the relationship of employee and employer. There must be some connection between the death and the employment. Not in any common-law sense of causal connection but in the common-sense, everyday, realistic view. The Deputy Commissioner knew that, so he found as a *fact* that "at the time of his drowning and death the deceased was using the recreational facilities sponsored and made available by the employer for the use of its employees and such participation by the deceased was an incident of his employment . . . ." This finding is false and has no scintilla of evidence or inference to support it.

I am unable to understand how this Court can say this is a fact based upon evidence. It is undisputed upon this record that the deceased, at the time he met his death, was outside the recreational area in the performance of a voluntary act of attempted rescue of someone unknown to the record. There can be no inference of liability here unless liability follows from the mere relationship of employer and employee. The attempt to rescue was an isolated, voluntary act of bravery of the deceased in no manner arising out of or in the course of his employment. The only relation his employment had with the attempted rescue and the following death was that his employment put him on the Island of Guam.

I suppose the way to avoid what we said today in *Universal Camera Corp.* v. *Labor Board, ante,* p. 474, is to find facts where there are no facts, on the whole record or any piece of it. It sounds a bit hollow to me for the Court, as it does, to quote from the New York case of *Matter of Waters* v. *Taylor Co.,* 218 N. Y. 248, 252, 112 N. E. 727, 728, "where an employee, even with the laudable purpose of helping another, might go so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment." This would seem to indicate that we are leaving some place for voluntary acts of the employees outside the course of their employment for which the employer may not be liable. There surely are such areas, but this case does not recognize them. The employer is liable in this case because he is an employer.

I would affirm the judgment of the Court of Appeals.

CANTON RAILROAD CO. *v.* ROGAN ET AL., CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 96. Argued November 28–29, 1950.—Decided February 26, 1951.

Maryland imposes on railroads a franchise tax, measured by gross receipts, apportioned to the length of their lines within the State. Appellant railroad operates, wholly in Baltimore, a marine terminal and rail lines connecting the terminal with trunk-line railroads. Its operating revenues are derived from switching freight cars; storage pending forwarding; wharfage; weighing loaded freight cars; and rentals paid by a stevedoring company for the use of a crane. *Held:*

1. The Import-Export Clause, Art. I, § 10, cl. 2, of the Federal Constitution is not violated by the inclusion, in the gross receipts by which the tax is measured, of revenues derived by appellant from its handling of goods moving in foreign trade. Pp. 512–515.

(a) The tax in this case is not on the *goods* but on the *handling* of them at the port. Pp. 513–515.

(b) Since appellant merely rents a crane for loading and unloading and does not itself do the stevedoring, it is unnecessary to decide whether loading for export and unloading for import are immune from tax under the Import-Export Clause. P. 515.

(c) Any activity more remote than loading for export and unloading for import does not commence the movement of the commodities abroad nor end their arrival, and therefore is not a part of the export or import process. P. 515.

2. The tax is not invalid under the Commerce Clause, since the State may constitutionally impose a nondiscriminatory tax on gross receipts from interstate transportation, apportioned according to mileage within the State. *Greyhound Lines* v. *Mealey*, 334 U. S. 653. Pp. 515–516.

—— Md. ——, 73 A. 2d 12, affirmed.

A state franchise tax assessed against appellant was sustained by the State Supreme Court against a challenge that it was invalid under the Federal Constitution. ——

910798 O—51——39

Md. —, 73 A. 2d 12. On appeal to this Court, *affirmed*, p. 516.

John Henry Lewin argued the cause and filed a brief for appellant.

Hall Hammond, Attorney General of Maryland, and *Harrison L. Winter*, Assistant Attorney General, argued the cause and filed a brief for appellees.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The State of Maryland imposes on steam railroad companies a franchise tax, measured by gross receipts, apportioned to the length of their lines within the State.[1] Appellant Canton Railroad Company, a Maryland corporation, challenges the validity of the tax under the Import-Export Clause of the Constitution, Art. I, § 10, cl. 2, insofar as the gross income by which the tax is measured includes revenues derived from the handling of goods moving in foreign trade.

Canton is a common carrier of freight operating entirely within the City of Baltimore, Maryland. It maintains a marine terminal in the port of Baltimore and railroad lines connecting this terminal with the lines of major trunk-line railroads. Its operating revenues are derived from services which fall into the following classifications:

Switching freight cars from the piers to the lines of connecting railroads.

Storage pending forwarding, for which a charge is made for each day beyond a free period.

Wharfage, or the privilege of using Canton's piers for the transfer of cargo to lighters or to trucks.

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[1] Md. Ann. Code (1943 Supp.), Art. 81, §§ 94½ and 95.

Weighing of loaded freight cars.

Furnishing a crane for use in unloading vessels. This crane is operated by a stevedoring company, which pays Canton a set charge per ton for the "crane privilege."

A substantial proportion of the freight moved to and from the port consists of exports from and imports into the United States. In its report to the State Tax Commission for 1946, Canton showed gross receipts from its railroad business in Maryland of $1,588,744.48, of which it claimed $705,957.21 to be exempt from taxation because derived from operations in foreign commerce. After a hearing, the Commission rejected Canton's contention that a part of its gross receipts was constitutionally exempt from the tax, assessed its gross receipts at the higher figure, and imposed a tax of $39,092.34. The Commission's order was affirmed both by the Baltimore Circuit Court and by the Court of Appeals of Maryland, two judges dissenting. — Md. —, 73 A. 2d 12.

The case is here on appeal.

The Constitution commands in Art. I, § 10, cl. 2 that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws . . . ." The Maryland court held that the tax does not violate this provision of the Constitution; and we agree.

If this were a tax on the articles of import and export, we would have the kind of problem presented in *Spalding & Bros.* v. *Edwards,* 262 U. S. 66; *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69; *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652; and *Joy Oil Co.* v. *State Tax Comm'n,* 337 U. S. 286. But the present tax is not on the articles of import and export; nor is it the equivalent of a direct tax on the articles, as was held to be true of stamp taxes on foreign bills of lading (*Fairbank* v. *United States,*

181 U. S. 283), stamp taxes on charter parties in foreign commerce (*United States* v. *Hvoslef,* 237 U. S. 1); and stamp taxes on policies insuring exports against maritime risks. *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19. It is true that the latter cases indicate that the prohibition of the Import-Export Clause against taxes on imports and exports involves more than an exemption from taxes laid upon the goods themselves. Moreover, *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, following the reasoning of *Brown* v. *Maryland,* 12 Wheat. 419, 444–445, gave like immunity to the business of selling goods in foreign commerce when gross receipts were taxed. Cf. *Anglo-Chilean Corp.* v. *Alabama,* 288 U. S. 218. Though appellant is not engaged in the import-export business, it claims that its handling of goods, which are destined for export or which arrive as imports, is part of the process of exportation and importation. In support of the argument it refers to language in *Spalding & Bros.* v. *Edwards, supra,* and *Richfield Oil Corp.* v. *State Board, supra,* relative to when the export process starts; and it argues that, if the baseballs and the baseball bats in *Spalding*[2] and the oil in *Richfield* were immune from the sales taxes because those commodities had been committed to exportation, the same immunity should be allowed here since the goods handled by appellant were similarly committed. The difference is that in the present case the tax is not on the *goods* but on the *handling* of them at the port. An article may be an export and immune from a tax long before or long after it reaches

[2] This case involved a federal tax equivalent to 3 per cent of the price "upon all tennis rackets, golf clubs, baseball bats," etc. Act of Oct. 3, 1917, § 600 (f), 40 Stat. 300, 316. It presented, as did the *Fairbank, Hvoslef,* and *Thames & Mersey Ins. Co.* cases, a question under Art. I, § 9, cl. 5 of the Constitution, which provides, "No Tax or Duty shall be laid on Articles exported from any State."

the port. But when the tax is on activities connected with the export or import the range of immunity cannot be so wide.

To export means to carry or send abroad; to import means to bring into the country. Those acts begin and end at water's edge. The broader definition which appellant tenders distorts the ordinary meaning of the terms. It would lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined. For if the handling of the goods at the port were part of the export process, so would hauling them to or from distant points or perhaps mining them or manufacturing them. The phase of the process would make no difference so long as the goods were in fact committed to export or had arrived as imports.

Appellant claims that loading and unloading are a part of its activities. But close examination of the record indicates that it merely rents a crane for loading and unloading and does not itself do the stevedoring work. Hence we need not decide whether loading for export and unloading for import are immune from tax by reason of the Import-Export Clause. Cf. *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422.

We do conclude, however, that any activity more remote than that does not commence the movement of the commodities abroad nor end their arrival and therefore is not a part of the export or import process.

The objection to Maryland's tax on the ground that interstate commerce is involved is not well taken. It is settled that a nondiscriminatory gross receipts tax on an interstate enterprise may be sustained if fairly apportioned to the business done within the taxing state (see *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 255) and not reaching any activities carried on beyond the borders of the state. Where transportation is con-

cerned, an apportionment according to the mileage within the state [3] is an approved method. *Greyhound Lines* v. *Mealey*, 334 U. S. 653, 663.

Affirmed.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

By MR. JUSTICE JACKSON, whom MR. JUSTICE FRANKFURTER joins, reserving judgment.†

In this case, I reserve judgment in the belief that today's decision of the Court may be found, upon consideration of matters not briefed or argued, to be untenable.

One of the fundamental federal policies, established by the Constitution itself, is that "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another . . . ." Art. I, § 9, cl. 6. This policy is further implemented by a requirement that federal duties, imposts and excises be uniform (Art. I, § 8, cl. 1), and by a prohibition of any federal tax or duty on articles exported from a state (Art. I, § 9, cl. 5). But this policy of equality of access to the high seas can also be upset by the states. Hence the Constitution forbids any state, without the consent of Congress, to lay any imposts or duties on imports or exports, except to pay the cost of inspection laws. Art. I, § 10, cl. 2.

This detailed constitutional concern about exports and imports is a manifestation of a realistic recognition that a state or city with a safe harbor sits at a gateway with not only an inevitable natural advantage, but also a

[3] The tax required of appellant is "upon such proportion of its gross earnings as the length of its line in this State bears to the whole length of its line." § 95 (b), *supra*, note 1.

† [This opinion applies also to No. 205, *Western Maryland R. Co.* v. *Rogan*, *post*, p. 520.]

strategic one which may be exploited if not restrained. Political influence of wealthy and populous port areas was feared in the making of federal law, hence the restrictions on Congress. The disposition of cities and states to exploit their location astride the Nation's portals also was feared, hence the restriction on the states.

If the roads to the ports may be obstructed with local regulation and taxes, inland producers may be made to pay tribute to the seaboard for the privilege of exportation, and the longer the road to port, the more localities that may lay burdens on the passing traffic. The evident policy of the Constitution is to avoid these burdens and maintain free and equal access to foreign ports for the inland areas. If the constitutional policy can be avoided by shifting the tax from the exported article itself to some incident such as carriage, unavoidable in the process of exportation, then the policy is a practical nullity. I think prohibition of a tax on exports and imports goes beyond exempting specific articles from direct ad valorem duties—it prohibits taxing exports and imports as a process.

This is a matter of giving the inland farms and factories a fair access to the sea which will enable them to compete in foreign commerce, as well as to make imports as equally available as possible, regardless of distance from port. Ocean rates to a given foreign port are the same from all Atlantic ports, so that any differences in the costs of reaching the coast from the inland cannot be offset and represent net differences in the costs of reaching foreign markets.

Congress, the Interstate Commerce Commission, this Court, and American rail and motor carriers have all concurred in the development of rate structures on the premise that exports are to be recognized as such from the time they are delivered to the carrier for export and not merely when they reach the water's edge. There is a wealth of statutory material relating to the carriage of goods for

export by railroads, motor carriers, and shipping companies.* Railroads have established lawful tariffs for export goods substantially less than for like goods destined for local markets. *Texas & P. R. Co.* v. *I. C. C.*, 162

*As demonstrative that Congress is vitally concerned about exports and imports, see 15 U. S. C. § 173, respecting the annual report on statistics of commerce required of the Director of the Bureau of Foreign and Domestic Commerce, in which he must outline the "kinds, quantities, and values" of all articles exported or imported, showing the exports to and imports from each foreign country and their values, the exports being required to be broken down into those manufactured in the United States and their value, and those manufactured in other countries and their value.

Also, although the Interstate Commerce Act does not apply to carriers engaged in foreign commerce insofar as their carriage beyond the limits of the United States is concerned, 49 U. S. C. § 902 (i) (3); 49 C. F. R. § 141.67, their state-side activities have received considerable attention. Chapter 12, Part III of the Act, relating to water carriers, defines "common carrier by water" as "any person which holds itself out to the general public to engage in the transportation by water in interstate *or foreign commerce* of passengers or property . . . ." (Emphasis supplied.) 49 U. S. C. § 902 (d). Section 905 (b) of the same Title states: "It shall be the duty of common carriers by water to establish reasonable through routes . . . with common carriers by railroad . . . and just and reasonable rates . . . applicable thereto . . . . Common carriers by water may establish reasonable through routes and rates . . . with common carriers by motor vehicle. . . ." And § 905 (c) provides that, "It shall be unlawful for any common carrier by water to . . . give . . . any undue or unreasonable preference or advantage to any particular person, port, . . . territory, or description of traffic . . . ."

Further congressional concern is evidenced in 49 U. S. C. § 906 (a): "Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through route and joint rate shall have been established. . . ." See also 49

U. S. 197; *Texas & P. R. Co.* v. *United States,* 289 U. S. 627. In the latter case, this Court recognized that export and import shipments, although not made on through bills, might lawfully be transported at rates below those charged for domestic traffic between the same points. *Id.,* at 636. The differential, I believe, is sometimes as much as fifty percent of the local tariff over the same route. Of course, if the export character of the goods is not to be recognized until they are ready to board or have boarded ship, this is a rank discrimination against local shippers quite without justification.

What Maryland has done, if these goods while in transit do constitute exports, is to tax gross proceeds of their transportation and handling, not merely the profits therefrom. This adds directly to the cost of their reaching ship-side, and the greater distance they travel, the greater possible accumulation of tax burden. Clearly, this is an obstruction in the path of the federal policy.

However, the effect of the federal policy on the validity of the Maryland tax was not advanced in the courts below nor here by railroad counsel, so I do not wish to express a final view on the matter. But I suspect today's decision will cause mischief in quarters we have not considered.

U. S. C. § 6, par. (12), providing: "If any common carrier subject to this chapter and chapters 8 and 12 of this title enters into arrangements with any water carrier operating from a port in the United States to a foreign country . . . for the handling of through business between interior points of the United States and such foreign country, the Commission may by order require such common carrier to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country."

The ever-present concern with through routes and joint rates would appear a strong indication that the Congress regards goods as in export from the time they are first consigned to a carrier for a foreign destination, not from the time they reach the ship on which they are to be carried.

WESTERN MARYLAND RAILWAY CO. *v.* ROGAN ET AL., CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 205. Argued November 28–29, 1950.—Decided February 26, 1951.

A Maryland franchise tax on railroads, measured by gross receipts apportioned according to mileage within the State, was challenged as invalid under the Import-Export Clause, Art. I, § 10, cl. 2, of the Federal Constitution, to the extent that the gross receipts by which the tax is measured include revenues derived from the transportation of goods moving in foreign trade. *Held:* The tax is sustained. *Canton R. Co.* v. *Rogan, ante,* p. 511. Pp. 520–522.
— Md. —, 73 A. 2d 12, affirmed.

A state franchise tax assessed against the appellant was sustained by the State Supreme Court against a challenge that it was invalid under the Federal Constitution. — Md. —, 73 A. 2d 12. On appeal to this Court, *affirmed,* p. 522.

William C. Purnell argued the cause and filed a brief for appellant.

Hall Hammond, Attorney General of Maryland, and *Harrison L. Winter* argued the cause and filed a brief for appellees.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a companion case to *Canton R. Co.* v. *Rogan, ante,* p. 511. This appellant likewise challenges the validity under Art. I, § 10, cl. 2 of the Constitution of the application of the Maryland franchise tax* to the extent

*Md. Ann. Code (1943 Supp.), Art. 81, §§ 94½ and 95.

that the gross receipts by which the tax is measured include revenues derived from the transportation of goods moving in foreign trade.

Western Maryland Railway Company is an interstate common carrier by rail with lines in Maryland, West Virginia and Pennsylvania. It operates several piers in the port of Baltimore for handling cargoes of coal, ores and general merchandise, as well as a grain elevator. A substantial proportion of Western Maryland's freight traffic from and to these facilities consists of the transportation of goods imported into or to be exported from the United States.

The present case concerns the taxable years 1945 and 1946. For 1945 Western Maryland reported gross receipts of $33,156,236.74, of which the State Tax Commission, pursuant to the statutory formula, apportioned $13,219,822.62 to Maryland. For 1946 the amounts were $30,844,132.74 and $12,322,817.41 respectively. In subsequent amended returns Western Maryland excluded from taxable receipts the sums of $2,505,322.58 for 1945 and $5,405,559.44 for 1946. It claimed that these amounts represented revenues from the transportation over its lines of exports and imports and were therefore beyond the state's power to tax. After a hearing, the Commission rejected this contention. Its assessment was sustained, and the case is here on appeal.

What we have said in *Canton R. Co.* v. *Rogan, supra,* is dispositive of this case. The present facts illustrate how wide a zone of tax immunity would be created if the contrary holding were made in the *Canton R. Co.* case. There we were dealing with the handling of exports and imports within a port. Here we have transportation of exports and imports to and from the port. If Maryland were required to grant tax immunity to the services involved in getting the exports to the port and the imports to their destination, so would any other

State. The ultimate impact of such a holding is difficult to measure, since manifold services are involved in the movement of exports and imports within the country. Problems of this nature, like many problems in the law, involve the drawing of lines. So far as taxes on activities connected with bringing exports to or imports from the ship are concerned, we think the line must be drawn at the water's edge. Whether loading and unloading would be exempt is a question we reserve.

Affirmed.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

[For opinion of MR. JUSTICE JACKSON, joined by MR. JUSTICE FRANKFURTER, reserving judgment in this case and in No. 96, *Canton R. Co.* v. *Rogan,* see *ante,* p. 511.]

WARREN *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 87. Argued January 2, 1951.—Decided February 26, 1951.

Petitioner, a messman on a ship owned by the United States, went ashore on leave while the vessel was at Naples. He and two other members of the crew did some sightseeing, drank a bottle of wine together, and then spent an hour and a half at a dance hall. A room adjoining the dance hall and overlooking the sea had French doors opening onto an unprotected ledge. Petitioner stepped onto the ledge, grasped an iron rod which seemed to be attached to the building, and leaned forward to take a look. The iron rod broke off and petitioner lost his balance, fell, and broke his leg. *Held:* Petitioner was entitled to recover from the United States for maintenance and cure. Pp. 524–530.

1. The exceptions to the liability of shipowners, which the Shipowners' Liability Convention, Art. 2, par. 2, permits to be made by "national laws or regulations," are operative by virtue of the general maritime law and no Act of Congress is necessary to give them force. Pp. 525–526.

(a) As used in Art. 2, par. 2 of the Convention, the term "national laws or regulations" includes the rules of court decisions as well as legislative acts. Pp. 526–528.

(b) Both paragraph 1 and paragraph 2 of Article 2 of the Convention state the standard of liability which legislative and decisional law define in particularity. Pp. 527–528.

2. Petitioner's injury was not due to his "wilful act, default or misbehaviour," within the meaning of Art. 2, par. 2 (b) of the Convention, and recovery was not barred thereby. Pp. 528–529.

3. Petitioner's injury occurred "in the service of the ship," within the meaning of that term as used in Art. 2, par. 2 (a) of the Convention. Pp. 529–530.

179 F. 2d 919, reversed.

In a suit by petitioner for maintenance and cure, the District Court awarded maintenance. 75 F. Supp. 210, 76 F. Supp. 735. The Court of Appeals disallowed it. 179 F. 2d 919. This Court granted certiorari. 340 U. S. 806. *Reversed,* p. 530.

Saul Sperling and *Charles A. Ellis* argued the cause and filed a brief for petitioner.

Leavenworth Colby argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Acting Assistant Attorney General Clapp, James L. Morrisson* and *Samuel D. Slade.*

Walter X. Connor and *Vernon Sims Jones* filed a brief for the United States Lines Company, as *amicus curiae,* urging affirmance.

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner seeks in this suit maintenance and cure from the United States, as owner of S. S. *Anna Howard Shaw.* Petitioner was a messman who went ashore on leave while the vessel was at Naples in 1944. He and two other members of the crew first did some sightseeing. Then the three of them drank one bottle of wine and went to a dance hall, where they stayed an hour and a half, dancing. There was a room adjoining the dance hall that overlooked the ocean. French doors opened onto an unprotected ledge which extended out from the building a few feet. Petitioner stepped to within 6 inches of the edge and leaned over to take a look. As he did so, he took hold of an iron rod which seemed to be attached to the building. The rod came off and petitioner lost his balance and fell, breaking a leg.

The District Court awarded maintenance.[1] 75 F. Supp. 210, 76 F. Supp. 735. The Court of Appeals disallowed it. 179 F. 2d 919. The case is here on certiorari.

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[1] Petitioner sued the United States as owner and American South African Line, Inc. as the general agent and operator. The District Court dismissed the libel as to the United States and held the general agent liable under *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707. During the pendency of the appeal by the general agent and the

The Shipowners' Liability Convention, proclaimed by the President Sept. 29, 1939, 54 Stat. 1693, provides in Art. 2:

"1. The shipowner shall be liable in respect of—

"(a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;

"(b) death resulting from such sickness or injury.

"2. Provided that national laws or regulations may make exceptions in respect of:

"(a) injury incurred otherwise than in the service of the ship;

"(b) injury or sickness due to the wilful act, default or misbehaviour of the sick, injured or deceased person;

"(c) sickness or infirmity intentionally concealed when the engagement is entered into."

Petitioner's argument is twofold. He maintains first that under paragraph 1 a shipowner's duty to provide maintenance and cure is absolute and that the exceptions specified in paragraph 2 are not operative until a statute is enacted which puts them in force. He argues in the second place that, even if paragraph 2 is operative without an Act of Congress, his conduct was not due to a "wilful act, default or misbehaviour" within the meaning of that paragraph. An *amicus curiae* argues that the injury was not received "in the service of the ship" within the meaning of Paragraph 2 (a) of Art. 2.

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cross-appeal by petitioner, *Fink* v. *Shepard S. S. Co.*, 337 U. S. 810, was decided. Accordingly the decree against the general agent was reversed and the Court of Appeals considered the case on the merits against the United States.

There is support for petitioner's first point in the concurring opinion of Chief Justice Stone in *Waterman Steamship Corp.* v. *Jones,* 318 U. S. 724, 738.[2] But we think the preferred view is opposed. Our conclusion is that the exceptions permitted by paragraph 2 are operative by virtue of the general maritime law and that no Act of Congress is necessary to give them force.

The language of paragraph 2, in its ordinary range of meaning, easily permits that construction. It is "national laws or regulations" which may make exceptions. The term law in our jurisprudence usually includes the rules of court decisions as well as legislative acts. That was held in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, to be true of the phrase "the laws of the several states" as used in the first Judiciary Act. 1 Stat. 73, § 34. No reason is apparent

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[2] Chief Justice Stone relied on the report of the Secretary of State to the President on the need for legislation implementing the Convention. The Secretary said in part: "Many of the provisions of the convention are considered to be self-executing, and there would appear to be no need to repeat verbatim the language of the convention in a statute to make it effective. Some of the articles of the convention, however, after stating the general rule, provide that national laws may make specified exceptions thereto. If this Government is to be excepted from certain obligations of the convention or alterations in our present practice, it is necessary to do so affirmatively by statute." H. R. Rep. No. 1328, 76th Cong., 1st Sess. 6.

The Secretary had the following to say about Article 2: "Section 4 follows the exceptions in article 2 of the convention which sets forth the risks covered in the entire convention. . . . Paragraph 1 of article 2 of the convention was not incorporated in the bill because of the belief (1) that it is self-executing in that it establishes liability, although no definite amount is provided; and (2) that it will not be held by the courts to conflict with present law in this country." *Id.,* p. 6.

The implementing legislation was passed by the House, 84 Cong. Rec. 10540, but not by the Senate. See Hearings, Subcommittee of the Committee on Commerce, U. S. Senate, on H. R. 6881, 76th Cong., 3d Sess.; S. Doc. 113, 77th Cong., 1st Sess.; 87 Cong. Rec. 7434.

why a more restricted meaning should be given "national laws or regulations." The purpose of the Convention would not be served by the narrow meaning. This Convention was a product of the International Labor Organization.[3] Its purpose was to provide an international system of regulation of the shipowner's liability. That international system was aimed at providing a reasonable average which could be applied in any country.[4] We find no suggestion that it was designed to adopt a more strict standard of liability than that which our maritime law provides. The aim indeed was not to change materially American standards but to equalize operating costs by raising the standards of member nations to the American level.[5] If the Convention was designed to make absolute the liability of the shipping industry until and unless each member nation by legislative act reduced it, we can hardly believe some plain indication of the purpose would not have been made. Much of this body of maritime law had developed through the centuries in judicial decisions. To reject that body of law and start anew with a complete code would be a novel and drastic step. Under our construction the Convention provides a reasonable average for international application. The definition of the ex-

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[3] See Fried, Relations Between the United Nations and the International Labor Organization, 41 Am. Pol. Sci. Rev. 963; Dillon, International Labor Conventions (1942); Shotwell, The Origins of the International Labor Organization (1934).

The United States became a member of the International Labor Organization on August 20, 1934. See U. S. Treaties, Treaty Series, No. 874.

[4] See International Labor Conference, Proceedings, Thirteenth Sess. (1929), 131.

[5] The report of the Secretary of State recommending ratification of the Convention emphasized that the treaty (1) would not materially change American legal standards and (2) would raise standards of member nations to the American level and thus equalize operating costs. S. Exec. Rep. 8, 75th Cong., 3d Sess. 3.

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ceptions itself helps provide the average, leaving the creation of the exceptions to any source of law which the member nations recognize. That view serves the purpose of the Convention and conforms to the normal meaning of the words used. Our conclusion is that both paragraph 1 and paragraph 2 of Art. 2 state the standard of liability which legislative and decisional law define in particularity.

The District Court held that petitioner's degree of fault did not bar a recovery for maintenance and cure. The Court of Appeals thought otherwise. The question is whether the injury was "due to the wilful act, default or misbehaviour" of petitioner within the meaning of Art. 2, paragraph 2 (b) of the Convention. The standard prescribed is not negligence but wilful misbehavior. In the maritime law it has long been held that while fault of the seaman will forfeit the right to maintenance and cure, it must be "some positively vicious conduct—such as gross negligence or willful disobedience of orders." *The Chandos,* 6 Sawy. 544, 549–550; *The City of Carlisle,* 39 F. 807, 813; *The Ben Flint,* 1 Biss. 562, 566. And see *Reed* v. *Canfield,* 1 Sumn. 195, 206. In *Aguilar* v. *Standard Oil Co.,* 318 U. S. 724, 731, we stated the rule as follows: "Conceptions of contributory negligence, the fellow-servant doctrine, and assumption of risk have no place in the liability or defense against it. Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection."

The exception which some cases have made for injuries resulting from intoxication (see *Aguilar* v. *Standard Oil Co., supra,* p. 731, notes 11 and 12) has no place in this case. As the District Judge ruled, the amount of wine consumed hardly permits a finding of intoxication. Petitioner was plainly negligent. Yet we would have to strain to find the element of wilfulness or its equivalent. He sought to use some care when he looked down from the

small balcony, as evidenced by his seizure of the iron bar for a handhold. His conduct did not measure up to a standard of due care under the circumstances. But we agree with the District Court that it was not wilful misbehavior within the meaning of the Convention.

Finally it is suggested that the injury did not occur "in the service of the ship," as that term is used in paragraph 2 (a) of Art. 2 of the Convention. We held in *Aguilar* v. *Standard Oil Co., supra,* that maintenance and cure extends to injuries occurring while the seaman is departing on or returning from shore leave though he has at the time no duty to perform for the ship. It is contended that the doctrine of that case should not be extended to injuries received during the diversions of the seaman after he has reached the shore. Mr. Justice Rutledge, speaking for the Court in the *Aguilar* case, stated the reasons for extending maintenance and cure to shore leave cases as follows (pp. 733–734):

> "To relieve the shipowner of his obligation in the case of injuries incurred on shore leave would cast upon the seaman hazards encountered only by reason of the voyage. The assumption is hardly sound that the normal uses and purposes of shore leave are 'exclusively personal' and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship, without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it. . . . In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion.

> "The voyage creates not only the need for relaxation ashore, but the necessity that it be satisfied in distant and unfamiliar ports. If, in those surroundings, the seaman, without disqualifying misconduct, contracts disease or incurs injury, it is because of the voyage, the shipowner's business. That business has separated him from his usual places of association. By adding this separation to the restrictions of living as well as working aboard, it forges dual and unique compulsions for seeking relief wherever it may be found. In sum, it is the ship's business which subjects the seaman to the risks attending hours of relaxation in strange surroundings. Accordingly, it is but reasonable that the business extend the same protections against injury from them as it gives for other risks of the employment."

This reasoning is as applicable to injuries received during the period of relaxation while on shore as it is to those received while reaching it. To restrict the liability along the lines suggested would be to whittle it down "by restrictive and artificial distinctions" as attempted in the *Aguilar* case. We repeat what we said there, "If leeway is to be given in either direction, all the considerations which brought the liability into being dictate it should be in the sailor's behalf." 318 U. S. at 735.

Reversed.

MR. JUSTICE JACKSON and MR. JUSTICE CLARK dissent on the ground that the injuries were not sustained in the service of the ship. *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, held a seaman to be in the ship's service while going to or from the ship over premises at which the ship docked, even if the purpose of being ashore was leave from duty. The route of access was not the choice of the seaman, and access to the ship was held essential to the ship's service.

But the choice of places of refreshment and varieties of entertainment are the sailor's own. Unless his employment is a policy of accident insurance while on leave, recovery cannot be sustained in this case. That might be a wise rule of law but we think it one that should depend on legislation.

MR. JUSTICE FRANKFURTER, dissenting.

We brought this case here because it involved construction of the Shipowners' Liability Convention, 54 Stat. 1693. As to that, I agree with the Court that the Convention does not afford any basis for libellant's claim. Assuming that Article 2 of the Convention is self-executing, a matter which I do not now have to decide, the exceptions permitted by paragraph 2 of that Article are operative by virtue of the general maritime law. But I am unable to agree that we should reverse the Court of Appeals on its application of the proper standard to the facts.

The District Judge gave this description of what happened:

> "Libellant was a messman aboard the S. S. 'Anna Howard Shaw.' On October 30, 1944, while the vessel was in the Bay of Naples, Italy, libellant left on shore leave. In company with the ship's carpenter and another messman, he went sightseeing. They came to the waterfront town of Bagnoli (referred to by libellant as Magnolia). The group stopped at various stores and at one such place they bought a small bottle of wine which they divided among them. About three miles down the shore from where they had landed from a motor lifeboat, they stopped at a dance hall and stayed an hour and a half or so. Libellant says he was dancing most of

the time, and drank only one additional glass of wine.

"After a time libellant entered another room and approached a large window overlooking the sea, and he says the sight of the waves breaking upon the rocks some thirty-five feet below intrigued him. The French doors of this window extended to the level of the floor and he observed a sort of wholly unprotected ledge or balcony, which extended out from the building some two and a half or three feet. There was no railing of any sort and the slightest misstep or unsteadiness was almost sure to precipitate libellant. In any event, it was a perilous undertaking to go out upon this balcony and one even more perilous to lean over the edge to get a better view of the rocks and waves immediately below. But this is what libellant did. When he came to a position where the toes of his shoes were six inches from the edge, he leaned over, at the same time taking hold of a rod about one-half inch in circumference, which was apparently affixed to the building to his right. He merely took a casual glance at this rod and makes no claim to have done more. It looked like a 'lightning arrester or something of that type.' Whether the fastenings such as they were had been weakened by bombs and shell fire, which had otherwise marked the buildings in the vicinity to some extent, does not appear. Nor does the testimony disclose the purpose which this rod served. As he grasped it, and leaned over the edge, the rod came off and libellant lost his balance and fell. A similar ledge or balcony on one of the windows below broke his fall or he would have sustained injuries far more serious than a broken leg. This fall and its consequences are the basis for his suit for maintenance and cure." 75 F. Supp. 210, 213.

The District Judge concluded that libellant had not acted "in reckless disregard of safety." 75 F. Supp. at 216. The Court of Appeals for the Second Circuit unanimously reversed. It thought that

> "In the case at bar, the risk of serious injury or even death if the seaman should fall over the cliff, was obvious; and the requisite degree of care correspondingly higher. In the face of evident danger, the care which Warren took was very slight—a mere casual glance at the rod which he thought to be a 'lightning arrester or something of that type.' We think that a man who acts as he did under circumstances of danger does not show even a minimal degree of regard for the consequences of his act. Unless his ship is to be an insurer of his safety, he cannot recover against her." 179 F. 2d 919, 922.

I do not think the judgment of the Court of Appeals that the libellant's conduct was a "deliberate act of indiscretion," *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 731, should be disturbed.

NORTON COMPANY *v.* DEPARTMENT OF REVENUE OF ILLINOIS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 133. Argued December 6, 1950.—Decided February 26, 1951.

Under the Illinois Retailers' Occupation Tax Act of June 28, 1933, Illinois levied a tax on the gross receipts from all sales to persons in Illinois by petitioner, a Massachusetts corporation with its factory and head office in Massachusetts and a branch office in Chicago. At petitioner's head office are its general management, accounting, and credit offices, where it accepts all direct mail orders and orders forwarded by its Chicago office. The Chicago office makes local sales at retail from a limited inventory carried there, receives orders and forwards them to the head office for action there, and acts as an intermediary to reduce freight charges on goods shipped from the head office. The Supreme Court of Illinois found that the presence of petitioner's local retail outlet, in the circumstances of this case, was sufficient to attribute all income derived from Illinois sales to that outlet and render it taxable. *Held:* The tax is sustained on all sales to Illinois customers, except on orders sent directly by the customers to the head office and shipped directly to the customers from the head office. Pp. 535–539.

1. When a foreign corporation has gone into a state to do local business by state permission and has submitted itself to the taxing power of the state, it can avoid taxation on some sales to persons in that state only by sustaining the burden of showing that particular transactions are disassociated from the local business and interstate in nature. P. 537.

2. By submitting itself to the taxing power of the state, it likewise submits itself to the state's judicial power to construe and apply its tax laws, insofar as it keeps within constitutional bounds. P. 538.

3. In the light of all the evidence, the judgment of the Illinois court attributing to petitioner's Chicago branch income from all sales that utilized it either in receiving the orders or distributing the goods was within the realm of permissible judgment. Pp. 538–539.

4. The only transactions here involved that are so clearly interstate in character that the State could not reasonably attribute their proceeds to the local business are orders sent directly to its

head office by the customers and shipped directly to the customers from the head office; and such transactions are not subject to this tax. P. 539.

405 Ill. 314, 90 N. E. 2d 737, judgment vacated and remanded.

The Supreme Court of Illinois sustained a state tax on the gross receipts from all sales by petitioner to persons in Illinois. 405 Ill. 314, 90 N. E. 2d 737. This Court granted certiorari. 340 U. S. 807. *Judgment vacated and cause remanded,* p. 539.

Joseph B. Brennan argued the cause for petitioner. With him on the brief were *Roland Towle, Mac Asbill* and *W. A. Sutherland.*

William C. Wines, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *Ivan A. Elliott,* Attorney General, and *Raymond S. Sarnow* and *James C. Murray,* Assistant Attorneys General.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Petitioner, a Massachusetts corporation, manufactures and sells abrasive machines and supplies. Under consent from the State of Illinois to do business therein, it operates a branch office and warehouse in Chicago from which it makes local sales at retail. These sales admittedly subject it to an Illinois Occupation Tax "upon persons engaged in the business of selling tangible personal property at retail in this State." The base for computation of the tax is gross receipts. Ill. Rev. Stat., 1949, c. 120, § 441.

Not all of petitioner's sales to Illinois customers are over-the-counter, but the State has collected, under protest, the tax on the entire gross income of this company from sales to its inhabitants. The statute specifically exempts "business in interstate commerce" as required

by the Constitution, and the question is whether the State has exceeded the constitutional range of its taxing power by taxing all of petitioner's Illinois derived income.

In Worcester, Massachusetts, petitioner manufactures some 225,000 items, 18,000 of which it usually carries in stock. There are its general management, accounting, and credit offices, where it accepts or rejects all direct mail orders and orders forwarded by its Chicago office. If an order calls for specially built machines, it is there studied and accepted or rejected. Orders are filled by shipment f. o. b. Worcester either directly to the customer or via the Chicago office.

The Chicago place of business performs several functions. It carries an inventory of about 3,000 most frequently purchased items. From these it serves cash customers and those whose credit the home office has approved, by consummating direct sales. Income from these sales petitioner admits to be constitutionally taxable. But this office also performs useful functions for other classes of customers. For those of no established credit, those who order items not in local stock, and those who want special equipment, it receives their order and forwards it to the home office for action there. For many of these Illinois customers it also acts as an intermediary to reduce freight charges. Worcester packages and marks each customer's goods but accumulates them until a carload lot can be consigned to the Chicago office. Chicago breaks the carload and reconsigns the separate orders in their original package to customers. The Chicago office thus intervenes between vendor and Illinois vendees and performs service helpful to petitioner's competition for that trade in all Illinois sales except when the buyer orders directly from Worcester, and the goods are shipped from there directly to the buyer.

The Illinois Supreme Court recognized that it was dealing with interstate commerce. It reiterated its former

holdings "that there could be no tax on solicitation of orders only" in the State.[1] But no solicitors work the territory out of either the home office or the Chicago branch, although petitioner will supply engineering and technical advice. The Illinois court held that the presence of petitioner's local retail outlet, in the circumstances of this case, was sufficient to attribute all income derived from Illinois sales to that outlet and render it all taxable.

Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. *McLeod* v. *Dilworth Co.*, 322 U. S. 327. Of course, a state imposing a sales or use tax can more easily meet this burden, because the impact of those taxes is on the local buyer or user. Cases involving them are not controlling here, for this tax falls on the vendor.[2]

But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only by showing that particular transactions are dissociated from the local business and interstate in nature. The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption.[3]

This burden is never met merely by showing a fair difference of opinion which as an original matter might be

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[1] 405 Ill. 314, 320, 90 N. E. 2d 737, 741.

[2] Cf. *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33; *McLeod* v. *Dilworth Co.*, *supra.*

[3] *Compañia General* v. *Collector*, 279 U. S. 306, 310; *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 316.

decided differently. This corporation, by submitting itself to the taxing power of Illinois, likewise submitted itself to its judicial power to construe and apply its taxing statute insofar as it keeps within constitutional bounds. Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence.[4]

This corporation has so mingled taxable business with that which it contends is not taxable that it requires administrative and judicial judgment to separate the two. We conclude that, in the light of all the evidence, the judgment attributing to the Chicago branch income from all sales that utilized it either in receiving the orders or distributing the goods was within the realm of permissible judgment. Petitioner has not established that such services as were rendered by the Chicago office were not decisive factors in establishing and holding this market. On this record, no other source of the customer relationship is shown.

This corporation could have approached the Illinois market through solicitors only and it would have been entitled to the immunity of interstate commerce as set out in the *Dilworth* case. But, from a competitive point of view, that system has disadvantages. The trade may view the seller as remote and inaccessible. He cannot be reached with process of local courts for breach of contract, or for service if the goods are defective or in need of replacement. Petitioner elected to localize itself in the Illinois market with the advantages of a retail outlet in the State, to keep close to the trade, to supply

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[4] *Merchants' National Bank* v. *Richmond,* 256 U. S. 635, 638; *Carlson* v. *Curtiss,* 234 U. S. 103, 106.

locally many items and take orders for others, and to reduce freight costs to local consumers. Although the concern does not, by engaging in business within the State, lose its right to do interstate business with tax immunity, *Cooney* v. *Mountain States Telegraph Co.*, 294 U. S. 384, it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business.

The only items that are so clearly interstate in character that the State could not reasonably attribute their proceeds to the local business are orders sent directly to Worcester by the customer and shipped directly to the customer from Worcester. Income from those we think was not subject to this tax.

The judgment below is vacated and the cause remanded for further proceedings not inconsistent herewith.

It is so ordered.

MR. JUSTICE REED, dissenting in part.

MR. JUSTICE REED concurs with the Court's opinion and judgment except as it permits Illinois to use as a base for the tax computation petitioner's sales, consummated in Massachusetts by the acceptance of orders forwarded to petitioner there by its Illinois branch office, filled in Massachusetts, and shipped from Massachusetts directly, and not by transhipment through the Illinois branch, to the buyer. In those sales title passes to buyer in Massachusetts. Illinois concedes in its brief the above facts as to this class of sales. From those facts I conclude that, nothing else appearing, the shipment was at the buyer's cost and risk.

The Illinois statute recognizes that interstate business is not to be taxed. The transactions described above are interstate business.

The pull to permit each state to measure its tax by gross receipts from all sales with some slight relation to the taxing state is strong. The Constitution, however, puts the regulation of interstate commerce in the hands of the Federal Government. We have gone far in interpretation of the Constitution to allow a state to collect tax money, but in view of the delegation to the Federal Government of the power over commerce carried on in more than one state, we should preserve interstate commerce itself from taxes levied on it directly or on the unapportioned gross receipts of that commerce. *Greyhound Lines* v. *Mealey*, 334 U. S. 653; *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422; *Interstate Pipe Line Co.* v. *Stone*, dissent, 337 U. S. 662, 676.

Our closest approach to the tax on the above interstate business was the tax on DuGrenier, Inc., in *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 309 U. S. 70, 77. Despite marked differences between the DuGrenier transactions and all others considered in *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, without analysis of the effect of those differences and in reliance upon the fact that "possession" was transferred in New York from the transportation company to the buyer, we upheld the tax. If by the language used it was meant to say that the seller delivered the goods to the buyer, the transactions were, as we said, "controlled" by *Berwind-White*.

A few years later, however, in *McLeod* v. *Dilworth Co.*, 322 U. S. 327, an opinion in which the writer of the *DuGrenier* opinion, Chief Justice Stone, joined, we made it clear that a tax cannot be collected by the buyer's state on orders solicited in one state, accepted in another, and shipped at the purchaser's risk. That later clarifying holding seems to me to state the true rule applicable here. I can see no difference, constitutionally, between solicitation by salesmen in a branch office or on the road. Such sales, consummated by direct shipment to Illinois buyers

from out of the state are interstate business and free of the tax Illinois has levied. So far as the Supreme Court of Illinois holds those transactions taxable, it should be reversed.

MR. JUSTICE CLARK, dissenting in part.

I believe the respondent reasonably attributed all of the proceeds of petitioner's sales in Illinois to the company's local activities. I therefore agree with the Illinois Supreme Court that under the circumstances shipments sent directly to Illinois customers on orders sent directly to Worcester were subject to the tax.

As the Court points out, petitioner can avoid taxation on its direct sales only "by showing that . . . [they] are dissociated from the local business and [are] interstate in nature. The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption." Petitioner has failed to meet this burden. In fact Illinois has shown that petitioner's Chicago office is its only source of customer relationship in Illinois; that the Chicago office provides the sole means through which petitioner can be reached with process by Illinois courts in the event a customer is aggrieved; that the local office affords service to machines after sale, as well as replacement of machines which are defective; that it stands ready to receive complaints and to offer engineering and technical advice; and that these multitudinous activities give to petitioner a local character which is most helpful in all its Illinois operations. Surely the Court's conclusion, that "Petitioner has not established that such services as were rendered by the Chicago office were not decisive factors in establishing and holding this market," applies with equal validity to the direct sales.

In maintaining a local establishment of such magnitude, petitioner has adopted the label of a home-town merchant.

After it has received the manifold advantages of that label, we should not give our sanction to its claim made at taxpaying time that with respect to direct sales it is only an itinerant drummer. For the foregoing and other reasons which need not be stated, I would affirm in its entirety the judgment below.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join in this opinion.

UNITED STATES *v.* YELLOW CAB CO.

NO. 218. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

Argued December 6, 1950.—Decided February 26, 1951.

The Federal Tort Claims Act empowers a United States District Court to require the United States to be impleaded as a third-party defendant and to answer the claim of a joint tort-feasor for contribution as if the United States were a private individual. Pp. 544–557.

1. The Government has consented to be sued for contribution claimed by a joint tort-feasor in the circumstances of these cases. Pp. 546–552.

2. The Federal Tort Claims Act carries the Government's consent to be sued for contribution claimed by a joint tort-feasor, not only in a separate proceeding but also as a third-party defendant. Pp. 552–557.

3. A different result is not required by the fact that the Act requires claims against the United States to be tried without a jury, whereas the Seventh Amendment to the Constitution preserves to private individuals their right of trial by jury on such claims in a federal court. Pp. 555–557.

181 F. 2d 967, affirmed.

87 U. S. App. D. C. —, 183 F. 2d 825, reversed.

The cases are stated in the opinion. The judgment in No. 218 is *affirmed* and that in No. 204 is *reversed*, p. 557.

James L. Morrisson argued the causes for the United States. With him on the briefs were *Solicitor General Perlman* and *Paul A. Sweeney*. *Assistant Attorney General Morison* was also on the brief in No. 218. *Acting Assistant Attorney General Clapp* was also on the brief in No. 204.

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*Together with No. 204, *Capital Transit Co.* v. *United States*, on certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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Frank F. Roberson argued the cause for petitioner in No. 204. With him on the brief were *George D. Horning, Jr.* and *Joseph J. Smith, Jr.*

Bernard G. Segal argued the cause for respondent in No. 218. With him on the brief were *Wm. A. Schnader* and *James J. Leyden.*

MR. JUSTICE BURTON delivered the opinion of the Court.

The question presented is whether the Federal Tort Claims Act[1] empowers a United States District Court to require the United States to be impleaded as a third-party defendant and to answer the claim of a joint tort-feasor for contribution as if the United States were a private individual. For the reasons hereinafter stated, we hold that it does.

No. 218—YELLOW CAB CASE.

December 1, 1946, in Philadelphia, Pennsylvania, four passengers in a taxicab were injured by a collision between the cab and a United States mail truck. Claiming diversity of citizenship and charging negligence on the part of the cab driver, they sued his employer, the Yellow Cab Company, in the United States District Court. By leave of court, the company impleaded the United States as a third-party defendant and charged that the negligence of the mail truck driver made the United States liable for all or part of the passengers' claims against the company. The United States moved for its dismissal as a third-party defendant on the ground that the Federal Tort Claims

[1] Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 812, 842–847, 28 U. S. C. (1946 ed.) §§ 921–946. Under the revision of the Judicial Code, effective September 1, 1948, 62 Stat. 869, *et seq.*, these provisions now appear, with slight modifications, in 28 U. S. C. (1946 ed., Supp. III) §§ 1291, 1346 (b), 1402 (b), 1504, 2110, 2401 (b), 2402, 2411, 2412 and 2671–2680.

Act does not authorize suits against it on derivative claims. The motions were denied. The court tried the cases together, without a jury, and rendered judgments against the company totaling $7,800, but in favor of the company against the United States for one-half of the several amounts awarded the passengers. Motions by the United States to set aside the judgments against it were denied and the Court of Appeals for the Third Circuit affirmed those denials. *Howey* v. *Yellow Cab Co.,* 181 F. 2d 967. On petition of the United States, we granted certiorari after the *Capital Transit* case, *infra,* had been decided the other way. 340 U. S. 809.

No. 204—Capital Transit Case.

August 4, 1947, in the District of Columbia, a passenger on a streetcar was injured by a collision between it and a jeep operated by a United States soldier acting within the scope of his duties. The passenger, charging negligence, sued the Capital Transit Company in the District Court for the District of Columbia. By leave of court, the company impleaded the United States as a third-party defendant, charging that the soldier's negligence was the sole or a contributing cause of the collision and asking judgment against the United States for a contributable portion of any sum which might be awarded against the company in favor of the passenger. In response to motions by the United States, the court entered a final judgment dismissing the third-party complaint on the ground that it failed to state a claim upon which relief could be granted against the United States. *Stradley* v. *Capital Transit Co.,* 87 F. Supp. 94. The Court of Appeals for the District of Columbia Circuit affirmed. 87 U. S. App. D. C. —, 183 F. 2d 825. It reviewed the opinion in *Howey* v. *Yellow Cab, supra,* and disagreed with it. See also, *Sappington* v. *Barrett,* 86 U. S. App. D. C. 334, 182 F. 2d 102. On petition of the company, we

granted certiorari because of the conflict of decisions and the importance of the issue in the application of the Federal Tort Claims Act. 340 U. S. 808.

THE GOVERNMENT HAS CONSENTED TO BE SUED FOR CONTRIBUTION.

In the *Yellow Cab* case the court below concluded that under the law of Pennsylvania a private individual would be liable to his joint tort-feasor for contribution,[2] and that the United States, through the Federal Tort Claims Act, had consented to be sued and would be liable, under the same circumstances, in the same manner and to the same extent. In the *Capital Transit* case, while the court below held that the United States could not be impleaded as a third-party defendant, it refrained from deciding whether, in a separate action, the company might enforce a right to contribution against the United States. Accordingly, although the court affirmed the dismissal of the third-party complaint against the United States, it did so without prejudice to the maintenance of a separate action for contribution by the joint tort-feasor. 87 U. S. App. D. C. at —, 183 F. 2d at 830.[3]

The Government now contends, in both cases, that it has not consented to be sued for contribution claimed by a

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[2] Pa. Laws 1939, No. 376; Purdon's Pa. Stat. Ann., Tit. 12, § 2081 (Cum. Pocket Part 1949); and see *Goldman* v. *Mitchell-Fletcher Co.*, 292 Pa. 354, 141 A. 231; *Fisher* v. *Diehl*, 156 Pa. Super. 476, 482, 40 A. 2d 912, 916. For the District of Columbia, see *Knell* v. *Feltman*, 85 U. S. App. D. C. 22, 174 F. 2d 662; *George's Radio* v. *Capital Transit Co.*, 75 U. S. App. D. C. 187, 126 F. 2d 219. No question has been raised as to the applicability of the law of Pennsylvania and that of the District of Columbia in the respective cases as the law under which the liability of the United States is to be determined if its immunity from suit has been waived.

[3] The District Court went further. It stated that it found "nothing within the letter of the statute constituting a waiver of immunity in respect of claims against the United States for contribution in actions in tort." 87 F. Supp. at 95.

joint tort-feasor, even in a separate action. We therefore discuss that issue first.

The Federal Tort Claims Act waives the Government's immunity from suit in sweeping language.[4] It unquestionably waives it in favor of an injured person. It does the same for an insurer whose claim has been subrogated

[4] "SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred . . . sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees. . . ." 60 Stat. 843–844, 28 U. S. C. (1946 ed.) § 931 (a).

A proviso as to death cases, included in this section by 61 Stat. 722, as of August 2, 1946, is not material here.

Effective September 1, 1948, the above provisions were repealed and their substance, material here, was largely reenacted in 28 U. S. C. (1946 ed., Supp. III) §§ 1346 (b), 1402 (b), 2402 and 2674. We rely on the meaning of the language in the original Act and read the revised language as carrying it out. Insofar as the changes are material here, the reviser's note merely stated that "Minor changes were made in phraseology." H. R. Rep. No. 308, 80th Cong., 1st Sess. A123. Furthermore, the acts complained of in the instant cases occurred before the revised code became effective and the parties treat the original language as applicable. "Any rights or liabilities now existing under such [repealed] sections or parts thereof shall not be affected by this repeal." 62 Stat. 992, effective September 1, 1948.

to his. *United States* v. *Aetna Surety Co.*, 338 U. S. 366. The issue here is whether the Act also covers claims for contribution which would be due from the Government if the Government were a private individual.

On its face the Act amply covers such consent. Section 410 (a) waives immunity from suit on—

> "*any claim* against the United States, for money only, accruing on and after January 1, 1945, *on account of* damage to or loss of property or *on account of* personal injury or death *caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred.* Subject to the provisions of this title, *the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances,* except that the United States shall not be liable for interest prior to judgment, or for punitive damages. . . ." (Emphasis supplied.) 60 Stat. 844, 28 U. S. C. (1946 ed.) § 931 (a).

The words "*any claim* against the United States . . . *on account of* personal injury" (emphasis supplied) are broad words in common usage. They are not words of art. Section 421 lists 12 classes of claims to which the waiver shall not apply, but claims for contribution are not so listed.[5]

This Act does not subject the Government to a previously unrecognized type of obligation. Through hundreds of private relief acts, each Congress for many years

[5] "Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule [of strict construction] cannot be had in order to enlarge

has recognized the Government's obligation to pay claims on account of damage to or loss of property or on account of personal injury or death caused by negligent or wrongful acts of employees of the Government. This Act merely substitutes the District Courts for Congress as the agency to determine the validity and amount of the claims. It suggests no reason for reading into it fine distinctions between various types of such claims.

Despite the broad language of the Act, the Government has reviewed its legislative history in an attempt to restrict its scope. Most of that history relates to periods prior to the 2d Session of the 79th Congress at which the Act was passed. After more than 20 years of consideration, the subject was then presented to Congress in a new aspect.[6] The bill became Title IV of the Legislative Reorganization Bill of 1946 at a moment when the over-

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the exceptions." *Employers' Fire Ins. Co.* v. *United States,* 167 F. 2d 655, 657. See also, *Old Colony Ins. Co.* v. *United States,* 168 F. 2d 931, 933.

The significance of the failure to list a claim for contribution as excepted from the waiver is emphasized by such exceptions as the following:

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid . . . .

. . . . . .

"(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. . . ." 60 Stat. 845, 846, 28 U. S. C. (1946 ed.) § 943 (a) and (h), see 28 U. S. C. (1946 ed., Supp. III) § 2680 (a) and (h).

[6] The only Act previously adopted in this field was the Small Tort Claims Act of December 28, 1922. It merely authorized heads of executive departments and independent establishments to give summary relief on "any claim accruing after April 6, 1917, on account of damages to or loss of privately owned property where the amount of the claim does not exceed $1,000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment. . . ." 42 Stat. 1066, 31 U. S. C. (1940 ed.) § 215; see

whelming purpose of Congress was to make changes of procedure which would enable it to devote more time to major public issues.[7] The reports at that session omitted previous discussions which tended to restrict the scope of the Tort Claims bill. The proceedings emphasized the benefits to be derived from relieving Congress of the pressure of private claims. Recognizing such a clearly defined breadth of purpose for the bill as a whole, and the general trend toward increasing the scope of the waiver by the United States of its sovereign immunity from suit, it is inconsistent to whittle it down by refinements.[8]

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60 Stat. 843, 28 U. S. C. (1946 ed.) § 921, 28 U. S. C. (1946 ed., Supp. III) § 2672.

Many bills to enlarge the waiver of immunity were introduced but not passed. See *Brooks* v. *United States*, 337 U. S. 49, 51; Gottlieb, The Federal Tort Claims Act—A Statutory Interpretation, 35 Geo. L. J. 1–8 (1946–1947).

[7] The Special Senate Committee on the Organization of Congress, which reported the bill, referred to this Title IV as follows: "It is complementary to the provision in title I banning private bills and resolutions in Congress, leaving claimants to their remedy under this title." S. Rep. No. 1400 (on S. 2177), 79th Cong., 2d Sess. 29. That provision was:

"PRIVATE BILLS BANNED

"SEC. 131. No private bill or resolution (including so-called omnibus claims or pension bills), and no amendment to any bill or resolution, authorizing or directing (1) the payment of money for property damages, for personal injuries or death for which suit may be instituted under the Federal Tort Claims Act, or for a pension (other than to carry out a provision of law or treaty stipulation); (2) the construction of a bridge across a navigable stream; or (3) the correction of a military or naval record, shall be received or considered in either the Senate or the House of Representatives." 60 Stat. 831.

[8] The broad lines of the trend in waiving the immunity of the United States from suit appear from the Court of Claims Act of Feb. 24, 1855, 10 Stat. 612, see 28 U. S. C. (1946 ed., Supp. III) § 171, *et seq.;* Tucker Act of Mar. 3, 1887, 24 Stat. 505, see 28 U. S. C. (1946 ed., Supp. III) § 1491, *et seq.;* Patent Infringement Act of June 25, 1910, 36 Stat. 851, as amended, 35 U. S. C. (1946 ed.) § 68; Suits in

Of course there is no immunity from suit *by* the Government to collect claims for contribution due it from its joint tort-feasors. The Government should be able to enforce this right in a federal court not only in a

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Admiralty Act of Mar. 9, 1920, 41 Stat. 525, as amended, 46 U. S. C. (1946 ed.) § 741, *et seq.;* Small Tort Claims Act of Dec. 28, 1922, 42 Stat. 1066, see 28 U. S. C. (1946 ed., Supp. III) § 2672; Public Vessels Act of Mar. 3, 1925, as amended, 43 Stat. 1112, 46 U. S. C. (1946 ed.) § 781, *et seq.* See also, Shumate, Tort Claims Against State Governments, 9 Law and Contemp. Prob. (1942) 242; Constitutional and Statutory Provisions of the States, Vol. VIII, Settlement of Claims Against the States, published by The Council of State Governments (1950).

The views expressed in the earlier legislative history of this particular bill lose force by their omission from the 1946 report and discussion. However, the following comment made in 1942 by the House Committee on the Judiciary, then in charge of the bill, is of some significance for the reason that it relates to the effect of the omission of a certain provision, and there was no occasion to refer again to that omission in 1946:

"Section 403 of the Senate bill provided for proportionate liability of the United States where a Government employee was a joint tort-feasor with someone else. This provision is not contained in the recommended bill *and in cases involving joint tort-feasors the rights and liabilities of the United States will be determined by the local law.*" (Emphasis supplied.) H. R. Rep. No. 2245, 77th Cong., 2d Sess. 12.

This recognizes that with the provision for proportionate liability eliminated, as is still the case, the immunity of the United States should be considered as waived in relation to the Government's rights and liabilities in cases involving joint tort-feasors.

In the same report, at page 9, the Committee made statements which are relied upon by the Government in argument, as assimilating the proposed jurisdiction of the District Courts under the Federal Tort Claims Act to their existing jurisdiction under the Tucker Act. Based on such assimilation, it is argued that the United States may not be joined as a defendant under the new Act because it could not be so joined under the Tucker Act. These statements were repeated in the report of the same Committee in 1945. H. R. Rep. No. 1287 (on H. R. 181), 79th Cong., 1st Sess. 5. The statements, however,

separate action but by impleading the joint tort-feasor as a third-party defendant. See 3 Moore's Federal Practice (2d ed. 1948) 507, *et seq.* It is fair that this should work both ways. However, if the Act is interpreted as now urged by the Government, it would mean that if an injured party recovered judgment against the Government, the Government then could sue its joint tort-feasor for the latter's contributory share of the damages (local substantive law permitting). On the other hand, if the injured party recovered judgment against the private tort-feasor, it would mean that (despite local substantive law favoring contributory liability) that individual could not sue the Government for the latter's contributory share of the same damages. Presumably, the claimant would be relegated to a private bill for legislative relief. Such a result should not be read into this Act without a clearer statement of it than appears here.

We find, therefore, that the Government has consented to be sued for contribution under the circumstances of these cases—at least in a separate action. There remains the question of whether the Government may be impleaded as a third-party defendant.

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were entirely omitted from even the sectional analysis of the measure when in 1946 it was incorporated in the Reorganization Bill and the report on it was made by the Senate Committee on the Organization of Congress. S. Rep. No. 1400 (on S. 2177), 79th Cong., 2d Sess. 29–34. The omitted comments related to the joinder of the United States as a co-defendant, rather than as a third-party defendant. We note also that the Tort Claims Act substantially broadens the jurisdiction of the District Courts as compared to that provided by the Tucker Act. Under the Tort Claims Act their jurisdiction is unlimited in amount instead of being restricted to claims not exceeding $10,000; it is exclusive of, rather than concurrent with, that of the Court of Claims, and the District Court procedure is expressly made subject to the Federal Rules of Civil Procedure rather than to the Tucker Act.

THE GOVERNMENT HAS CONSENTED TO BE IMPLEADED AS A THIRD-PARTY DEFENDANT IN AN ACTION FOR CONTRIBUTION DUE A JOINT TORT-FEASOR.

The Government contends that, even if the Federal Tort Claims Act carries the Government's consent to be sued in a separate action for contribution due a joint tort-feasor, it does not carry consent to be impleaded as a third-party defendant to meet such a claim.

We find nothing in the nature of the rights and obligations of joint tort-feasors to require such a procedural distinction, nor does the Act state such a requirement. On the contrary, the Act expressly makes the Federal Rules of Civil Procedure applicable,[9] and Rule 14 provides for third-party practice.[10]

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[9] "SEC. 411. In actions under this part [suits on tort claims against the United States], the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064) [Federal Rules of Civil Procedure]; and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under the Act of March 3, 1887 (24 Stat. 505) [Tucker Act]." 60 Stat. 844, 28 U. S. C. (1946 ed.) § 932.

The above references to the specific instances in which the Tucker Act procedure is to control under the Federal Tort Claims Act emphasize the application of the Federal Rules of Civil Procedure under all other circumstances.

In the revision of Title 28, effective September 1, 1948, this section was omitted as unnecessary because "the Rules of Civil Procedure promulgated by the Supreme Court shall apply to all civil actions." S. Rep. No. 1559, 80th Cong., 2d Sess. 12, as to Amendment No. 61.

[10] "RULE 14. THIRD-PARTY PRACTICE.

"(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY. Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person

This brings the instant cases within the principle approved in *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 383:

> "In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson* v. *Hayes Construction Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29–30: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.' "

Once we have concluded that the Federal Tort Claims Act covers an action for contribution due a tort-feasor, we should not, by refinement of construction, limit that consent to cases where the procedure is by separate action and deny it where the same relief is sought in a third-party action. As applied to the State of New York, Judge Cardozo said in language which is apt here: "No sensible reason can be imagined why the State, having consented to be sued, should thus paralyze the remedy." 243 N. Y. at 147, 153 N. E. at 29. "A sense of justice has brought

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not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 . . . . The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. . . ." (The amendments which became effective March 19, 1948, and are included here, made no changes that are material in the instant cases.)

Rule 20 similarly provides for the permissive joinder of parties.

a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. . . . When authority is given, it is liberally construed." *United States* v. *Shaw,* 309 U. S. 495, 501.

The Government suggests that difficult procedural problems may arise in other cases if a waiver of immunity is held to exist in these cases. For example, the Act requires claims against the United States to be tried without a jury and, although a jury was not insisted upon in the instant cases, the Seventh Amendment to the Constitution preserves to private individuals their right of trial by jury on such claims in a federal court. The Government argues that the Act is not sufficiently specific to permit two such different modes of trial to arise in the same case.

Such difficulties are not insurmountable.[11] If, for example, a jury had been demanded in the *Yellow Cab* case, the decision of jury and nonjury issues could have

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[11] See *Englehardt* v. *United States,* 69 F. Supp. 451 (D. C. Md.); *Newsum* v. *Pennsylvania R. Co.,* 79 F. Supp. 225 (D. C. S. D. N. Y.) (third-party practice); *Maryland* v. *Manor Real Estate & Trust Co.,* 83 F. Supp. 91 (D. C. Md.), rev'd in part on other grounds, 176 F. 2d 414; *Rivers* v. *Bauer,* 79 F. Supp. 403 (D. C. E. D. Pa.), aff'd, 175 F. 2d 774; and *Bullock* v. *United States,* 72 F. Supp. 445 (D. C. N. J.); also 3 Moore's Federal Practice (2d ed. 1948) 2737–2738; Hulen, Suits on Tort Claims Against the United States, 7 F. R. D. (1948) 699–700; and Note, Joinder of the Government under the Federal Tort Claims Act, 59 Yale L. J. 1515–1521 (1950). Contra: *Prechtl* v. *United States,* 84 F. Supp. 889 (D. C. W. D. N. Y.); *Donovan* v. *McKenna,* 80 F. Supp. 690 (D. C. Mass.); *Uarte* v. *United States,* 7 F. R. D. 705 (D. C. S. D. Calif.), aff'd on other grounds, 175 F. 2d 110; *Drummond* v. *United States,* 78 F. Supp. 730 (D. C. E. D. Va.).

been handled in a manner comparable to that used when issues of law are tried to a jury and issues of an equitable nature in the same case are tried by the court alone.[12] If special circumstances had demonstrated the inadvisability, in the first instance, of impleading the United States as a third-party defendant, the leave of court required by Rule 14 could have been denied.[13] If, at a later stage, the situation had called for a separation of the claims, the court could have ordered their separate trial. Fed. Rules Civ. Proc., 42 (b). The availability of third-party procedure is intended to facilitate, not to preclude, the trial of multiple claims which otherwise would be triable only in separate proceedings. The possibility of such procedural difficulties is not sufficient ground for so limiting the scope of the Act as to preclude its application to all cases of contribution or even to all cases of contribution arising under third-party practice. If the Act develops unanticipated complications, Congress can then meet them to such extent as it may desire to fit the demonstrated needs.

We therefore conclude that the Federal Tort Claims Act carries the Government's consent to be sued for con-

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[12] See *Ryan Distributing Corp.* v. *Caley,* 51 F. Supp. 377 (D. C. E. D. Pa.) (in patent litigation, claim of damages for infringement was tried by jury and petition for injunction was passed on by the court); *Ford* v. *Wilson & Co.,* 30 F. Supp. 163 (D. C. Conn.) (legal issues to jury, equity issues to the court); *Munkacsy* v. *Warner Bros. Pictures,* 2 F. R. D. 380 (D. C. E. D. N. Y.) (libel issue by jury; violation of civil rights where jury was not demanded was tried by the court); *Mealy* v. *Fidelity National Bank,* 2 F. R. D. 339 (D. C. E. D. N. Y.) (two causes of action tried by court and third by jury); *Elkins* v. *Nobel,* 1 F. R. D. 357 (D. C. E. D. N. Y.) (one cause of action tried by court and three by jury). See also, Fed. Rules Civ. Proc., 38 (c), 39 and 42.

[13] See note 10, *supra.*

tribution not only in a separate proceeding but also as a third-party defendant.

The *Yellow Cab* case is affirmed. The *Capital Transit* case is reversed and the cause remanded to the District Court for proceedings in conformity with this opinion.

No. 218, affirmed.
No. 204, reversed and remanded.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

EMICH MOTORS CORP. ET AL. *v.* GENERAL MOTORS CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 209. Argued January 3–4, 1951.—Decided February 26, 1951.

1. In this suit under § 4 of the Clayton Act to recover treble damages for injuries sustained by reason of a conspiracy in restraint of trade, plaintiffs were entitled under § 5 to introduce a prior criminal judgment based on a conviction of defendants for the same conspiracy, in order to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based. Pp. 566–569.
2. Where the criminal judgment rests on a general verdict of the jury, what was decided by that judgment must be determined by the trial judge hearing the treble damage suit, upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the court. P. 569.
3. The criminal judgment involved in this case was prima facie evidence of a general conspiracy for the purpose of monopolizing the financing of General Motors cars, and also of the effectuation of that conspiracy by coercing General Motors dealers to use its subsidiary finance company's services. Pp. 570–571.
4. In order to establish their prima facie case, it therefore was only necessary for plaintiffs to introduce, in addition to the criminal judgment, evidence of the impact of the conspiracy on them and evidence of any resulting damages. P. 571.
5. What issues were decided by the criminal conviction is a question of law on which the judge must instruct the jury. He should (1) examine the record to determine the issues decided by that judgment; (2) in his instructions to the jury reconstruct that case in the manner and to the extent he deems necessary to acquaint the jury fully with the issues determined therein; and (3) explain the scope and effect of the former judgment on the case at trial. Pp. 571–572.

181 F. 2d 70, modified.

The case is *remanded to the Court of Appeals with directions to modify its judgment,* p. 572.

Anthony Bradley Eben argued the cause for petitioners. With him on the brief were *Thomas Dodd Healy, Harold Stickler* and *Edward Atlas.*

Ferris E. Hurd argued the cause for respondents. With him on the brief were *Henry M. Hogan, Henry F. Herbermann* and *Daniel Boone.*

Solicitor General Perlman, Acting Assistant Attorney General Underhill, Philip Elman, Victor H. Kramer, J. Roger Wollenberg and *Baddia J. Rashid* filed a brief for the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE CLARK delivered the opinion of the Court.

This action was brought in the United States District Court for the Northern District of Illinois under § 4 of the Clayton Act[1] to recover treble damages for injuries alleged to have been suffered by reason of a conspiracy in restraint of trade in violation of the Sherman Act, § 1.[2] Plaintiffs, petitioners here, are Emich Motors Corporation, a former dealer in Chevrolet cars, and its related finance company, U. S. Acceptance Corporation. Respondents are General Motors Corporation and its wholly owned subsidiary finance company, General Motors Acceptance Corporation (GMAC).

Prior to this action respondents had been convicted in the Federal District Court for the Northern District of Indiana on an indictment charging them, and certain of their officers and agents who were acquitted, with a conspiracy in restraint of interstate trade in General Motors cars. At trial in the instant case petitioners were per-

[1] 38 Stat. 731, 15 U. S. C. § 15.

[2] 26 Stat. 209, 15 U. S. C. § 1.

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mitted to introduce the antecedent criminal indictment, verdict and judgment as evidence under § 5 of the Clayton Act, which provides in part that

> "A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . ." [3]

A judgment for petitioners was reversed by the Court of Appeals for the Seventh Circuit partly on the ground that the trial court erred in the use it permitted the jury to make of evidence derived from the prior criminal proceeding. 181 F. 2d 70 (1950). We granted certiorari, limiting review to important questions as to the scope of § 5 of the Clayton Act. 340 U. S. 808 (1950), rehearing denied 340 U. S. 894 (1950).

I.

The relevant facts as to the criminal prosecution against respondents may be stated briefly. The charge of the indictment was summarized on appeal as follows:

> ". . . paragraph 34 charges . . . a conspiracy to restrain unduly the interstate trade and commerce in General Motors automobiles. Paragraph 35 states that the purpose of the defendants was to monopolize and control the business of financing the trade and commerce in new and used General Motors automobiles. Paragraph 70 alleges that dealers have com-

[3] 38 Stat. 731, 15 U. S. C. § 16.

plied with the defendants' coercive plan in order to save substantial investments in their businesses, paragraph 71 states that the effect of the conspiracy has been to restrain and burden unreasonably the interstate trade and commerce in General Motors automobiles, and paragraph 72 is a restatement of paragraph 34.

"The specific conduct embraced within the illegal concert of action is described in paragraphs 36 to 67 of the indictment . . . : (1) Requiring dealers to promise to use GMAC exclusively as a condition to obtaining a franchise for the sale, transportation and delivery of automobiles; (2) Making contracts for short periods and cancellable without cause, canceling or threatening to cancel such contracts unless GMAC facilities are used; (3) Discriminating against dealers not using GMAC by refusing to deliver cars when ordered, delaying shipment and shipping cars of different number, model, color and style; (4) Compelling dealers to disclose how they finance their wholesale purchases and retail sales, examining and inspecting dealers' books and accounts in order to procure this information, and requiring dealers to justify their using other financing media; (5) Giving special favors to dealers using the wholesale and retail facilities of GMAC; (6) Granting special favors to GMAC which are denied to other discount companies; (7) Giving dealers a rebate from the GMAC finance charge paid by the retail purchaser, in order to induce use of GMAC financing facilities; and (8) Compelling dealers to refrain from using other finance companies by all other necessary, appropriate or effective means." [4]

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[4] *United States* v. *General Motors Corp.*, 121 F. 2d 376, 383 (C. A. 7th Cir. 1941).

The criminal case was submitted to the jury with instructions that the Government need not prove all of some twenty-six acts alleged in the indictment as the means of effecting the conspiracy. The jury rendered a general verdict finding the corporate defendants guilty and acquitting all individual defendants. Maximum fines were assessed against each of the corporations. The Seventh Circuit Court of Appeals affirmed. *United States* v. *General Motors Corp.*, 121 F. 2d 376 (1941). This Court denied certiorari, 314 U. S. 618 (1941), rehearing denied 314 U. S. 710 (1941).

Among the almost 50 dealers and former dealers whose testimony the Government introduced in the criminal action was Fred Emich, who owned or controlled the corporations which are petitioners here. On the criminal appeal the Court of Appeals thus reviewed his testimony:

> "Fred Emich was a Chevrolet dealer at Chicago, Illinois, from 1932 to 1936 and he owned his own finance company to facilitate his purchases and sales, a course of business conduct which displeased GMAC. He received unordered cars and trucks in 1933, and the city manager of Chevrolet informed him that shipment of unordered cars would cease as soon as he would give some of his time sales finance paper to GMAC. He gave GMAC around 10% of his business in 1934 and became acquainted with the visits of GMAC and Chevrolet representatives. The zone manager warned him at the 1935 contract renewal meeting to the effect that if he expected to continue as a Chevrolet dealer he had better use GMAC at least 50%. Again he experienced difficulties with Chevrolet. This time cars of wrong colors and models were shipped to him and unordered accessories in great quantities were forced upon him. In addition he was required to send blank checks to the factory before cars were shipped to him. He was told by

> the GMAC representative that these problems would disappear if he used GMAC. In 1936 Emich was given his 'last warning,' the zone manager telling him that he was going to make an example of Emich for his failure to use GMAC. Not long thereafter Emich was cancelled as a dealer, and he appealed to the president of General Motors where he pleaded that in a period of four years he had done a gross business of around $3,000,000. The president of General Motors told him that he had been cancelled because he did not use GMAC, that it was the policy of the corporation to require dealers to use GMAC, and that if Emich would not agree to use GMAC it would be useless for the president of General Motors to discuss his reinstatement . . . ." [5]

II.

In their complaint petitioners allege that respondents unlawfully conspired in restraint of interstate trade in General Motors cars; that the conspiracy so alleged is the same as that charged against respondents and of which they were convicted in the antecedent criminal action, a copy of the indictment therein being attached as an exhibit; that pursuant to this conspiracy respondents injured petitioners' businesses by one or more of the unlawful acts set forth in said indictment, more particularly by terminating or cancelling or threatening to terminate or cancel the dealer franchise contracts of Emich Motors, which had financed the purchase or sale of cars through U. S. Acceptance Corporation rather than through GMAC. Respondents deny any conspiracy; they admit cancellation of the franchises but assert that such action was justified by Emich Motors' failure to perform certain obli-

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[5] *United States* v. *General Motors Corp.*, 121 F. 2d 376, 396 (C. A. 7th Cir. 1941).

gations thereunder, as well as its persistence in a course of conduct inimical to the interest of General Motors in promoting the sale of Chevrolet cars.

In order to establish their prima facie case under § 5, petitioners offered in evidence the six-volume record of testimony and exhibits in the criminal case. The court held it inadmissible as evidence for the jury, with certain exceptions not important here. However, over respondents' objection, the court admitted, as exhibits to go to the jury, the indictment, verdict and judgment of conviction in the criminal case.

In his instructions the trial judge summarized the criminal indictment, the complaint of petitioners, and respondents' answer. He then instructed that the

> ". . . judgment in the criminal proceedings . . . is admitted as evidence in this case as prima facie evidence that [respondents] did enter into an unlawful conspiracy in violation of the anti-trust laws . . . in the manner described in the indictment . . . ."

After explaining the term "prima facie evidence," the court then summarized § 5 of the Clayton Act and charged that

> ". . . it was not necessary for the government to prove all of the acts alleged in the separate sections of the indictment. . . . nor is it necessary for the plaintiffs to prove all the acts charged in the indictment for you to find that the conspiracy alleged did exist.
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> "The judgment in the criminal case was admitted in evidence in this case, pursuant to the law to which I have just referred, for the purpose of the plaintiff making a prima facie case against the defendants as to one of the issues of this case and only and solely for the purpose of defining, describing, and limiting the scope of the judgment on the verdict which was

entered in that case, namely, the conspiracy to violate the anti-trust laws.

"The burden is on the plaintiffs of establishing by a preponderance of the evidence that they were injured by the defendants pursuant to or in the course of a conspiracy and in order to recover damages for the cancellation of the Chevrolet franchises they must prove by a preponderance of the evidence *including the criminal judgment* that the defendants entered into a conspiracy to compel the use of General Motors Acceptance Corporation by agreeing among themselves, among other things, to cancel dealers who failed or refused to use General Motors Acceptance Corporation to a satisfactory extent and that the franchise of Emich Motors Corporation was cancelled by reason of and pursuant to said conspiracy and not because of the things alleged by defendants as the reasons for such cancellation, and to recover any damages for the failure of defendants to deliver any Chevrolet automobiles, plaintiffs must establish that defendants as part of the conspiracy agreed among themselves to withhold or delay delivery of automobiles to dealers who refused or failed to use the services of General Motors Acceptance Corporation to a satisfactory extent and that the defendants actively failed to deliver or delayed shipments of cars to plaintiffs pursuant to and as a part of said alleged conspiracy." (Emphasis supplied.)

The jury returned a verdict for petitioners which resulted in judgments for $1,236,000 treble damages. The court assessed $257,358.10 as costs and attorneys' fees.

The Court of Appeals concluded that under § 5 the criminal judgment was prima facie evidence "that defendants had been guilty of a conspiracy to restrain dealers' interstate trade and commerce in General Motors cars for the purpose of monopolizing the financing essential

to the movement of those cars." 181 F. 2d at 75. It approved the trial court's ruling as to the inadmissibility in evidence of the entire record of the criminal case, but criticized the use of the indictment as an exhibit to the complaint, as well as certain references to the indictment in the opening statement and closing argument of petitioners' counsel to the jury. It held that serious error was committed when the indictment was sent to the jury as an exhibit and the trial court "told the jury that it could look to it [the indictment] to ascertain the *means* and the *acts* committed in furtherance of the conspiracy . . . ." The court observed that "it was unnecessary for the Government to prove . . . any of the acts or means, except for the purpose of establishing venue, in order for the jury in the criminal proceeding to find defendants guilty," and that "such acts and means are not to be considered as established by the finding of guilt." It concluded that the use of the indictment as evidence was aggravated by the instruction of the trial judge last quoted and italicized in part, *supra*, p. 565.

III.

The issue we must determine, as defined in our order granting review, is "whether the Court of Appeals erred in construing § 5 of the Clayton Act . . . as not permitting: (*a*) the admission in the instant case of the indictment in the antecedent criminal case against respondents, nor (*b*) the judgment therein to be used as evidence that the conspiracy of which respondents had been convicted occasioned Emich Motors' cancellation."

In considering the application of § 5 in this case we are confronted with five differing interpretations. The broadest construction is urged by petitioners who contend that the criminal judgment is prima facie evidence that Emich Motors' franchises were cancelled pursuant to the unlawful conspiracy, and that the entire record in the

criminal case should be admissible in this action. The view of the trial judge differs only in that he would not permit the record in the criminal case, beyond the indictment, verdict and judgment, to go to the jury. The United States as *amicus curiae* takes a more contracted position, urging in its brief that the judgment is prima facie evidence of the conspiracy and also of the performance of such acts in accomplishing it as the jury in the criminal case, in rendering a verdict of guilty, necessarily found to have occurred, the latter to be determined by the trial judge in the treble-damage suit from the entire record in the criminal case. In its view the trial court under appropriate instructions may submit the criminal pleadings to the jury in order to assist it in understanding the charge as to what was determined by the criminal conviction. The Court of Appeals construes the section still more narrowly, holding the judgment prima facie evidence only of conspiracy by respondents. It concludes that none of the record in the criminal case should be exhibited to the jury, although the trial judge may examine it "as an aid in determining or defining the issues presented by the earlier case . . . ." 181 F. 2d at 76. Finally, respondents contend that the indictment charged a single conspiracy to perform some twenty-six different acts; that since the Government did not offer evidence to support all of the acts and was required to prove only one of them, it is impossible upon a general verdict of guilty to determine on which of the various acts the jury based its verdict; that consequently the judgment has no relevance here.

IV.

Section 5 of the Clayton Act was adopted in response to a recommendation by President Wilson that Congress "agree in giving private individuals . . . the right to found their [antitrust] suits for redress upon the facts

and judgments proved and entered in suits by the Government where the Government has . . . sued the combinations complained of and won its suit . . . ." 51 Cong. Rec. 1964. Congressional reports and debates on the proposal which ultimately became § 5 reflect a purpose to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions. See H. R. Rep. No. 627, 63d Cong., 2d Sess. 14; S. Rep. No. 698, 63d Cong., 2d Sess. 45; 51 Cong. Rec. 9270, 9490, 13851. The intended application and extent of such evidentiary benefits is not revealed by legislative materials, except that they should follow equally from prior criminal prosecutions and equity proceedings by the Government. By its terms, however, § 5 makes a prior final judgment or decree in favor of the United States available to a private suitor as prima facie evidence of "all matters respecting which" the judgment "would be an estoppel" between the defendants and the United States. We think that Congress intended to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit.

The evidentiary use which may be made under § 5 of the prior conviction of respondents is thus to be determined by reference to the general doctrine of estoppel. As this Court has observed, that "principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction." *Frank* v. *Mangum,* 237 U. S. 309, 334 (1915); *Sealfon* v. *United States,* 332 U. S. 575, 578 (1948). It is well established that a prior criminal conviction may work an estoppel in favor of the Government in a subsequent civil proceeding. *United States* v. *Greater New York Live Poultry Chamber of Commerce,* 53 F. 2d 518 (S. D. N. Y. 1931), affirmed *sub nom.*

Local 167 v. *United States,* 291 U. S. 293 (1934); *Farley* v. *Patterson,* 166 App. Div. 358, 152 N. Y. Supp. 59 (1915); see *State* v. *Adams,* 72 Vt. 253, 47 A. 779 (1900); 2 Freeman, Judgments (5th ed. 1925), § 657. Such estoppel extends only to questions "distinctly put in issue and directly determined" in the criminal prosecution. See *Frank* v. *Mangum, supra,* at 334; *United States* v. *Meyerson,* 24 F. 2d 855, 856 (S. D. N. Y. 1928). In the case of a criminal conviction based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment. Cf. *Commonwealth* v. *Evans,* 101 Mass. 25 (1869). Accordingly, we think plaintiffs are entitled to introduce the prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based.

The difficult problem, of course, is to determine what matters were adjudicated in the antecedent suit. A general verdict of the jury or judgment of the court without special findings does not indicate which of the means charged in the indictment were found to have been used in effectuating the conspiracy. And since all of the acts charged need not be proved for conviction, *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150 (1940), such a verdict does not establish that defendants used all of the means charged or any particular one. Under these circumstances what was decided by the criminal judgment must be determined by the trial judge hearing the treble-damage suit, upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts. *Sealfon* v. *United States, supra;* cf. *Oklahoma* v. *Texas,* 256 U. S. 70 (1921).[6]

[6] See also McLaren, The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases, 10 Wash. L. Rev. 198, 200 (1935).

In the criminal case it was the Court of Appeals' undisturbed determination, which we accept here, that the jury verdict was firmly rooted in a finding of coercive conduct on the part of respondents toward General Motors dealers to force the use of GMAC facilities. That court, in commenting on the sufficiency of the evidence, said that "the jury finding of coercion is supported by the evidence. The coercive practices were many and varied . . . and directly aimed to compel dealer-purchasers to use GMAC in financing the wholesale purchase and retail sale of General Motors cars. . . . Undoubtedly the jury was warranted in attaching the coercion label to the action thus adopted by the appellants." *United States* v. *General Motors Corp.*, 121 F. 2d 376, 397 (C. A. 7th Cir. 1941). The same conclusion was reached by this Court in *Ford Motor Co.* v. *United States*, 335 U. S. 303 (1948), where it was required for another purpose to determine what was necessarily found by the jury verdict in the criminal proceeding against General Motors and GMAC.[7]

We are, therefore, of opinion that the criminal judgment was prima facie evidence of the general conspiracy for the purpose of monopolizing the financing of General Motors

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[7] In the *Ford* case it was stated that the "plain effect" of the instructions in the criminal action against General Motors and GMAC was "to draw a line between such practices as cancellation of a dealer's contract, or refusal to renew it, or discrimination in the shipment of automobiles, as a means of influencing dealers to use GMAC, all of which fall within the common understanding of 'coercion,' and other practices for which 'persuasion,' 'exposition' or 'argument' are fair characterizations. . . . The trial judge used the word 'coercion' to summarize practices which, if the jury found them to exist, would call for a verdict against General Motors. He used the words 'persuasion,' 'exposition' and 'argument' to describe conduct which, in common usage, is not 'coercion' and therefore would not support such a verdict. Nothing in other portions of the judge's charge erases or blurs this line of distinction." 335 U. S. at 316–319. Relevant portions of the instructions are set forth at p. 316, n. 3.

cars, and also of its effectuation by coercing General Motors dealers to use GMAC. To establish their prima facie case it therefore was necessary for petitioners only to introduce, in addition to the criminal judgment, evidence of the impact of the conspiracy on them, such as the cancellation of their franchises and the purpose of General Motors in cancelling them, and evidence of any resulting damages.[8] From this it follows that the Court of Appeals was in error when it held that the judgment was prima facie evidence only of a conspiracy by respondents.

What issues were decided by the former Government litigation is, of course, a question of law as to which the court must instruct the jury. It is the task of the trial judge to make clear to the jury the issues that were determined against the defendant in the prior suit, and to limit to those issues the effect of that judgment as evidence in the present action. As to the manner in which such explanation should be made, no mechanical rule can be laid down to control the trial judge, who must take into account the circumstances of each case. He must be free to exercise "a well-established range of judicial discretion." *Nardone* v. *United States,* 308 U. S. 338, 342 (1939). He is not precluded from resorting to such portions of the

[8] In deciding that under § 5 the criminal judgment against respondents may be admitted as prima facie evidence only of the fact of conspiracy and of the use of coercive methods in carrying it out, we do not intend to preclude its admission for such other purposes, apart from § 5, as the general law of evidence may permit. Petitioners contend that the judgment may be considered by the jury as evidence of respondents' intention in cancelling the Emichs' franchises. Cf. Wigmore, Evidence (3d ed. 1940), §§ 302–304; *American Medical Association* v. *United States,* 76 U. S. App. D. C. 70, 87–89, 130 F. 2d 233, 250–252 (C. A. D. C. Cir. 1942), affirmed 317 U. S. 519 (1943). Whether this contention is correct and, if so, whether such evidence would establish prima facie an illegal motive are questions beyond the scope of our present review.

record, including the pleadings and judgment, in the antecedent case as he may find necessary or appropriate to use in presenting to the jury a clear picture of the issues decided there and relevant to the case on trial. Cf. *Eastman Kodak Co.* v. *Southern Photo Material Co.,* 295 F. 98, 101 (C. A. 5th Cir. 1923), affirmed 273 U. S. 359 (1927). A similar discretion must be exercised in approving the attachment of a copy of the indictment as an exhibit to the complaint.

In summary the trial judge should (1) examine the record of the antecedent case to determine the issues decided by the judgment; (2) in his instructions to the jury reconstruct that case in the manner and to the extent he deems necessary to acquaint the jury fully with the issues determined therein; and (3) explain the scope and effect of the former judgment on the case at trial. The court may, in the interest of clarity, so inform the jury at the time the judgment in the prior action is offered in evidence; or he may so instruct at a later time if, in his discretion, the ends of justice will be served.

The case is remanded to the Court of Appeals with directions to modify its judgment to conform with this opinion.

It is so ordered.

Mr. Justice Minton took no part in the consideration or decision of this case.

MOORE, ADMINISTRATRIX, *v.* CHESAPEAKE & OHIO RAILWAY CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 318. Argued January 4, 1951.—Reargued January 10, 1951.—Decided February 26, 1951.

In this action under the Federal Employers' Liability Act to recover for the death of a brakeman, there was no evidence of negligence on the part of the railroad, and the District Court properly sustained the motion for judgment notwithstanding the verdict. Pp. 573–578.

184 F. 2d 176, affirmed.

The case is stated in the opinion. The judgment below is *affirmed,* p. 578.

Geo. E. Allen argued the cause and filed a brief for petitioner.

Meade T. Spicer, Jr. and *Strother Hynes* argued the cause on the original argument and *Mr. Hynes* on the reargument for respondent. With them on the brief was *Walter Leake.*

MR. JUSTICE MINTON delivered the opinion of the Court.

This action, brought under the Federal Employers' Liability Act[1] in the United States District Court for the Eastern District of Virginia on behalf of a surviving widow and children, charged negligence against respondent railroad in the death of petitioner's decedent, who was acting in the course of his employment as a brakeman for respondent at the time of his death. The case was tried before a jury. At the conclusion of all the evidence, re-

[1] 35 Stat. 65, as amended, 45 U. S. C. §§ 51 *et seq.*

spondent moved for a directed verdict on the ground, among others, that respondent was not shown to have been negligent. The District Court reserved decision, pursuant to Rule 50 of the Federal Rules of Civil Procedure, and submitted the case to the jury, which returned a verdict for petitioner. Respondent then renewed its contention by motion for judgment notwithstanding the verdict, which was sustained, and the action was dismissed on the merits. The Court of Appeals for the Fourth Circuit affirmed, 184 F. 2d 176, and we granted certiorari to determine whether the province of the jury had been invaded by the action of the District Court. 340 U. S. 874.

On September 25, 1948, petitioner's decedent was employed by respondent as a brakeman in respondent's switching yards at Richmond, Virginia. The day was fair. At about 3:50 p. m., the crew with which decedent was working undertook its first car movement of the day. An engine and tender were headed into Track 12 and the front end of the engine was coupled onto 33 loaded freight cars which were to be moved out initially upon the straight track referred to as the ladder track. The switch at the junction of Track 12 and the ladder track was properly aligned for the train to pass onto the ladder track. Who aligned the switch does not appear.

Decedent gave the signal for the engine to back out of Track 12 with the cars. It moved out in a westerly direction, with the rear of the tender as the front of the moving train. Decedent was standing on a footboard at the rear of the tender, his back to the tender; the outer edge of the footboard was about ten inches in from the outer edge of the tender and about a foot above the rail. The engineer was in his seat on the same side of the train as the footboard on which decedent was standing. The engineer was turned in the seat and leaning out the side cab window, looking in the direction in which the train

was moving. Decedent's duty as he rode on the footboard was to give signals to the engineer, who testified that he could at all times see the edge of the arm and shoulder of decedent. To be thus seen and in a position to give signals, decedent had to extend outward beyond the edge of the tender, supporting himself partly by a handrail, otherwise the tender, the top of which was eight feet seven inches above the footboard, would have obstructed the engineer's view of him altogether.

The engineer testified that as the train approached Switch 12 at about five miles an hour, having moved ten or twelve car lengths, he saw decedent slump as if his knees had given way, then right himself, then tumble forward in a somersault toward the outside of the track. The engineer testified that he then made an emergency stop in an unsuccessful effort to avoid injuring decedent. The train ran the length of the tender and engine and about a car length and a half before it stopped at a point about an engine or car length past the switch on the ladder track. Decedent died immediately of the injuries received.

To recover under the Act, it was incumbent upon petitioner to prove negligence of respondent which caused the fatal accident. *Tennant* v. *Peoria & P. U. R. Co.,* 321 U. S. 29, 32. The negligence she alleged was that respondent's engineer made a sudden and unexpected stop without warning, "thereby causing decedent to be thrown from a position of safety on the rear of the tender" into the path of the train.

It is undisputed that only one stop of the train was made and that a sudden stop without warning. The engineer was the only witness to the accident and was called to testify by petitioner. He testified that he saw decedent fall from the tender and that he made an emergency stop in an attempt to avoid injuring him. He testified that he received no signal to stop and had no

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reason to stop until he saw decedent fall. When his attention was directed to the point, the engineer never wavered in his testimony that decedent was continuously in his view and in a position to give signals up to the time he was seen to fall and the emergency stop was made.

Petitioner attempts to avoid the effect of this by pointing to statements of the engineer which allegedly contradict his testimony that decedent was continuously in his view. Petitioner relies on testimony and measurements of an expert witness, and upon the fact that the jury was permitted to view the engine and tender, to support the alleged contradiction. As a consequence, it is asserted, the jury was entitled to disbelieve the engineer's version of the accident and to accept petitioner's.

True, it is the jury's function to credit or discredit all or part of the testimony. But disbelief of the engineer's testimony would not supply a want of proof. *Bunt* v. *Sierra Butte Gold Mng. Co.*, 138 U. S. 483, 485. Nor would the possibility alone that the jury might disbelieve the engineer's version make the case submissible to it.

The burden was upon petitioner to prove that decedent fell after the train stopped without warning, which was the act of negligence she charged. Her evidence showed he fell before the train stopped. The only evidence which petitioner can glean from this record to support her charge is the engineer's testimony that there was no one around the switch as the train approached it, and that he did not know whether "they" intended to take all of the 33 cars out of the switch at one time, or to stop and cut off some of them.[2] From this it is said a jury might reasonably

[2] "Q. Were you going to take all of those thirty-eight [*sic*] cars out at one time through that switch?

"A. I don't know about that. I work by signals. I don't know whether they intended to put them all out and switch them or to stop and cut part of them off." R. 30.

infer that the engineer decided to make and did make an emergency stop which threw decedent from the tender. However, the engineer's testimony, appearing at the very same page of the transcript as the statement relied on, was that he worked by signals; that he had received no signal to stop or do anything; that in the event he did not receive a signal he would "[k]eep pulling the cars on back" until he received a signal, until he "cleared the switch"—"[p]robably beyond."[3] We do not think that the isolated portion of the engineer's testimony relied on by petitioner permits an inference of negligence when placed in its setting of uncontradicted and unequivocal testimony totally at variance with such an inference.

Hence, all the evidence shows is that decedent fell before the train stopped. If one does not believe the engineer's testimony that he stopped after—indeed, because of—the fall, then there is no evidence as to when decedent fell. There would still be a failure of proof.

To sustain petitioner, one would have to infer from no evidence at all that the train stopped where and when it did for no purpose at all, contrary to all good railroading practice, prior to the time decedent fell, and then infer

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[3] *Supra*, n. 2;

"Q. Had you received any signal at that time to stop or to do anything—cut off any of the cars?

"A. No, sir, I had not.

"Q. What were you going to do in the event you didn't receive any further signals either from the conductor or from Mr. Moore or from anybody else?

"A. Keep pulling the cars on back until I received a signal.

"Q. And until you cleared the switch, until you cleared No. 12 switch?

"A. Yes, sir.

"Q. You keep——

"A. Probably beyond.

"Q. You keep on going?

"A. Yes." R. 30.

that decedent fell because the train stopped. This would be speculation run riot. Speculation cannot supply the place of proof. *Galloway* v. *United States,* 319 U. S. 372, 395.

Since there was no evidence of negligence, the court properly sustained the motion for judgment notwithstanding the verdict. The judgment is

Affirmed.

MR. JUSTICE FRANKFURTER would dismiss this writ as improvidently granted, for reasons set forth by him in *Carter* v. *Atlanta & St. Andrews Bay R. Co.,* 338 U. S. 430, 437. See *Affolder* v. *N. Y., C. & St. L. R. Co.,* 339 U. S. 96, 101.

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

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS concurs, dissenting.

The complaint in this case alleged that petitioner's husband, while performing his duties as a railroad brakeman, was thrown from a footboard at the back of a tender and killed as a result of a sudden and unexpected stop made by the engineer. That these allegations, if proved, supported the jury's finding of negligence is not and could not be denied. I have no doubt but that the following evidence was sufficient to justify such a finding and the verdict for petitioner:

Decedent was an experienced brakeman with respondent railroad, having served in that capacity for about seven years. On the day of the accident, his duty required him to ride the footboard on the rear of a tender which was being moved backwards by an engine coupled to 33 loaded freight cars. The engineer testified that he suddenly threw the engine into reverse and made an emer-

gency stop without warning. Decedent's badly broken and mutilated body was found lying beside the track. He had died as a result of his injuries.

Unless we are to require the element of proximate cause to be proved by eye-witness testimony, a reasonable jury certainly could infer from the foregoing facts that the sudden stopping of the engine threw the decedent to his death. Yet the Court apparently ignores this strong circumstantial evidence by relying upon the engineer's testimony that he made the sudden stop after he saw the decedent "somersault" off the tender. Of course, had the jury believed both that the engineer stopped the train abruptly and that he did so at the time he said he did, it would have found for respondent. But as the Court concedes, the jury was not compelled wholly to accept or wholly to reject the engineer's version. It was entitled to credit part of his testimony and discredit the balance, especially since there were noticeable inconsistencies, improbabilities and self-interest in the engineer's story as to how and when the fall occurred. If the jury rejected the statement that decedent fell before the engine stopped, it could find for petitioner on the basis of the circumstantial evidence previously set out.

The technique used today in depriving petitioner of her verdict is to frame the issue in terms of "When did the decedent fall?" and then to hold that petitioner failed to sustain the burden of proof because she introduced no eye-witness evidence on this point.* Such a myopic view loses sight of all the circumstances from which the time and cause of the fall can be inferred. What the record shows is that petitioner tried the case on a theory that

*The Court also appears to believe that petitioner should have proved the engineer's purpose in stopping the train so suddenly. But whatever was the engineer's purpose, petitioner was entitled to recover in this case if her husband's death was caused by the sudden, unexpected stop.

decedent's fall resulted from a sudden stopping of the engine, while respondent asserted the theory that the fall was due to a heart attack. Although there was some showing that decedent had been afflicted with heart trouble in the past, respondent failed to produce any evidence that the body when found gave indications of heart disease. The jury therefore quite reasonably rejected respondent's theory for lack of proof. Just as reasonably, it accepted the petitioner's evidence as proving the allegations of her complaint. In my opinion, the taking of this verdict from petitioner is a totally unwarranted substitution of a court's view of the evidence for that of a jury.

I would reverse.

JOHNSON *v.* MUELBERGER.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 296. Argued January 4, 1951.—Decided March 12, 1951.

1. In a divorce proceeding brought in Florida by the second wife of a New York resident, wherein he answered on the merits and had full opportunity to contest (but did not contest) the jurisdictional issues, the court granted a decree of divorce, although the wife had not complied with the jurisdictional 90-day residence requirement of Florida. He married again, and after his death his third wife elected, under New York law, to take the statutory one-third share of his estate. This was contested in New York by a daughter of his first marriage (sole legatee under his will), who challenged the validity of the Florida divorce on the ground that the complainant had not complied with the 90-day residence requirement. *Held:* The daughter could not have challenged the validity of the Florida decree in the courts of that State, and therefore she was precluded by the Full Faith and Credit Clause of the Federal Constitution from collaterally attacking it in the courts of New York. Pp. 582–589.
2. When a decree of divorce cannot be attacked on jurisdictional grounds by parties who were actually before the court, or by their privies, or by strangers, in the courts of the State in which the decree was rendered, the Full Faith and Credit Clause precludes their attacking it in the courts of a sister State. P. 589.

301 N. Y. 13, 92 N. E. 2d 44, reversed.

An order of the New York Surrogate's Court sustaining the validity of an election by petitioner to take as surviving spouse the statutory share of a decedent's estate was affirmed by the Appellate Division, 275 App. Div. 848. The Court of Appeals reversed on constitutional grounds. 301 N. Y. 13, 92 N. E. 2d 44. This Court granted certiorari. 340 U. S. 874. *Reversed*, p. 589.

William E. Leahy argued the cause for petitioner. With him on the brief was *William J. Hughes, Jr.*

Saul Hammer argued the cause for respondent. With him on the brief was *Louis Flato.*

MR. JUSTICE REED delivered the opinion of the Court.

The right of a daughter to attack in New York the validity of her deceased father's Florida divorce is before us. She was his legatee. The divorce was granted in Florida after the father appeared there and contested the merits. The issue turns on the effect in New York under these circumstances of the Full Faith and Credit Clause of the Federal Constitution.

Eleanor Johnson Muelberger, respondent, is the child of decedent E. Bruce Johnson's first marriage. After the death of Johnson's first wife in 1939, he married one Madoline Ham, and they established their residence in New York. In August 1942, Madoline obtained a divorce from him in a Florida proceeding, although the undisputed facts as developed in the New York Surrogate's hearing show that she did not comply with the jurisdictional ninety-day residence requirement.[1] The New York Surrogate found that

> "In the Florida court, the decedent appeared by attorney and interposed an answer denying the wrongful acts but not questioning the allegations as to residence in Florida. The record discloses that testimony was taken by the Florida court and the divorce granted Madoline Johnson. Both parties had full opportunity to contest the jurisdictional issues in that court and the decree is not subject to attack on the ground that petitioner was not domiciled in Florida."

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[1] "In order to obtain a divorce the complainant must have resided ninety days in the State of Florida before the filing of the bill of complaint." Fla. Stat. Ann., 1943, § 65.02. This has been construed to require residence for the ninety days immediately preceding the filing date. *Curley* v. *Curley*, 144 Fla. 728, 198 So. 584. Madoline arrived in Florida from New York in June, and filed a bill of complaint on July 29.

In 1944 Mr. Johnson entered into a marriage, his third, with petitioner, Genevieve Johnson, and in 1945 he died, leaving a will in which he gave his entire estate to his daughter, Eleanor. After probate of the will, the third wife filed notice of her election to take the statutory one-third share of the estate, under § 18 of the New York Decedent Estate Law. This election was contested by respondent daughter, and a trial was had before the Surrogate, who determined that she could not attack the third wife's status as surviving spouse, on the basis of the alleged invalidity of Madoline's divorce, because the divorce proceeding had been a contested one, and "[s]ince the decree is valid and final in the State of Florida, it is not subject to collateral attack in the courts of this state."

The Appellate Division affirmed the Surrogate's decree *per curiam*, 275 App. Div. 848, but the New York Court of Appeals reversed. 301 N. Y. 13, 92 N. E. 2d 44. The remittitur remanded the case to the Surrogate "for further proceedings not inconsistent with" the opinion of the Court of Appeals. But in light of the record before us we assume that the requirement of Florida for a residence of 90 days as a jurisdictional basis for a Florida divorce is no longer open as an issue upon return of these proceedings to the Surrogate's Court. Accordingly the judgment under review is a final decree.

The Court of Appeals held that the Florida judgment finding jurisdiction to decree the divorce bound only the parties themselves. This followed from their previous opportunity to contest the jurisdictional issue. As the court read the Florida cases to allow Eleanor to attack the decree collaterally in Florida, it decided she should be equally free to do so in New York. The Court of Appeals reached this decision after consideration of the Full Faith and Credit Clause. Because the case involves important

issues in the adjustment of the domestic-relations laws of the several states, we granted certiorari, 340 U. S. 874.

The clause and the statute prescribing the effect in other states of judgments of sister states are set out below.[2] This statutory provision has remained substantially the same since 1790. 1 Stat. 122. There is substantially no legislative history to explain the purpose and meaning of the clause and of the statute.[3] From judicial experience with and interpretation of the clause, there has emerged the succinct conclusion that the Framers intended it to help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they have in the state of the original forum.[4] The faith and credit given is not to be niggardly but generous, full.[5] "[L]ocal policy must at times be required to give way, such 'is part of the price of our federal system.' "[6]

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[2] U. S. Const., Art. IV, § 1:

"Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

28 U. S. C. § 1738:

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

[3] Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Col. L. Rev. 1.

[4] *Sherrer* v. *Sherrer,* 334 U. S. 343, 355, and cases cited; *Williams* v. *North Carolina,* 317 U. S. 287, 301, 303; *Riley* v. *New York Trust Co.,* 315 U. S. 343, 348–349.

[5] *Davis* v. *Davis,* 305 U. S. 32, 40.

[6] *Sherrer* v. *Sherrer, supra,* 355.

This constitutional purpose promotes unification, not centralization. It leaves each state with power over its own courts but binds litigants, wherever they may be in the Nation, by prior orders of other courts with jurisdiction.[7] "One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties." [8] The federal purpose of the clause makes this Court, for both state and federal courts,[9] the "final arbiter when the question is raised as to what is a permissible limitation on the full faith and credit clause." [10]

In the exercise of this responsibility we have recently restated the controlling effect of the clause on state proceedings subsequent to divorce decrees in other states. In *Davis* v. *Davis,* 305 U. S. 32, we held that a Virginia decree of divorce, granted a husband who had acquired local domicile after he had obtained a decree of separation in the District of Columbia, the marital domicile, must be given effect in the District. The wife had entered her appearance in the Virginia court and was held bound by its findings of jurisdiction, after contest. In two cases, *Williams I* and *II,* 317 U. S. 287, and 325 U. S. 226, we held that domicile of one party to a divorce creates an adequate relationship with the state to justify its exercise of power over the marital relation, 317 U. S. at 298; 325 U. S. at 235. The later *Williams* case left a sister state free to determine whether there was domicile of one party in an *"ex parte"* proceeding so as to give the court jurisdiction to enter a decree. 325 U. S. at 230, n. 6, 237,

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[7] *Davis* v. *Davis, supra,* 41.

[8] *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66, 78.

[9] *Mills* v. *Duryee,* 7 Cranch 481, 485.

[10] *Williams* v. *North Carolina I, supra,* 302.

dissent 277; *Esenwein* v. *Commonwealth,* 325 U. S. 279, 281. Cf. *Rice* v. *Rice,* 336 U. S. 674.

Three years later a question undecided in *Williams II* was answered. In *Sherrer* v. *Sherrer,* 334 U. S. 343, a Florida divorce, where both parties appeared personally or by counsel, was held by Massachusetts not to be entitled to full faith or credit in that state because both parties lacked Florida domicile.[11] 320 Mass. 351, 358, 69 N. E. 2d 801, 805. We reversed, saying:

> "We believe that the decision of this Court in the *Davis* case and those in related situations are clearly indicative of the result to be reached here. Those cases stand for the proposition that the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree." Pp. 351–352. And cf. pp. 355–356.[12]

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[11] This was a proceeding where the former husband sought permission, under Mass. Gen. Laws (Ter. ed.), c. 209, § 36, to convey real estate as if he were sole, because living apart from his wife for justifiable causes.

[12] The dissent highlights the ruling: "But the real question here is whether the Full Faith and Credit Clause can be used as a limitation on the power of a State over its citizens who do not change their domicile, who do not remove to another State, but who leave the State only long enough to escape the rigors of its laws, obtain a divorce, and then scurry back. To hold that this Massachusetts statute contravenes the Full Faith and Credit Clause is to say that that State has so slight a concern in the continuance or termination of the marital relationships of its domiciliaries that its interest may be foreclosed by an arranged litigation between the parties in which it was not represented." Pp. 362–363.

Coe v. *Coe,* 334 U. S. 378; cf. *Estin* v. *Estin,* 334 U. S. 541.

It is clear from the foregoing that, under our decisions, a state by virtue of the clause must give full faith and credit to an out-of-state divorce by barring either party to that divorce who has been personally served or who has entered a personal appearance from collaterally attacking the decree. Such an attack is barred where the party attacking would not be permitted to make a collateral attack in the courts of the granting state. This rule the Court of Appeals recognized. 301 N. Y. 13, 17, 92 N. E. 2d 44, 46. It determined, however, that a "stranger to the divorce action," as the daughter was held to be in New York, may collaterally attack her father's Florida divorce in New York if she could have attacked it in Florida.

No Florida case has come to our attention holding that a child may contest in Florida its parent's divorce where the parent was barred from contesting, as here, by *res judicata. State ex rel. Willys* v. *Chillingworth,* 124 Fla. 274, 168 So. 249, on which the Court of Appeals of New York relied, does not so hold. That case was a suggestion for a writ of prohibition filed in the Supreme Court of Florida to prohibit a lower court of record from proceeding on a complaint filed by Willys' daughter that her stepmother's divorce from a former husband was fraudulently obtained. Therefore, it was alleged, her stepmother's marriage to Willys was void and the stepmother had no right or interest as widow in Willys' estate. The writ of prohibition was granted because of improper venue of the complaint. The two opinions intimated that a daughter, as heir, could represent a deceased father in an attack on a stepmother's former divorce.[13] Neither of the opin-

[13] 124 Fla. at 278, 168 So. at 251:

"The rule is settled in this State that respondent being heir to her father's estate has a right to question the validity of his marriage to

ions nor any of the Florida cases cited cover any situation where the doctrine of *res judicata* was or might be applied. That is, neither Willys nor his daughter was a party to the stepmother's divorce proceedings. If the laws of Florida should be that a surviving child is in privity with its parent as to that parent's estate, surely the Florida doctrine of *res judicata* would apply to the child's collateral attack as it would to the father's.[14] If, on the other hand, Florida holds, as New York does in this case, that the child of a former marriage is a stranger to the divorce proceedings,[15] late opinions of Florida indicate that the child would not be permitted to attack the divorce, since the child had a mere expectancy at the time of the divorce.

In *deMarigny* v. *deMarigny*, 43 So. 2d 442, a second wife sought to have the divorce decree of the first marriage declared invalid. The Supreme Court of Florida held that the putative wife, being a stranger, without then existing interest, to the divorce decree, could not impeach it. It quoted with approval 1 Freeman on Judgments (5th ed.) 636, § 319:

> "It is only those strangers who, if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right, that are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cause nor

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petitioner. Rawlins v. Rawlins [18 Fla. 345], and Kuehmsted v. Turnwall [103 Fla. 1180, 138 So. 775], *supra*." This observation was not directed at circumstances where *res judicata* could bind the parent.

[14] We find nothing in the Florida cases to cause us to question the application of the general rule that *res judicata* applies between parties both of whom appeared in prior litigation. See *Sherrer* v. *Sherrer*, 334 U. S. 343, 349, n. 11.

[15] See Note, Standing of Children to Attack Their Parents' Divorce Decree, 50 Col. L. Rev. 833.

> appeal from the judgment, they are by law allowed to impeach it whenever it is attempted to be enforced against them so as to affect rights or interests acquired prior to its rendition." P. 447.

See also *Gaylord* v. *Gaylord,* 45 So. 2d 507. The *de-Marigny* case also refused to permit the putative wife to represent the state in an effort to redress an alleged fraud on the court.

We conclude that Florida would not permit Mrs. Muelberger to attack the Florida decree of divorce between her father and his second wife as beyond the jurisdiction of the rendering court. In that case New York cannot permit such an attack by reason of the Full Faith and Credit Clause. When a divorce cannot be attacked for lack of jurisdiction by parties actually before the court or strangers in the rendering state, it cannot be attacked by them anywhere in the Union. The Full Faith and Credit Clause forbids.

Reversed.

MR. JUSTICE FRANKFURTER dissents, substantially for the reasons given in the opinion of the New York Court of Appeals, 301 N. Y. 13, 92 N. E. 2d 44, in light of the views expressed by him in *Sherrer* v. *Sherrer* and *Coe* v. *Coe,* 334 U. S. 343, 356.

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

UNITED STATES *v.* LEWIS.

CERTIORARI TO THE COURT OF CLAIMS.

No. 347. Argued March 2, 1951.—Decided March 26, 1951.

In his 1944 income tax return, respondent reported $22,000 received that year as an employee's bonus, which he claimed in good faith and used unconditionally as his own. In subsequent litigation, it was decided that the bonus had been computed improperly; and, under compulsion of a judgment, respondent returned $11,000 to his employer in 1946. He then sued in the Court of Claims for refund of an alleged overpayment of his 1944 income tax. *Held:* Under the "claim of right" doctrine announced in *North American Oil* v. *Burnet*, 286 U. S. 417, the entire $22,000 was income in 1944, and respondent was not entitled to recompute his 1944 tax. Pp. 590–592.

117 Ct. Cl. 336, 91 F. Supp. 1017, reversed.

The case is stated in the opinion. The judgment below is *reversed,* p. 592.

Ellis N. Slack argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle* and *I. Henry Kutz.*

Sigmund W. David argued the cause and filed a brief for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Respondent Lewis brought this action in the Court of Claims seeking a refund of an alleged overpayment of his 1944 income tax. The facts found by the Court of Claims are: In his 1944 income tax return, respondent reported about $22,000 which he had received that year as an employee's bonus. As a result of subsequent litigation in a state court, however, it was decided that respondent's bonus had been improperly computed; under compulsion of the state court's judgment he returned approximately $11,000 to his employer. Until payment

of the judgment in 1946, respondent had at all times claimed and used the full $22,000 unconditionally as his own, in the good faith though "mistaken" belief that he was entitled to the whole bonus.

On the foregoing facts the Government's position is that respondent's 1944 tax should not be recomputed, but that respondent should have deducted the $11,000 as a loss in his 1946 tax return. See G. C. M. 16730, XV–1 Cum. Bull. 179 (1936). The Court of Claims, however, relying on its own case, *Greenwald* v. *United States,* 102 Ct. Cl. 272, 57 F. Supp. 569, held that the excess bonus received "under a mistake of fact" was not income in 1944 and ordered a refund based on a recalculation of that year's tax. 117 Ct. Cl. 336, 91 F. Supp. 1017. We granted certiorari, 340 U. S. 903, because this holding conflicted with many decisions of the courts of appeals, see, *e. g., Haberkorn* v. *United States,* 173 F. 2d 587, and with principles announced in *North American Oil* v. *Burnet,* 286 U. S. 417.

In the *North American Oil* case we said: "If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent." 286 U. S. at 424. Nothing in this language permits an exception merely because a taxpayer is "mistaken" as to the validity of his claim. Nor has the "claim of right" doctrine been impaired, as the Court of Claims stated, by *Freuler* v. *Helvering,* 291 U. S. 35, or *Commissioner* v. *Wilcox,* 327 U. S. 404. The *Freuler* case involved an entirely different section of the Internal Revenue Code, and its holding is inapplicable here. 291 U. S. at 43. And in *Commissioner* v. *Wilcox, supra,* we held that receipts from embezzlement did not constitute income, distinguishing *North American Oil* on the ground

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that an embezzler asserts no "bona fide legal or equitable claim." 327 U. S. at 408.

Income taxes must be paid on income received (or accrued) during an annual accounting period. Cf. I. R. C., §§ 41, 42; and see *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, 363. The "claim of right" interpretation of the tax laws has long been used to give finality to that period, and is now deeply rooted in the federal tax system. See cases collected in 2 Mertens, Law of Federal Income Taxation, § 12.103. We see no reason why the Court should depart from this well-settled interpretation merely because it results in an advantage or disadvantage to a taxpayer.*

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

The question in this case is not whether the bonus had to be included in 1944 income for purposes of the tax. Plainly it should have been because the taxpayer claimed it as of right. Some years later, however, it was judicially determined that he had no claim to the bonus. The question is whether he may then get back the tax which he paid on the money.

Many inequities are inherent in the income tax. We multiply them needlessly by nice distinctions which have no place in the practical administration of the law. If the refund were allowed, the integrity of the taxable year would not be violated. The tax would be paid when due; but the Government would not be permitted to maintain the unconscionable position that it can keep the tax after it is shown that payment was made on money which was not income to the taxpayer.

*It has been suggested that it would be more "equitable" to reopen respondent's 1944 tax return. While the suggestion might work to the advantage of this taxpayer, it could not be adopted as a general solution because, in many cases, the three-year statute of limitations would preclude recovery. I. R. C., § 322 (b).

Syllabus.

62 CASES OF JAM ET AL. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 363. Argued March 5–6, 1951.—Decided March 26, 1951.

Under § 304 of the Federal Food, Drug, and Cosmetic Act, as amended, the Government filed a libel to condemn 62 cases of a product which closely resembled fruit jam in appearance and taste, claiming that it was "misbranded" within the meaning of § 403 (g). The product did not meet the standards for fruit jam prescribed in the regulations issued under § 401 and incorporated by reference in § 403 (g); but it was wholesome and fit for human consumption, was plainly labeled as "imitation" in compliance with § 403 (c), and was sold as "imitation jam," without any effort to misrepresent it as genuine fruit jam. *Held:* It was not "misbranded" within the meaning of § 403. *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, distinguished. Pp. 593–601.

183 F. 2d 1014, reversed.

On a libel by the United States against certain food products under § 304 of the Federal Food, Drug, and Cosmetic Act, the District Court held that they were not "misbranded" within the meaning of § 403. 87 F. Supp. 735. The Court of Appeals reversed. 183 F. 2d 1014. This Court granted certiorari. 340 U. S. 890. *Reversed*, p. 601.

Benjamin F. Stapleton, Jr. argued the cause for petitioners. With him on the brief were *Clarence L. Ireland* and *Edward Brown Williams.*

Robert L. Stern argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney, Vincent A. Kleinfeld, John T. Grigsby* and *William W. Goodrich.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The Federal Food, Drug, and Cosmetic Act authorizes the United States to bring a libel against any article of food which is "misbranded" when using the channels of interstate commerce. Act of June 25, 1938, § 304, 52 Stat. 1040, 1044, 21 U. S. C. § 334. The Act defines "misbranded" in the eleven paragraphs of § 403. 52 Stat. 1047–1048, 21 U. S. C. § 343. The question before us is raised by two apparently conflicting paragraphs.

One of them, subsection (c), comes from the original Pure Food and Drugs Act of 1906. Act of June 30, 1906, 34 Stat. 768, 770–771, § 8 (first paragraph concerning "food," and second proviso). It directs that a food shall be deemed "misbranded" if it "is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated." The other, subsection (g), was added by the enlargement of the statute in 1938. It condemns as "misbranded" a product which "purports to be or is represented as a food," the ingredients of which the Administrator has standardized, if the product does not conform in all respects to the standards prescribed. The Administrator has authority to promulgate standards when in his judgment "such action will promote honesty and fair dealing in the interest of consumers." § 401, 52 Stat. 1046, 21 U. S. C. § 341.

The proceeding before us was commenced in 1949 in the District Court for the District of New Mexico. By it the United States seeks to condemn 62 cases of "Delicious Brand Imitation Jam," manufactured in Colorado and shipped to New Mexico. The Government claims that this product "purports" to be fruit jam, a food for which the Federal Security Administrator has promulgated a "definition and standard of identity." The regulation

specifies that a fruit jam must contain "not less than 45 parts by weight" of the fruit ingredient. 21 C. F. R. (1949 ed.) § 29.0. The product in question is composed of 55% sugar, 25% fruit, 20% pectin, and small amounts of citric acid and soda. These specifications show that pectin, a gelatinized solution consisting largely of water, has been substituted for a substantial proportion of the fruit required. The Government contends that the product is therefore to be deemed "misbranded" under § 403 (g).

On the basis of stipulated testimony the District Judge found that although the product seized did not meet the prescribed standards for fruit jam, it was "wholesome" and "in every way fit for human consumption." It was found to have the appearance and taste of standardized jam, and to be used as a less expensive substitute for the standard product. In some instances, products similar to those seized were sold at retail to the public in response to telephone orders for jams, and were served to patrons of restaurants, ranches and similar establishments, who had no opportunity to learn the quality of what they received. But there is no suggestion of misrepresentation. The judge found that the labels on the seized jars were substantially accurate; and he concluded that since the product purported to be only an imitation fruit preserve and complied in all respects with subsection (c) of § 403 of the Act, it could not be deemed "misbranded." 87 F. Supp. 735.

The Court of Appeals for the Tenth Circuit, one judge dissenting, reversed this judgment. 183 F. 2d 1014. It held that since the product seized closely resembled fruit jam in appearance and taste, and was used as a substitute for the standardized food, it "purported" to be fruit jam, and must be deemed "misbranded" notwithstanding that it was duly labeled an "imitation." The court therefore remanded the cause with instructions to

enter a judgment for condemnation. We granted certiorari, 340 U. S. 890, because of the importance of the question in the administration of the Federal Food, Drug, and Cosmetic Act.

1. By the Act of 1906, 34 Stat. 768, as successively strengthened, Congress exerted its power to keep impure and adulterated foods and drugs out of the channels of commerce. The purposes of this legislation, we have said, "touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words." *United States* v. *Dotterweich,* 320 U. S. 277, 280. This is the attitude with which we should approach the problem of statutory construction now presented. But our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort.

2. Misbranding was one of the chief evils Congress sought to stop. It was both within the right and the wisdom of Congress not to trust to the colloquial or the dictionary meaning of misbranding, but to write its own. Concededly we are not dealing here with misbranding in its crude manifestations, what would colloquially be deemed a false representation. Compare § 403 (a), (b), (d), 52 Stat. 1047, 21 U. S. C. § 343 (a), (b), (d). Our concern is whether the article of food sold as "Delicious Brand Imitation Jam" is "deemed to be misbranded" according to § 403 (c) and (g) of the Federal Food, Drug, and Cosmetic Act of 1938.

3. The controlling provisions of the Act are as follows:

> "SEC. 304. (a) [as amended by the Act of June 24, 1948, 62 Stat. 582] Any article of food, drug, device, or cosmetic that is adulterated or misbranded when

introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, . . . shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: . . . .

. . . . . .

"SEC. 401. Whenever in the judgment of the [Administrator] such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container: . . . . In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the [Administrator] shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. . . .

. . . . . .

"SEC. 403. A food shall be deemed to be misbranded—

. . . . . .

"(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated.

. . . . . .

"(g) If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by

section 401, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring, and coloring) present in such food."

4. By §§ 401 and 403 (g), Congress vested in the Administrator the far-reaching power of fixing for any species of food "a reasonable definition and standard of identity." In *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, we held that this means that the Administrator may, by regulation, fix the ingredients of any food, and that thereafter a commodity cannot be introduced into interstate commerce which "purports to be or is represented as" the food which has been thus defined unless it is composed of the required ingredients. The Administrator had prescribed the ingredients of two different species of food—"farina" and "enriched farina." The former was an exclusively milled wheat product; the latter included certain additional ingredients, one of which optionally could be vitamin D. The Quaker Oats Company marketed a product it called "Quaker Farina Wheat Cereal Enriched with Vitamin D," which did not conform to either standard. Because it contained an additional vitamin it was not "farina"; because it lacked certain of the essential ingredients it could not be called "enriched farina." It was concededly a wholesome product, accurately labeled; but under the Administrator's regulations it could not be sold. We sustained the regulations, holding that Congress had constitutionally empowered the Administrator to define a food and had thereby precluded manufacturers—or courts—from determining for themselves whether some other ingredients would not produce as nutritious a product. "The statutory purpose to fix a definition of iden-

tity of an article of food sold under its common or usual name would be defeated if producers were free to add ingredients, however wholesome, which are not within the definition." 318 U. S. at 232.

5. Our decision in the *Quaker Oats* case does not touch the problem now before us. In that case it was conceded that although the Quaker product did not have the standard ingredients, it "purported" to be a standardized food. We did not there consider the legality of marketing properly labeled "imitation farina." That would be the comparable question to the one now here.

According to the Federal Food, Drug, and Cosmetic Act, nothing can be legally "jam" after the Administrator promulgated his regulation in 1940, 5 Fed. Reg. 3554, 21 C. F. R. § 29.0, unless it contains the specified ingredients in prescribed proportion. Hence the product in controversy is not "jam." It cannot lawfully be labeled "jam" and introduced into interstate commerce, for to do so would "represent" as a standardized food a product which does not meet prescribed specifications.

But the product with which we are concerned is sold as "imitation jam." Imitation foods are dealt with in § 403 (c) of the Act. In that section Congress did not give an esoteric meaning to "imitation." It left it to the understanding of ordinary English speech. And it directed that a product should be deemed "misbranded" if it imitated another food "unless its label bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated."

In ordinary speech there can be no doubt that the product which the United States here seeks to condemn is an "imitation" jam. It looks and tastes like jam; it is unequivocally labeled "imitation jam." The Government does not argue that its label in any way falls short of the requirements of § 403 (c). Its distribution in interstate commerce would therefore clearly seem to be

authorized by that section. We could hold it to be "misbranded" only if we held that a practice Congress authorized by § 403 (c) Congress impliedly prohibited by § 403 (g).

We see no justification so to distort the ordinary meaning of the statute. Nothing in the text or history of the legislation points to such a reading of what Congress wrote. In § 403 (g) Congress used the words "purport" and "represent"—terms suggesting the idea of counterfeit. But the name "imitation jam" at once connotes precisely what the product is: a different, an inferior preserve, not meeting the defined specifications. Section 403 (g) was designed to protect the public from inferior foods resembling standard products but marketed under distinctive names. See S. Rep. No. 361, 74th Cong., 1st Sess. 8–11. Congress may well have supposed that similar confusion would not result from the marketing of a product candidly and flagrantly labeled as an "imitation" food. A product so labeled is described with precise accuracy. It neither conveys any ambiguity nor emanates any untrue innuendo, as was the case with the "Bred Spred" considered by Congress in its deliberation on § 403 (g). See H. R. Rep. No. 2139, 75th Cong., 3d Sess. 5; House Hearings on H. R. 6906, 8805, 8941 and S. 5, 74th Cong., 1st Sess. 46–47. It purports and is represented to be only what it is—an imitation. It does not purport nor represent to be what it is not—the Administrator's genuine "jam."

In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop. The Government would have us hold that when the Administrator standardizes the ingredients of a food, no imitation of that food can be marketed which contains an ingredient of the original and serves a similar purpose. If Congress wishes to say that

nothing shall be marketed in likeness to a food as defined by the Administrator, though it is accurately labeled, entirely wholesome, and perhaps more within the reach of the meager purse, our decisions indicate that Congress may well do so. But Congress has not said so. It indicated the contrary. Indeed, the Administrator's contemporaneous construction concededly is contrary to what he now contends. We must assume his present misconception results from a misreading of what was written in the *Quaker Oats* case.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

The result reached by the Court may be sound by legislative standards. But the legal standards which govern us make the process of reaching that result tortuous to say the least. We must say that petitioner's "jam" purports to be "jam" when we read § 403 (g) and purports to be not "jam" but another food when we read § 403 (c). Yet if petitioner's product did not purport to be "jam" petitioner would have no claim to press and the Government no objection to raise.

SPECTOR MOTOR SERVICE, INC. *v.* O'CONNOR, TAX COMMISSIONER.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 132. Argued November 29–30, 1950.—Reargued January 10, 1951.—Decided March 26, 1951.

1. Connecticut imposes upon the franchises of foreign corporations, for the privilege of doing business within the State, a tax computed at a nondiscriminatory rate on that part of the corporation's net income which is reasonably attributable to its business activities within the State. The tax is not levied as compensation for the use of the highways or collected in lieu of an ad valorem property tax. It is not a fee for inspection or a tax on sales or use. *Held:* As applied to a foreign corporation which was engaged exclusively in interstate trucking, the tax was invalid under the Commerce Clause of the Federal Constitution. Pp. 603–610.

   (a) The fact that, if some intrastate commerce were involved or if an appropriate tax were imposed as compensation for the corporation's use of the highways, the same sum of money as is at issue here might be lawfully collected from the corporation, cannot sustain the constitutional validity of the tax. Pp. 607–608.

   (b) Whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so. P. 608.

   (c) As construed by the state courts, this is a tax solely on the franchise of petitioner to do a business which is *exclusively* interstate; and such a tax contravenes the Commerce Clause, no matter how fairly it is apportioned to business done within the state. Pp. 608–610.

2. The Federal District Court had jurisdiction of this case in the first instance because of the uncertainty of the adequacy of a remedy in the state courts, and it did not lose that jurisdiction by virtue of the later clarification of the procedure in the courts of the State. P. 605.

181 F. 2d 150, reversed.

The case is stated in the opinion, pp. 603–605. The judgment of the Court of Appeals is *reversed,* p. 610.

Cyril Coleman argued the cause and filed a brief for petitioner.

Louis Weinstein, Assistant Attorney General of Connecticut, argued the cause for respondent. With him on the brief was *William L. Hadden,* Attorney General.

MR. JUSTICE BURTON delivered the opinion of the Court.

This proceeding attacks, under the Commerce Clause of the Constitution of the United States, the validity of a state tax imposed upon the franchise of a foreign corporation for the privilege of doing business within the State when (1) the business consists solely of interstate commerce, and (2) the tax is computed at a nondiscriminatory rate on that part of the corporation's net income which is reasonably attributable to its business activities within the State. For the reasons hereinafter stated, we hold this application of the tax invalid.

Petitioner, Spector Motor Service, Inc., is a Missouri corporation engaged exclusively in interstate trucking. It instituted this action in 1942 in the United States District Court for the District of Connecticut against the Tax Commissioner of that State. It sought to enjoin collection of assessments and penalties totaling $7,795.50, which had been levied against it, for various periods between June 1, 1935, and December 31, 1940, under the Connecticut Corporation Business Tax Act of 1935 and amendments thereto.[1] It asked also for a declaratory

[1] "SEC. 418c. IMPOSITION OF TAX. Every mutual savings bank, savings and loan association and building and loan association doing business in this state, and *every other corporation or association carrying on business in this state which is required to report to the collector of internal revenue* for the district in which such corporation or association has its principal place of business for the purpose of assessment, collection and payment of an income tax [with exceptions not material here] . . . *shall pay, annually, a tax or excise upon its franchise for the privilege of carrying on or doing business within*

judgment as to its liability, if any, under that Act. It claimed that the tax imposed by the Act did not apply to it and that, if it did, such application violated both the Connecticut Constitution and the Commerce and Due Process Clauses of the United States Constitution. Finally, it alleged that it had no plain, speedy and efficient remedy at law or in equity in the state courts [2] and that the collection of the taxes and penalties by the means provided in the statute would cause it irreparable injury. The District Court took jurisdiction, held that the Act did not apply to petitioner and granted the injunction sought. 47 F. Supp. 671. The Court of Appeals for the Second Circuit, one judge dissenting, reversed. 139 F. 2d 809. It held that the tax did apply to petitioner and was constitutional. We granted certiorari, 322 U. S. 720, but, after hearing, remanded the cause to the District Court with directions to retain the bill pending the determination of proceedings to be brought in the state court in conformity with the opinion rendered, 323 U. S. 101.

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the state, such tax to be measured by the entire net income as herein defined received by such corporation or association from business transacted within the state during the income year and to be assessed at the rate of two per cent; . . . ." (Emphasis supplied.) Conn. Gen. Stat. Cum. Supp. 1935.

This section was amended in 1937 by inserting in the first italicized clause, after the words *"every other corporation or association carrying on,"* the words *"or having the right to carry on."* Conn. Gen. Stat. Cum. Supp. 1939, § 354e. Our conclusion is the same as to the assessments levied before and those levied after the amendment.

The current revision of the statute, as subsequently amended, appears in Conn. Gen. Stat., 1949, §§ 1896–1921.

[2] ". . . no [United States] district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State." 50 Stat. 738, 28 U. S. C. (1940 ed.) § 41 (1). See 28 U. S. C. (1946 ed., Supp. III) § 1341.

Petitioner thereupon sought a declaratory judgment in the Superior Court for Hartford County, Connecticut. The Superior Court held that the tax was applicable to petitioner but invalid under the Commerce Clause. 15 Conn. Supp. 205. The Supreme Court of Errors of the State of Connecticut likewise held that petitioner was subject to the tax but it declined to pass on the effect of the Commerce Clause. 135 Conn. 37, 70, 61 A. 2d 89, 105. On a motion asking it to dissolve its original injunction, the United States District Court declined to do so. 88 F. Supp. 711. It reviewed the recent decisions and held that, applying the Act to petitioner, as required by the interpretation of it by the state courts, such application violated the Commerce Clause of the United States Constitution. The Court of Appeals for the Second Circuit, acting through the same majority as on the previous occasion, reversed. One judge dissented for the reasons stated by the district judge and by the judge who had dissented on the former appeal. 181 F. 2d 150. We granted certiorari because of the fundamental nature of the issue and the apparent conflict between the judgment below and previous judgments of this Court. 340 U. S. 806. The case was argued twice at this term.

The United States District Court had jurisdiction over this case in the first instance because of the uncertainty of the adequacy of a remedy in the state courts, and it did not lose that jurisdiction by virtue of the later clarification of the procedure in the courts of Connecticut. *American Life Ins. Co.* v. *Stewart,* 300 U. S. 203; *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288.

The vital issue which remains is whether the application of the tax to petitioner violates the Commerce Clause of the Federal Constitution. We come to that issue now with the benefit of a statement from the state court of final jurisdiction showing exactly what it is that the State has sought to tax. The all-important "operating inci-

dence" of the tax is thus made clear.[3] After full consideration and with knowledge that its statement would be made the basis of determining the validity of the application of the tax under the Commerce Clause, that court said:

> "The tax is then a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state, whether they be domestic or foreign. *Stanley Works* v. *Hackett,* 122 Conn. 547, 551, 190 A. 743. Net earnings are used merely for the purpose of determining the amount to be paid by each corporation, a measure which, by the application of the rate charged, was intended to impose upon each corporation a share of the general tax burden as nearly as possible equivalent to that borne by other wealth in the state. As regards a corporation doing business both within and without the state, the intention was, by the use of a rather complicated formula, to measure the tax by determining as fairly as possible the proportionate amount of its business done in this state. There is no ground upon which the tax can be said to rest upon the use of highways by motor trucks . . . ." 135 Conn. at 56–57, 61 A. 2d at 98–99.

The incidence of the tax is upon no intrastate commerce activities because there are none. Petitioner is engaged only in interstate transportation. Its principal place of business is in Illinois. It is authorized by the Interstate Commerce Commission to do certain interstate trucking and by the Connecticut Public Utilities Commission to do part of such interstate trucking in Connecticut. Petitioner has filed with the Secretary of State of Connecticut a certificate of its incorporation in Missouri, has designated an agent in Connecticut for service

[3] *Wisconsin* v. *Penney Co.,* 311 U. S. 435, 444.

of process and has paid the state fee required in that connection. It has not been authorized by the State of Connecticut to do intrastate trucking and does not engage in it. See *Terminal Taxicab Co.* v. *District of Columbia,* 241 U. S. 252, 253–254.

Petitioner's business is the interstate transportation of freight by motor truck between east and west. When a full truckload is to be shipped to or from any customer in Connecticut, petitioner's over-the-road trucks go directly to the customer's place of business. In the case of less-than-truckload shipments, pickup trucks operated by petitioner gather the freight from customers for assembly into full truckloads at either of two terminals maintained within the State. "The pickup trucks merely act as a part of the interstate transportation of the freight." 135 Conn. at 44, 61 A. 2d at 93.

The tax does not discriminate between interstate and intrastate commerce. Neither the amount of the tax nor its computation need be considered by us in view of our disposition of the case. The objection to its validity does not rest on a claim that it places an unduly heavy burden on interstate commerce in return for protection given by the State. The tax is not levied as compensation for the use of highways [4] or collected in lieu of an ad valorem property tax.[5] Those bases of taxation have been disclaimed by the highest court of the taxing State. It is not a fee for an inspection or a tax on sales or use. It is a

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[4] See *Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542; *Aero Transit Co.* v. *Board of Comm'rs,* 332 U. S. 495; *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245 (Conn. excise tax on the use of the highways). Cf. *Memphis Gas Co.* v. *Stone,* 335 U. S. 80; *McCarroll* v. *Dixie Lines,* 309 U. S. 176.

[5] See *Interstate Pipe Line Co.* v. *Stone,* 337 U. S. 662, 679; *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450; *Old Dominion S. S. Co.* v. *Virginia,* 198 U. S. 299; *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688.

910798 O—51——45

"tax or excise" placed unequivocally upon the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the State. It serves no purpose for the State Tax Commissioner to suggest that, if there were some intrastate commerce involved or if an appropriate tax were imposed as compensation for petitioner's use of the highways, the same sum of money as is at issue here might be collected lawfully from petitioner. Even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so. *Freeman* v. *Hewit,* 329 U. S. 249; *McLeod* v. *Dilworth Co.,* 322 U. S. 327.

Taxing power is inherent in sovereign states, yet the states of the United States have divided their taxing power between the Federal Government and themselves. They delegated to the United States the exclusive power to tax the privilege to engage in interstate commerce when they gave Congress the power "To regulate Commerce with foreign Nations, and among the several States . . . ." U. S. Const., Art. I, § 8, cl. 3. While the reach of the reserved taxing power of a state is great, the constitutional separation of the federal and state powers makes it essential that no state be permitted to exercise, without authority from Congress, those functions which it has delegated exclusively to Congress. Another example of this basic separation of powers is the inability of the states to tax the agencies through which the United States exercises its sovereign powers. See *M'Culloch* v. *Maryland,* 4 Wheat. 316, 425–437; *Brown* v. *Maryland,* 12 Wheat. 419, 445–449; *Mayo* v. *United States,* 319 U. S. 441.

The answer in the instant case has been made clear by the courts of Connecticut. It is not a matter of labels. The incidence of the tax provides the answer. The

courts of Connecticut have held that the tax before us attaches solely to the franchise of petitioner to do interstate business. The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory.

This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state. *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203 (measured by percentages of "corporate excess" and net income); *Ozark Pipe Line Corp.* v. *Monier,* 266 U. S. 555 (measured by percentage of capital stock and surplus). See *Interstate Pipe Line Co.* v. *Stone,* 337 U. S. 662, 669, *et seq.* (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); *Joseph* v. *Carter & Weekes Co.,* 330 U. S. 422; *Freeman* v. *Hewit, supra.*[6]

Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying

[6] The decision in *Memphis Gas Co.* v. *Beeler,* 315 U. S. 649, upheld a Tennessee tax on earnings of the taxpayer within that State where the earnings were derived from the intrastate distribution of gas by the taxpayer in a joint enterprise with the Memphis Power & Light Company. Any suggestion in that opinion as to the possible validity of such a tax if applied to earnings derived wholly from interstate commerce is not essential to the decision in the case.

on intrastate business and, within reasonable limits,[7] may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. *Interstate Pipe Line Co.* v. *Stone, supra; International Harvester Co.* v. *Evatt,* 329 U. S. 416; *Atlantic Lumber Co.* v. *Comm'r of Corporations and Taxation,* 298 U. S. 553. The same is true where the taxpayer's business activity is local in nature, such as the transportation of passengers between points within the same state, although including interstate travel, *Central Greyhound Lines* v. *Mealey,* 334 U. S. 653, or the publication of a newspaper, *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250. See also, *Memphis Gas Co.* v. *Stone,* 335 U. S. 80.

In this field there is not only reason but long-established precedent for keeping the federal privilege of carrying on exclusively interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law—*M'Culloch* v. *Maryland, supra.*

The judgment of the Court of Appeals, which reversed that of the District Court, is accordingly

Reversed.

MR. JUSTICE CLARK, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

The Court assumes, and I think it has been clearly demonstrated, that the tax under challenge is nondiscriminatory, fairly apportioned and not an undue burden on interstate commerce. Hence, if appellant had been

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[7] See *International Harvester Co.* v. *Evatt,* 329 U. S. 416; *Butler Bros.* v. *McColgan,* 315 U. S. 501; *Department of Treasury* v. *Wood Preserving Corp.,* 313 U. S. 62; *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331; *Connecticut General Life Ins. Co.* v. *Johnson,* 303 U. S. 77; *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123; *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113.

engaged in an iota of activity which the Court would be willing to call "intrastate," Connecticut could have applied its tax to the company's interstate business in the precise form which it now seeks to employ—a tax on the privilege of doing business in Connecticut measured by the entire net income attributable to the State, even though derived from interstate commerce.

But solely because Spector engages in what the Court calls "exclusively interstate" business, a different standard is applied. The Court does not ask whether the State is merely asking interstate commerce to pay its way, or whether the State in fact provides protection and services for which such commerce may fairly be charged. Nor is the Court concerned whether the tax puts interstate business at a competitive disadvantage or is likely to do so. Instead, the tax is declared invalid simply because the State has verbally characterized it as a levy on the privilege of doing business within its borders. The Court concedes, or at least appears to concede, that if the Connecticut legislature or highest court had described the tax as one for the use of highways or in lieu of an ad valorem property tax, Spector would have had to pay the same amount, calculated in the same way, as is sought to be collected here. In acknowledging this, the Court's own opinion totally refutes its protestation that the standard employed to strike down Connecticut's tax is more than a matter of labels. Spector remains free—as it has since the tax law was adopted in 1935—from paying any share of the State's expenses, and its tax-free status continues until Connecticut renames or reshuffles its tax.

Neither such a standard nor such a result persuades me. I agree with the well-reasoned opinions of the court below that the cases upholding fairly apportioned taxes on mixed intrastate and interstate business, and recognizing the right of states to make interstate commerce pay its

way, have enfeebled—and justifiably so—the precedents which today's decision restores to full vigor. In the not too distant past, this seemed to be quite clear. In *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649 (1942), a tax was upheld as being reasonably attributable to intrastate activities. But Chief Justice Stone, speaking for a unanimous Court, went further to state:

> "In any case, even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there . . . or upon net income derived from within the state . . . is not prohibited by the commerce clause . . . ." *Id.* at 656.

In light of the apparent need for clearing up the tangled underbrush of past cases, it appears that this view was delivered advisedly. Nor do I understand it to have been upset by *Freeman* v. *Hewit,* 329 U. S. 249 (1946), or *Joseph* v. *Carter & Weekes Co.,* 330 U. S. 422 (1947). The former involved a gross-receipts tax capable of duplication by another state; the latter involved a gross-receipts tax rather than a net-income tax; and the opinion in each case was written by a member of the Court who joined in the *Beeler* decision.

But in any event, I would confine those decisions to their "special facts." *Freeman* v. *Hewit, supra,* at 252. The Connecticut tax meets every practical test of fairness and propriety enunciated in cases upholding privilege taxes on corporations doing a mixed intrastate and interstate business. These cases should govern here, for there is no apparent difference between an "exclusively interstate" business and a "mixed" business which would warrant different constitutional regard. There is nothing spiritual about interstate commerce. It is rarely devoid of significant contacts with the several states. Hence,

this Court has long treated the problems in this field with a flexibility which the competing demands of federal and state governmental spheres have required. In the absence of federal action, this Court has been quick to recognize legitimate local interests and uphold state regulations of activities which admittedly form a part of, or impinge on, interstate commerce. See, *e. g., South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177 (1938). The same approach is hardly foreign to the field of state taxes:

> ". . . [W]hen accommodation must be made between state and national interests, manufacture within a State, though destined for shipment outside, is not a seamless web so as to prevent a State from giving the manufacturing part detached relevance for purposes of local taxation." *Freeman* v. *Hewit, supra,* at 255.

A similar recognition of facts is no less suited to this case. Spector qualified to do business in the State on June 11, 1934, by filing the necessary papers with the Secretary of State. It leases and utilizes terminals in Connecticut. It employs twenty-seven full-time workers in Connecticut, the payroll at New Britain amounting to $1,200 per week. It owns pickup trucks which are registered in its name with the State Motor Vehicle Department and which ply the streets of Connecticut cities. It uses heavy trucks which grind over Connecticut highways. As pointed out by the Connecticut Supreme Court of Errors, its leaseholds

> ". . . were the means adopted by it for the successful operation of its business in this state, and no doubt they were of material service in producing the large proportion of the plaintiff's business which is attributable to Connecticut." *Spector Motor Service, Inc.* v. *Walsh,* 135 Conn. 37, 50, 61 A. 2d 89, 96 (1948).

To be sure, the company does not make intrastate deliveries. But if it did, its activities would differ only in that its trucks might use different streets and highways and make different stops; the protection and services rendered by the State would be the same. The local aspects of Spector's business, even though it might technically be "exclusively interstate," are easily as substantial as those which this Court recently found adequate to uphold parts of the Illinois occupation tax, *Norton Co.* v. *Department of Revenue,* 340 U. S. 534 (1951). They are at least as extensive as those which validated a "privilege" tax in *Memphis Natural Gas Co.* v. *Stone,* 335 U. S. 80 (1948).

It has taken eight years and eight courts to bring this battered litigation to an end. The taxes involved go back thirteen years. It is therefore no answer to Connecticut and some thirty other states who have similar tax measures that they can now collect the same revenues by enacting laws more felicitously drafted. Because of its failure to use the right tag, Connecticut cannot collect from Spector for the years 1937 to date, and it and other states may well have past collections taken away and turned into taxpayer bonanzas by suits for refund not barred by the respective statutes of limitation.

Nor can the states be entirely certain that statutes recast in the light of this decision will be immune from later constitutional attack. It is at least doubtful that this statute is the only kind of measure which the Court might think would impose a tax "on the privilege of doing interstate business." But even assuming that the Court has promulgated a sure guide for states to follow in future enactments, the fact remains that there is no reasonable warrant for cloaking a purely verbal standard with constitutional dignity. "Exclusively interstate commerce" receives adequate protection when state levies are fairly

apportioned and nondiscriminatory. See opinion of Justice Rutledge in *Interstate Oil Pipe Line Co.* v. *Stone,* 337 U. S. 662 (1949). The "protection" bestowed by today's decision is neither substantial nor deserved.

Objections to the fairness of Connecticut's apportionment formula have been correctly disposed of by the Court of Appeals. I would affirm its judgment.

UNITED STATES *v.* MOORE ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 344. Argued February 28 and March 1, 1951.—Decided March 26, 1951.

1. In an action by the United States under the Housing and Rent Act of 1947, as amended, a landlord may be ordered under § 206 (b) to make restitution of overceiling rentals, even though a prohibitory injunction be not required because the defense-rental area was decontrolled after the violations but before suit was brought. Pp. 617–620.

   (a) An order for restitution in this action was permissible under the "other order" provision of § 206 (b). *Porter* v. *Warner Holding Co.*, 328 U. S. 395. Pp. 619–620.

2. The termination of rent control in the defense-rental area did not end the legal effect of §§ 205 and 206 (under which this action was brought), in view of the provision of § 204 (f) for the survival of rights and liabilities incurred prior to the expiration of the Act on either the date specified by Congress in the Act or such date as the President or Congress might later determine. Pp. 620–621.

3. The trial of this proceeding as an action for equitable relief did not deny respondents their constitutional right to a jury trial, because no demand for a jury trial was made as required by Rule 38 of the Federal Rules of Civil Procedure and, so far as the record shows, any right to a jury trial was waived. P. 621.

182 F. 2d 332, reversed.

The case is stated in the opinion, pp. 617–618. The judgment of the Court of Appeals is *reversed*, p. 621.

James L. Morrisson argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Ed Dupree, Leon J. Libeu* and *Nathan Siegel.*

Frank Cusack submitted on brief for respondents.

MR. JUSTICE CLARK delivered the opinion of the Court.

The United States brings this action under the Housing and Rent Act of 1947, as amended,[1] to obtain damages for violations of the Act and restitution of overceiling rentals collected. The question is whether under § 206 (b) of the Act a landlord may be ordered to make restitution of overceiling rentals where a prohibitory injunction is not required because the defense-rental area was decontrolled after the violations but before the Government brought suit.

Respondents are landlords of housing accommodations in Dallas, Texas. Between October 1, 1947, and May 31, 1949, they demanded and received rents in excess of those allowed by the applicable maximum rent regulation[2] issued under the Act. This action was begun in Federal District Court on June 29, 1949, pursuant to §§ 205[3] and 206 (b)[4] of the Act. The complaint by its terms sought a prohibitory injunction, restitution of all overcharges, and statutory damages. Respondents moved to dismiss on the ground that on June 23, 1949, six days prior to filing of the complaint, the Housing Expediter, pursuant to action taken by the City of Dallas under § 204 (j) (3) of the Act, terminated rent control in that city; that this act of the Expediter terminated as to Dallas all provisions of Title II of the Act including the remedial provisions under which this suit is brought; and that no saving clause was applicable. The District Court denied the motion. Respondents did not demand a jury. A trial to

[1] 61 Stat. 193, as amended, 50 U. S. C. App. (Supp. III) § 1881 *et seq.*

[2] Controlled Housing Rent Regulation, as amended, 12 Fed. Reg. 4331; 13 Fed. Reg. 1861; 14 Fed. Reg. 1571.

[3] 61 Stat. 199, as amended, 50 U. S. C. App. (Supp. III) § 1895.

[4] 61 Stat. 199, as amended, 50 U. S. C. App. (Supp. III) § 1896 (b).

the court concluded in a judgment for the Government, allowing statutory damages of $50 for a wilful violation and ordering restitution to the tenant of all overcharges received. On appeal by respondents the Court of Appeals for the Fifth Circuit reversed. 182 F. 2d 332 (1950). It held that the Government has a right of action solely for statutory damages under § 205 and remanded for new trial on this issue. A dismissal was directed insofar as the complaint seeks injunctive relief and restitution. The Government, asserting conflict with *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946), petitioned for review here only of the court's denial of restitution. We granted certiorari. 340 U. S. 890 (1950).[5]

The Court of Appeals recognized that restitution of overceiling rentals may be ordered as ancillary to injunctive relief against violations of the Act or regulations. However, as petitioner conceded that it has no right to an injunction when rent control has been lawfully terminated, the court concluded that "there remained no proceeding of which equity would have jurisdiction to which restitution could be adjunctive" and that restitution "was neither appropriate nor issuable." 182 F. 2d at 336.

Petitioner asserts that it is entitled to the remedy of restitution, independently of injunctive relief, under § 206 (b) of the Act. This section provides that, if in the judgment of the Housing Expediter there is an actual or threatened violation of the Act or any regulation, "the United States may make application to any . . . court of competent jurisdiction for an order enjoining such acts or practices, or for *an order enforcing compliance* with such provision, and upon a showing that such person has

[5] On cross-appeal by petitioner from the trial court's order allowing statutory damages for less than the amount of the established overcharges, the Court of Appeals sustained petitioner's contention. 182 F. 2d 336 (C. A. 5th Cir. 1950). Respondents have not challenged this decision here.

engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or *other order* shall be granted without bond." (Emphasis supplied.) It is petitioner's contention that the italicized language authorizes the relief sought.

Both parties rely, as did the Court of Appeals, on the decision of this Court in *Porter* v. *Warner Holding Co., supra,* which construed § 205 (a) of the Emergency Price Control Act of 1942. This provision was the source of § 206 (b) of the 1947 Act, and the two sections are for present purposes identical. The complaint in the *Warner* case sought injunctive relief against violations and restitution of overcharges. The lower courts allowed the injunction but denied restitution. This Court reversed, concluding that an order of restitution was a proper "other order." This interpretation was required to give effect to the congressional purpose to authorize whatever order within the inherent equitable power of the District Court may be considered appropriate and necessary to enforce compliance with the Act. The Court said that the section "anticipates orders of that character, although it makes no attempt to catalogue the infinite forms and variations which such orders might take. . . . In framing such remedies . . . courts must act primarily to effectuate the policy of the Emergency Price Control Act and to protect the public interest while giving necessary respect to the private interests involved. The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress." 328 U. S. at 400. Thus an equitable decree of restitution would be within the section if it was reasonably appropriate and necessary to enforce compliance with the Act and effectuate its purposes.

Adhering to the broad ground of interpretation of the "other orders" provision adopted in the *Warner* case, we

think the order for restitution entered by the District Court in this action was permissible under § 206 (b). Such a decree clearly enforces compliance with the Act and regulations for the period in which respondents demanded and received excess rentals. If the provision in § 206 (b) for orders enforcing compliance had been intended merely to insure subsequent obedience to rent regulations while in effect in a defense-rental area, it would have been unnecessary to authorize orders for other than injunctive relief since the latter remedy is wholly adequate to secure prospective compliance. See *Ebeling* v. *Woods,* 175 F. 2d 242, 244 (C. A. 8th Cir. 1949).[6]

Two contentions advanced by respondents require brief consideration. It is argued that termination of rent control in respondents' defense-rental area ended the legal effect of §§ 205 and 206 under which the action was instituted. Respondents rely here upon the literal provision of § 204 (j) (3) that "The Housing Expediter shall

[6] It has uniformly been the view of the lower federal courts that restitution of overcharges may be ordered under § 206 (b) of the 1947 Act and like provisions, whether or not injunctive relief is sought or is permissible at the time of the order. *Woods* v. *Wayne,* 177 F. 2d 559 (C. A. 4th Cir. 1949); *Creedon* v. *Randolph,* 165 F. 2d 918 (C. A. 5th Cir. 1948); *Jackson* v. *Woods,* 182 F. 2d 338 (C. A. 5th Cir. 1950); *Bowles* v. *Skaggs,* 151 F. 2d 817 (C. A. 6th Cir. 1945); *Warner Holding Co.* v. *Creedon,* 166 F. 2d 119 (C. A. 8th Cir. 1948); *Ebeling* v. *Woods,* 175 F. 2d 242 (C. A. 8th Cir. 1949); *Woods* v. *Richman,* 174 F. 2d 614 (C. A. 9th Cir. 1949); *Woods* v. *Gochnour,* 177 F. 2d 964 (C. A. 9th Cir. 1949); *Emery* v. *United States,* 186 F. 2d 900 (C. A. 9th Cir. 1951); *United States* v. *Mashburn,* 85 F. Supp. 968 (W. D. Ark. 1949); *United States* v. *Cowen's Estate,* 91 F. Supp. 331 (D. Mass. 1950); see *Woods* v. *Wolfe,* 182 F. 2d 516, 518–519 (C. A. 3d Cir. 1950). Only the court below in this proceeding has concluded that restitution must be denied in such cases because an injunction could not have been obtained when the complaint was filed. Compare *Ebeling* v. *Woods, supra,* and *Woods* v. *Richman, supra,* with *Miller* v. *United States,* 186 F. 2d 937 (C. A. 5th Cir. 1951).

terminate the provisions of this title" upon the taking of appropriate action by the city. We think a sufficient answer is § 204 (f), set out in the margin; [7] it provides for the survival of rights and liabilities incurred prior to the expiration of the title on either the date specified by Congress in the Act or such date as the President or Congress might later determine.

Respondents also contend that the trial of this proceeding as an action for equitable relief denied their constitutional right to a jury trial. No demand for a jury trial was made as required by Rule 38 of the Federal Rules of Civil Procedure and, so far as this record shows, any right to a jury trial was waived.

The judgment of the Court of Appeals on respondents' appeal must be reversed and the cause remanded to that court for further proceedings in conformity with this opinion.

Reversed.

THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS would affirm the judgment on the opinion of the Court of Appeals. 182 F. 2d 332.

MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER would affirm the judgment of the Court of Appeals.

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[7] "The provisions of this title shall cease to be in effect at the close of June 30, 1950, or upon the date of a proclamation by the President or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this title is not necessary because of the existence of an emergency, whichever date is the earlier; except that as to rights or liabilities incurred prior to such termination date, the provisions of this title and regulations, orders, and requirements thereunder shall be treated as still remaining in force for the purpose of sustaining any proper suit or action with respect to any such right or liability." 63 Stat. 24, 50 U. S. C. App. (Supp. III) § 1894 (f). The section has subsequently been amended in minor respects.

HAMMERSTEIN *v.* SUPERIOR COURT OF CALIFORNIA ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA AND TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 421. Argued March 9, 1951.—Continued March 26, 1951.

This cause is continued for such period as will enable counsel for petitioner, with all convenient speed, to apply to the appropriate California courts for certificate or other expression, to show whether the judgments herein rest on adequate and independent state grounds or whether decision of the federal question was necessary to the judgments rendered. Pp. 622–623.

Milton A. Rudin argued the cause for petitioner. With him on the brief was *Robert E. Kopp.*

E. Loyd Saunders argued the cause for respondents. *Saul Ross* filed a brief for respondents.

PER CURIAM.

In this case the respondent Reggie Hammerstein, by her mother and guardian, commenced a paternity action against the petitioner in the Superior Court of California. Petitioner entered a special appearance in that court, alleging that it had no personal jurisdiction over him, as he was a New York resident. He moved to quash the service upon him in New York on the grounds that any judgment obtained against him in this proceeding would deprive him of due process. The motion to quash was denied. The superior court entered judgment for the respondent.

Prior to the entry of the judgment, petitioner filed a petition for a writ of prohibition in the District Court of Appeal. This petition was denied without opinion. The California Supreme Court denied his application for

a hearing. After judgment, petitioner filed in the California Supreme Court a petition for a writ of certiorari to review the superior court proceedings. The California Supreme Court denied this petition without opinion. We granted certiorari, 340 U. S. 919 (1951).

Throughout these proceedings, petitioner preserved his federal questions, but since neither of the decisions below was accompanied by an opinion, it is not clear whether the California courts found it necessary to decide any federal question. If their judgments rest upon an adequate state ground, we, of course, will not review those judgments. If the denials of petitioner's applications for review were based upon a determination of the merits of his federal claim, the case will be ripe for our adjudication. In this circumstance, we think it advisable that we adhere to the procedure followed in *Herb* v. *Pitcairn,* 324 U. S. 117 (1945).

We will continue the cause for such period as will enable counsel for the petitioner, with all convenient speed, to apply to the appropriate California courts for certificate or other expression, to show whether the judgments herein rest on adequate and independent state grounds or whether decision of the federal question was necessary to the judgments rendered. Cf. *Loftus* v. *Illinois,* 334 U. S. 804 (1948); *Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95 (1938).

Cause continued.

910798 O—51——46

EDITORIAL NOTE.

The next page is purposely numbered 801. The numbers from 623 to 801 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

DECISIONS PER CURIAM AND ORDERS FROM BEGINNING OF OCTOBER TERM, 1950, THROUGH MARCH 27, 1951.

OCTOBER 9, 1950.

Per Curiam Decisions.

No. 114. HENDRICKS *v.* SMITH, AUDITOR OF BUTLER COUNTY, ET AL. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. MR. JUSTICE DOUGLAS is of the opinion probable jurisdiction should be noted. *George S. Hawke* and *Robert H. Fosdick* for appellant. *Jackson Bosch* for appellees. Reported below: 153 Ohio St. 500, 92 N. E. 2d 393.

No. 117. CORTINAS *v.* DI GIOVANNI ET AL. Appeal from the Supreme Court of Louisiana. *Per Curiam:* The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. *Daniel Wendling* for appellant. Reported below: 216 La. 687, 44 So. 2d 818.

No. 142. GOSSMAN *v.* CALIFORNIA ET AL. Appeal from the District Court of Appeal of California, Second Appellate District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. Appellant *pro se*. *Fred N. Howser,* Attorney General, and *Frank W. Richards,* Deputy Attorney General, for the State of California, appellee. Reported below: 95 Cal. App. 2d 293, 212 P. 2d 585.

No. 152. EL DORADO OIL WORKS *v.* MCCOLGAN, FRANCHISE TAX COMMISSIONER. Appeal from the Su-

preme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. *Butler Bros.* v. *McColgan,* 315 U. S. 501; *International Harvester Co.* v. *Evatt,* 329 U. S. 416. *W. S. Culbertson* and *W. F. Williamson* for appellant. *Fred N. Howser,* Attorney General of California, and *James E. Sabine,* Deputy Attorney General, for appellee. Reported below: 34 Cal. 2d 731, 215 P. 2d 4.

No. 157. Burt *v.* Pittsburgh et al. Appeal from the United States District Court for the Western District of Pennsylvania. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *United States ex rel. T. V. A.* v. *Welch,* 327 U. S. 546. *James A. Danahey* for appellant. *Anne X. Alpern, Arthur B. Van Buskirk, Timothy N. Pfeiffer, Charles E. Kenworthey* and *Ralph H. Demmler* for appellees.

No. 254. Norfolk Southern Bus Corp. *v.* United States et al. Appeal from the United States District Court for the Eastern District of Virginia. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *S. Burnell Bragg* and *James G. Martin* for appellant. *Acting Solicitor General Raum* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission; and *I. M. Bailey* for the Virginia Dare Transportation Co., appellees.

No. 263. Hinton *v.* Mississippi. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. *Weaver Gore* for appellant. *John W. Kyle,* Attorney General of Missis-

sippi, and *George H. Ethridge,* Assistant Attorney General, for appellee. Reported below: 209 Miss. 608, 46 So. 2d 445.

No. 284. BOURQUARDEZ, RECEIVER, *v.* FLORIDA STATE RACING COMMISSION. Appeal from the Supreme Court of Florida. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Thomas M. Shackleford, Jr.* for appellant. *G. L. Reeves* for appellee. Reported below: 45 So. 2d 876.

Miscellaneous Orders.

No. 5, Original. NEW JERSEY *v.* NEW YORK ET AL.; and

No. 7, Original. TEXAS *v.* FLORIDA ET AL. These cases are ordered stricken from the docket.

No. 844, October Term, 1949. LOEW'S, INC. *v.* UNITED STATES;

No. 845, October Term, 1949. WARNER BROS. PICTURES, INC. ET AL. *v.* UNITED STATES;

No. 846, October Term, 1949. TWENTIETH CENTURY-FOX FILM CORP. ET AL. *v.* UNITED STATES; and

No. 847, October Term, 1949. UNITED STATES *v.* LOEW'S, INC. ET AL. The order of this Court entered in these cases on June 5, 1950, is amended to read as follows:

> "*Per Curiam:* The judgment is affirmed. MR. JUSTICE REED and MR. JUSTICE BURTON are of the opinion that probable jurisdiction should be noted and the cases set down for argument. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of these cases."

[The order is reported as amended in the bound volume of 339 U. S. at p. 974.]

No. 2. HUBSCH *v.* UNITED STATES; and

No. 3. SCHWEITZER *v.* UNITED STATES. Certiorari, 338 U. S. 814, to the United States Court of Appeals for the Fifth Circuit. Writs of certiorari dismissed on motion of counsel for petitioners.

No. 780, October Term, 1949. DRURY *v.* HURLEY ET AL., 339 U. S. 983. Petition for rehearing dismissed on motion of counsel for petitioner.

No. 170, Misc. YANKEY *v.* OHIO. Petition for writ of certiorari to the Supreme Court of Ohio dismissed on motion of counsel for the petitioner. *Cecile J. Shapiro* for petitioner.

No. 2, Misc. HOSKINS *v.* MOORE, WARDEN;
No. 4, Misc. STERBA *v.* ILLINOIS;
No. 10, Misc. HUDSON *v.* OVERHOLSER;
No. 21, Misc. BURKHOLDER *v.* UNITED STATES;
No. 28, Misc. TAYLOR *v.* SQUIER, WARDEN;
No. 33, Misc. MIDDLETON *v.* MICHIGAN;
No. 43, Misc. STEPHENSON *v.* PAGE, WARDEN;
No. 80, Misc. GIBBS *v.* BUSHONG, SUPERINTENDENT;
No. 82, Misc. FLEET *v.* SWENSON, WARDEN;
No. 84, Misc. VAN BEEK *v.* MICHIGAN;
No. 91, Misc. STEWART *v.* STEELE, WARDEN;
No. 92, Misc. LANG *v.* MAYO, CUSTODIAN;
No. 102, Misc. GRIER *v.* WARDEN, STATE PRISON;
No. 112, Misc. CARROLL *v.* SWENSON, WARDEN;
No. 129, Misc. HORN *v.* FRISBIE, WARDEN; and
No. 149, Misc. HULL *v.* FRISBIE, WARDEN. The motions for leave to file petitions for writs of habeas corpus in these cases are severally denied. Petitioners *pro se*. *Solicitor General Perlman* for respondent in No. 28, Misc. *Price Daniel*, Attorney General of Texas, *Charles D.*

Mathews, First Assistant Attorney General, *E. Jacobson* and *Calvin B. Garwood, Jr.,* Assistant Attorneys General, for respondent in No. 2, Misc.

No. 23, Misc. BASHAW *v.* CALIFORNIA SUPREME COURT;

No. 35, Misc. BYERS *v.* HILL;

No. 55, Misc. CARVER *v.* SUPREME COURT OF CALIFORNIA; and

No. 135, Misc. BOYDEN *v.* SMITH, CLERK, U. S. DISTRICT COURT. The motions for leave to file petitions for writs of mandamus in these cases are severally denied.

No. 9, Misc. PERKINS *v.* RAGEN, WARDEN. The motion for leave to file petition for writ of certiorari is denied.

No. 16, Misc. BERG *v.* UNITED STATES;

No. 68, Misc. COOPER *v.* UNITED STATES;

No. 81, Misc. EATON *v.* RAGEN, WARDEN; and

No. 81, Misc., October Term, 1949. EAGLE *v.* CHERNEY ET AL., 338 U. S. 837. The applications in these cases are severally denied.

No. 56, Misc. BARTSCH ET AL. *v.* COLEMAN, U. S. DISTRICT JUDGE. Leave granted to withdraw petition for writ of prohibition and/or mandamus.

No. 62, Misc. TABOR *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA. Leave granted to withdraw petition for writ of mandamus.

Certiorari Granted.

No. 71. INTERNATIONAL WORKERS ORDER, INC. ET AL. *v.* MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. MR.

JUSTICE CLARK took no part in the consideration or decision of this application. *Lee Pressman* and *Allan R. Rosenberg* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, James L. Morrisson* and *Samuel D. Slade* for respondents. Reported below: 86 U. S. App. D. C. 287, 182 F. 2d 368.

No. 77. MONTANA-DAKOTA UTILITIES CO. *v.* NORTHWESTERN PUBLIC SERVICE CO. C. A. 8th Cir. Certiorari granted. *William D. Mitchell, John C. Benson* and *H. F. Fellows* for petitioner. *Jacob M. Lashly, Max Royhl* and *Fredric H. Stafford* for respondent. Reported below: 181 F. 2d 19.

No. 83. UNITED STATES EX REL. TOUHY *v.* RAGEN, WARDEN, ET AL. C. A. 7th Cir. Certiorari granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Edward M. Burke* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Stanley M. Silverberg, Robert S. Erdahl* and *Robert G. Maysack* for McSwain, respondent. Reported below: 180 F. 2d 321.

No. 87. WARREN *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Saul Sperling* and *Charles A. Ellis* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *John R. Benney* for the United States. Reported below: 179 F. 2d 919.

No. 122. NATIONAL LABOR RELATIONS BOARD *v.* GULLETT GIN CO., INC. C. A. 5th Cir. Certiorari granted. *Solicitor General Perlman* and *Robert N. Denham* for petitioner. Reported below: 179 F. 2d 499.

No. 132. SPECTOR MOTOR SERVICE, INC. *v.* MCLAUGHLIN, TAX COMMISSIONER, O'CONNOR, SUBSTITUTED DE-

FENDANT. C. A. 2d Cir. Certiorari granted. *Cyril Coleman* for petitioner. *William L. Hadden* for respondent. Reported below: 181 F. 2d 150.

No. 133. NORTON COMPANY *v.* DEPARTMENT OF REVENUE OF ILLINOIS. Supreme Court of Illinois. Certiorari granted. *Roland Towle* for petitioner. *Ivan A. Elliott,* Attorney General of Illinois, *William C. Wines, Raymond S. Sarnow* and *James C. Murray,* Assistant Attorneys General, for respondent. Reported below: 405 Ill. 314, 90 N. E. 2d 737.

No. 147. WEST VIRGINIA EX REL. DYER ET AL. *v.* SIMS, AUDITOR OF WEST VIRGINIA. Supreme Court of Appeals of West Virginia. Certiorari granted. *William C. Marland,* Attorney General of West Virginia, *Thomas J. Gillooly,* Assistant Attorney General, and *John B. Hollister* for petitioners. *Charles C. Wise, Jr.* for respondent. Briefs of *amici curiae* supporting petitioners were filed on behalf of the United States by *Acting Solicitor General Raum;* the States of Illinois by *Ivan A. Elliott,* Attorney General, and *Lucien S. Field,* Assistant Attorney General, Indiana by *J. Emmett McManamon,* Attorney General, Kentucky by *A. E. Funk,* Attorney General, and *Squire N. Williams, Jr.,* Assistant Attorney General, New York by *Nathaniel L. Goldstein,* Attorney General, Ohio by *Herbert S. Duffy,* Attorney General, and *William C. Bryant,* Assistant Attorney General, and Pennsylvania by *Charles J. Margiotti,* Attorney General, *M. Vashti Burr,* Deputy Attorney General, and *H. F. Stambaugh;* the State of Pennsylvania by *Charles J. Margiotti,* Attorney General, *M. Vashti Burr,* Deputy Attorney General, and *Harry F. Stambaugh;* and the Interstate Commission on the Potomac River Basin by *L. Harold Sothoron.* Reported below: 134 W. Va. ——, 58 S. E. 2d 766.

No. 168. UNITED STATES *v.* PEWEE COAL CO., INC. Court of Claims. Certiorari granted. *Solicitor General Perlman* for the United States. Reported below: 115 Ct. Cl. 626, 88 F. Supp. 426.

No. 169. UNITED STATES *v.* WHEELOCK BROS., INC.; and

No. 177. WHEELOCK BROS., INC. *v.* UNITED STATES. Court of Claims. Certiorari granted. *Solicitor General Perlman* for the United States. *Franklin N. Parks* for Wheelock Bros., Inc. Reported below: 115 Ct. Cl. 733, 88 F. Supp. 278.

No. 170. UNITED STATES *v.* PENNER INSTALLATION CORP. Court of Claims. Certiorari granted. *Solicitor General Perlman* for the United States. *Albert Foreman* and *M. Carl Levine* for respondent. Reported below: 116 Ct. Cl. 550, 89 F. Supp. 545.

No. 204. CAPITAL TRANSIT CO. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *George D. Horning, Jr.* and *Frank F. Roberson* for petitioner. *Acting Solicitor General Raum* for the United States. Reported below: 87 U. S. App. D. C. —, 183 F. 2d 825.

No. 209. EMICH MOTORS CORP. ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 7th Cir. Certiorari granted, limited to the question whether the Court of Appeals erred in construing § 5 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 16, as not permitting: (*a*) the admission in the instant case of the indictment in the antecedent criminal case against respondents, nor (*b*) the judgment therein to be used as evidence that the conspiracy of which respondents had been convicted occasioned Emich Motors' cancellation. *Thomas Dodd Healy, Harold Stickler* and

A. Bradley Eben for petitioners. *Henry M. Hogan* for respondents. *Solicitor General Perlman* filed a brief for the United States, as *amicus curiae*, supporting the petition. Reported below: 181 F. 2d 70.

No. 211. NIAGARA HUDSON POWER CORP. *v.* LEVENTRITT; and

No. 212. SECURITIES & EXCHANGE COMMISSION *v.* LEVENTRITT. C. A. 2d Cir. Certiorari granted. *Randall J. LeBoeuf, Jr.* and *Craigh Leonard* for petitioner in No. 211. *Acting Solicitor General Raum* and *Roger S. Foster* for petitioner in No. 212. *T. Roland Berner* for respondent. Reported below: 179 F. 2d 615.

No. 217. COLLINS ET AL. *v.* HARDYMAN ET AL. C. A. 9th Cir. Certiorari granted. *Aubrey N. Irwin* for petitioners. *A. L. Wirin, Fred Okrand, Robert R. Rissman, Arthur Garfield Hays, William Egan Colby* and *Clore Warne* for respondents. Reported below: 183 F. 2d 308.

No. 218. UNITED STATES *v.* YELLOW CAB CO. C. A. 3d Cir. Certiorari granted. *Acting Solicitor General Raum* for the United States. *Wm. A. Schnader* for respondent. Reported below: 181 F. 2d 967.

Certiorari Denied. (*See also Nos. 117 and 263, supra.*)

No. 41. MAGUIRE INDUSTRIES, INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Eugene Daniel Powers* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney* for the United States. Reported below: 114 Ct. Cl. 687, 86 F. Supp. 905.

No. 44. LITTLETON *v.* MCNEILL ET AL.; and

No. 58. KINCAID *v.* LITTLETON. C. A. 4th Cir. Certiorari denied. *Elmer McClain* for Littleton. *Armi-*

stead L. Boothe for petitioner in No. 58. *T. Bruce Fuller* and *Robert H. McNeill* for McNeill et al., respondents in No. 44. Reported below: 179 F. 2d 848.

No. 51. KROPP FORGE CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Hugh Fulton, Leo T. Norville* and *Louis Linton Dent* for petitioners. *Solicitor General Perlman, Robert N. Denham, David P. Findling* and *Mozart G. Ratner* for respondent. Reported below: 178 F. 2d 822.

No. 53. BEVIS *v.* ARMCO STEEL CORP. Supreme Court of Ohio. Certiorari denied. *Robert Emmett Brooks* and *Louis C. Capelle* for petitioner. *H. J. Siebenthaler* and *G. W. A. Wilmer* for respondent. Reported below: 153 Ohio St. 366, 91 N. E. 2d 479.

No. 54. WEST, ADMINISTRATOR, *v.* EASTERN TRANSPORTATION CO., INC. C. A. 4th Cir. Certiorari denied. *Louis B. Fine* for petitioner. Reported below: 179 F. 2d 478.

No. 55. DRUG & CHEMICAL CLUB OF NEW YORK *v.* UNITED STATES. Court of Claims. Certiorari denied. *Morrie Slifkin* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for the United States. Reported below: 115 Ct. Cl. 66.

No. 56. ORVIS ET AL., EXECUTORS, *v.* HIGGINS, FORMER COLLECTOR OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *George W. Riley* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Helen Goodner* for respondent. Reported below: 180 F. 2d 537.

No. 57. PARSONS, PRESIDENT OF UNITED TELEPHONE ORGANIZATIONS, *v.* HERZOG ET AL. United States Court

of Appeals for the District of Columbia Circuit. Certiorari denied. *Ellis W. Manning* for petitioner. *Solicitor General Perlman, Robert N. Denham, David P. Findling, A. Norman Somers* and *Norton J. Come* for respondents. Reported below: 86 U. S. App. D. C. 198, 181 F. 2d 781.

No. 59. AMBROSE ET AL. *v.* MARZALL, COMMISSIONER OF PATENTS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Alva D. Adams* and *Stone E. Bush* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Melvin Richter* for respondent. Reported below: 86 U. S. App. D. C. 413, 181 F. 2d 272.

No. 60. TOWER HOSIERY MILLS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *L. P. McLendon* and *Thornton H. Brooks* for petitioner. *Solicitor General Perlman, Robert N. Denham, David P. Findling, Mozart G. Ratner* and *Samuel M. Singer* for respondent. Reported below: 180 F. 2d 701.

No. 61. DAVIS *v.* COOK ET AL., CONSTITUTING THE BOARD OF EDUCATION OF ATLANTA. C. A. 5th Cir. Certiorari denied. *Oliver W. Hill, Thurgood Marshall, Robert L. Carter* and *James M. Nabrit* for petitioner. *M. F. Goldstein* and *B. D. Murphy* for respondents. Reported below: 178 F. 2d 595.

No. 62. TOLEDO BLADE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Mark Eisner* and *Ferdinand Tannenbaum* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Irving I. Axelrad* for respondent. Reported below: 180 F. 2d 357.

No. 63. HALLIBURTON OIL WELL CEMENTING CO. *v.* PAULK ET AL. C. A. 5th Cir. Certiorari denied. *John H. Crooker, Jr., Robert O. Brown* and *Newton Gresham* for petitioner. *Ben G. Sewell* for respondents. Reported below: 180 F. 2d 79.

No. 65. VAHLSING *v.* HARRELL. C. A. 5th Cir. Certiorari denied. *Emmett J. Rahm* for petitioner. *Karl M. Gibbon* for respondent. Reported below: 178 F. 2d 622.

No. 67. JACKSON *v.* CARTER OIL CO. ET AL. C. A. 10th Cir. Certiorari denied. *Finis E. Riddle* for petitioner. *Forrest M. Darrough, W. T. Anglin, Glenn O. Wallace* and *W. M. Haulsee* for respondents. Reported below: 179 F. 2d 524.

No. 68. UNITED STATES *v.* FIVE PARCELS OF LAND IN HARRIS COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. *Solicitor General Perlman* for the United States. *Chas. W. Bell* for the Harris County Houston Ship Channel Navigation District; and *Robert F. Campbell* for the Houston Deepwater Land Co., respondents. Reported below: 180 F. 2d 75.

No. 70. PENNSYLVANIA EX REL. SMITH *v.* ASHE, WARDEN, ET AL. Supreme Court of Pennsylvania. Certiorari denied. *Thomas D. McBride* for petitioner. *Charles J. Margiotti,* Attorney General of Pennsylvania, *Harrington Adams* and *George W. Keitel,* Deputy Attorneys General, for respondents. Reported below: 364 Pa. 93, 71 A. 2d 107.

No. 72. CARDENAS *v.* WILSON & CO., INC. C. A. 10th Cir. Certiorari denied. *Jean P. Day* for petitioner. Reported below: 180 F. 2d 828.

No. 74. ERICSON ET AL. *v.* JORGENSEN ET AL. C. A. 8th Cir. Certiorari denied. *Hugh M. Morris* and *George R. Ericson* for petitioners. *John H. Bruninga* for respondents. Reported below: 180 F. 2d 180.

No. 76. SWARZ *v.* GOOLSBY. Supreme Court of Florida. Certiorari denied. Reported below: See 38 So. 2d 312 and 43 So. 2d 639.

No. 78. SILBIGER *v.* PRUDENCE-BONDS CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Samuel Silbiger pro se. Charles M. McCarty* for Prudence Bonds Corporation, respondent. Reported below: 180 F. 2d 917.

No. 79. PADDOCK, TRUSTEE IN BANKRUPTCY, *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Jacob I. Weinstein* and *Frank B. Appleman* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 180 F. 2d 121.

No. 80. ESTATE OF REEVES ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Lee McCanliss* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, A. F. Prescott* and *Harry Baum* for respondent. Reported below: 180 F. 2d 829.

No. 82. GENERAL MOTORS CORP. *v.* BOLTEN. C. A. 7th Cir. Certiorari denied. *Alvin G. Hubbard* for petitioner. *Guy W. Green* for respondent. Reported below: 180 F. 2d 379.

No. 84. CONSUMERS COOPERATIVE ASSOCIATION *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. ET AL. C. A. 10th Cir. Certiorari denied. *Guy W. Green* for petitioner. *W. F. Peter* for respondents. Reported below: 180 F. 2d 900.

No. 88. GULF OIL CORP. *v.* NEWTON ET AL. C. A. 3d Cir. Certiorari denied. *Thomas E. Byrne, Jr.* for petitioner. *Abraham E. Freedman* for respondents. Reported below: 180 F. 2d 491.

No. 90. COMMISSIONER OF INTERNAL REVENUE *v.* BROWN ET VIR. C. A. 3d Cir. Certiorari denied. *Solicitor General Perlman* for petitioner. *Geo. E. H. Goodner* and *Scott P. Crampton* for respondents. Reported below: 180 F. 2d 926.

No. 91. MAY, STERN & Co. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Louis Caplan* and *Charles C. MacLean, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Irving I. Axelrad* for respondent. Reported below: 181 F. 2d 407.

No. 92. ATLANTIC COAST LINE RAILROAD CO. *v.* HILL. Supreme Court of North Carolina. Certiorari denied. *Charles Cook Howell* and *F. S. Spruill* for petitioner. *Harold D. Cooley, Hubert E. May* and *Francis E. Winslow* for respondent. Reported below: 231 N. C. 499, 57 S. E. 2d 781.

No. 94. TRUST COMPANY OF GEORGIA *v.* ALLEN, COLLECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Furman Smith* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Fred E. Youngman* for respondent. Reported below: 180 F. 2d 527.

No. 95. HOLLY STORES, INC. *v.* JUDIE ET AL. C. A. 7th Cir. Certiorari denied. *S. J. Crumpacker, Sr.* for petitioner. Reported below: 179 F. 2d 730.

No. 97. WALLACE *v.* FOSTER, SHERIFF. Supreme Court of Georgia. Certiorari denied. *Allen Lumpkin Henson* for petitioner. *Eugene Cook*, Attorney General of Georgia, *M. H. Blackshear, Jr.*, Deputy Assistant Attorney General, and *Edward E. Dorsey* for respondent. Reported below: 206 Ga. 561, 57 S. E. 2d 920.

No. 98. REPUBLIC STEEL CORP. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Luther Day* and *Thomas F. Patton* for petitioner. *Acting Solicitor General Raum, Assistant Attorney General Caudle, Ellis N. Slack* and *Hilbert P. Zarky* for the United States. Reported below: 114 Ct. Cl. 516, 86 F. Supp. 146.

No. 100. WATSON BROS. TRANSPORTATION CO., INC. *v.* CENTRAL STATES COOPERATIVES, INC. C. A. 7th Cir. Certiorari denied. *Julius L. Sherwin* and *Theodore R. Sherwin* for petitioner. *Thomas G. McBride* for respondent. Reported below: 180 F. 2d 689.

No. 101. SOUTH WESTERN RAILROAD CO. ET AL. *v.* BENTON ET AL. Supreme Court of Georgia. Certiorari denied. *Wallace Miller, A. R. Lawton, Walter A. Harris* and *T. M. Cunningham* for petitioners. *Charles J. Bloch* and *Ellsworth Hall, Jr.* for respondents. Reported below: 206 Ga. 770, 58 S. E. 2d 905.

No. 102. SULLIVAN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Francis A. McGurk* for petitioner. *Burton C. Meighan* for respondent.

No. 103. CREAM-O PRODUCTS CORP. *v.* HOFFMAN, RECEIVER AND TRUSTEE. C. A. 2d Cir. Certiorari denied. *A. Walter Socolow* and *Joseph M. Cohen* for petitioner. *Max Schwartz* for respondent. Reported below: 180 F. 2d 649.

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October 9, 1950. 340 U. S.

No. 105. DAVISON CHEMICAL CORP. *v.* JOLIET CHEMICALS, INC. ET AL. C. A. 7th Cir. Certiorari denied. *Harold W. Norman* for petitioner. *Jules L. Brady* and *John Rex Allen* for respondents. Reported below: 179 F. 2d 793.

No. 106. SHIPPERS PRE-COOLING SERVICE *v.* MACKS. C. A. 5th Cir. Certiorari denied. *F. W. Davies* for petitioner. *J. Kirkman Jackson* for respondent. Reported below: 181 F. 2d 510.

No. 107. KREHER ET AL., TRUSTEES, *v.* UNITED STATES. Court of Claims. Certiorari denied. *Robert C. Handwerk* and *Frank E. Scrivener* for petitioners. *Acting Solicitor General Raum, Assistant Attorney General Morison* and *Samuel D. Slade* for the United States. Reported below: 115 Ct. Cl. 355, 87 F. Supp. 881.

No. 112. DE CRIGNIS VON WEDEL *v.* MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. C. A. 3d Cir. Certiorari denied. *Robert P. Patterson* and *Francis J. Sypher* for petitioner. *Solicitor General Perlman, Harold I. Baynton* and *George B. Searls* for respondent. Reported below: 180 F. 2d 716.

No. 113. CHICAGO PNEUMATIC TOOL CO. *v.* HUGHES TOOL CO. C. A. 10th Cir. Certiorari denied. *Floyd H. Crews* and *Raymond G. Mullee* for petitioner. *George I. Haight* and *Robert F. Campbell* for respondent. Reported below: 180 F. 2d 97.

No. 115. DALL *v.* JOHNSON, ADMINISTRATOR. Appellate Court of Illinois, First District. Certiorari denied. *Alexander Kahan, John J. O'Connor* and *Harry J. Pasternak* for petitioner. *W. H. F. Millar* and *Egbert Robertson* for respondent. Reported below: 339 Ill. App. 110, 88 N. E. 2d 886.

No. 116. OGDEN CORPORATION *v.* FIELDING ET AL. C. A. 2d Cir. Certiorari denied. *Richard Joyce Smith* for petitioner. *Mortimer Hays* for respondents. Reported below: 181 F. 2d 163.

No. 118. JOHNSTON *v.* McINTEE ET AL. C. A. 7th Cir. Certiorari denied. *Charles Ralph Johnston* and *Hector A. Brouillet* for petitioner. *Claude A. Roth, Harry E. Smoot, Louis M. Mantynband* and *George L. Siegel* for respondents. Reported below: 179 F. 2d 789.

No. 119. LOCKHART *v.* IOWA. Supreme Court of Iowa. Certiorari denied. *Eugene Cotton* and *Edward J. Dahms* for petitioner. Reported below: 241 Iowa 635, 39 N. W. 2d 636.

No. 120. PORTER *v.* BENNISON ET AL. C. A. 10th Cir. Certiorari denied. *I. H. Spears* for petitioner. Reported below: 180 F. 2d 523.

No. 121. BENEDUM ET AL. *v.* GRANGER, COLLECTOR OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *C. L. Wallace* and *Wm. Alvah Stewart* for petitioners. *Acting Solicitor General Raum, Assistant Attorney General Caudle, Ellis N. Slack* and *Morton K. Rothschild* for respondent. Reported below: 180 F. 2d 564.

No. 123. DENISON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Edward S. Reid, Jr.* and *Emmett E. Eagan* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for respondent. Reported below: 180 F. 2d 938.

No. 124. SMILEY *v.* UNITED STATES; and

No. 213. UNITED STATES *v.* SMILEY. C. A. 9th Cir. Certiorari denied. *Otto Christensen* for petitioner in No.

124. *Acting Solicitor General Raum* for the United States. With *Mr. Raum* in No. 124 were *Assistant Attorney General McInerney* and *Robert S. Erdahl*. Reported below: 181 F. 2d 505.

No. 126. ORDER OF RAILROAD TELEGRAPHERS *v.* NEW YORK CENTRAL RAILROAD CO. C. A. 2d Cir. Certiorari denied. *Lester P. Schoene* and *John F. Davis* for petitioner. *Frederick L. Wheeler* and *Gerald E. Dwyer* for respondent. Reported below: 181 F. 2d 113.

No. 127. KELLER ET AL. *v.* HALL. C. A. 5th Cir. Certiorari denied. *Leonard S. Lyon* for petitioners. *Thomas E. Scofield* and *Philip Subkow* for respondent. Reported below: 180 F. 2d 753.

No. 128. DILL MANUFACTURING CO. ET AL. *v.* J. W. SPEAKER CORP. C. A. 7th Cir. Certiorari denied. *Arthur J. Hudson* and *Watts T. Estabrook* for petitioners. *Ira Milton Jones* for respondent. Reported below: 179 F. 2d 278.

No. 129. CHARLES R. ALLEN, INC. ET AL. *v.* UNITED STATES. United States Court of Customs and Patent Appeals. Certiorari denied. *John F. Kavanagh* for petitioners. *Acting Solicitor General Raum, Assistant Attorney General Edelstein* and *John R. Benney* for the United States. Reported below: 37 C. C. P. A. (Cust.) 110, 184 F. 2d 846.

No. 130. NORTHWESTERN MUTUAL LIFE INSURANCE CO. *v.* GILBERT. C. A. 9th Cir. Certiorari denied. *Charles A. Hart* for petitioner. Reported below: 180 F. 2d 581.

No. 131. FEDERAL TRADE COMMISSION *v.* ALBERTY ET AL. United States Court of Appeals for the District of

Columbia Circuit. Certiorari denied. *Solicitor General Perlman* for petitioner. *Carl McFarland* and *Kenneth L. Kimble* for respondents. Reported below: 86 U. S. App. D. C. 238, 182 F. 2d 36.

No. 135. BLANCH ET AL. *v.* CORDERO, AUDITOR OF PUERTO RICO, ET AL. C. A. 1st Cir. Certiorari denied. *F. Fernandez Cuyar* for petitioners. *Acting Solicitor General Raum, Assistant Attorney General Morison, Paul A. Sweeney* and *Melvin Richter* for respondents. Reported below: 180 F. 2d 856.

No. 137. NEW BRUNSWICK TRUST CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Martin W. Meyer* and *Robert Holt Myers* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Irving I. Axelrad* for respondent. Reported below: 180 F. 2d 959.

No. 138. UNITED STATES ET AL. *v.* PRESTON ET AL. C. A. 9th Cir. Certiorari denied. *Solicitor General Perlman* for petitioners. *John W. Preston* and *Oliver O. Clark* for respondents. Reported below: 181 F. 2d 69.

No. 139. UNITED STATES ET AL. *v.* PRESTON ET AL. C. A. 9th Cir. Certiorari denied. *Solicitor General Perlman* for petitioners. *John W. Preston* and *Oliver O. Clark* for respondents. Reported below: 181 F. 2d 62.

No. 140. JONES ET AL. *v.* MEDLOCK ET AL. C. A. 10th Cir. Certiorari denied. *Sid White* for petitioners. Reported below: 180 F. 2d 658.

No. 141. SUNSHINE PACKING CORP. *v.* PORTER, PRICE ADMINISTRATOR, NOW UNITED STATES. C. A. 3d Cir. Certiorari denied. *S. Y. Rossiter* for petitioner. *Acting*

Solicitor General Raum, Assistant Attorney General McInerney, Robert S. Erdahl and *Felicia H. Dubrovsky* for respondent. Reported below: 181 F. 2d 348.

No. 143. MARINE MAINTENANCE CORP. *v.* MCGLYNN, TRUSTEE. C. A. 3d Cir. Certiorari denied. *Thomas P. Mesick* for petitioner. *Aaron Lasser* for respondent. Reported below: 181 F. 2d 119.

No. 144. HONOLULU PLANTATION CO. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *C. Nils Tavares* for petitioner. *Acting Solicitor General Raum, Assistant Attorney General Vanech* and *Roger P. Marquis* for the United States. Reported below: 182 F. 2d 172.

No. 148. WATCHTOWER BIBLE & TRACT SOCIETY, INC. *v.* COUNTY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. *Hayden C. Covington* for petitioner. *Harold W. Kennedy* for respondents. Reported below: 181 F. 2d 739.

No. 149. OHIO EX REL. GREISIGER ET AL. *v.* GRAND RAPIDS BOARD OF EDUCATION ET AL. Supreme Court of Ohio. Certiorari denied. *Hayden C. Covington* for petitioners. *Martin L. Hanna* for respondents.

No. 150. TRAILMOBILE COMPANY *v.* BRITT ET AL. C. A. 6th Cir. Certiorari denied. *Morison R. Waite* and *Philip J. Schneider* for petitioner. *Solicitor General Perlman* filed a memorandum stating that respondents (represented by the Government as statutory counsel) do not oppose the granting of the petition. Reported below: 179 F. 2d 569.

No. 151. TEXAS & NEW ORLEANS RAILROAD CO. *v.* FLETCHER L. YARBROUGH & CO. Court of Civil Appeals

of Texas, Fifth Supreme Judicial District. Certiorari denied. *William Claude Williams* for petitioner. Reported below: 226 S. W. 2d 257.

No. 154. STANDARD OIL CO. (N. J.) *v.* CARR. C. A. 2d Cir. Certiorari denied. *Walter X. Connor* and *Vernon Sims Jones* for petitioner. *Bertram J. Dembo* and *Jacob Rassner* for respondent. Reported below: 181 F. 2d 15.

No. 158. DRESCHER *v.* UNITED STATES; and

No. 198. UNITED STATES *v.* DRESCHER. C. A. 2d Cir. Certiorari denied. *T. Carl Nixon, Hugh Satterlee* and *Rollin Browne* for petitioner in No. 158. *Solicitor General Perlman* for the United States. With *Mr. Perlman* in No. 158 were *Assistant Attorney General Caudle, Ellis N. Slack* and *Hilbert P. Zarky.* Reported below: 179 F. 2d 863.

No. 160. REYNOLDS SPRING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Thomas G. Long* for petitioner. *Acting Solicitor General Raum, Assistant Attorney General Caudle, Ellis N. Slack* and *Hilbert P. Zarky* for respondent. Reported below: 181 F. 2d 638.

No. 161. CONRAD *v.* PENNSYLVANIA RAILROAD CO.; and

No. 162. DAMIANO *v.* PENNSYLVANIA RAILROAD CO. C. A. 3d Cir. Certiorari denied. *Lois G. Forer* and *Leo Gitlin* for petitioners. *Philip Price* and *Hugh B. Cox* for respondent.

No. 165. DEAUVILLE ASSOCIATES, INC. *v.* MURRELL ET AL., RECEIVERS. C. A. 5th Cir. Certiorari denied. *Harold Leventhal* for petitioner. *R. H. Ferrell, John M. Murrell* and *D. H. Redfearn* for respondents. Reported below: 180 F. 2d 275.

No. 166. GARDEN SUBURBS GOLF & COUNTRY CLUB, INC. *v.* MURRELL ET AL., RECEIVERS. C. A. 5th Cir. Certiorari denied. *A. Frank Katzentine* for petitioner. *R. H. Ferrell* for respondents. Reported below: 180 F. 2d 435.

No. 167. NATIONAL BANK OF COMMERCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *John R. Stivers* and *Hamilton E. Little* for petitioner. *Acting Solicitor General Raum, Assistant Attorney General Caudle, Ellis N. Slack* and *Lee A. Jackson* for the United States. Reported below: 180 F. 2d 356.

No. 172. CAVANAUGH ET AL. *v.* GELDER ET AL., CONSTITUTING THE PENNSYLVANIA LIQUOR CONTROL BOARD. Supreme Court of Pennsylvania. Certiorari denied. *Abraham J. Levinson* for petitioners. *Charles J. Margiotti,* Attorney General of Pennsylvania, *Horace A. Segelbaum,* Deputy Attorney General, and *Harry F. Stambaugh* for respondents. Reported below: 364 Pa. 361, 72 A. 2d 85.

No. 173. MCDANIEL ET VIR *v.* CALIFORNIA-WESTERN STATES LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. *Lloyd E. Elliott* for petitioners. *C. E. Bryson* for respondent. Reported below: 181 F. 2d 606.

No. 174. TERRELL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Raymond E. Hackett* and *William H. Timbers* for petitioner. *Acting Solicitor General Raum, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Morton K. Rothschild* for respondent. Reported below: 179 F. 2d 838.

No. 175. EL CAMPO RICE MILLING CO. *v.* MIRAVALLE SUPPLY CO., INC. C. A. 8th Cir. Certiorari denied.

John S. Leahy and *Roberts P. Elam* for petitioner. *Walter H. Pollmann* for respondent. Reported below: 181 F. 2d 679.

No. 178. North Little Rock Transportation Co., Inc. *v.* Casualty Reciprocal Exchange et al. C. A. 8th Cir. Certiorari denied. *A. F. House* for petitioner. *James B. Donovan* and *Edward L. Wright* for respondents. Reported below: 181 F. 2d 174.

No. 179. Walton et al. *v.* City of Atlanta et al. C. A. 5th Cir. Certiorari denied. *John M. Slaton* for petitioners. *J. C. Murphy* and *Henry L. Bowden* for respondents. Reported below: 181 F. 2d 693.

No. 180. Brotherhood of Railroad Trainmen *v.* Templeton et al. C. A. 8th Cir. Certiorari denied. *R. Carter Tucker* for petitioner. *James P. Aylward* and *Terence M. O'Brien* for Templeton; and *R. S. Outlaw* and *W. J. Milroy* for the Atchison, T. & S. F. R. Co. et al., respondents. Reported below: 181 F. 2d 527.

No. 181. Red Arrow Freight Lines, Inc. et al. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *Sam R. Sayers* for petitioners. *Acting Solicitor General Raum, Robert N. Denham, David P. Findling* and *Mozart G. Ratner* for respondent. Reported below: 180 F. 2d 585.

No. 182. Lewyt Corporation *v.* Health-Mor, Inc. et al. C. A. 7th Cir. Certiorari denied. *Carlton Hill* and *Casper W. Ooms* for petitioner. *Max W. Zabel* and *Benton Baker* for respondents. Reported below: 181 F. 2d 855.

No. 183. Finnegan, Collector of Internal Revenue, *v.* Dimmitt-Rickhoff-Bayer Real Estate Co.

C. A. 8th Cir. Certiorari denied. *Solicitor General Perlman* for petitioner. *William H. Armstrong* for respondent. Reported below: 179 F. 2d 882.

No. 184. NANGLE, CIRCUIT COURT JUDGE, *v.* MISSOURI EX REL. TAYLOR, ATTORNEY GENERAL. Supreme Court of Missouri. Certiorari denied. *Morris A. Shenker* for petitioner. *J. E. Taylor,* Attorney General of Missouri, *Arthur M. O'Keefe* and *Robert R. Welborn,* Assistant Attorneys General, for respondent. Reported below: 360 Mo. 122, 227 S. W. 2d 655.

No. 185. BAKER-CAMMACK HOSIERY MILLS, INC. ET AL. *v.* DAVIS COMPANY. C. A. 4th Cir. Certiorari denied. *James F. Byrnes, Henry N. Paul, Jr., Ernest F. Mechlin* and *Thornton H. Brooks* for petitioners. *James P. Burns, Charles A. Noone* and *Welch Jordan* for respondent. Reported below: 181 F. 2d 550.

No. 187. INDIAN TRAILS, INC. *v.* HYNES. C. A. 7th Cir. Certiorari denied. *Lawrence C. Mills* for petitioner. *Joseph F. Elward* for respondent. Reported below: 181 F. 2d 668.

No. 188. SURPRISE, TRUSTEE IN BANKRUPTCY, *v.* FLETCHER. C. A. 7th Cir. Certiorari denied. *George Cohan* for petitioner. *Harry Long* for respondent. Reported below: 180 F. 2d 669.

No. 189. LANSDEN ET AL. *v.* HART, U. S. ATTORNEY, ET AL. C. A. 7th Cir. Certiorari denied. *John F. Donelan* for petitioners. *Acting Solicitor General Raum, Assistant Attorney General Vanech* and *Roger P. Marquis* for Hart et al., respondents. Reported below: 180 F. 2d 679.

No. 192. SCHARF, DOING BUSINESS AS PARAMOUNT PHOTO SERVICE, ET AL. *v.* FORGETT, DOING BUSINESS AS SERVICE WELDING CO. C. A. 3d Cir. Certiorari denied. *Samuel Milberg* for petitioners. *Robert L. Hood* and *Charles B. McGroddy, Jr.* for respondent. Reported below: 181 F. 2d 754.

No. 193. WHITE BROTHERS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Frank S. Normann* for petitioner. *Acting Solicitor General Raum, Assistant Attorney General Caudle, Ellis N. Slack* and *Hilbert P. Zarky* for respondent. Reported below: 180 F. 2d 451.

No. 194. KERNER ET AL. *v.* FISHER. C. A. 7th Cir. Certiorari denied. *John A. Looby, Jr.* for petitioners. *John S. Miller* for respondent. Reported below: 179 F. 2d 361.

No. 196. PISCIOTTA *v.* CITY OF NEW YORK ET AL. Court of Appeals of New York. Certiorari denied. *Howard A. Ameli* for petitioner. *John P. McGrath* and *Stanley Buchsbaum* for respondents.

No. 197. PORHOWNIK ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Albert Viault* and *Lyman Stansky* for petitioners. *Solicitor General Perlman, Ed Dupree, Leon J. Libeu* and *Benjamin Freidson* for the United States. Reported below: 182 F. 2d 829.

No. 200. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Warner Fuller* and *Arnot L. Sheppard* for petitioner. *Acting Solicitor General Raum, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 182 F. 2d 149.

No. 202. BURNHAM CHEMICAL CO. *v.* CHAPMAN, SECRETARY OF THE INTERIOR, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Elden McFarland* for petitioner. *Acting Solicitor General Raum* and *Assistant Attorney General Vanech* for respondents. Reported below: 86 U. S. App. D. C. 412, 181 F. 2d 288.

No. 203. WOLFGANG, PRINCE OF HESSE, ET AL. *v.* BURROWS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph S. Robinson, Dayton M. Harrington* and *James D. Graham, Jr.* for petitioners. *Charles F. McKay, Jr.* for respondent. Reported below: 86 U. S. App. D. C. 340, 181 F. 2d 630.

No. 206. UNITED STATES *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. *Acting Solicitor General Raum* for the United States. *Fred N. Howser,* Attorney General of California, and *Hartwell H. Linney,* Chief Assistant Attorney General, for respondent. Reported below: 180 F. 2d 596, 181 F. 2d 598.

No. 207. ROSENBLUM ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Albert Ward* and *Palmer K. Ward* for petitioners. *Acting Solicitor General Raum, Assistant Attorney General Caudle, Ellis N. Slack* and *George R. Gallagher* for the United States. Reported below: 182 F. 2d 956.

No. 208. GOOD ET AL. *v.* CATE, TRUSTEE IN BANKRUPTCY. C. A. 3d Cir. Certiorari denied. *Samuel Kagle* and *Oscar Brown* for petitioners. *Bertram Bennett* for respondent. Reported below: 181 F. 2d 146.

No. 210. BUTLER ET AL. *v.* DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry F. Butler* for

petitioners. *Vernon E. West, Chester H. Gray* and *George C. Updegraff* for respondent. Reported below: 86 U. S. App. D. C. 207, 181 F. 2d 790.

No. 214. FRUEHAUF TRAILER CO. *v.* MYERS. C. A. 9th Cir. Certiorari denied. *Arthur W. Dickey* for petitioner. *Michael F. Mulcahy* for respondent. Reported below: 181 F. 2d 1008.

No. 215. VALIER COMPANY *v.* MONTANA ET AL. Supreme Court of Montana. Certiorari denied. *Forrest H. Anderson* for petitioner. *William Meyer* for respondents. Reported below: 123 Mont. 329, 215 P. 2d 966.

No. 216. UNITED GAS PIPE LINE CO. *v.* FEDERAL POWER COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *C. Huffman Lewis* and *W. Scott Wilkinson* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney, Melvin Richter, Bradford Ross* and *Bernard A. Foster, Jr.* for respondent. Reported below: 86 U. S. App. D. C. 314, 181 F. 2d 796.

No. 219. BYRD, PRESIDENT OF THE UNIVERSITY OF MARYLAND, ET AL. *v.* MCCREADY. Court of Appeals of Maryland. Certiorari denied. *Hall Hammond,* Attorney General of Maryland, and *Kenneth C. Proctor,* Assistant Attorney General, for petitioners. Reported below: —— Md. ——, 73 A. 2d 8.

No. 222. SCHATTE ET AL. *v.* INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS ET AL. C. A. 9th Cir. The motion for leave to file brief of Conference of Studio Unions et al., as *amici curiae,* is denied. Certiorari denied. *Zach Lamar Cobb* for petitioners. *Henry G. Bodkin, George M. Breslin* and *Michael G. Luddy* for the International

Alliance of Theatrical Stage Employees and Moving Picture Machine Operators et al.; and *Homer I. Mitchell* for the Association of Motion Picture Producers, Inc. et al., respondents. *Robert W. Kenney* filed the motion for leave to file a brief for the Conference of Studio Unions et al., as *amici curiae*. Reported below: 182 F. 2d 158.

No. 223. Studio Carpenters Local Union No. 946 *v.* Loew's, Inc. et al. C. A. 9th Cir. Certiorari denied. *Zach Lamar Cobb* for petitioner. *Homer I. Mitchell* for Loew's, Inc. et al.; and *Henry G. Bodkin, George M. Breslin* and *Michael G. Luddy* for Brewer et al., respondents. Reported below: 182 F. 2d 168.

No. 224. MacKay et al. *v.* Loew's, Inc. et al. C. A. 9th Cir. Certiorari denied. *Zach Lamar Cobb* for petitioners. *Homer I. Mitchell* for respondents. Reported below: 182 F. 2d 170.

No. 225. Johnson *v.* Matthews, U. S. Marshal. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph L. Rauh, Jr.* and *Irving J. Levy* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, James L. Morrisson, Robert S. Erdahl* and *Robert G. Maysack* for respondent. Reported below: 86 U. S. App. D. C. 376, 182 F. 2d 677.

No. 227. Lyons *v.* Baker et al. C. A. 5th Cir. Certiorari denied. *John Wattawa* for petitioner. *T. T. Oughterson* and *M. G. Littman* for respondents. Reported below: 180 F. 2d 893.

No. 228. Arrow Airways, Inc. et al. *v.* Civil Aeronautics Board. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Dayton M. Harrington* for petitioners. *Solicitor General*

Perlman, Assistant Attorney General Morison, Paul A. Sweeney, Melvin Richter and *Emory T. Nunneley, Jr.* for respondent. Reported below: 87 U. S. App. D. C. —, 182 F. 2d 705.

No. 230. STATES MARINE CORP. *v.* AABY ET AL. C. A. 2d Cir. Certiorari denied. *Charles R. Hickox* and *Cletus Keating* for petitioner. *Kenneth Gardner* and *James McKown, Jr.* for respondents. Reported below: 181 F. 2d 383.

No. 231. THATCHER *v.* TENNESSEE GAS TRANSMISSION CO. C. A. 5th Cir. Certiorari denied. *Thos. W. Leigh* for petitioner. *Clyde R. Brown* for respondent. Reported below: 180 F. 2d 644.

No. 235. CHICAGO & SOUTHERN AIR LINES, INC. *v.* CIVIL AERONAUTICS BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Roger J. Whiteford, Hubert A. Schneider* and *Philip S. Peyser* for petitioner. *Solicitor General Perlman, Assistant Attorney General Bergson, Charles H. West* and *Richard E. Guggenheim* for the Civil Aeronautics Board; and *L. Welch Pogue* for the Resort Airlines, Inc., respondents.

No. 236. ROBERTS, ADMINISTRATRIX, *v.* ALABAMA GREAT SOUTHERN RAILROAD CO. Supreme Court of Alabama. Certiorari denied. *Francis H. Hare* for petitioner. *Sidney S. Alderman, Borden Burr,* and *H. G. Hedrick* for respondent. Reported below: 253 Ala. 636, 46 So. 2d 213.

No. 237. STEFFNER *v.* SAVORETTI, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION. C. A. 5th Cir. Certiorari denied. *Louis A. Sabatino* for petitioner. *Solicitor General Perlman, Assistant Attorney General Mc-*

Inerney, Robert S. Erdahl and *Felicia H. Dubrovsky* for respondent. Reported below: 183 F. 2d 19.

No. 238. ESTATE OF LOUGHRIDGE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *Thomas F. Boyle* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Helen Goodner* for respondent. Reported below: 183 F. 2d 294.

No. 239. SCHWARZ *v.* WEST. C. A. 7th Cir. Certiorari denied. *Alphonse Cerza* for petitioner. *Meyer J. Myer* for respondent. Reported below: 182 F. 2d 721.

No. 241. KOUTSKY-BRENNAN-VANA CO. *v.* DANEBO LUMBER CO., INC. ET AL. C. A. 9th Cir. Certiorari denied. *S. L. Winters* for petitioner. *Carl E. Davidson* for respondents. Reported below: 182 F. 2d 489.

No. 242. KOUTSKY-BRENNAN-VANA CO. ET AL. *v.* FURROW. C. A. 9th Cir. Certiorari denied. *S. L. Winters* for petitioners. *Carl E. Davidson* for respondent. Reported below: 182 F. 2d 496.

No. 244. VIENI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Henry K. Chapman* for petitioner. *Frank S. Hogan* for respondent.

No. 273. MACCABEES ET AL. *v.* CARTER. C. A. 6th Cir. Certiorari denied. *Thomas G. Watkins, David A. Hersh* and *George G. Perrin* for petitioners. *John J. Hooker* for respondent. Reported below: 181 F. 2d 595.

No. 43. ILLINOIS EX REL. WOODS *v.* TUOHY, PRESIDING JUSTICE, ET AL.; and

No. 125. WOODS *v.* NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO. Supreme Court of Illinois. The motions

to strike petitioner's reply briefs are denied. Certiorari denied. *Harry G. Fuerst* and *Harry P. Warner* for petitioner. *Harold A. Smith* for respondents.

No. 52. PRUDENCE-BONDS CORP. *v.* SILBIGER ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion the petition should be granted. *Charles M. McCarty* for petitioner. *Solicitor General Perlman* filed a memorandum for the Reconstruction Finance Corporation, respondent, and for the Securities & Exchange Commission, as *amicus curiae,* supporting the petition. *Samuel Silbiger, pro se; Frank L. Weil* for Weil; and *Lester H. Marks* for Miller, respondents. Reported below: 180 F. 2d 917.

No. 86. CHENERY CORPORATION ET AL. *v.* SECURITIES & EXCHANGE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Spencer Gordon* and *Charles A. Horsky* for petitioners. *Solicitor General Perlman, Robert L. Stern, Roger S. Foster* and *Ellwood L. Englander* for the Securities & Exchange Commission; *Allen S. Hubbard* for the Federal Water & Gas Corporation; and *Percival E. Jackson* for the Federal Water & Gas Corporation Common Stockholders' Committee, respondents.

No. 99. EMMICK *v.* BALTIMORE & OHIO RAILROAD CO. Appellate Court of Illinois, First District. The motion to amend the petition is granted. Certiorari denied. *Edward J. Bradley* for petitioner. *Edwin H. Burgess* and *James F. Wright* for respondent. Reported below: 339 Ill. App. 147, 88 N. E. 2d 739.

No. 104. VISIC *v.* DEVER, OFFICER IN CHARGE, MIAMI OFFICE, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Savoretti, present District Director of the

Immigration and Naturalization Service for the Miami District, substituted as party respondent. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Ralph C. Busser* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Philip R. Monahan* and *Robert G. Maysack* for respondent. Reported below: 180 F. 2d 924.

No. 69. SHOTKIN *v.* COLORADO EX REL. ATTORNEY GENERAL OF COLORADO. Supreme Court of Colorado. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petition should be granted. *Walter F. Dodd* for petitioner. *John W. Metzger,* Attorney General of Colorado, and *Vincent Cristiano,* Assistant Attorney General, for respondent. Reported below: 212 P. 2d 1007.

No. 111. TAYLOR *v.* CITY OF BIRMINGHAM. Supreme Court of Alabama. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petition should be granted. *Earl B. Dickerson, Arthur D. Shores* and *John J. Abt* for petitioner. *Thomas E. Huey, Jr.* for respondent. *Thurgood Marshall* filed a brief for the National Association for the Advancement of Colored People, as *amicus curiae,* supporting the petition. Reported below: 253 Ala. 369, 45 So. 2d 60.

No. 164. ROBERTS *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. Court of Civil Appeals, Fifth Supreme Judicial District, of Texas. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petition should be granted. *F. Neilson Rogers* for petitioner. *Ralph Elliott* for respondent. Reported below: 225 S. W. 2d 198.

No. 232. TURNER *v.* ALTON BANKING & TRUST CO., EXECUTOR. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petition should be granted. *Lon Hocker* for petitioner. Reported below: 181 F. 2d 899.

No. 155. SABIN ET AL. *v.* LEVORSEN. Supreme Court of Oklahoma. Certiorari denied. Reported below: 202 Okla. 468, 214 P. 2d 449.

No. 156. SABIN ET AL. *v.* MIDLAND SAVINGS & LOAN CO. C. A. 10th Cir. Certiorari denied. Petitioners *pro se*. *Ernest B. Fowler* for respondent. Reported below: 178 F. 2d 923.

No. 171. LARSSON *v.* COASTWISE (PACIFIC FAR EAST) LINE. C. A. 9th Cir. Certiorari denied. *John Paul Jennings* for petitioner. *Lyman Henry* for respondent. Reported below: 181 F. 2d 6.

No. 186. SIMS *v.* IOWA. Supreme Court of Iowa. Certiorari denied. *J. R. McManus* for petitioner. Reported below: 241 Iowa 641, 40 N. W. 2d 463.

No. 226. TENNESSEE EX REL. HUNTER *v.* ROBINSON, SHERIFF, ET AL. Supreme Court of Tennessee. Certiorari denied. *Howard F. Butler* for petitioner. *Roy H. Beeler*, Attorney General of Tennessee, *W. F. Barry, Jr.*, Solicitor General, and *J. Malcolm Shull*, Assistant Attorney General, for respondents.

No. 190. KLEIN'S OUTLET, INC. ET AL. *v.* LIPTON. C. A. 2d Cir. The motion to strike respondent's brief is denied. Certiorari denied. Petitioners *pro se*. *Harold L. Lipton* for respondent. Reported below: 181 F. 2d 713.

No. 191. WILLUMEIT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Joseph W. Solomon* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Robert G. Maysack* for the United States.

No. 220. COMMON STOCKHOLDERS COMMITTEE OF LONG ISLAND LIGHTING CO. *v.* SECURITIES & EXCHANGE COMMISSION ET AL.; and

No. 221. GORDON *v.* SECURITIES & EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications. *Harold G. Aron, Lynne A. Warren* and *Charles B. McGroddy, Jr.* for petitioner in No. 220. *Donald Havens* for petitioner in No. 221. *Solicitor General Perlman, John F. Davis, Roger S. Foster, Harry G. Slater, Solomon Freedman* and *Ellwood L. Englander* for the Securities & Exchange Commission; *Charles G. Blakeslee* and *David K. Kadane* for the Long Island Lighting Co. et al.; and *Milton Pollack* and *Richard F. Wolfson* for the Committee of Preferred Stockholders of the Long Island Lighting Co., respondents. Reported below: 183 F. 2d 45.

No. 249. HALSTED ET AL. *v.* SECURITIES & EXCHANGE COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Harold G. Aron, Lynne A. Warren* and *Charles B. McGroddy, Jr.* for petitioners. *Solicitor General Perlman, John F. Davis, Roger S. Foster, Harry G. Slater, Solomon Freedman* and *Ellwood L. Englander* for respondent. Reported below: 86 U. S. App. D. C. 352, 182 F. 2d 660.

No. 5, Misc. GRIFFEN *v.* BURFORD, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: —— Okla. Cr. ——, 216 P. 2d 597.

No. 6, Misc. GLASCOW *v.* MAYO, FLORIDA STATE PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied. Reported below: 41 So. 2d 766.

No. 7, Misc. HAYES *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied. Reported below: 169 Kan. 248, 217 P. 2d 904.

No. 8, Misc. LUCAS *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 12, Misc. ADKINS, ADMINISTRATRIX, *v.* E. I. DU PONT DE NEMOURS & CO., INC. ET AL. C. A. 10th Cir. Certiorari denied. *John W. Porter, Jr.* for petitioner. *Grover C. Spillers* for Du Pont de Nemours & Co., Inc., respondent. *Solicitor General Perlman* for the United States. Reported below: 181 F. 2d 641.

No. 14, Misc. SPELLER *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *Herman L. Taylor, C. J. Gates* and *Charles W. Williamson* for petitioner. *Harry McMullan,* Attorney General of North Carolina, and *Hughes J. Rhodes,* Assistant Attorney General, for respondent. Reported below: 231 N. C. 549, 57 S. E. 2d 759.

No. 15, Misc. GENSBURG *v.* SMITH, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied. Reported below: 35 Wash. 2d 849, 215 P. 2d 880.

No. 17, Misc. PETITT *v.* ROBINSON, WARDEN. Circuit Court of Sangamon County, Illinois. Certiorari denied.

No. 18, Misc. GREGORY *v.* NEVADA. Supreme Court of Nevada. Certiorari denied. *Richard R. Hanna* for petitioner. *Alan Bible,* Attorney General of Nevada, *Geo. P. Annand* and *Robert L. McDonald,* Deputy Attorneys General, for respondent. Reported below: 66 Nev. 317, 212 P. 2d 701.

No. 19, Misc. SCHECTMAN *v.* NEW YORK. County Court of Kings County, New York. Certiorari denied.

No. 20, Misc. MEYER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 405 Ill. 487, 91 N. E. 2d 425.

No. 22, Misc. HANSON *v.* WISCONSIN. Supreme Court of Wisconsin. Certiorari denied.

No. 24, Misc. DUNCAN *v.* CRANOR, SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 182 F. 2d 258.

No. 25, Misc. ROBERTS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 26, Misc. KING *v.* CRANOR, SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 182 F. 2d 257.

No. 27, Misc. BRAKEFIELD *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se. David Diamond* for respondent.

No. 29, Misc. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Perlman* for the United States. Reported below: 182 F. 2d 473.

No. 30, Misc. BROOKS *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *Grover N. McCormick* for petitioner. *Roy H. Beeler,* Attorney General of Tennessee, *W. F. Barry, Jr.,* Solicitor General, and *J. Malcolm Shull,* Assistant Attorney General, for respondent.

No. 31, Misc. MULKEY *v.* BREAKEY, CIRCUIT JUDGE, ET AL. Supreme Court of Michigan. Certiorari denied.

No. 32, Misc. HUBBARD *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 36, Misc. FIFE *v.* GREAT ATLANTIC & PACIFIC TEA CO. Supreme Court of Pennsylvania. Certiorari denied. *John D. Meyer* for petitioner. *William H. Eckert* for respondent.

No. 40, Misc. HEIN *v.* SMITH, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied. *Graham K. Betts* for petitioner. Reported below: 35 Wash. 2d 688, 215 P. 2d 403.

No. 41, Misc. FARRANT *v.* IOWA. Supreme Court of Iowa. Certiorari denied.

No. 42, Misc. LYLE *v.* EIDSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 182 F. 2d 344.

No. 44, Misc. HOLDER *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 154 Tex. Cr. R. ——, 227 S. W. 2d 807.

No. 45, Misc. CHICK *v.* MOORE, WARDEN. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 154 Tex. Cr. R. ——, 228 S. W. 2d 513.

No. 46, Misc. PERKINS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 47, Misc. BRENNAN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 48, Misc. PRIESTER *v.* ASHE, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 182 F. 2d 941.

No. 50, Misc. POWERS *v.* IOWA. Supreme Court of Iowa. Certiorari denied.

No. 51, Misc. RAVALLI *v.* JACKSON, WARDEN. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, *Herman N. Harcourt* and *Raymond B. Madden,* Assistant Attorneys General, for respondent.

No. 53, Misc. KIRSCH *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 54, Misc. ADKINS *v.* SMYTH, SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. *William Alfred Hall, Jr.* for petitioner.

No. 57, Misc. MATTHEWS ET AL. *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *Robert S. Cahoon* for petitioners. *Harry McMullan,* Attorney General of North Carolina, and *T. W. Bruton,* Assistant Attorney General, for respondent. Reported below: 231 N. C. 617, 58 S. E. 2d 625.

No. 58, Misc. BAERCHUS *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 63, Misc. STINCHCOMB *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 64, Misc. PASCAL *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 67, Misc. HILL *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 69, Misc. BUNK ET AL. *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *James L. McKenna, Louis Auerbacher, Jr.* and *Edward J. Gilhooly* for petitioners. *Duane E. Minard* for respondent. Reported below: 4 N. J. 461, 73 A. 2d 249.

No. 70, Misc. DI NAPOLI *v.* NEW YORK. Appellate Division of the Supreme Court of New York. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *Whitman Knapp* for respondent.

No. 72, Misc. LYNCH *v.* NYGAARD. Supreme Court of North Dakota. Certiorari denied.

No. 73, Misc. CAREY *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 78, Misc. LAYTON *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. Reported below: 217 La. 57, 46 So. 2d 37.

No. 83, Misc. BRIGGS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 85, Misc. MONTGOMERY *v.* NEW YORK. Appellate Division of the Supreme Court of New York. Certiorari denied.

No. 86, Misc. PERRY *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 87, Misc. WATKINS *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: 228 Ind. 277, 91 N. E. 2d 845.

No. 88, Misc. WITTJE *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 89, Misc. EX PARTE NIX. Supreme Court of Texas. Certiorari denied. Reported below: 149 Tex. —, 231 S. W. 2d 411.

No. 90, Misc. CARR *v.* OKLAHOMA. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: — Okla. Cr. —, 216 P. 2d 333.

No. 95, Misc. BOONE *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 97, Misc. DELANO *v.* ARMSTRONG RUBBER CO. Supreme Court of Errors of Connecticut. Certiorari denied. *William L. Beers* for petitioner. Reported below: 136 Conn. 663, 73 A. 2d 828.

No. 98, Misc. CHESSMAN *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 99, Misc. RUTLEDGE *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 104, Misc. PETRUCELLI *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 106, Misc. WILLIAMS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 405 Ill. 574, 92 N. E. 2d 120.

No. 107, Misc. LILLY *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 108, Misc. CARPENTER *v.* ROHM & HAAS CO., INC. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *James R. Morford* for respondent.

No. 109, Misc. COOPER *v.* CRANOR, SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 182 F. 2d 256.

No. 110, Misc. VAN EPS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 111, Misc. TIMMONS *v.* DANIELS. Supreme Court of South Carolina. Certiorari denied. Reported below: 216 S. C. 539, 59 S. E. 2d 149.

No. 113, Misc. CAREY *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 114, Misc. CUMMINGS *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 115, Misc. MAHURIN *v.* EIDSON, WARDEN, ET AL. Supreme Court of Missouri. Certiorari denied.

No. 116, Misc. ODDO *v.* NEW YORK. First Judicial Department of the Appellate Division of the Supreme Court of New York. Certiorari denied.

No. 117, Misc. HUGHES *v.* MICHIGAN PAROLE BOARD. Supreme Court of Michigan. Certiorari denied.

No. 118, Misc. MCCARTHY *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 120, Misc. ARNOLD *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 121, Misc. STELLOH *v.* WISCONSIN STATE SUPREME COURT. Supreme Court of Wisconsin. Certiorari denied.

No. 122, Misc. RAZUTIS *v.* DUFFY, WARDEN. Supreme Court of California. Certiorari denied.

No. 123, Misc. DI STEFANO ET AL. *v.* BEONDY. Supreme Court of Florida. Certiorari denied.

No. 125, Misc. DUNLEVY *v.* BAREIS ET AL. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 126, Misc. OLIVER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 127, Misc. BRUCE *v.* HUDSPETH, WARDEN, ET AL. Supreme Court of Kansas. Certiorari denied.

No. 128, Misc. MURPHY *v.* JACKSON, WARDEN. Clinton County Court of New York. Certiorari denied. Petitioner *pro se.* *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General,

Herman N. Harcourt and *Raymond B. Madden,* Assistant Attorneys General, for respondent.

No. 132, Misc. FLICKINGER *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *D. M. Garrahan* for petitioner. Reported below: 365 Pa. 59, 73 A. 2d 652.

No. 133, Misc. FRAZIER *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 136, Misc. KERR *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 137, Misc. HARINCAR *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 141, Misc. BEATTY *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 142, Misc. RANDELL *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 143, Misc. HOSHOR *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 144, Misc. DANIELS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 145, Misc. SCHUMAN *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 147, Misc. ERSKINE *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 148, Misc. PANKOLA *v.* WARDEN, PHILADELPHIA COUNTY PRISON. Supreme Court of Pennsylvania. Certiorari denied.

No. 153, Misc. PAYNE *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 59, Misc. AGOSTON *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. MR. JUSTICE FRANKFURTER has filed a memorandum respecting the denial of the petition for writ of certiorari. Petitioner *pro se*. *William N. Trinkle* for respondent. Reported below: 364 Pa. 464, 72 A. 2d 575.

Memorandum of MR. JUSTICE FRANKFURTER respecting the denial of the petition for writ of certiorari.

The Court has stated again and again what the denial of a petition for writ of certiorari means and more particularly what it does not mean. Such a denial, it has been repeatedly stated, "imports no expression of opinion upon the merits of the case." *United States* v. *Carver*, 260 U. S. 482, 490, and see, *e. g.*, *House* v. *Mayo*, 324 U. S. 42, 48; *Sunal* v. *Large*, 332 U. S. 174, 181. A denial simply means that as a matter of "sound judicial discretion" fewer than four members of the Court deemed it desirable to review a decision of a lower court. Rule 38, par. 5. See *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912. But it is not merely the laity that fails to appreciate that by denying leave for review here of a lower court decision this Court lends no support to the decision of the lower court. Obviously it does not imply approval of anything that may have been said by the lower court in support of its decision.

At the risk of redundancy, it seems to me important to reiterate our settled rule as to the meaning of a denial

of certiorari in its application to this case. The denial of the petition seeking to bring here the decision of the Supreme Court of Pennsylvania carries with it no support of the decision in that case, nor of any of the views in the opinion supporting it. 364 Pa. 464, 72 A. 2d 575.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

This case is close on its facts to *Turner* v. *Pennsylvania,* 338 U. S. 62, also from the Supreme Court of Pennsylvania, and its companion cases, *Watts* v. *Indiana,* 338 U. S. 49, and *Harris* v. *South Carolina,* 338 U. S. 68. In the *Turner* case a majority of this Court (Justices Black, Frankfurter, Douglas, Murphy and Rutledge) held that, where a prisoner was not brought before a magistrate for a prompt hearing as required by Pennsylvania law but was held by the police until prolonged questioning resulted in a confession, such confession was obtained by a denial of due process. In this case the Supreme Court of Pennsylvania, in sustaining a judgment of conviction based on a confession obtained under like circumstances, relied on the dissent in the *Turner* case. See 364 Pa. 464, 483, 72 A. 2d 575, 585. The principle basic to the *Turner* decision is that the police may not be allowed to substitute their system of inquisition or protective custody for the safeguards of a hearing before a magistrate. My conviction is that only by consistent application of that principle can we uproot in this country the third-degree methods of the police.

Rehearing Denied.

No. 2, October Term, 1949. GRAVER TANK & MFG. CO., INC. ET AL. *v.* LINDE AIR PRODUCTS CO., 339 U. S. 605. Rehearing denied. MR. JUSTICE MINTON took no part in the consideration or decision of this application.

No. 12, October Term, 1949. OSMAN ET AL. *v.* DOUDS, REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD, 339 U. S. 846. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 33, October Term, 1949. QUICKSALL *v.* MICHIGAN, 339 U. S. 660. Motion for leave to file petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 44, October Term, 1949. SWEATT *v.* PAINTER ET AL., 339 U. S. 629. Rehearing denied.

No. 455, October Term, 1949. AUTOMATIC RADIO MANUFACTURING CO., INC. *v.* HAZELTINE RESEARCH, INC., 339 U. S. 827. Rehearing denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 570, October Term, 1949. LORD MANUFACTURING CO. *v.* UNITED STATES, 339 U. S. 956. Rehearing denied.

No. 716, October Term, 1949. HENDERSON *v.* UNITED STATES, 339 U. S. 963;

No. 717, October Term, 1949. WILDMAN *v.* UNITED STATES, 339 U. S. 963;

No. 718, October Term, 1949. SHUFFLEBARGER *v.* UNITED STATES, 339 U. S. 963;

No. 719, October Term, 1949. FRANTZ *v.* UNITED STATES, 339 U. S. 963; and

No. 828, October Term, 1949. WIXOM *v.* UNITED STATES, 339 U. S. 981. The petition for rehearing in these cases is denied.

No. 737, October Term, 1949. YATES *v.* BALL, 339 U. S. 964;

No. 742, October Term, 1949. THE ARLINGTON, INC. ET AL. *v.* MAYER, 339 U. S. 965;

No. 745, October Term, 1949. MAHANA *v.* UNITED STATES, 339 U. S. 978;

No. 752, October Term, 1949. DUNAWAY ET AL. *v.* STANDARD OIL CO. (NEW JERSEY) ET AL., 339 U. S. 965;

No. 779, October Term, 1949. HUNTINGTON PALISADES PROPERTY OWNERS CORP., LTD. *v.* METROPOLITAN FINANCE CORP., 339 U. S. 980;

No. 781, October Term, 1949. CONNELLY *v.* HURLEY ET AL., CIVIL SERVICE COMMISSIONERS OF CHICAGO, 339 U. S. 983; and

No. 792, October Term, 1949. GLISSMANN *v.* CITY OF OMAHA ET AL., 339 U. S. 960. The petitions for rehearing in these cases are severally denied.

No. 236, Misc., October Term, 1949. SANDERS *v.* SWOPE, WARDEN, 339 U. S. 985;

No. 415, Misc., October Term, 1949. POWERS *v.* HUNTER, WARDEN, 339 U. S. 986;

No. 474, Misc., October Term, 1949. LOOMIS *v.* EDWARDS, JUDGE, 339 U. S. 970;

No. 486, Misc., October Term, 1949. HACKWORTH *v.* HIATT, WARDEN, 339 U. S. 962;

No. 506, Misc., October Term, 1949. LEDER *v.* CALIFORNIA, 339 U. S. 962;

No. 527, Misc., October Term, 1949. KADANS *v.* COLEMAN, 339 U. S. 976;

No. 534, Misc., October Term, 1949. SPRUILL *v.* BROOKS, 339 U. S. 989; and

No. 550, Misc., October Term, 1949. SIEGEL ET AL. *v.* RAGEN, WARDEN, 339 U. S. 990. The petitions for rehearing in these cases are severally denied.

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No. 237, Misc., October Term, 1948. WILLIAMS *v.* UNITED MINE WORKERS OF AMERICA, 335 U. S. 897. Second petition for rehearing denied.

OCTOBER 16, 1950.

Per Curiam Decision.

No. 145. RICE *v.* ARNOLD, SUPERINTENDENT OF MIAMI SPRINGS COUNTRY CLUB. On petition for writ of certiorari to the Supreme Court of Florida. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is vacated and the cause is remanded to the Supreme Court of Florida for reconsideration in the light of subsequent decisions of this Court in *Sweatt* v. *Painter,* 339 U. S. 629, and *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637. *Franklin H. Williams* for petitioner. *J. W. Watson, Jr.* and *John D. Marsh* for respondent. Reported below: 45 So. 2d 195.

Miscellaneous Orders.

No. 13, Original. UNITED STATES *v.* TEXAS. The opinion of this Court, 339 U. S. 707, is amended as follows:

1. On page 713, substitute for the quotation in line 19 the following: "on an equal footing with the original States in all respects whatever." [6]

2. On page 713, amend footnote 6 to read, "See Joint Resolution approved December 29, 1845, 9 Stat. 108."

3. On page 714, amend footnote 7 to read, "Joint Resolution approved March 1, 1845, 5 Stat. 797."

4. In the next to the last line on page 715, substitute "admitting" for "annexing".

The petition for rehearing is denied. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

[This opinion is reported, as amended, in the bound volume of 339 U. S. at pages 713, 714, 715.]

No. 155, Misc. JEFFRIES *v.* DUFFY, WARDEN;
No. 158, Misc. TAYLOR *v.* SQUIER, WARDEN;
No. 163, Misc. FLEENOR *v.* HUNTER, WARDEN;
No. 169, Misc. POLESKI *v.* OHIO ET AL.; and
No. 176, Misc. PENTZ *v.* STEELE, WARDEN. The motions for leave to file petitions for writs of habeas corpus in these cases are severally denied. Petitioners *pro se*. *Solicitor General Perlman* for respondent in No. 158, Misc.

No. 183, Misc. MUNOZ *v.* CALIFORNIA SUPREME COURT. The motion for leave to file petition for writ of mandamus is denied.

No. 186, Misc. WESLEY *v.* VIRGINIA. The application is denied.

Certiorari Granted. (*See also No. 145, supra.*)

No. 26. UNITED STATES *v.* WILLIAMS ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Perlman* for the United States. Reported below: 179 F. 2d 644.

No. 66. DOWD, WARDEN, *v.* UNITED STATES EX REL. COOK. C. A. 7th Cir. Certiorari granted. *J. Emmett McManamon,* Attorney General of Indiana, *Merl M. Wall* and *Charles F. O'Connor,* Deputy Attorneys General, for petitioner. Reported below: 180 F. 2d 212.

No. 252. AMERICAN FIRE & CASUALTY CO. *v.* FINN. C. A. 5th Cir. Certiorari granted. *M. L. Cook* for petitioner. Reported below: 181 F. 2d 845.

No. 267. O'LEARY, DEPUTY COMMISSIONER, FOURTEENTH COMPENSATION DISTRICT, *v.* BROWN-PACIFIC-MAXON, INC. ET AL. C. A. 9th Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. Reported below: 182 F. 2d 772.

No. 1, Misc. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *Bart. A. Riley* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Philip R. Monahan* for the United States. Reported below: 179 F. 2d 656.

Certiorari Denied.

No. 75. EL RIO OILS (CANADA) LTD. *v.* PACIFIC COAST ASPHALT CO., INC. ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Kenneth Dobson Miller* for petitioner. *Don Petty* for the Pacific Coast Asphalt Co., Inc., respondent. Reported below: 95 Cal. App. 2d 186, 213 P. 2d 1.

No. 159. UNIVERSAL OIL PRODUCTS CO. *v.* CAMPBELL ET AL. C. A. 7th Cir. Certiorari denied. *Ralph S. Harris, William W. Owens* and *Adam M. Byrd* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Harry Baum* for respondents. Reported below: 181 F. 2d 451.

No. 199. JONES *v.* NEW YORK CENTRAL RAILROAD CO. ET AL. C. A. 6th Cir. Certiorari denied. *Marvin C. Harrison* for petitioner. *Parker Fulton* for respondents. Reported below: 182 F. 2d 326.

No. 233. STEADMAN *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. *C. T. Graydon* for petitioner. *John M. Daniel,* Attorney General of South Carolina, *T. C. Callison* and *R. Hoke Robinson,* Assistant Attorneys General, for respondent. Reported below: 216 S. C. 579, 59 S. E. 2d 168.

No. 234. KELLY, DOING BUSINESS AS KELLY DAIRIES, *v.* UNITED STATES. Court of Claims. Certiorari denied. *Robert F. Klepinger* for petitioner. *Solicitor General*

Perlman, Assistant Attorney General Morison, Samuel D. Slade and *Joseph Kovner* for the United States. Reported below: 116 Ct. Cl. 811, 91 F. Supp. 305.

No. 240. ROSE ET AL. *v.* BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES ET AL. C. A. 4th Cir. Certiorari denied. *James B. Swails* for petitioners. *I. M. Bailey, Clarence M. Mulholland, Richard R. Lyman* and *Edward J. Hickey, Jr.* for respondents. Reported below: 181 F. 2d 944.

No. 243. EVANS *v.* MANNING. Supreme Court of South Carolina. Certiorari denied. Reported below: 217 S. C. 10, 59 S. E. 2d 341.

No. 246. FORD MOTOR CO. ET AL. *v.* RYAN, U. S. DISTRICT JUDGE, ET AL. C. A. 2d Cir. Certiorari denied. *Whitney North Seymour, William T. Gossett, Bruce Bromley* and *Samuel A. Pleasants* for petitioners. *John T. Cahill, James A. Fowler, Jr.* and *John F. Sonnett* for respondents. Reported below: 182 F. 2d 329.

No. 247. KALMIA REALTY & INSURANCE CO. ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *L. Barrett Jones* and *Garner W. Green* for petitioners. *Solicitor General Perlman* and *Assistant Attorney General Vanech* for the United States. Reported below: 181 F. 2d 598.

No. 248. BERG, DOING BUSINESS AS BERG TRUCK & PARTS CO., *v.* SCHREIBER ET AL., DOING BUSINESS AS SCHREIBER TRUCKING CO. Supreme Court of Illinois. Certiorari denied. *Alfred Kamin* for petitioner. *Lawrence C. Mills* for respondents. Reported below: 405 Ill. 528, 92 N. E. 2d 88.

October 16, 1950. 340 U. S.

No. 253. ARGONNE CO., INC. *v.* HITAFFER. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *H. Mason Welch* for petitioner. *W. Gwynn Gardiner* for respondent. Reported below: 87 U. S. App. D. C. —, 183 F. 2d 811.

No. 257. WILLINGHAM, COLLECTOR OF INTERNAL REVENUE, ET AL. *v.* HOME OIL MILL ET AL. C. A. 5th Cir. Certiorari denied. *Solicitor General Perlman* for Willingham, petitioner. *Chas. H. Eyster* for respondents. Reported below: 181 F. 2d 9.

No. 259. GEORGE KEMP REAL ESTATE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Alexander S. Andrews* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Harry Marselli* for respondent. Reported below: 182 F. 2d 847.

No. 262. CAROLIN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *William A. Alfs* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Lee A. Jackson* for respondent. Reported below: 181 F. 2d 186.

No. 265. WORLD FIRE & MARINE INS. CO. *v.* PALMER ET AL. C. A. 5th Cir. Certiorari denied. *Wm. H. Watkins, P. H. Eager, Jr., Thos. H. Watkins* and *Elizabeth Hulen* for petitioner. *William Harold Cox* for respondents. Reported below: 182 F. 2d 707.

No. 266. UNITED STATES *v.* BEAL ET AL. C. A. 6th Cir. Certiorari denied. *Solicitor General Perlman* for the United States. *Monroe Oppenheimer, Robert E. Sher* and *Harry B. Miller* for respondents. Reported below: 182 F. 2d 565.

No. 269. ROSPIGLIOSI *v.* CLOGHER. Supreme Court of Florida. Certiorari denied. *Milton M. Ferrell, Joseph Edward Casey* and *Edward P. Troxell* for petitioner. *Henry G. Simmonite* for respondent. Reported below: 46 So. 2d 170.

No. 274. AUTOGRAPHIC REGISTER CO. *v.* UARCO, INC. C. A. 7th Cir. Certiorari denied. *Casper W. Ooms* and *Thomas J. Byrne* for petitioner. *Bernard A. Schroeder* for respondent. Reported below: 182 F. 2d 353.

No. 277. ISLAND CREEK FUEL & TRANSPORTATION CO. *v.* REEVES, COMMISSIONER OF REVENUE, ET AL. Court of Appeals of Kentucky. Certiorari denied. *Rolla D. Campbell* for petitioner. *A. E. Funk,* Attorney General of Kentucky, *Hal O. Williams,* Assistant Attorney General, *Henry M. Johnson* and *Lucian L. Johnson* for Reeves, respondent. Reported below: 313 Ky. 400, 230 S. W. 2d 924.

No. 283. GENTRY *v.* SEABOARD AIR LINE RAILROAD CO. Supreme Court of Florida. Certiorari denied. *Chester Bedell* and *Thomas J. Lewis* for petitioner. *Charles R. Scott* for respondent. Reported below: 46 So. 2d 485.

No. 285. ESTATE OF STRAUSS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Timothy N. Pfeiffer* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Robert N. Anderson* and *Carlton Fox* for respondent. Reported below: 183 F. 2d 288.

No. 256. RD-DR CORPORATION *v.* SMITH ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion the petition should be granted. *Samuel I. Rosenman, Richard S. Salant* and *Ambrose Doskow* for

petitioner. *J. C. Murphy* and *Henry L. Bowden* for respondents. Reported below: 183 F. 2d 562.

No. 37, Misc. ROUZER *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 71, Misc. PHYLE *v.* SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF MARIN. Supreme Court of California. Certiorari denied. *Morris Lavine* for petitioner.

No. 100, Misc. EDMISTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 105, Misc. SISKIND *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Melvin Richter* for the United States. Reported below: 116 Ct. Cl. 809.

No. 139, Misc. FULLUM *v.* KEENAN, SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied. *Carl Blanchfield* for petitioner.

No. 146, Misc. CROGHAN *v.* UNITED STATES. Court of Claims. Certiorari denied. *Ernest Woodward* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Joseph Kovner* for the United States. Reported below: 116 Ct. Cl. 577, 89 F. Supp. 1002.

No. 152, Misc. DUNNE *v.* RAILROAD RETIREMENT BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 183 F. 2d 366.

No. 154, Misc. JOHNSON *v.* LAWRENCE, SUPERINTENDENT. Supreme Court of Louisiana. Certiorari denied.

No. 156, Misc. LEVY *v.* SAWYER, SECRETARY OF COMMERCE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman* for respondents.

No. 160, Misc. FARMER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 183 F. 2d 328.

No. 165, Misc. ROY ET AL. *v.* OFFICE OF THE HOUSING EXPEDITER. United States Emergency Court of Appeals. Certiorari denied.

No. 166, Misc. CAINE *v.* CAINE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Stanley B. Frosh* for petitioner. *Albert E. Conradis* for respondent. Reported below: 86 U. S. App. D. C. 404, 182 F. 2d 246.

No. 171, Misc. HARRIS *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 172, Misc. GAGLIO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 173, Misc. BUTZ *v.* REDNOUR. Circuit Court of Williamson County, Illinois. Certiorari denied.

No. 175, Misc. SHAW *v.* UTECHT, WARDEN. Supreme Court of Minnesota. Certiorari denied. Reported below: 232 Minn. 82, 43 N. W. 2d 781.

No. 177, Misc. LEIMER *v.* REEVES, U. S. DISTRICT JUDGE. C. A. 8th Cir. Certiorari denied. Reported below: 180 F. 2d 891.

No. 178, Misc. SCHNEIDER *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. Reported below: 35 Cal. 2d 396, 217 P. 2d 934.

No. 182, Misc. SULLIVAN *v.* SCHNECKLOTH, ASSOCIATE WARDEN. Supreme Court of California. Certiorari denied.

No. 184, Misc. LOVELL *v.* ROBINSON, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 185, Misc. WALLACE *v.* ALVIS, WARDEN. Supreme Court of Ohio. Certiorari denied.

No. 187, Misc. SHOTKIN *v.* PERKINS ET AL. C. A. 10th Cir. Certiorari denied. *Walter F. Dodd* for petitioner. *John W. Metzger,* Attorney General of Colorado, and *Vincent Cristiano,* Assistant Attorney General, for respondents.

No. 192, Misc. WASHINGTON *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *Victor Rabinowitz* for petitioner. Reported below: 217 La. 687, 47 So. 2d 46.

No. 174, Misc. DOWDY ET AL. *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petition should be granted. Reported below: —— La. ——, 47 So. 2d 496.

Rehearing Denied. (*See also No. 13, Original, supra.*)

No. 12, Original. UNITED STATES *v.* LOUISIANA, 339 U. S. 699. Rehearing denied. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 568, October Term, 1949. EWING, FEDERAL SECURITY ADMINISTRATOR, ET AL. *v.* MYTINGER & CASSELBERRY, INC., 339 U. S. 594. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 739, October Term, 1949. ELLIS, RECEIVER, *v.* CATES, 339 U. S. 964. Rehearing denied.

No. 844, October Term, 1949. LOEW'S, INC. *v.* UNITED STATES;

No. 845, October Term, 1949. WARNER BROS. PICTURES, INC. ET AL. *v.* UNITED STATES; and

No. 846, October Term, 1949. TWENTIETH CENTURY-FOX FILM CORP. ET AL. *v.* UNITED STATES, 339 U. S. 974. The petitions for rehearing are denied. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

No. 79, Misc., October Term, 1949. CHAMBERS *v.* UNITED STATES, 338 U. S. 894. Rehearing denied.

OCTOBER 23, 1950.

Per Curiam Decisions.

No. 19. GARA *v.* UNITED STATES. Certiorari, 339 U. S. 927, to the United States Court of Appeals for the Sixth Circuit. Argued October 13, 16, 1950. Decided October 23, 1950. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Francis Heisler* argued the cause for petitioner. With him on the brief was *Stanley U. Robinson, Jr. John W. MacDonald* was also of counsel. *Philip R. Monahan* argued the cause for the United States. With him on the brief

were *Solicitor General Perlman, Assistant Attorney General McInerney, Stanley M. Silverberg* and *Robert S. Erdahl.* Reported below: 178 F. 2d 38.

No. 293. WENNING *v.* PEOPLES BANK CO. ET AL. Appeal from, and petition for writ of certiorari to, the Supreme Court of Ohio. *Per Curiam:* The motions to dismiss are granted and the appeal is dismissed. The petition for writ of certiorari is denied. MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE DOUGLAS are of the opinion that this case should be set down for argument and that further consideration of the question of jurisdiction should be postponed to the hearing of the case on the merits. *Elmer McClain* for appellant-petitioner. *Kahl K. Spriggs* for the Peoples Bank Co. et al.; and *Carleton Carl Reiser* and *Alexander M. Heron* for Davis et al., appellees-respondents. Reported below: 153 Ohio St. 583, 92 N. E. 2d 689.

Miscellaneous Orders.

No. 2, Original. WISCONSIN ET AL., *v.* ILLINOIS ET AL.;
No. 3, Original. MICHIGAN *v.* ILLINOIS ET AL.; and
No. 4, Original. NEW YORK *v.* ILLINOIS ET AL. The motion of the States of Wisconsin et al. to dismiss the petition of the State of Illinois and the Sanitary District of Chicago for an interpretation and clarification of the decree of April 21, 1930, 281 U. S. 696, is granted. *Ivan A. Elliott,* Attorney General, *Robert J. Burdett,* Assistant Attorney General, and *Ernst Buehler* were on the petition of the State of Illinois and the Sanitary District of Chicago. On the motion to dismiss the petition were *Thomas E. Fairchild,* Attorney General, for the State of Wisconsin; *J. A. A. Burnquist,* Attorney General, for the State of Minnesota; *Herbert S. Duffy,* Attorney General, for the State of Ohio; *Charles J. Margiotti,* Attorney General, and *M. Vashti Burr,* Deputy Attorney General, for the

State of Pennsylvania; *Stephen J. Roth,* Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Graydon G. Withey,* Deputy Attorney General, for the State of Michigan; *Nathaniel L. Goldstein,* Attorney General, and *Edward L. Ryan,* Assistant Attorney General, for the State of New York; and *Herbert H. Naujoks,* Special Assistant to Attorneys General.

No. 8, Original. KANSAS *v.* MISSOURI. Upon consideration of the joint motion of counsel for the parties in this case to amend the decree of this Court (322 U. S. 654), it is ordered that the joint motion be, and it is hereby, granted and the decree is amended to read as follows:

"This cause was argued by counsel at the October Term, 1943, upon the pleadings and exceptions to the Report of the Special Master. On June 5, 1944, this Court entered a decree establishing a boundary between the States. Since the entry of the decree the States of Kansas and Missouri through their legislatures have agreed upon a boundary and such agreement has been ratified by joint resolution of the Congress of the United States and the resolution approved by the President of the United States. Public Law 637, approved August 3, 1950. [64 Stat. 397.] Therefore, in order to conform this Court's decree to the agreement of the parties as ratified by the Congress of the United States,

"It is Ordered, Adjudged, and Decreed that the boundary line between the States of Kansas and Missouri, which extends from the intersection of the Missouri River with the 40th parallel, north latitude, southward to the middle of the mouth of the Kaw or Kansas River, be and it is hereby established as the middle line of the main navigable channel of the Missouri River as said river flows throughout its entire course from its intersection with the 40th parallel, north latitude, southward to the middle

of the mouth of the Kaw or Kansas River, subject only to changes which may occur by the natural processes of accretion and reliction, but not by avulsion.

"The costs of this suit are equally divided between the two States, Complainant and Defendant."

Harold R. Fatzer, Attorney General of Kansas, for complainant. *T. E. Taylor,* Attorney General of Missouri, and *Frank W. Hayes,* Assistant Attorney General, for defendant.

No. 200, Misc. SPITZER *v.* MAYO, CUSTODIAN. Supreme Court of Florida. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 191, Misc. ALLEN *v.* ASHE, WARDEN. Petition for writ of certiorari to the Supreme Court of Pennsylvania dismissed on motion of petitioner.

No. 134, Misc. ENOS ET AL. *v.* CHAPMAN, SECRETARY OF THE INTERIOR, ET AL. Motion for leave to file petition for writ of certiorari denied.

No. 168, Misc. MACKAY ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. Motion for leave to file petition for writs of mandamus and prohibition denied. *Zach Lamar Cobb* for petitioners. *Solicitor General Perlman* for respondents.

No. 190, Misc. PHYSIOC *v.* SUPREME COURT OF CALIFORNIA ET AL.; and

No. 195, Misc. HOMLERY *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. Motions for leave to file petitions for writs of mandamus denied.

No. 198, Misc. IN RE SHENKIN. Motion for leave to file petition for writ of habeas corpus denied.

No. 371. SHUB *v.* SIMPSON, SECRETARY OF STATE OF MARYLAND. Appeal from the Court of Appeals of Maryland; and

No. 372. SIMPSON, SECRETARY OF STATE OF MARYLAND, *v.* GERENDE. On petition for writ of certiorari to the Court of Appeals of Maryland. *I. Duke Avnet* for appellant in No. 371. *Hall Hammond,* Attorney General of Maryland, *J. Edgar Harvey,* Deputy Attorney General, and *Harrison L. Winter,* Assistant Attorney General, for petitioner in No. 372 and appellee in No. 371. Reported below: —— Md. ——, 75 A. 2d 842.

No. 371 is a motion to advance and expedite the hearing of an appeal from a decision of the Court of Appeals of the State of Maryland affirming the denial of a petition for writ of mandamus.

Appellant, petitioner below, was nominated by the Progressive Party for Governor of Maryland at a convention held on August 7, 1950. On August 18, nine days before the last date permitted by law, he tendered a certificate of nomination to the Secretary of State, a prerequisite to appearing on the ballot for the election on November 7. On the same day, August 18, the tender was rejected for failure to file an affidavit required by the Maryland Subversive Activities Act of 1949, Md. Laws 1949, c. 96, § 1, par. 15. On September 14, petitioner obtained from the Circuit Court of Anne Arundel County an order to show cause why a writ of mandamus should not be issued to compel the Secretary of State to accept the certificate. The Secretary, on September 27, demurred to the petition; and on October 9, after a hearing, the court sustained the demurrer and dismissed the petition. On appeal to the Maryland Court of Appeals argument was heard on October 12. That court entered a *per curiam* order, two judges dissenting, the same day, affirming the judgment

against the petitioner and, obviously deeming an exposition of the statute necessary, stated that an opinion would thereafter be filed. On October 18 petitioner filed an appeal from this order. In this situation the motion to advance and expedite is denied.

No. 372 is a petition for writ of certiorari from the same order of the Court of Appeals insofar as it reversed the dismissal by the Circuit Court of the petition for writ of mandamus brought by a Progressive Party nominee for the United States House of Representatives. The petition is denied.

THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, dissenting in No. 371.

The order denying the motion to advance and expedite No. 371 in all probability deprives this appellant of an opportunity to have a final decision on the grave constitutional questions which he presents. This means that before the Court can consider the case in the course of ordinary procedure, the election in which he desires to run for Governor will undoubtedly have been held and the controversy thus rendered moot. We cannot agree to deny appellant a hearing in this manner.

The nature of typical election laws is such that only a limited time is available for judicial review. This fact has presented difficulties in this Court before, see *Colegrove* v. *Green,* 328 U. S. 549, 565; *MacDougall* v. *Green,* 335 U. S. 281, 285; *Cook* v. *Fortson, Turman* v. *Duckworth,* 329 U. S. 675, 677, and generally advancement has had to be requested in cases of this nature. *MacDougall* v. *Green, supra; Cook* v. *Fortson, Turman* v. *Duckworth, supra; South* v. *Peters,* 339 U. S. 276. Where, as here, a justiciable controversy and substantial federal questions co-exist, the Court can and should advance a determination of the case. There is no showing of lack of diligence

on appellant's part. Under the present circumstances the absence of an opinion by the Maryland Court of Appeals is no reason for refusing consideration here. Whatever the Maryland court may later say, appellant has been deprived of his opportunity to become a candidate in the election.

Certiorari Granted.

No. 297. KIEFER-STEWART CO. *v.* JOSEPH E. SEAGRAM & SONS, INC. ET AL. C. A. 7th Cir. Certiorari granted. MR. JUSTICE MINTON took no part in the consideration or decision of this application. *Joseph J. Daniels* and *Paul A. Porter* for petitioner. *Thomas Kiernan* and *Paul Y. Davis* for respondents. Reported below: 182 F. 2d 228.

No. 336. DENNIS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted, limited to questions 1 and 2 presented by the petition for the writ, *viz.:*

"1. Whether either Section 2 or Section 3 of the Smith Act, inherently or as construed and applied in the instant case, violates the First Amendment and other provisions of the Bill of Rights.

"2. Whether either Section 2 or Section 3 of the Act, inherently or as construed and applied in the instant case, violates the First and Fifth Amendments because of indefiniteness."

MR. JUSTICE CLARK took no part in the consideration or decision of this application.

George W. Crockett, Jr., Richard Gladstein, Abraham J. Isserman and *Harry Sacher* for petitioners. *Solicitor General Perlman, Irving H. Saypol, Robert W. Ginnane* and *Irving S. Shapiro* for the United States. Reported below: 183 F. 2d 201.

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No. 140, Misc. WILSON *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari granted. *Henry P. Viering* for petitioner. Reported below: 217 La. 470, 46 So. 2d 738.

Certiorari Denied. (*See also Nos. 293 and 372 and Misc. Nos. 134 and 200, supra.*)

No. 245. TODD CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Justin J. Doyle* for petitioner. *Solicitor General Perlman, David P. Findling, Mozart G. Ratner* and *Marcel Mallet-Prevost* for respondent.

No. 250. TEMPLE OF LIGHT, A MICHIGAN ECCLESIASTICAL CORPORATION, ET AL. *v.* BOSTON EDISON PROTECTIVE ASSOCIATION ET AL. Supreme Court of Michigan. Certiorari denied. *Edward N. Barnard* for petitioners. *Henry R. Bishop* for respondents.

No. 255. WARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Earl Boyd Pierce* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: 183 F. 2d 270.

No. 264. STOPPELLI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Jacob W. Friedman* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: 183 F. 2d 391.

No. 275. BROWN *v.* EASTERN STATES CORP. ET AL. C. A. 4th Cir. Certiorari denied. *David I. Shivitz* and *Edmund B. Hennefeld* for petitioner. *Horace R. Lamb* for respondents. Reported below: 181 F. 2d 26.

No. 279. PEOPLE EX REL. MOFFETT *v.* BATES ET AL., CONSTITUTING THE STATE TAX COMMISSION. Court of Appeals of New York. Certiorari denied. *Lee McCanliss* for petitioner. *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *John C. Crary, Jr.,* Assistant Attorney General, for respondents. Reported below: 301 N. Y. 597, 93 N. E. 2d 494.

No. 289. BURNS STEAMSHIP CO. *v.* NATIONAL BULK CARRIERS, INC. C. A. 2d Cir. Certiorari denied. *Chauncey I. Clark* for petitioner. *John C. Prizer* for respondent. Reported below: 183 F. 2d 405.

No. 290. BRENNAN *v.* HAWLEY PRODUCTS CO. C. A. 7th Cir. Certiorari denied. *Luther Day* and *Curtis C. Williams, Jr.* for petitioner. *Richard L. Johnston* and *Lloyd C. Root* for respondent. Reported below: 182 F. 2d 945.

No. 291. HANSEN *v.* SAINT JOSEPH FUEL OIL & MANUFACTURING CO. ET AL. C. A. 8th Cir. Certiorari denied. *Charles M. Miller* for petitioner. *R. A. Brown, Jr.* for respondents. Reported below: 181 F. 2d 880.

No. 326. REILLY *v.* REILLY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* for petitioner. *John L. Ingoldsby, Jr.* for respondent. Reported below: 86 U. S. App. D. C. 345, 182 F. 2d 108.

No. 260. BRUSZEWSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade, Leavenworth Colby* and *Morton Hollander* for the United States. Reported below: 181 F. 2d 419.

No. 271. PENNSYLVANIA EX REL. MASTER *v.* BALDI, SUPERINTENDENT. Superior Court of Pennsylvania. Certiorari denied. *David Berger* for petitioner.

No. 276. STORY, TRADING AS STORY & CO., *v.* SNYDER ET AL., TRUSTEES OF THE LIBRARY OF CONGRESS TRUST FUND BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Hugh H. Obear* and *Edmund D. Campbell* for petitioner. *Solicitor General Perlman, Assistant Attorney General Vanech, Roger P. Marquis* and *Harold S. Harrison* for respondents. Reported below: 87 U. S. App. D. C. —, 184 F. 2d 454.

No. 288. FLEISCHMAN ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *O. John Rogge* and *Benedict Wolf* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Philip R. Monahan* and *Robert G. Maysack* for the United States. Reported below: 87 U. S. App. D. C. —, 183 F. 2d 996.

No. 303. NEFF *v.* KANSAS. Supreme Court of Kansas. Certiorari denied. *W. L. Cunningham* for petitioner. *Harold R. Fatzer,* Attorney General of Kansas, *C. Harold Hughes,* Assistant Attorney General, and *Ford Harbaugh* for respondent. Reported below: 169 Kan. 116, 218 P. 2d 248.

No. 325. PAWLEY *v.* PAWLEY. Supreme Court of Florida. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *W. G. Ward, D. H. Redfearn* and *R. H. Ferrell* for peti-

tioner. *Paul R. Scott, A. L. McCarthy, Robert H. Anderson* and *Scott M. Loftin* for respondent. Reported below: 46 So. 2d 464.

No. 66, Misc. SOULIA *v.* O'BRIEN, WARDEN. Superior Court of Hampden County, Massachusetts. Certiorari denied. *Joseph J. McGovern* and *Margaret F. McGovern* for petitioner. *Francis E. Kelly,* Attorney General of Massachusetts, and *Henry P. Fielding,* Assistant Attorney General, for respondent.

No. 101, Misc. PICKETT *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *M. Gabriel Nahas, Jr.* for petitioner. *Price Daniel,* Attorney General of Texas, and *David B. Irons,* Administrative Assistant Attorney General, for respondent. Reported below: 154 Tex. Cr. R. ——, 228 S. W. 2d 516.

No. 124, Misc. SEGER ET AL. *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 130, Misc. PENNSYLVANIA EX REL. ALMEIDA *v.* BALDI, SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied. Petitioner *pro se. Charles J. Margiotti,* Attorney General of Pennsylvania, *Randolph C. Ryder, Harrington Adams, George W. Keitel,* Deputy Attorneys General, *Colbert C. McClain* and *John H. Maurer* for respondent.

No. 164, Misc. WATWOOD *v.* BRADFORD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 180, Misc. LENOBLE *v.* KANE, NOW HALPIN, ADMINISTRATRIX. C. A. 2d Cir. Certiorari denied. *Jacob W. Friedman* for petitioner. *Robert D. Marcus* for respondent. Reported below: 182 F. 2d 1020.

No. 193, Misc. SKINNER *v.* ROBINSON, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 194, Misc. ANDERSON *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 196, Misc. LYNCH *v.* NORTH DAKOTA. Supreme Court of North Dakota. Certiorari denied.

No. 197, Misc. O'NEAL *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 199, Misc. BOSALAVICH *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

NOVEMBER 6, 1950.

Per Curiam Decisions.

No. 304. TREICHLER, EXECUTOR, *v.* WISCONSIN. Appeal from the Supreme Court of Wisconsin. *Per Curiam:* Insofar as the appeal attacks the validity of the computation of appellant's tax under the Wisconsin Emergency Tax on Inheritances, Wis. Stat. (1947) § 72.74 (2), the judgment of the Wisconsin Supreme Court is affirmed. *Treichler* v. *Wisconsin,* 338 U. S. 251 (1949). Insofar as the appeal attacks the validity of the computation of appellant's tax under the Wisconsin Estate Tax, Wis. Stat. (1947) § 72.50, the appeal is dismissed, that portion of the judgment of the Wisconsin Supreme Court resting on an adequate nonfederal ground. *A. W. Schutz* for appellant. *Thomas E. Fairchild,* Attorney General of Wisconsin, *Harold H. Persons,* Assistant Attorney General, and *Neil Conway* for appellee. *J. Gilbert Hardgrove* filed a brief, as *amicus curiae,* supporting appellant. Reported below: 257 Wis. 439, 43 N. W. 2d 428.

No. 349. Public Service Company of Oklahoma *v.* Town of Skiatook et al. Appeal from the Supreme Court of Oklahoma. *Per Curiam:* The motion for leave to file motion to dismiss or affirm is granted. The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Harry D. Moreland* for appellant. *John H. Poe* for appellee. Reported below: 203 Okla. 316, 220 P. 2d 273.

Final Order and Decree.

No. 9, Original. Illinois *v.* Indiana et al.

The Fifth Special Report of the Special Master is approved. The Amended Bill of Complaint is dismissed as to (1) American Maize Products Company, pursuant to a joint motion of complainant State of Illinois, and defendants State of Indiana, City of Hammond, and American Maize Products Company; (2) Carnegie-Illinois Steel Corporation, pursuant to a joint motion of complainant State of Illinois, and defendants State of Indiana, City of Gary, and Carnegie-Illinois Steel Corporation; (3) City of Whiting, pursuant to a joint motion of complainant State of Illinois, and defendants State of Indiana and City of Whiting; (4) Standard Oil Company, pursuant to a joint motion of complainant State of Illinois, and defendants State of Indiana, City of Whiting, and Standard Oil Company; (5) The Youngstown Sheet and Tube Company, pursuant to a joint motion of complainant State of Illinois, and defendants State of Indiana, City of East Chicago, and The Youngstown Sheet and Tube Company; (6) State of Indiana, pursuant to a joint motion of complainant State of Illinois, and defendants State of Indiana, City of East Chicago, City of Gary, and City of Hammond; (7) City of East Chicago, pursuant to a joint motion of complainant State of Illinois, and defendants State of Indiana, City

of East Chicago, City of Gary, and City of Hammond; (8) City of Gary, pursuant to a joint motion of complainant State of Illinois, and defendants State of Indiana, City of East Chicago, City of Gary, and City of Hammond; (9) City of Hammond, pursuant to a joint motion of complainant State of Illinois, and defendants State of Indiana, City of East Chicago, City of Gary, and City of Hammond.

The Fifth and Final Report of the Special Master dated October 18, 1950, is approved.

The Court finds that the Amended Bill of Complaint has been dismissed as to all parties defendant who have heretofore stipulated herein to perform certain work as follows: Shell Oil Company, Incorporated, and The Texas Company dismissed by order of February 17, 1947 (330 U. S. 799); American Bridge Company, Carbide and Carbon Chemicals Corporation, E. I. du Pont de Nemours and Company, Fruit Growers Express Company, and Universal Atlas Cement Company dismissed by order of November 17, 1947 (332 U. S. 822); Bates Expanded Steel Corporation, an Indiana corporation (as well as its predecessor, Bates Expanded Steel Corporation, a Delaware corporation, now known as East Chicago Expanded Steel Company), Rogers Galvanizing Company, and U. S. S. Lead Refinery, Inc., dismissed by order of October 25, 1948 (335 U. S. 850); Cities Service Oil Company, Cudahy Packing Company, Inland Steel Company, National Tube Company, Sinclair Refining Company, and Socony-Vacuum Oil Company dismissed by order of October 24, 1949 (338 U. S. 856); and American Maize Products Company, Carnegie-Illinois Steel Corporation, City of Whiting, Standard Oil Company, and The Youngstown Sheet and Tube Company dismissed hereinbefore by this order. The Court further finds that with the dismissal of the aforesaid defendants no acts remain to

be performed by the other named defendants, namely, State of Indiana, City of East Chicago, City of Gary, and City of Hammond, and that the Amended Bill of Complaint be, and it is hereby, dismissed as to all parties defendant.

The Court further orders that the recommendations of the Special Master as to the apportionment of costs be adopted and costs for the period from September 8, 1949, to the date of this decree, inclusive, shall be taxed as recommended in the Fifth and Final Report.

The fees of the Clerk of this Court shall be taxed and divided equally between the complainant and defendants.

The Court finds that the Special Master has performed all duties required of him by the Court's order dated March 7, 1944, appointing him Special Master and the Court's orders of February 17, 1947, November 17, 1947, October 25, 1948, and October 24, 1949, approving the procedure and practice which has been followed in this cause. The Court orders that upon the payment of compensation and expenses, the Special Master be dismissed and relieved of any further duty in this cause.

For the State of Illinois: *Ivan A. Elliott,* Attorney General, *George F. Barrett,* then Attorney General, *Albert E. Hallett, Albert J. Meserow, William C. Wines* and *Mary V. Neff,* Assistant Attorneys General.

For the State of Indiana: *J. Emmett McManamon,* Attorney General, *James A. Emmert,* then Attorney General, *Cleon H. Foust,* then Attorney General, *Urban C. Stover, Robert Hollowell, Jr., Joseph W. Hutchinson* and *Maurice E. Tennant,* Deputy Attorneys General.

For the City of Hammond: *Harry H. Stilley, Timothy P. Galvin* and *Edmond J. Leeney.*

For the City of East Chicago: *Loyd J. Cohen, Allen P. Twyman* and *Robert G. Estill.*

For the City of Gary: *John E. Roszkowski, Samuel S. Dubin* and *Richard H. MacCracken.*

For the City of Whiting: *James S. McCarthy* and *Timothy P. Galvin.*

For the American Bridge Co., Carnegie-Illinois Steel Corp., National Tube Co. and Universal Atlas Cement Co.: *R. M. Blough* and *R. C. Stevenson.*

For the American Maize Products Co., Inc.: *Richard P. Tinkham.*

For the Bates Expanded Steel Corp., now known as the East Chicago Expanded Steel Co.: *R. L. Hackbert, R. C. Stevenson* and *David A. Watts.*

For the Carbide & Carbon Chemicals Corp.: *Homer A. Holt.*

For the Cities Service Oil Co.: *Lester F. Murphy.*

For E. I. du Pont de Nemours & Co.: *Timothy P. Galvin.*

For the Fruit Growers Express Co.: *William G. Brantley* and *Carl H. Richmond.*

For the Inland Steel Co.: *Paul M. Godehn* and *Donald M. Graham.*

For the Rogers Galvanizing Co.: *John P. Hart* and *Barnabas F. Sears.*

For the Shell Oil Co., Inc.: *Cyrus S. Gentry* and *Philip M. Payne.*

For the Sinclair Refining Co.: *James W. Reid.*

For the Socony-Vacuum Oil Co., Inc.: *J. F. Dammann.*

For the Standard Oil Co.: *Gordon E. Tappan, Buell F. Jones, Thomas E. Sunderland* and *Charles Henry Austin.*

For The Texas Company: *Harold K. Norton.*

For the U. S. S. Lead Refinery, Inc.: *David A. Watts.*

For The Youngstown Sheet & Tube Co.: *J. C. Argetsinger* and *R. C. Stevenson.*

Miscellaneous Orders.

No. 371. SHUB *v.* SIMPSON, SECRETARY OF STATE OF MARYLAND, *ante*, p. 861. The motion to reconsider the motion to advance is denied.

No. 61, Misc. MYERS *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied.

No. 202, Misc. MATTISON *v.* PENNSYLVANIA. Application denied.

No. 203, Misc. GERRISH *v.* LOVELL, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 207, Misc. BRINK *v.* PENNSYLVANIA. Application denied.

No. 213, Misc. HARRIS *v.* SWENSON, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted.

No. 281. UNITED STATES *v.* ALCEA BAND OF TILLAMOOKS ET AL. Court of Claims. Certiorari granted, limited to the first question presented by the petition for the writ, *i. e.:*

"Whether the respondents are entitled to interest since 1855 on the value of the tribal lands. This depends on whether their claimed compensation rests on the Constitution or on the special jurisdictional act."

Solicitor General Perlman for the United States. *L. A. Gravelle, Edward F. Howrey, Douglas Whitlock* and *John G. Mullen* for respondents. Reported below: 115 Ct. Cl. 463, 87 F. Supp. 938.

No. 296. JOHNSON *v.* MUELBERGER. Court of Appeals of New York. Certiorari granted. *William E. Leahy* and *William J. Hughes, Jr.* for petitioner. *Louis Flato* for respondent. Reported below: 301 N. Y. 13, 92 N. E. 2d 44.

No. 318. MOORE, ADMINISTRATRIX, *v.* CHESAPEAKE & OHIO RAILWAY CO. C. A. 4th Cir. Certiorari granted. *Geo. E. Allen* for petitioner. *Walter Leake* and *Meade T. Spicer, Jr.* for respondent. Reported below: 184 F. 2d 176.

No. 329. AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, ET AL. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD; and

No. 330. AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, ET AL. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL. Supreme Court of Wisconsin. Certiorari granted. *David Previant* for petitioners. *Thomas E. Fairchild,* Attorney General of Wisconsin, *Stewart G. Honeck,* Deputy Attorney General, and *Malcolm L. Riley,* Assistant Attorney General, for the Wisconsin Employment Relations Board et al., respondents. *Van B. Wake* for the Milwaukee Electric Railway & Transport Co., respondent in No. 330. *Stephen J. Roth,* Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, filed a brief for the State of Michigan, as *amicus curiae,* in support of respondents. Reported below: 257 Wis. 43, 53, 42 N. W. 2d 471, 477.

Certiorari Denied. (*See also No. 61, Misc., supra.*)

No. 176. HARDING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Alexander W. Parker* for petitioner.

Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl and *Felicia H. Dubrovsky* for the United States. Reported below: 182 F. 2d 524.

No. 270. BLACKHAWK-PERRY CORPORATION *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Wayne G. Cook* and *W. A. Sutherland* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Carlton Fox* for respondent. Reported below: 182 F. 2d 319.

No. 278. BROWN *v.* WATT CAR & WHEEL CO. C. A. 6th Cir. Certiorari denied. *Solicitor General Perlman* for petitioner. *Parker Fulton* for respondent. Reported below: 182 F. 2d 570.

No. 280. CAPITAL AIRLINES, INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Charles H. Murchison* and *William A. Carter* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Melvin Richter* for the United States. Reported below: 116 Ct. Cl. 850, 90 F. Supp. 926.

No. 294. CARMACK ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *J. B. Lewright* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *A. F. Prescott* for respondent. Reported below: 183 F. 2d 1.

No. 305. FARINA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Vine H. Smith* and *Peter L. F. Sabbatino* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Irving S. Shapiro* and *Felicia H. Dubrovsky* for the United States. Reported below: 184 F. 2d 18.

No. 306. STERN *v.* TEEVAL CO., INC.;

No. 307. NEW YORK *v.* TEEVAL CO., INC.; and

No. 321. TEEVAL CO., INC. *v.* STERN. Court of Appeals of New York. Certiorari denied. *Eugene J. Morris* for petitioner in No. 306. *Nathaniel L. Goldstein,* Attorney General, *Wendell P. Brown,* Solicitor General, and *Abe Wagman,* Special Assistant Attorney General, for the State of New York. *Robert S. Fougner* and *Frank S. Ketcham* for the Teeval Co., Inc. *John P. McGrath* filed a brief for New York City, as *amicus curiae,* supporting the petition in No. 306. Reported below: 301 N. Y. 346, 93 N. E. 2d 884.

No. 346. JAWROWER *v.* LEIGHTON ET AL.; and

No. 350. LEIGHTON ET AL. *v.* JAWROWER. Court of Appeals of New York. Certiorari denied. *Barney Rosenstein* for Jawrower. *Barnet Kaprow* for petitioners in No. 350 and respondents in No. 346. *John P. McGrath* filed a brief for New York City, as *amicus curiae,* supporting the petition in No. 346. Reported below: 301 N. Y. 346, 93 N. E. 2d 884.

No. 308. DEAN MILK CO. *v.* NATIONAL DAIRYMEN ASSOCIATION, INC. C. A. 7th Cir. Certiorari denied. *Fred A. Gariepy* and *Owen Rall* for petitioner. *Daniel M. Schuyler* for respondent. Reported below: 183 F. 2d 349.

No. 309. BROTHERHOOD OF RAILROAD TRAINMEN *v.* PENNSYLVANIA-READING SEASHORE LINES ET AL. Supreme Court of New Jersey. Certiorari denied. *Lester A. Drenk* and *James M. Davis, Jr.* for petitioner. *James D. Carpenter* for the Pennsylvania-Reading Seashore Lines, respondent. Reported below: 5 N. J. 114, 74 A. 2d 265.

No. 311. GOGGIN, RECEIVER, *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION. C. A. 9th Cir. Certiorari denied. *Martin Gendel* for petitioner. *Hugo A. Steinmeyer, Robert H. Fabian* and *Samuel B. Stewart, Jr.* for respondent. Reported below: 183 F. 2d 322.

No. 317. RYLES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Jack T. Conn* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Irving S. Shapiro* and *Robert G. Maysack* for the United States. Reported below: 183 F. 2d 944.

No. 319. EM. H. METTLER & SONS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *George H. Zeutzius* and *A. P. G. Steffes* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Hilbert P. Zarky* for respondent. Reported below: 181 F. 2d 848.

No. 320. WINBERRY *v.* SALISBURY. Supreme Court of New Jersey. Certiorari denied. *Frank G. Schlosser* for petitioner. *Theodore D. Parsons,* Attorney General of New Jersey, *Warren Dixon, Jr.,* Deputy Attorney General, and *Joseph A. Murphy,* Assistant Deputy Attorney General, for respondent. Reported below: 5 N. J. 240, 74 A. 2d 406.

No. 327. KENT *v.* CANFIELD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Austin F. Canfield, pro se,* and *Lester Wood, pro se.*

No. 333. BECK ET AL., TRADING AS MITCHEL BECK CO., *v.* THE VIZCAYA ET AL. C. A. 3d Cir. Certiorari denied. *Thomas E. Byrne, Jr.* for petitioners. *Joseph W. Henderson* for respondents. Reported below: 182 F. 2d 942.

No. 337. PUETT ELECTRICAL STARTING GATE CORP. *v.* HARFORD AGRICULTURAL & BREEDERS' ASSOCIATION ET AL. C. A. 4th Cir. Certiorari denied. *Daniel L. Morris, Edward G. Curtis, Truman S. Safford* and *Joseph V. Meigs* for petitioner. *W. Brown Morton* and *J. Cookman Boyd, Jr.* for respondents. Reported below: 182 F. 2d 608.

No. 340. ANGLIN ET AL. *v.* BENDER. Supreme Court of Georgia. Certiorari denied. *J. C. Murphy* and *Henry L. Bowden* for petitioners. *Harold Sheats* for respondent. Reported below: 207 Ga. 108, 60 S. E. 2d 756.

No. 272. MORFORD *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Abraham J. Isserman, David Rein* and *Joseph Forer* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 87 U. S. App. D. C. —, 184 F. 2d 864.

No. 316. SWIFT & CO. *v.* RECONSTRUCTION FINANCE CORP. C. A. 7th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Edward R. Johnston, Albert E. Jenner, Jr., Edgar Byron Kixmiller* and *William N. Strack* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Morton Hollander* for respondent. Reported below: 183 F. 2d 456.

No. 34, Misc. KUNKLE *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 138, Misc. DORSEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Bart. A. Riley* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Robert G. Maysack* for the United States.

No. 151, Misc. REED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. Reported below: 181 F. 2d 141.

No. 162, Misc. COOPER ET AL. *v.* RUST ENGINEERING Co. C. A. 6th Cir. Certiorari denied. *James G. Wheeler* for petitioners. *J. D. Inman* and *E. Palmer James* for respondent. *Solicitor General Perlman* and *William S. Tyson* filed a memorandum for the United States, as *amicus curiae,* supporting the petition. Reported below: 181 F. 2d 107.

No. 188, Misc. GOLDSTEIN *v.* JOHNSON, SECRETARY OF DEFENSE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: 87 U. S. App. D. C. —, 184 F. 2d 342.

No. 201, Misc. PENSKI *v.* ROBINSON, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 204, Misc. KNOWLES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Rosalind G. Bates* for petitioner. Reported below: 35 Cal. 2d 175, 217 P. 2d 1.

No. 209, Misc. BALLES *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 212, Misc. HANSON *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: — Md. —, 75 A. 2d 924.

No. 214, Misc. JENKOT *v.* GREEN ET AL. C. A. 7th Cir. Certiorari denied.

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No. 215, Misc. PERKINS *v.* UTECHT, WARDEN. Supreme Court of Minnesota. Certiorari denied. Reported below: 232 Minn. 116, 44 N. W. 2d 113.

NOVEMBER 13, 1950.

Per Curiam Decisions.

No. 5. COMPAGNA ET AL. *v.* HIATT, WARDEN. Certiorari, 339 U. S. 955, to the United States Court of Appeals for the Fifth Circuit. Argued October 9–10, 1950. Decided November 13, 1950. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Wm. Scott Stewart* argued the cause for petitioners. With him on the brief was *A. Walton Nall*. *Stanley M. Silverberg* argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Philip R. Monahan*. Reported below: 178 F. 2d 42.

No. 292. MOLSEN *v.* YOUNG, INSPECTOR IN CHARGE, U. S. IMMIGRATION AND NATURALIZATION SERVICE. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The joint motion of petitioner and the Solicitor General for remand of this case is granted. The judgments of the Court of Appeals and the District Court are vacated and the cause is remanded to the District Court for consideration of the effect of § 25 of the Subversive Activities Control Act of 1950, 64 Stat. 987, 1013, with leave to each party to present further evidence upon the material issues of the case. *Searcy L. Johnson* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 182 F. 2d 480.

No. 371. SHUB *v.* SIMPSON, SECRETARY OF STATE OF MARYLAND. Appeal from the Court of Appeals of Maryland. *Per Curiam:* The appeal is dismissed on the ground that the federal questions have become moot. *I. Duke Avnet* for appellant. *Hall Hammond,* Attorney General of Maryland, *J. Edgar Harvey,* Deputy Attorney General, and *Harrison L. Winter,* Assistant Attorney General, for appellee. Reported below: 76 A. 2d 332.

No. 373. BOREN ET AL. *v.* STATE OF WASHINGTON ET AL. Appeal from the Supreme Court of Washington. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Jeffrey Heiman* for appellants. *John J. Sullivan* for appellees. Reported below: 36 Wash. 2d 522, 219 P. 2d 566.

No. 381. BOARD OF SUPERVISORS OF ELIZABETH CITY COUNTY ET AL. *v.* STATE MILK COMMISSION. Appeal from the Supreme Court of Appeals of Virginia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Henry H. Fowler* for appellants. *J. Lindsay Almond, Jr.,* Attorney General of Virginia, for appellee. Reported below: 191 Va. 1, 60 S. E. 2d 35.

No. 181, Misc. JOHNSON *v.* PENNSYLVANIA. On petition for writ of certiorari to the Supreme Court of Pennsylvania. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Turner* v. *Pennsylvania,* 338 U. S. 62. MR. JUSTICE REED and MR. JUSTICE JACKSON are of opinion that this Court should not reverse the highest court of a State without hearing and that the circumstances of this case differ from those of the

Turner case. *Milford J. Meyer* for petitioner. *Colbert C. McClain* and *John H. Maurer* for respondent. Reported below: 365 Pa. 303, 74 A. 2d 144.

Certiorari Granted. (*See also No. 292 and Misc. No. 181, supra.*)

No. 298. ZITTMAN (WITH WHOM THE CHASE NATIONAL BANK WAS IMPLEADED BELOW) *v.* MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN;

No. 299. ZITTMAN (WITH WHOM THE FEDERAL RESERVE BANK OF NEW YORK WAS IMPLEADED BELOW) *v.* MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN;

No. 314. MCCARTHY (WITH WHOM THE CHASE NATIONAL BANK WAS IMPLEADED BELOW) *v.* MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN;

No. 315. MCCARTHY (WITH WHOM THE FEDERAL RESERVE BANK OF NEW YORK WAS IMPLEADED BELOW) *v.* MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN; and

No. 324. MCCLOSKEY, SHERIFF, *v.* MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. C. A. 2d Cir. Certiorari granted. *Joseph M. Cohen* for Zittman. *Henry I. Fillman* and *Otto C. Sommerich* for McCarthy. *Sidney Posner* for McCloskey, Sheriff. *Solicitor General Perlman, Assistant Attorney General Baynton* and *George B. Searls* for respondent. Reported below: 182 F. 2d 349.

Certiorari Denied.

No. 261. CANAVERAL PORT AUTHORITY *v.* 1329.25 ACRES OF LAND, MORE OR LESS, IN BREVARD COUNTY, FLORIDA, ET AL. Supreme Court of Florida. Certiorari

denied. The motion of respondents to tax costs is also denied. *William D. Jones, Jr.* for petitioner. *L. C. Crofton* for respondents. Reported below: 46 So. 2d 611.

No. 287. SUDAMETAL SOCIEDAD ANONIMA SUD AMERICANA DE METALES Y MINERALES *v.* UNITED STATES. Court of Claims. Certiorari denied. *Harry T. Zucker* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Joseph Kovner* for the United States. Reported below: 116 Ct. Cl. 789, 90 F. Supp. 551.

No. 312. HOLLOWAY ET AL. *v.* PURCELL, DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS, ET AL. Supreme Court of California. Certiorari denied. *Darold D. DeCoe* for petitioners. Reported below: 35 Cal. 2d 220, 217 P. 2d 665.

No. 322. TRANSAMERICA CORPORATION ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM; and

No. 323. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM. C. A. 9th Cir. Certiorari denied. *Samuel B. Stewart, Jr.* and *Gerhard A. Gesell* for petitioners in No. 322. *Thurman Arnold, Abe Fortas, Paul A. Porter, Milton V. Freeman* and *Luther E. Birdzell* for petitioners in No. 323. *Solicitor General Perlman* and *Robert L. Stern* for respondent. Reported below: See 184 F. 2d 311, 319, 326.

No. 332. CLAWSON & BALS, INC. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Harold T. Halfpenny* and *E. S. D. Butterfield* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *A. F. Prescott* for the United States. Reported below: 182 F. 2d 402.

No. 353. LAND ET AL. *v.* DOLLAR ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Solicitor General Perlman* for petitioners. *Herman Phleger, Maurice E. Harrison, Gregory A. Harrison, Moses Lasky, Clinton M. Hester* and *Michael M. Kearney* for respondents. Reported below: 87 U. S. App. D. C. —, 184 F. 2d 245.

No. 13, Misc. CUCKOVICH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 181 F. 2d 187.

No. 52, Misc. STRINGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 210, Misc. CARNEY *v.* REDNOUR, SUPERINTENDENT. Circuit Court of Sangamon County, Illinois. Certiorari denied.

No. 211, Misc. MASON *v.* STATE OF WASHINGTON. Supreme Court of Washington. Certiorari denied.

Rehearing Denied.

No. 16, Misc. BERG *v.* UNITED STATES, *ante,* p. 805;

No. 31, Misc. MULKEY *v.* BREAKEY, CIRCUIT JUDGE, ET AL., *ante,* p. 837;

No. 42, Misc. LYLE *v.* EIDSON, WARDEN, *ante,* p. 837;

No. 105, Misc. SISKIND *v.* UNITED STATES, *ante,* p. 854;

No. 123, Misc. DI STEFANO ET AL. *v.* BEONDY, *ante,* p. 842; and

No. 156, Misc. LEVY *v.* SAWYER, SECRETARY OF COMMERCE, ET AL., *ante,* p. 855. The petitions for rehearing in these cases are denied.

No. 53. BEVIS *v.* ARMCO STEEL CORP., *ante*, p. 810;

No. 69. SHOTKIN *v.* COLORADO EX REL. ATTORNEY GENERAL OF COLORADO, *ante*, p. 832;

No. 118. JOHNSTON *v.* MCINTEE ET AL., *ante*, p. 817;

No. 124. SMILEY *v.* UNITED STATES, *ante*, p. 817;

No. 152. EL DORADO OIL WORKS *v.* MCCOLGAN, FRANCHISE TAX COMMISSIONER, *ante*, p. 801;

No. 155. SABIN ET AL. *v.* LEVORSEN, *ante*, p. 833;

No. 156. SABIN ET AL. *v.* MIDLAND SAVINGS & LOAN CO., *ante*, p. 833;

No. 164. ROBERTS *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO., *ante*, p. 832;

No. 180. BROTHERHOOD OF RAILROAD TRAINMEN *v.* TEMPLETON ET AL., *ante*, p. 823;

No. 197. PORHOWNIK ET AL. *v.* UNITED STATES, *ante*, p. 825;

No. 214. FRUEHAUF TRAILER CO. *v.* MYERS, *ante*, p. 827;

No. 222. SCHATTE ET AL. *v.* INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA ET AL., *ante*, p. 827;

No. 223. STUDIO CARPENTERS LOCAL UNION NO. 946 *v.* LOEW'S, INC. ET AL., *ante*, p. 828;

No. 224. MACKAY ET AL. *v.* LOEW'S, INC. ET AL., *ante*, p. 828;

No. 232. TURNER *v.* ALTON BANKING & TRUST CO., EXECUTOR, *ante*, p. 833;

No. 235. CHICAGO & SOUTHERN AIR LINES, INC. *v.* CIVIL AERONAUTICS BOARD ET AL., *ante*, p. 829. The petitions for rehearing in these cases are denied.

No. 191. WILLUMEIT *v.* UNITED STATES, *ante*, p. 834. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

NOVEMBER 25, 1950.

Certiorari Denied.

No. 253, Misc. MCGARTY *v.* MASSACHUSETTS. Supreme Judicial Court of Massachusetts. The motion for a stay of execution of sentence of death is denied. Certiorari denied. *William C. Crossley* for petitioner. Reported below: 326 Mass. 413, 95 N. E. 2d 158.

NOVEMBER 27, 1950.

Per Curiam Decision.

No. 402. KAISER COMPANY, INC. ET AL. *v.* BASKIN. Appeal from the District Court of Appeal, First Appellate District, of California. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Baskin* v. *Industrial Accident Commission,* 338 U. S. 854; *Bethlehem Steel Co.* v. *Moores,* 335 U. S. 874; *Davis* v. *Department of Labor,* 317 U. S. 249. *Allan P. Matthew* for appellants. *Franklin C. Stark* and *Samuel B. Horovitz* for appellee. Reported below: 97 Cal. App. 2d 257, 217 P. 2d 733.

Miscellaneous Orders.

No. 163. O'DONOVAN, U. S. MARSHAL, *v.* UNITED STATES EX REL. DE LUCIA. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit dismissed on motion of counsel for the petitioner. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Solicitor General Perlman* for petitioner. *Wm. Scott Stewart* and *George Callaghan* for respondent. Reported below: 178 F. 2d 876.

No. 216, Misc. SMITH *v.* FRISBIE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 336. DENNIS ET AL. *v.* UNITED STATES, *ante*, p. 863. C. A. 2d Cir. The motion of petitioners for a postponement of oral argument is denied. The motion of petitioners for a member of the English Bar to participate in oral argument *pro hac vice* is granted. The motion of petitioners to grant an aggregate of two hours for oral argument, divided among three attorneys, is granted. MR. JUSTICE CLARK took no part in the consideration or decision of these motions. An individual statement was filed by MR. JUSTICE FRANKFURTER. *Harry Sacher* and *Abraham J. Isserman* were on the motions for petitioners. *Solicitor General Perlman* for the United States. Reported below: 183 F. 2d 201.

Individual Statement of MR. JUSTICE FRANKFURTER.

The petition for certiorari in this case was granted on October 23. 340 U. S. 863. For obvious reasons, criminal cases should be heard with every expedition. In view of the nature and range of the issues here involved, the case was set for argument on December 4, 1950. On November 17, the petitioners moved the Court to postpone the argument until January 22, 1951, in order to make possible participation in the argument by an English barrister.

Adequate presentation by qualified counsel of issues relevant to a litigation is indispensable to the adjudicatory process of this Court. To that end, litigants have the unquestioned right to make their choice from the members of the bar of this Court, or even to be represented by nonmembers of this bar who are given special leave under appropriate circumstances to appear *pro hac vice*. If a party is unable to secure representation, this Court, on cause shown, appoints qualified counsel. Intrinsic professional competence alone matters. The name or fame of counsel plays no part whatever in the attention

paid to argument, and is wholly irrelevant to the outcome of a case.

If this were a case in which the Court were duly advised that the petitioners were without adequate legal representation and were unable to secure competent counsel, the Court would of course appoint counsel qualified to press upon the Court the arguments on behalf of the petitioners. There is not the remotest suggestion that the counsel who have thus far appeared in the Court of Appeals and here are not in every way fully equipped to present the cause of the petitioners. There is no suggestion that these lawyers will not in every way meet their duties to their clients as well as to the Court. Indeed it is clear that they are especially qualified for this professional task. These five lawyers argued these questions at length before the Court of Appeals and submitted full briefs to that court. They are the same five lawyers who successfully presented the motion for admission to bail to Circuit Justice Jackson, 184 F. 2d 280, and on whose petition and brief this Court granted a review of the decision of the Court of Appeals. They are the same five lawyers who on November 20 filed a brief on behalf of the petitioners constituting a volume of 280 pages, which, even on a cursory examination, is disclosed as an able piece of advocacy.

Solicitous regard for every interest of the petitioners is part of the due administration of justice. In these circumstances their interests will be fully safeguarded if the case proceeds to argument as originally set, on December 4. If, on that day, counsel for petitioners deem it desirable to associate with themselves any other counsel, whether a member of the bar of this Court or, *pro hac vice,* a member of the bar of England or Australia, they are of course free to do so. See Rule 2 of the Rules of this Court, as amended.

No. 10, Original. GEORGIA *v.* PENNSYLVANIA RAILROAD CO. ET AL. Upon consideration of the motions of the defendants to dismiss and the joinder therein by the complainant,

It is ordered that the amended bill of complaint be, and the same is hereby, dismissed.

Costs, including the fee of the Special Master and his expenses, not satisfied by moneys advanced by the parties during the course of the case, are to be taxed against the defendants.

Eugene Cook, Attorney General of Georgia, and *William L. McGovern,* Deputy Assistant Attorney General, for complainant. *John Dickinson, Hugh B. Cox, J. Aronson, E. H. Burgess, D. O. Mathews, James B. Osborne, W. T. Pierson, Harold A. Smith, E. Randolph Williams, D. Lynch Younger, Thomas M. Woodward, Sidney S. Alderman, William H. Swiggart, W. L. Grubbs, W. R. C. Cocke, Vernon W. Foster, Richard B. Gwathmey* and *R. V. Fletcher* for the Pennsylvania Railroad Co. et al.; and *Robert W. Purcell* and *Horace L. Walker* for the Chesapeake & Ohio Railway Co., defendants.

No. 217, Misc. JERONIS *v.* SUPREME COURT OF MICHIGAN. Motion for leave to file petition for writ of mandamus denied.

No. 225, Misc. SGRO *v.* BURKE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted.

No. 295. ROBERTSON, PRESIDENT, ARMY REVIEW BOARD, *v.* CHAMBERS. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Perlman* for petitioner. *H. Russell Bishop* for respondent. Reported below: 87 U. S. App. D. C. ——, 183 F. 2d 144.

No. 344. UNITED STATES *v.* MOORE ET UX. C. A. 5th Cir. Certiorari granted. *Solicitor General Perlman* and *Ed Dupree* for the United States. *Frank Cusack* for respondents. Reported below: 182 F. 2d 332.

No. 348. JORDAN, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, *v.* DE GEORGE. C. A. 7th Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. *Thomas F. Dolan* for respondent. Reported below: 183 F. 2d 768.

No. 363. 62 CASES OF JAM ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted. *Clarence L. Ireland* and *Benjamin F. Stapleton, Jr.* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *John T. Grigsby* for the United States. Reported below: 183 F. 2d 1014.

No. 189, Misc. SHEPHERD ET AL. *v.* FLORIDA. Supreme Court of Florida. Certiorari granted. *Franklin H. Williams, Thurgood Marshall* and *Robert L. Carter* for petitioners. *Richard W. Ervin,* Attorney General of Florida, *Howard S. Bailey* and *Reeves Bowen,* Assistant Attorneys General, for respondent. Reported below: 46 So. 2d 880.

Certiorari Denied.

No. 251. DUISBERG *v.* UNITED STATES. Court of Claims. Certiorari denied. *Eugene L. Garey* and *Abraham Hornstein* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney* for the United States. Reported below: 116 Ct. Cl. 861, 89 F. Supp. 1019.

No. 339. KAMEN *v.* GRAY, SHERIFF. Supreme Court of Kansas. Certiorari denied. *Mark H. Adams* for petitioner. *Harold R. Fatzer,* Attorney General of Kansas,

C. Harold Hughes, Assistant Attorney General, and *John F. Eberhardt* for respondent. Reported below: 169 Kan. 664, 220 P. 2d 160.

No. 343. KARRELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *John W. Preston* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: 181 F. 2d 981.

No. 341. SMITH ET AL. *v.* FLORENCE-MAYO NUWAY CO. ET AL. C. A. 4th Cir. Certiorari denied. *Clarence M. Fisher* and *W. Brown Morton* for petitioners. *J. Hanson Boyden* and *Bernard F. Garvey* for respondents. Reported below: 182 F. 2d 507.

No. 354. CALIFORNIA STATE BOARD OF EQUALIZATION *v.* GOGGIN, RECEIVER IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. *Fred N. Howser,* Attorney General of California, *Walter L. Bowers,* Assistant Attorney General, and *James E. Sabine* and *Edward Sumner,* Deputy Attorneys General, for petitioner. Reported below: 183 F. 2d 489.

No. 361. SIMMS ET AL. *v.* COUNTY OF LOS ANGELES ET AL. Supreme Court of California. Certiorari denied. *W. Sumner Holbrook, Jr.* and *Edmund Nelson* for petitioners. *Harold W. Kennedy* for respondents. Briefs of *amici curiae* supporting the petition were filed by *Solicitor General Perlman* for the United States, and *William L. Holloway* and *C. Coolidge Kreis* for the California Bankers Association. Reported below: 35 Cal. 2d 303, 217 P. 2d 936.

No. 362. SECURITY-FIRST NATIONAL BANK OF LOS ANGELES *v.* COUNTY OF LOS ANGELES ET AL. Supreme Court of California. Certiorari denied. *W. Sumner Holbrook,*

Jr. and *Edmund Nelson* for petitioner. *Harold W. Kennedy* for respondents. *William L. Holloway* and *C. Coolidge Kreis* filed a brief for the California Bankers Association, as *amicus curiae,* supporting the petition. Reported below: 35 Cal. 2d 319, 217 P. 2d 946.

No. 369. CARROLL ET UX. *v.* KELLY, ADMINISTRATRIX. Supreme Court of Washington. Certiorari denied. *Clarence C. Dill* for petitioners. *Harry T. Davenport* for respondent. Reported below: 36 Wash. 2d 482, 219 P. 2d 79.

No. 370. KNAUTH ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Arnold W. Knauth* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade* and *Joseph Kovner* for the United States. Reported below: 183 F. 2d 874.

No. 377. STANDARD OIL CO. *v.* CITY OF TALLAHASSEE. C. A. 5th Cir. Certiorari denied. *Lawrence A. Truett* and *Charles G. Middleton* for petitioner. *James Messer, Jr.* for respondent. Reported below: 183 F. 2d 410.

No. 38, Misc. RICHTER *v.* UNITED STATES; and

No. 39, Misc. CANNON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Philip R. Monahan* and *Robert G. Maysack* for the United States. Reported below: 181 F. 2d 354, 591.

No. 60, Misc. ALLEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 79, Misc. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 182 F. 2d 225.

No. 96, Misc. KIMBALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 183 F. 2d 327.

No. 208, Misc. STAUFFER *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Court of Appeals of Maryland. Certiorari denied.

No. 220, Misc. COUCHOIS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 224, Misc. HOLT *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 229, Misc. HARDING *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 230, Misc. WASHBURN *v.* UTECHT, WARDEN. Supreme Court of Minnesota. Certiorari denied.

No. 231, Misc. TIMMONS *v.* FAGAN. Supreme Court of South Carolina. Certiorari denied. Reported below: 217 S. C. 432, 60 S. E. 2d 863.

No. 232, Misc. IN RE WALKER. Supreme Court of Appeals of Virginia. Certiorari denied.

Rehearing Denied.

No. 19. GARA *v.* UNITED STATES, *ante*, p. 857. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 165. DEAUVILLE ASSOCIATES, INC. *v.* MURRELL ET AL., RECEIVERS, *ante*, p. 821. Motion for leave to file petition for rehearing denied.

No. 76. SWARZ *v.* GOOLSBY, *ante*, p. 813;

No. 114. HENDRICKS *v.* SMITH, AUDITOR OF BUTLER COUNTY, ET AL., *ante*, p. 801;

No. 159. UNIVERSAL OIL PRODUCTS CO. *v.* CAMPBELL ET AL., *ante*, p. 850;

No. 189. LANSDEN ET AL. *v.* HART, U. S. ATTORNEY, ET AL., *ante*, p. 824;

No. 209. EMICH MOTORS CORP. ET AL. *v.* GENERAL MOTORS CORP. ET AL., *ante*, p. 808;

No. 233. STEADMAN *v.* SOUTH CAROLINA, *ante*, p. 850;

No. 243. EVANS *v.* MANNING, *ante*, p. 851;

No. 263. HINTON *v.* MISSISSIPPI, *ante*, p. 802; and

No. 281. UNITED STATES *v.* ALCEA BAND OF TILLAMOOKS ET AL., *ante*, p. 873. Petitions for rehearing in these cases denied.

No. 45, Misc. CHICK *v.* MOORE, WARDEN, *ante*, p. 837;

No. 80, Misc. GIBBS *v.* BUSHONG, SUPERINTENDENT, *ante*, p. 804;

No. 152, Misc. DUNNE *v.* RAILROAD RETIREMENT BOARD, *ante*, p. 854;

No. 165, Misc. ROY ET AL. *v.* OFFICE OF THE HOUSING EXPEDITER, *ante*, p. 855;

No. 171, Misc. HARRIS *v.* NEW YORK, *ante*, p. 855; and

No. 187, Misc. SHOTKIN *v.* PERKINS ET AL., *ante*, p. 856. Petitions for rehearing in these cases denied.

DECEMBER 4, 1950.

Miscellaneous Orders.

No. 238, Misc. KEITH *v.* WYOMING ET AL. The motion for leave to file petition for writ of habeas corpus is denied.

No. 241, Misc. JONES *v.* HOOPER ET AL., U. S. DISTRICT JUDGES. The motion for leave to file petition for writ of mandamus is denied.

No. 246, Misc. SESI *v.* REID, SUPERINTENDENT, WASHINGTON ASYLUM AND JAIL. The motion for leave to file petition for writ of habeas corpus is denied. *James K. Hughes* and *T. Emmett McKenzie* for petitioner.

No. 247, Misc. CROSS *v.* BOYLES, CHIEF JUSTICE OF THE SUPREME COURT OF MICHIGAN. The motion for leave to file petition for writ of mandamus is denied.

No. 249, Misc. HACKWORTH *v.* HIATT, WARDEN; and
No. 251, Misc. STINCHCOMB *v.* CALIFORNIA ET AL. The motions for leave to file petitions for writs of habeas corpus are denied.

Certiorari Granted.

No. 364. UNITED STATES *v.* ALLIED OIL CORP. ET AL. C. A. 7th Cir. Certiorari granted. *Solicitor General Perlman* for the United States. *Thomas J. Downs, Julius L. Sherwin, Theodore R. Sherwin, Michael F. Mulcahy* and *Henry W. Dieringer* for respondents. Reported below: 183 F. 2d 453.

Certiorari Denied.

No. 356. GENERAL STEEL CASTINGS CORP. ET AL. *v.* MISSISSIPPI RIVER FUEL CORP. ET AL.;
No. 357. ALTON BOX BOARD CO. ET AL. *v.* MISSISSIPPI RIVER FUEL CORP. ET AL.; and
No. 360. ILLINOIS COMMERCE COMMISSION *v.* MISSISSIPPI RIVER FUEL CORP. ET AL. C. A. 5th Cir. Certiorari denied. *Fred E. Fuller, Leslie Henry, William R. Bascom* and *Milton H. Tucker* for petitioners in No. 356 and the General Steel Castings Corporation et al., respondents in No. 360. *George A. McNulty* for petitioners in No. 357. *Ivan A. Elliott,* Attorney General of Illinois, *William R.*

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Ming, Jr., Special Assistant Attorney General, and *Milton Mallin*, Assistant Attorney General, for petitioner in No. 360. *William A. Dougherty, James Lawrence White* and *Henry F. Lippitt, II*, for the Mississippi River Fuel Corporation, respondent. Reported below: 181 F. 2d 833.

No. 366. KLAPPROTT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *P. Bateman Ennis, Frederick M. P. Pearse* and *Morton Singer* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Robert G. Maysack* for the United States. Reported below: 183 F. 2d 474.

No. 378. HESSEY ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL. *v.* BALTIMORE TRANSIT CO. ET AL. Court of Appeals of Maryland. Certiorari denied. *Charles D. Harris* for petitioners. *Clarence W. Miles, Henry H. Waters* and *William B. Rafferty* for respondents. Reported below: —— Md. ——, 75 A. 2d 76.

No. 380. M. H. JACOBS CO., INC. ET AL. *v.* STAHLY, INC. C. A. 7th Cir. Certiorari denied. *Sidney Neuman* and *Arthur B. Seibold, Jr.* for petitioners. *Jules L. Brady* and *John Rex Allen* for respondent. Reported below: 183 F. 2d 914.

No. 386. ADMIRAL CORPORATION *v.* HAZELTINE RESEARCH, INC. C. A. 7th Cir. Certiorari denied. *Floyd H. Crews, Morris Relson* and *Francis H. Uriell* for petitioner. *Laurence B. Dodds, Miles D. Pillars, Philip F. LaFollette, Leonard A. Watson* and *M. Hudson Rathburn* for respondent. Reported below: 183 F. 2d 953.

No. 3, Misc. BARRETT *v.* HUNTER, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Perlman, Assistant Attorney General McInerney, Philip R. Monahan* and *Robert G. Maysack* for respondent. Reported below: 180 F. 2d 510.

No. 49, Misc. SPADAFORA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Robert G. Maysack* for the United States. Reported below: 181 F. 2d 957.

No. 93, Misc. GOMEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 119, Misc. ANDERSON *v.* LAINSON, WARDEN. Supreme Court of Iowa. Certiorari denied. Petitioner *pro se.* *Robert L. Larson,* Attorney General of Iowa, and *Don Hise,* First Assistant Attorney General, for respondent.

No. 157, Misc. WOOLLOMES *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied. Petitioner *pro se.* *Fred N. Howser,* Attorney General of California, and *Clarence A. Linn,* Deputy Attorney General, for respondent.

No. 223, Misc. IN RE BYRER. C. A. 4th Cir. Certiorari denied.

No. 243, Misc. CLIFTON *v.* BURFORD, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied.

No. 244, Misc. DUTTON *v.* ROBINSON, WARDEN. Circuit Court of Adams County, Illinois. Certiorari denied.

No. 252, Misc. TINNIN *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

Rehearing Denied.

No. 234. KELLY, TRADING AS KELLY DAIRIES, *v.* UNITED STATES, *ante,* p. 850. Rehearing denied.

No. 264. STOPPELLI *v.* UNITED STATES, *ante,* p. 864. The motion for leave to file petition for rehearing is denied.

No. 311. GOGGIN, RECEIVER, *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, *ante,* p. 877;

No. 337. PUETT ELECTRICAL STARTING GATE CORP. *v.* HARFORD AGRICULTURAL & BREEDERS' ASSOCIATION ET AL., *ante,* p. 878;

No. 47, Misc. BRENNAN *v.* NEW YORK, *ante,* p. 838; and

No. 188, Misc. GOLDSTEIN *v.* JOHNSON, SECRETARY OF DEFENSE, *ante,* p. 879. Petitions for rehearing in these cases denied.

DECEMBER 11, 1950.

Per Curiam Decisions.

No. 170. UNITED STATES *v.* PENNER INSTALLATION CORP. Certiorari, 340 U. S. 808, to the Court of Claims. Argued November 30, 1950. Decided December 11, 1950. *Per Curiam:* The judgment is affirmed by an equally divided Court. THE CHIEF JUSTICE took no part in the consideration or decision of this case. *Paul A. Sweeney* argued the cause for the United States. With him on the brief were *Solicitor General Perlman* and *Acting Assistant Attorney General Clapp. Albert Foreman* argued the cause for respondent. With him on the brief was *M. Carl Levine.* Reported below: 116 Ct. Cl. 550, 89 F. Supp. 545.

No. 195. HOWARD *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. *Per Curiam:* The petition for

writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the cause is remanded to the District Court with directions to vacate its judgment and to dismiss the proceeding upon the ground that the cause is moot. *Roy St. Lewis* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 182 F. 2d 908.

Decrees.

No. 12, Original. UNITED STATES *v.* LOUISIANA. A decree is entered as follows:

"This cause came on to be heard on the motion for judgment filed by the plaintiff and was argued by counsel.

"For the purpose of carrying into effect the conclusions of this Court as stated in its opinion announced June 5, 1950, 339 U. S. 699, it is ordered, adjudged, and decreed as follows:

"1. The United States 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 Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Louisiana, and outside of the inland waters, extending seaward twenty-seven marine miles and bounded on the east and west, respectively, by the eastern and western boundaries of the State of Louisiana. The State of Louisiana has no title thereto or property interest therein.

"2. The State of Louisiana, its privies, assigns, lessees, and other persons claiming under it, are hereby enjoined from carrying on any activities upon or in the submerged area described in paragraph 1 hereof for the purpose of taking or removing therefrom any petroleum, gas, or other valuable mineral products, and from taking or removing therefrom any petroleum, gas, or other valuable mineral products, except under authorization first obtained from the United States. On appropriate showing, the United

States may obtain the other injunctive relief prayed for in the complaint.

"3. The United States is entitled to a true, full, and accurate accounting from the State of Louisiana of all or any part of the sums of money derived by the State from the area described in paragraph 1 hereof subsequent to June 5, 1950, which are properly owing to the United States under the opinion entered in this case on June 5, 1950, this decree, and the applicable principles of law.

"4. 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."

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

Solicitor General Perlman for the United States. *Bolivar E. Kemp, Jr.*, Attorney General, *John L. Madden*, Assistant Attorney General, *L. H. Perez, Bailey Walsh, F. Trowbridge vom Baur* and *Cullen R. Liskow* for the State of Louisiana.

No. 13, Original. UNITED STATES *v.* TEXAS. A decree is entered as follows:

"This cause came on to be heard on the motion for judgment filed by the plaintiff and was argued by counsel.

"For the purpose of carrying into effect the conclusions of this Court as stated in its opinion announced June 5, 1950, 339 U. S. 707, 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 Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Texas, and outside of the inland waters, extending seaward to the outer edge of the continental shelf and bounded on the east and southwest, respectively, by the

eastern boundary of the State of Texas and the boundary between the United States and Mexico. The State of Texas has no title thereto or property interest therein.

"2. The State of Texas, its privies, assigns, lessees, and other persons claiming under it, are hereby enjoined from carrying on any activities upon or in the submerged area described in paragraph 1 hereof for the purpose of taking or removing therefrom any petroleum, gas, or other valuable mineral products, and from taking or removing therefrom any petroleum, gas, or other valuable mineral products, except under authorization first obtained from the United States. On appropriate showing, the United States may obtain the other injunctive relief prayed for in the complaint.

"3. The United States is entitled to a true, full, and accurate accounting from the State of Texas of all or any part of the sums of money derived by the State from the area described in paragraph 1 hereof subsequent to June 5, 1950, which are properly owing to the United States under the opinion entered in this case on June 5, 1950, this decree, and the applicable principles of law.

"4. 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."

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

Solicitor General Perlman for the United States. *Price Daniel,* Attorney General, and *J. Chrys Dougherty, Jesse P. Luton, Jr., K. Bert Watson, Dow Heard* and *B. Thomas McElroy,* Assistant Attorneys General, for the State of Texas.

Miscellaneous Orders.

No. 227, Misc. BOYCE *v.* CALIFORNIA. Application denied.

No. 234, Misc. MARVICH *v.* HEINZE, WARDEN. The motion for leave to file petition for writ of habeas corpus is denied.

No. 258, Misc. CAREY *v.* BURKE, WARDEN. The motion for leave to file petition for writ of certiorari is denied.

Certiorari Granted. (*See also No. 195, supra.*)

No. 85. LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, A. F. OF L., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari granted. *Charles H. Tuttle* and *Francis X. Ward* for petitioners. *Solicitor General Perlman, Robert N. Denham, David P. Findling, Mozart G. Ratner* and *Marcel Mallet-Prevost* for respondent. Reported below: 181 F. 2d 126.

No. 108. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 501, A. F. OF L., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari granted. *Sydney A. Syme, Louis Sherman* and *Philip R. Collins* for petitioners. *Solicitor General Perlman, Robert N. Denham, David P. Findling, Mozart G. Ratner* and *Marcel Mallet-Prevost* for respondent. Reported below: 181 F. 2d 34.

No. 313. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL RICE MILLING CO., INC. ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Perlman* and *David P. Findling* for petitioner. Reported below: 183 F. 2d 21.

No. 393. NATIONAL LABOR RELATIONS BOARD *v.* DENVER BUILDING & CONSTRUCTION TRADES COUNCIL ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Perlman* for petitioner. *Louis Sherman, Martin F. O'Don-*

oghue, Philip Hornbein, Jr., William E. Leahy and *Wm. J. Hughes, Jr.* for respondents. Reported below: 87 U. S. App. D. C. ——, 186 F. 2d 326.

No. 338. TENNEY ET AL. *v.* BRANDHOVE. C. A. 9th Cir. Certiorari granted. *Fred N. Howser,* Attorney General of California, *C. J. Scott,* Assistant Attorney General, and *Harold C. Faulkner* for petitioners. *George Olshausen* for respondent. Reported below: 183 F. 2d 121.

No. 347. UNITED STATES *v.* LEWIS. Court of Claims. Certiorari granted. *Solicitor General Perlman* for the United States. *Sigmund W. David* for respondent. Reported below: 117 Ct. Cl. 336, 91 F. Supp. 1017.

No. 438. UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA, C. I. O., ET AL. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD. Supreme Court of Wisconsin. Certiorari granted. *Arthur J. Goldberg* and *Thomas E. Harris* for petitioners. Reported below: 258 Wis. 1, 44 N. W. 2d 547.

Certiorari Denied. (*See also No. 258, Misc., supra.*)

No. 33. OSTRANDER, ADMINISTRATRIX, *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *David H. Moses* for petitioner. *Solicitor General Perlman* for the United States.

No. 334. EASTERN (EMIGRANT) CHEROKEE INDIANS EX REL. NASH ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Wilfred Hearn* for petitioners. *Solicitor General Perlman, Assistant Attorney General Vanech* and *Roger P. Marquis* for the United States. Reported below: 116 Ct. Cl. 665, 89 F. Supp. 1006.

No. 335. WESTERN (OLD SETTLER) CHEROKEE INDIANS EX REL. OWEN ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Wilfred Hearn* for petitioners. *Solicitor General Perlman, Assistant Attorney General Vanech* and *Roger P. Marquis* for the United States. Reported below: 116 Ct. Cl. 665, 89 F. Supp. 1006.

No. 351. PITTSBURGH TERMINAL REALIZATION CORP. *v.* HEINER, TRUSTEE. C. A. 3d Cir. Certiorari denied. *Leonard H. Levenson* for petitioner. *James I. Marsh* for respondent. *Solicitor General Perlman, Roger S. Foster, George Zolotar, David Ferber* and *Ellwood L. Englander* filed a brief for the Securities & Exchange Commission opposing the petition. Reported below: 183 F. 2d 520.

No. 367. MARTIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *C. Carter Lee* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *J. F. Bishop* for the United States. Reported below: 183 F. 2d 436.

No. 368. COMMISSIONER OF INTERNAL REVENUE *v.* TOBIN ET AL. C. A. 5th Cir. Certiorari denied. *Solicitor General Perlman* for petitioner. *Leroy G. Denman, Jr.* for respondents. Reported below: 183 F. 2d 919.

No. 375. STANBACK ET AL. *v.* ROBERTSON, COLLECTOR OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *H. Gardner Hudson* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Carlton Fox* and *John R. Benney* for respondent. Reported below: 183 F. 2d 889.

No. 379. FREUND *v.* GULF, MOBILE & OHIO RAILROAD CO. C. A. 8th Cir. Certiorari denied. *Chelsea O. Inman* for petitioner. *Wayne Ely* for respondent. Reported below: 183 F. 2d 1005.

No. 382. UNIVERSAL CARLOADING & DISTRIBUTING CO., INC. *v.* PEDRICK, ADMINISTRATRIX, ET AL. C. A. 2d Cir. Certiorari denied. *Homer S. Cummings, Max O'Rell Truitt, William D. Donnelly* and *Herbert J. Patrick* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Robert L. Stern, Ellis N. Slack* and *Fred E. Youngman* for Pedrick; and *Clarence M. Mulholland* and *Edward J. Hickey, Jr.* for the Brotherhood of Railway & Steamship Clerks, etc., et al., respondents. Reported below: 184 F. 2d 64.

No. 383. DEAUVILLE ASSOCIATES, INC. *v.* LOJOY CORPORATION ET AL. C. A. 5th Cir. Certiorari denied. *Harold Leventhal* for petitioner. *Albert B. Bernstein* for the Lojoy Corporation, respondent. Reported below: 181 F. 2d 5.

No. 385. CAPITAL COMPRESSED STEEL CO. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. ET AL. C. A. 10th Cir. Certiorari denied. *Herman Merson* and *Duke Duvall* for petitioner. Reported below: 183 F. 2d 691.

No. 390. ALLBAUGH ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *George M. Tunison* for petitioners. *Solicitor General Perlman, Assistant Attorney General Vanech, Roger P. Marquis* and *John C. Harrington* for the United States. Reported below: 184 F. 2d 109.

No. 391. BAILEY *v.* WEST VIRGINIA. Supreme Court of Appeals of West Virginia. Certiorari denied. *W. Hayes Pettry* for petitioner. *William C. Marland,* Attorney General of West Virginia, *Eston B. Stephenson,* Assistant Attorney General, and *Herbert W. Bryan* for respondent.

No. 396. SUTHERLAND PAPER CO. *v.* GRANT PAPER BOX CO. ET AL. C. A. 3d Cir. Certiorari denied. *Raymond F. Adams, Mahlon E. Lewis* and *Curt Von Boetticher, Jr.* for petitioner. *Wm. H. Parmelee* and *Carl E. Glock* for respondents. Reported below: 183 F. 2d 926.

No. 400. CRANE COMPANY *v.* CARSON, COMMISSIONER OF FINANCE AND TAXATION. Supreme Court of Tennessee. Certiorari denied. *Charles L. Claunch* for petitioner. *William F. Barry* for respondent. Reported below: 191 Tenn. 353, 234 S. W. 2d 644.

No. 404. WESTERN PACIFIC RAILROAD CO. *v.* PACIFIC PORTLAND CEMENT CO. C. A. 9th Cir. Certiorari denied. *Harriet P. Tyler* for petitioner. *Eugene M. Prince* and *Eugene D. Bennett* for respondent. *Daniel W. Knowlton* and *Charlie H. Johns* filed a brief for the Interstate Commerce Commission, as *amicus curiae*, supporting the petition. Reported below: 184 F. 2d 34.

No. 418. CONSOLIDATED GAS ELECTRIC LIGHT & POWER CO. *v.* PENNSYLVANIA WATER & POWER CO. ET AL.; and

No. 424. HESSEY ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, *v.* PENNSYLVANIA WATER & POWER CO. ET AL. C. A. 4th Cir. Certiorari denied. *Harry N. Baetjer, Alfred P. Ramsey* and *John Henry Lewin* for petitioner in No. 418. *Charles D. Harris* for petitioners in No. 424. *James Piper* and *Wilkie Bushby* for the Pennsylvania Water & Power Co.; and *Thomas M. Kerrigan* and *Charles E. Thomas* for the Pennsylvania Public Utility Commission, respondents. Reported below: 184 F. 2d 552.

No. 94, Misc. CROSBY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *John A. Johnson* and *Duke Duvall* for petitioner. *Solicitor General Perlman, Assistant*

Attorney General McInerney, Philip R. Monahan and *Robert G. Maysack* for the United States. Reported below: 183 F. 2d 373.

No. 219, Misc. ROY *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. Reported below: 217 La. 1074, 47 So. 2d 915.

No. 250, Misc. TURK *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 257, Misc. MORRIS *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 262, Misc. HOVERMALE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

Rehearing Denied.

No. 12, Original. UNITED STATES *v.* LOUISIANA, 339 U. S. 699. The motion for leave to file a second petition for rehearing is denied. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 13, Original. UNITED STATES *v.* TEXAS, 339 U. S. 707. Rehearing denied. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 5. COMPAGNA ET AL. *v.* HIATT, WARDEN, *ante*, p. 880. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 322. TRANSAMERICA CORPORATION ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM; and

No. 323. BANK OF AMERICA NATIONAL SAVINGS & TRUST ASSOCIATION ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *ante*, p. 883. Rehearing denied.

JANUARY 2, 1951.

Per Curiam Decisions.

No. 345. SECURITIES & EXCHANGE COMMISSION *v.* HARRISON ET AL. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgments of the Court of Appeals are vacated and the cause is remanded to the District Court with directions to vacate its orders and to dismiss the proceeding upon the ground that the cause is moot. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36; *Howard* v. *United States*, 340 U. S. 898. *Solicitor General Perlman* and *Louis Loss* for petitioner. *Thurman Arnold, Abe Fortas* and *Milton V. Freeman* for respondents. Reported below: 87 U. S. App. D. C. —, 184 F. 2d 691.

No. 406. ICENHOUR *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The Government having conceded that petitioner moved for an instructed verdict, the judgment of the Court of Appeals is vacated and the case is remanded to that court for further consideration. *Benjamin E. Pierce, Sr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: 174 F. 2d 574.

No. 426. CITY OF LOS ANGELES ET AL. *v.* WOODS, HOUSING EXPEDITER, ET AL. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the cause is remanded to the

District Court with directions to vacate its judgment and to dismiss the complaint upon the ground that the cause is moot. *Ray L. Cheseboro, Bourke Jones* and *Charles S. Rhyne* for petitioners. *Solicitor General Perlman* and *Ed Dupree* for Woods; and *Hardy K. Maclay, Alexander H. Schullman, David S. Smith, Wallace M. Cohen, Herbert S. Thatcher, Arthur J. Goldberg* and *M. S. Ryder* for Miller et al., respondents. *William H. Emerson, Alexander G. Brown, Walter J. Mattison* and *David M. Proctor* filed a brief for the National Institute of Municipal Law Officers, as *amicus curiae,* supporting the petition. Reported below: 87 U. S. App. D. C. —, 185 F. 2d 508.

No. 436. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College et al. *v.* Wilson. Appeal from the United States District Court for the Eastern District of Louisiana. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Sweatt* v. *Painter,* 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637. *Bolivar E. Kemp, Jr.,* Attorney General of Louisiana, *Carroll Buck,* First Assistant Attorney General, *C. V. Porter* and *L. W. Brooks* for appellants. *A. P. Tureaud* and *Thurgood Marshall* for appellee. Reported below: 92 F. Supp. 986.

Miscellaneous Orders.

No. 30. United States *v.* United States Gypsum Co. et al., 340 U. S. 76. The motion of appellant for an amendment of the opinion is denied. Mr. Justice Jackson and Mr. Justice Clark took no part in the consideration or decision of this motion. *Solicitor General Perlman* for the United States. *Bruce Bromley* for the United States Gypsum Co.

No. 132. SPECTOR MOTOR SERVICE, INC. *v.* MCLAUGHLIN, TAX COMMISSIONER, O'CONNOR, SUBSTITUTED DEFENDANT. This case is ordered restored to the docket for reargument.

No. 268. WERNER *v.* SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS. Appeal from the Supreme Court of California. Dismissed on motion of counsel for the appellant. *Morris Lavine* for appellant. Reported below: 35 Cal. 2d 121, 216 P. 2d 825.

No. 275, Misc. MUSTERS *v.* SUPREME COURT OF INDIANA. Marion County Criminal Court, Indianapolis, Indiana. Certiorari denied. The motion for leave to file petition for writ of mandamus is also denied.

No. 75, Misc. MCCANN *v.* KAUFMAN, U. S. DISTRICT JUDGE. The motion for leave to file petition for writ of mandamus and/or certiorari is denied.

No. 77, Misc. MCCANN *v.* KEECH, U. S. DISTRICT JUDGE. The motion for leave to file petition for writ of mandamus is denied.

No. 269, Misc. IN RE LAKE. The motion for leave to file petition for writ of habeas corpus is denied.

No. 270, Misc. SMITH *v.* DOWD, WARDEN. The motion for leave to file petition for writ of certiorari is denied.

No. 280, Misc. WILLIAMS *v.* OVERHOLSER. The motion for leave to file petition for writ of habeas corpus is denied.

Certiorari Granted. (*See also Nos. 345, 406 and 426, supra.*)

No. 301. MOSER *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Jack Wasserman* for petitioner. *So-*

licitor General Perlman, Assistant Attorney General McInerney and *Philip R. Monahan* for the United States. Reported below: 182 F. 2d 734.

Certiorari Denied. (See also Misc. Nos. 75 and 275, supra.)

No. 342. FIRST NATIONAL BANK OF MOBILE, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Geo. E. H. Goodner* and *Scott P. Crampton* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 183 F. 2d 172.

No. 359. MCHUGH ET AL. *v.* MASSACHUSETTS. Superior Court of Suffolk County, Massachusetts. Certiorari denied. *A. C. Webber* and *Henry Wise* for petitioners. *Francis E. Kelly,* Attorney General of Massachusetts, and *Timothy J. Murphy,* Assistant Attorney General, waived the right to file a brief for respondent.

No. 374. LARSEN, SPECIAL ADMINISTRATRIX, *v.* SWITZER, U. S. DISTRICT JUDGE. C. A. 8th Cir. Certiorari denied. *Irving H. Green* and *Chester D. Johnson* for petitioner. *Warren Newcome, Nye F. Morehouse* and *Lowell Hastings* for respondent. Reported below: 183 F. 2d 850.

No. 392. SCHNITZER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Solomon J. Bischoff* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, I. Henry Kutz* and *John R. Benney* for respondent. Reported below: 183 F. 2d 70.

No. 398. MURPHY ET AL., TRUSTEES, ET AL. *v.* SCHNEIDER. C. A. 5th Cir. Certiorari denied. *D. H. Culton*

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for petitioners. *Armwell L. Cooper, Ellison A. Neel* and *Wm. Q. Boyce* for respondent. Reported below: 183 F. 2d 777.

No. 401. WALDON *v.* SWOPE, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 184 F. 2d 185.

No. 413. ESTATE OF FARRELL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Neile F. Towner* and *Theodore Pearson* for petitioners. Reported below: 182 F. 2d 903.

No. 416. COMMISSIONER OF INTERNAL REVENUE *v.* SWIRIN. C. A. 7th Cir. Certiorari denied. *Solicitor General Perlman* for petitioner. *Ben W. Heineman* for respondent. Reported below: 183 F. 2d 656.

No. 417. A. B. T. MANUFACTURING CORP. *v.* NATIONAL REJECTORS, INC. C. A. 7th Cir. Certiorari denied. *Clarence E. Threedy* for petitioner. *Clarence J. Loftus* and *William E. Lucas* for respondent. Reported below: 184 F. 2d 612.

No. 403. RAFFINGTON *v.* CALIFORNIA. District Court of Appeal for the Second Appellate District of California. Certiorari denied. *Morris Lavine* for petitioner. *Fred N. Howser,* Attorney General of California, and *Dan Kaufmann* and *Frank W. Richards,* Deputy Attorneys General, for respondent. Reported below: 98 Cal. App. 2d 455, 220 P. 2d 967.

No. 412. BOYER ET AL. *v.* GARRETT ET AL. The petition for writ of certiorari to the United States Court of Appeals

for the Fourth Circuit is denied for the reason that application therefor was not made within the time provided by law. 28 U. S. C. § 2101 (c). *I. Duke Avnet* for petitioners. *Allen A. Davis* for respondents. Reported below: 183 F. 2d 582.

No. 65, Misc. GALLAGHER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Robert G. Maysack* for the United States. Reported below: 183 F. 2d 342.

No. 74, Misc. UNITED STATES EX REL. McCANN *v.* ADAMS, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 76, Misc. UNITED STATES EX REL. McCANN *v.* ADAMS, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 103, Misc. PENNSYLVANIA EX REL. BEARRINGER *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 221, Misc. NOLLEY *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. C. A. 8th Cir. Certiorari denied. *Irving H. Green* for petitioner. *Arthur C. Erdall, A. N. Whitlock* and *M. L. Bluhm* for respondent. Reported below: 183 F. 2d 566.

No. 228, Misc. FINKEL *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 233, Misc. BUTNER *v.* NEVADA. Supreme Court of Nevada. Certiorari denied. Petitioner *pro se*. *Alan Bible,* Attorney General of Nevada, *W. T. Mathews,* Special Assistant Attorney General, and *Geo. P. Annand* and *Robert L. McDonald,* Deputy Attorneys General, for respondent.

No. 235, Misc. TAGGS *v.* HERETIS. Supreme Court of South Carolina. Certiorari denied. *Renah F. Camalier* and *H. Stewart McDonald* for petitioner. Reported below: 217 S. C. 369, 60 S. E. 2d 689.

No. 236, Misc. HANNAN ET AL. *v.* ADMINISTRATOR, CONNECTICUT UNEMPLOYMENT COMPENSATION LAW. Supreme Court of Errors of Connecticut. Certiorari denied. *James F. Rosen* for petitioners. Reported below: 137 Conn. 240, 75 A. 2d 483.

No. 239, Misc. BECK *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Herbert E. Rosenberg* and *Edward Norwalk* for petitioner. *Frank A. Gulotta* and *Philip Huntington* for respondent. Reported below: See 301 N. Y. 302, 93 N. E. 2d 859.

No. 240, Misc. FERNANDEZ *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *William Richter* for petitioner. *Frank A. Gulotta* and *Philip Huntington* for respondent. Reported below: See 301 N. Y. 302, 93 N. E. 2d 859.

No. 245, Misc. HAMPTON ET AL. *v.* SMYTH, SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. *Martin A. Martin* and *Thurgood Marshall* for petitioners. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, for respondent.

No. 255, Misc. NOVAK *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 256, Misc. MONAGHAN *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 261, Misc. TOWNSEND *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. Reported below: See 167 Pa. Super. 71, 74 A. 2d 746.

No. 266, Misc. WILLIS ET AL. *v.* UTECHT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 185 F. 2d 210.

No. 267, Misc. MAINELLO *v.* MARTIN, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 268, Misc. IN RE CASDORF. Urbana Circuit Court, Urbana, Illinois. Certiorari denied.

No. 272, Misc. MURRAY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 274, Misc. CHAPMAN *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 276, Misc. HASHAGEN *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 277, Misc. ENTRICAN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 278, Misc. WITTENMEYER *v.* DUFFY, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 281, Misc. CONWAY *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied. Reported below: 37 Wash. 2d 303, 223 P. 2d 452.

No. 282, Misc. MINER *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

Rehearing Denied.

No. 142. GOSSMAN *v.* CALIFORNIA ET AL., *ante*, p. 801;

No. 269. ROSPIGLIOSI *v.* CLOGHER, *ante*, p. 853;

No. 361. SIMMS ET AL. *v.* COUNTY OF LOS ANGELES ET AL., *ante*, p. 891;

No. 362. SECURITY-FIRST NATIONAL BANK OF LOS ANGELES *v.* COUNTY OF LOS ANGELES ET AL., *ante*, p. 891;

No. 386. ADMIRAL CORPORATION *v.* HAZELTINE RESEARCH, INC., *ante*, p. 896;

No. 49, Misc. SPADAFORA *v.* UNITED STATES, *ante*, p. 897;

No. 217, Misc. JERONIS *v.* SUPREME COURT OF MICHIGAN, *ante*, p. 889; and

No. 231, Misc. TIMMONS *v.* FAGAN, *ante*, p. 893. The petitions for rehearing in these cases are severally denied.

JANUARY 8, 1951.

Miscellaneous Orders.

No. 69. SHOTKIN *v.* COLORADO EX REL. ATTORNEY GENERAL OF COLORADO, *ante*, p. 832. The motion of petitioner for a refund of Clerk's fees is denied.

No. 318. MOORE, ADMINISTRATRIX, *v.* CHESAPEAKE & OHIO RAILWAY CO. This case is ordered restored to the docket for reargument.

No. 37. LIBBY, MCNEILL & LIBBY *v.* UNITED STATES, 340 U. S. 71. The opinion of the Court is amended by striking from the 17th line of the slip opinion the words "There was evidence to support this finding." The petition for rehearing is denied.

[The opinion is reported as amended, *ante*, p. 71, the change being at p. 72.]

No. 292, Misc. BAILEY *v.* WARDEN, MARYLAND PENITENTIARY. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Denied.

No. 397. GAUNT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *William L. McGovern* and *Bert B. Rand* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Fred G. Folsom* and *John R. Benney* for the United States. Reported below: 184 F. 2d 284.

No. 408. CENTRAL STATES ELECTRIC CORP. *v.* AUSTRIAN ET AL., TRUSTEES, ET AL.;

No. 409. CHASE *v.* AUSTRIAN ET AL., TRUSTEES, ET AL.;

No. 410. BERNER *v.* AUSTRIAN ET AL., TRUSTEES, ET AL.; and

No. 411. KELLY COMMITTEE FOR HOLDERS OF 6% PREFERRED STOCK OF THE CENTRAL STATES ELECTRIC CORP. *v.* AUSTRIAN ET AL., TRUSTEES, ET AL. C. A. 4th Cir. Certiorari denied. *Thomas B. Gay* for petitioner in No. 408. *George E. Allen* for petitioner in No. 409. *T. Roland Berner, pro se,* petitioner in No. 410. *Thomas F. Boyle* for petitioner in No. 411. *Solicitor General Perlman, John F. Davis, Roger S. Foster* and *Manuel F. Cohen* for the Securities & Exchange Commission; and *Saul J. Lance, Walter H. Brown, Jr., Lewis C. Williams, Thomas C. Egan, George Rosier, Victor Brudney* and *Francis E. Walter* for Austrian et al., respondents. Reported below: 183 F. 2d 879.

No. 419. DUBAN, EXECUTRIX, ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 3d Cir. Certiorari denied. *A. D. Bruce, Edwin Hall, 2nd,* and *Harry J.*

Alker, Jr. for petitioners. *Allen S. Olmsted, 2nd,* and *Edwin C. Emhardt* for respondent. Reported below: 183 F. 2d 429.

No. 441. Riggs Development Co. et al. *v.* District of Columbia. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Jacob N. Halper* for petitioners. *Vernon E. West, Chester H. Gray* and *Harry L. Walker* for respondent. Reported below: 87 U. S. App. D. C. —, 184 F. 2d 698.

No. 405. Taylor *v.* Tennessee. Supreme Court of Tennessee. Certiorari denied. *L. E. Gwinn* for petitioner. *Roy H. Beeler,* Attorney General of Tennessee, *W. F. Barry, Jr.,* Solicitor General, and *J. Malcolm Schull,* Assistant Attorney General, for respondent. Reported below: 191 Tenn. 670, 235 S. W. 2d 818.

No. 263, Misc. La Coco *v.* Illinois. Supreme Court of Illinois. Certiorari denied. *Charles A. Bellows* for petitioner. Reported below: 406 Ill. 303, 94 N. E. 2d 178.

No. 287, Misc. Goodman *v.* Swenson, Warden. Court of Appeals of Maryland. Certiorari denied.

No. 290, Misc. Oddo *v.* Foster, Warden. C. A. 2d Cir. Certiorari denied.

Rehearing Denied. (*See also No. 37, supra.*)

No. 32. Great Atlantic & Pacific Tea Co. *v.* Supermarket Equipment Corp., *ante,* p. 147. Rehearing denied.

No. 391. Bailey *v.* West Virginia, *ante,* p. 905. Rehearing denied.

No. 81, Misc., October Term, 1949. Eagle *v.* Cherney et al., 338 U. S. 837. Fourth petition for rehearing denied.

JANUARY 15, 1951.

Miscellaneous Orders.

No. 226, Misc. KOENIG *v.* CRANOR, SUPERINTENDENT. Application denied.

No. 284, Misc. HURST *v.* HUNTER, WARDEN; and

No. 295, Misc. SPENCER *v.* PENNSYLVANIA ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 297, Misc. SGRO *v.* WISCONSIN ET AL. Motion for leave to file petition for writ of habeas corpus and for other relief denied.

No. 307, Misc. IN RE WYBACK. Application for injunction denied.

Certiorari Granted.

No. 421. HAMMERSTEIN *v.* SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, ET AL. District Court of Appeal of California, Second Appellate District, and the Supreme Court of California. Certiorari granted. *Robert E. Kopp* for petitioner. *Harold W. Kennedy* and *Saul Ross* for respondents.

No. 435. BOWMAN DAIRY CO. ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Leo F. Tierney, Herman A. Fischer, Kenneth F. Burgess, Walter J. Cummings, Jr., Isidore Fried* and *Louis E. Hart* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison* and *J. Roger Wollenberg* for respondents. Reported below: 185 F. 2d 159.

Certiorari Denied.

No. 136. UNITED STATES *v.* KASINOWITZ ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Solicitor General Perlman* for the United States. *John T. McTernan* for respondents. Reported below: 181 F. 2d 632.

No. 286. POTTER, U. S. ATTORNEY, ET AL. *v.* ESTES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Solicitor General Perlman* for petitioners. Reported below: 183 F. 2d 865.

No. 389. WILCOX *v.* WOODS, HOUSING EXPEDITER. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman* for respondent. Reported below: 181 F. 2d 1012.

No. 394. MILLER *v.* KOSLING. Supreme Court of Ohio. Certiorari denied. Reported below: 154 Ohio St. 207, 94 N. E. 2d 1.

No. 422. CAVU CLOTHES, INC. ET AL. *v.* SQUIRES, INC. C. A. 6th Cir. Certiorari denied. *Robert S. Marx, Frank Zugelter* and *Gerald B. Tjoflat* for petitioners. *Warren C. Horton* for respondent. Reported below: 184 F. 2d 30.

No. 428. SUNBEAM CORPORATION *v.* SUNBEAM LIGHTING CO. ET AL. C. A. 9th Cir. Certiorari denied. *William T. Woodson* and *Beverly W. Pattishall* for petitioner. *Collins Mason* for respondents. Reported below: 183 F. 2d 969.

No. 467. STEBCO INCORPORATED *v.* GILLMOUTHE, SHERIFF. Supreme Court of Oregon. Certiorari denied. *Charles A. Hart, Hugh L. Biggs* and *Cleveland C. Cory*

for petitioner. *Wilber Henderson* and *Dean H. Dickinson* for respondent. Reported below: 189 Ore. 427, 221 P. 2d 914.

No. 131, Misc. LEVINE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 182 F. 2d 556.

No. 150, Misc. NEWAGON *v.* SWOPE, WARDEN. C. A. 9th Cir. Certiorari denied. *A. J. Zirpoli* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, John R. Benney* and *Felicia H. Dubrovsky* for respondent. Reported below: 183 F. 2d 340.

No. 167, Misc. NOELL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 183 F. 2d 334.

No. 206, Misc. SANDERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 183 F. 2d 748.

No. 222, Misc. NEWMAN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: 87 U. S. App. D. C. —, 184 F. 2d 275.

No. 242, Misc. MCINTOSH *v.* STEELE, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 184 F. 2d 721.

No. 248, Misc. FOSTER *v.* SHERIFF OF LOS ANGELES COUNTY. Supreme Court of California. Certiorari denied. *Loren Miller, Fred Okrand* and *A. L. Wirin* for petitioner.

No. 254, Misc. MCGEE *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. *Aubrey Grossman* for petitioner.

No. 271, Misc. KUMITIS *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 285, Misc. CRONHOLM *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se*. *William I. Siegel* for respondent.

No. 286, Misc. MCINTOSH *v.* UNITED STATES. United States District Court for the Southern District of Ohio. Certiorari denied.

No. 293, Misc. PHILLIPS *v.* NEW YORK COURT OF APPEALS ET AL. Court of Appeals of New York. Certiorari denied.

No. 296, Misc. KOENIG *v.* CRANOR, SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 299, Misc. BANKS *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 300, Misc. CALVIN *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 301, Misc. STODULSKI *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 306, Misc. THOMAS *v.* SIMPSON, JUDGE. Supreme Court of Indiana. Certiorari denied. Reported below: 228 Ind. 572, 94 N. E. 2d 485.

No. 321, Misc. JACKSON *v.* CALIFORNIA ET AL. Supreme Court of California. Motion for stay of execution denied. Certiorari denied.

Rehearing Denied.

No. 486, October Term, 1949. ROBERTSON ROCK BIT CO., INC. ET AL. *v.* HUGHES TOOL CO., 338 U. S. 948; and No. 109. WHELCHEL *v.* MCDONALD, WARDEN, *ante*, p. 122. Petitions for rehearing in these cases denied.

No. 170. UNITED STATES *v.* PENNER INSTALLATION CORP., *ante*, p. 898. Rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

FEBRUARY 26, 1951.

Per Curiam Decisions.

No. 423. PALERMO *v.* GANEY, U. S. DISTRICT JUDGE. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The order of the Court of Appeals is vacated and the case is remanded to that court with directions to dismiss the proceeding upon the ground that the cause is moot. *Frederick Bernays Wiener* and *Jacob Kossman* for petitioner. *Solicitor General Perlman* for respondent.

No. 488. KEMP *v.* SOUTH DAKOTA. Appeal from the Supreme Court of South Dakota. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. MR. JUSTICE DOUGLAS dissents. *Holton Davenport* for appellant. *Sigurd Anderson,* Attorney General of South Dakota, *E. D. Barron,* Assistant Attorney General, and *Ray F. Drewry* for appellee. Reported below: 73 S. D. —, 44 N. W. 2d 214.

No. 494. ANTHONY ET AL. *v.* VEATCH ET AL. Appeal from the Supreme Court of Oregon. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed

for the want of a substantial federal question. *George W. Mead* for appellants. *George Neuner,* Attorney General of Oregon, and *Cecil H. Quesseth* and *Carlisle B. Roberts,* Assistant Attorneys General, for Veatch et al.; and *Ben Anderson* for the Columbia River Fishermen's Protective Union et al., appellees. Reported below: 189 Ore. 462, 221 P. 2d 575.

Nos. 498, 499 and 500. BARTLETT, TRUSTEE, *v.* GROSS INCOME TAX DIVISION ET AL. Appeals from the Supreme Court of Indiana. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for the want of a substantial federal question. *Raymond Harkrider* and *Owen W. Crumpacker* for appellant. *J. Emmett McManamon,* Attorney General of Indiana, and *John J. McShane, Lloyd C. Hutchinson* and *Joseph E. Nowak,* Deputy Attorneys General, for the Gross Income Tax Division, appellee. Reported below: 228 Ind. 505, 93 N. E. 2d 174.

No. 503. GLANTZ *v.* MICHIGAN CORPORATION & SECURITIES COMMISSION ET AL. Appeal from the Supreme Court of Michigan. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. Appellant *pro se. Frank G. Millard,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for appellees.

No. 504. ROSECRANS ET AL. *v.* WEST EDMOND SALT WATER DISPOSAL ASSOCIATION ET AL. Appeal from the Supreme Court of Oklahoma. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted. *John H. Cantrell*

and *B. H. Carey* for appellants. *David A. Richardson, T. Murray Robinson, Walace Hawkins, Robert W. Richards, Russell G. Lowe, Ralph W. Garrett, Don Emery, Rayburn L. Foster, R. M. Williams, Harry D. Turner* and *W. H. Brown* for appellees. Reported below: 204 Okla. 9, 226 P. 2d 965.

No. 508. CONSUMER MAIL ORDER ASSOCIATION OF AMERICA ET AL. *v.* MCGRATH, ATTORNEY GENERAL. Appeal from the United States District Court for the District of Columbia. *Per Curiam:* The judgment is affirmed. *Thurman Arnold* and *Milton V. Freeman* for appellants. Reported below: 94 F. Supp. 705.

No. 517. BROOKS TRANSPORTATION CO., INC. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Eastern District of Virginia. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *John T. Grigsby, Walter L. Baumgartner* and *Albert B. Rosenbaum* for appellants. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission; and *Charles Pickett* for Schenley Industries, Inc., appellees. Reported below: 93 F. Supp. 517.

No. 534. CROSS *v.* STATE BAR OF CALIFORNIA. Appeal from the Supreme Court of California. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question.

Miscellaneous Orders.

No. 310. CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU *v.* DOWNEY, INSURANCE COMMISSIONER. Maloney, present Insurance Commissioner, substituted as the party appellee.

No. 45. ALABAMA GREAT SOUTHERN RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.;

No. 46. GALVESTON CHAMBER OF COMMERCE ET AL. *v.* UNITED STATES ET AL.;

No. 47. RAILROAD COMMISSION OF TEXAS *v.* UNITED STATES ET AL.; and

No. 48. SAVANNAH SUGAR REFINING CORP. *v.* UNITED STATES ET AL. The opinion of this Court, 340 U. S. 216, is amended as follows:

1. On page 228, substitute for the last sentence: "The only points urged by these appellants not answered in No. 45 are that the order gives a preference to the port of New Orleans over certain ports of Georgia and Texas, in violation of the Interstate Commerce Act and of Art. I, § 9, cl. 6, of the Federal Constitution."

2. On page 229, substitute for lines 1, 2, and 3: "With respect to the constitutional argument, this Court in *Louisiana Public Service Commission* v. *Texas & N. O. R. Co.*, 284 U. S. 125, 131, stated:"

3. On page 229, substitute for the first sentence of the last paragraph: "And we are clear that whatever preference there is to New Orleans is the result of geography and not of any action of the Commission."

The petition of the Texas Interests, appellants in Nos. 46 and 47, for rehearing is denied.

[The opinion is reported as amended, *ante*, p. 216.]

No. 191, Misc. ALLEN *v.* ASHE, WARDEN, *ante*, p. 860. The motion to reinstate the petition for writ of certiorari is denied.

No. 345, Misc. SILVERS *v.* SQUIER, WARDEN. The motion for leave to file petition for writ of habeas corpus is denied.

No. 310, Misc. HOSHOR *v.* HEINZE, WARDEN, ET AL.;
No. 311, Misc. CONNOR *v.* MAYO, PRISON CUSTODIAN;
No. 318, Misc. IN RE RUTHVEN;
No. 319, Misc. SEALS *v.* HIATT, WARDEN;
No. 335, Misc. IN RE DEBINSKI;
No. 340, Misc. IN RE JAMES;
No. 350, Misc. ST. JEAN *v.* MAYO, STATE PRISON CUSTODIAN; and
No. 356, Misc. CONN *v.* RAGEN, WARDEN. The motions for leave to file petitions for writs of habeas corpus in these cases are severally denied.

No. 312, Misc. ATWOOD ET AL. *v.* HANNAY, U. S. DISTRICT JUDGE, ET AL. The motion for leave to file petition for writ of mandamus, prohibition, or certiorari is denied. *Lloyd A. Faxon* for petitioners.

No. 313, Misc. SHIPLEY *v.* MISSOURI. Application denied.

No. 322, Misc. PATTEN *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA ET AL. The motion for leave to file petition for writ of certiorari is denied.

No. 337, Misc. SHEPPARD *v.* MAYO, CUSTODIAN OF THE FLORIDA STATE PRISON. The motion for leave to file petition for writ of habeas corpus or certiorari is denied.

Certiorari Granted. (*See also No. 423, supra.*)

No. 425. NATIONAL LABOR RELATIONS BOARD *v.* HIGHLAND PARK MANUFACTURING CO. C. A. 4th Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. *Whiteford S. Blakeney* for respondent. Reported below: 184 F. 2d 98.

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No. 442. SCHWEGMANN BROTHERS ET AL. *v.* CALVERT DISTILLERS CORP.; and

No. 443. SCHWEGMANN BROTHERS ET AL. *v.* SEAGRAM-DISTILLERS CORP. C. A. 5th Cir. Certiorari granted. *John Minor Wisdom* for petitioners. *J. Blanc Monroe, Monte M. Lemann, Walter J. Suthon, Jr.* and *Robert G. Polack* for respondents. *Solicitor General Perlman* filed a memorandum for the United States, as *amicus curiae,* supporting the petition. Reported below: 184 F. 2d 11.

No. 473. BRANNAN, SECRETARY OF AGRICULTURE, *v.* ELDER ET AL.; and

No. 474. ELDER ET AL. *v.* BRANNAN, SECRETARY OF AGRICULTURE. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Perlman* for the Secretary of Agriculture. With him on a memorandum in No. 474 were *Acting Assistant Attorney General Clapp* and *Paul A. Sweeney. C. L. Dawson* and *Greene Chandler Furman* for petitioners in No. 474 and respondents in No. 473. Reported below: 87 U. S. App. D. C. —, 184 F. 2d 219.

No. 446. CREST SPECIALTY, A LIMITED PARTNERSHIP, *v.* TRAGER, DOING BUSINESS AS TOPIC TOYS, ET AL. C. A. 7th Cir. Certiorari granted. *Clarence E. Threedy* for petitioners. *Sidney Neuman* for respondents. Reported below: 184 F. 2d 577.

No. 461. MOSSER, SUCCESSOR TRUSTEE, ET AL. *v.* DARROW, FORMER TRUSTEE, ET AL. C. A. 7th Cir. Certiorari granted. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *Carl W. Mulfinger, J. Edgar Kelly, Jacob B. Courshon* and *Stanley A. Kaplan* for petitioners. *Urban A. Lavery* and *Irving Herriott* for Darrow, respondent. *Solicitor General Perl-*

man, John F. Davis and *Roger S. Foster* filed a memorandum for the Securities & Exchange Commission supporting the petition. Reported below: 184 F. 2d 1.

No. 476. WOODWARD *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari granted, limited to the question whether a brother by adoption is within the permissible class of beneficiaries under § 602 (g) of the National Service Life Insurance Act of 1940. *Claude T. Wood* for petitioner. *Solicitor General Perlman* filed a memorandum stating that the United States was not opposed to the grant of the petition in this case, in view of a conflict between the Third and Eighth Circuits. *Jean Paul Bradshaw* for Haizlip, respondent. Reported below: 185 F. 2d 134.

Certiorari Denied. (*See also Misc. Nos. 322, 337 and 345, supra.*)

No. 415. KNIGHT *v.* COMMONWEALTH & SOUTHERN CORP. ET AL. C. A. 3d Cir. Certiorari denied. *T. Roland Berner, M. Victor Leventritt* and *Aaron Lewittes* for petitioner. *Solicitor General Perlman* and *Roger S. Foster* filed a memorandum for the Securities & Exchange Commission; and *George Roberts* filed a memorandum for the Commonwealth & Southern Corporation, respondents. Reported below: 184 F. 2d 81.

No. 430. CARROLL ET AL. *v.* ALLEN B. DUMONT LABORATORIES, INC. ET AL. C. A. 3d Cir. Certiorari denied. *Charles J. Margiotti,* then Attorney General of Pennsylvania, *Harry F. Stambaugh* and *Abraham J. Levy,* Special Deputy Attorney General, for petitioners. *Wm. A. Schnader, Earl G. Harrison, W. Theodore Pierson, Henry B. Weaver, Jr., Thad H. Brown* and *George O. Sutton* for respondents. Reported below: 184 F. 2d 153.

No. 434. SUPERIOR ENGRAVING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *George B. Christensen, Otto A. Jaburek* and *Harold A. Smith* for petitioner. *Solicitor General Perlman, John F. Davis, David P. Findling, Mozart G. Ratner* and *Dominick L. Manoli* for respondent. Reported below: 183 F. 2d 783.

No. 437. E. T. RENFRO DRUG CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *R. B. Cannon* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Irving I. Axelrad* for respondent. Reported below: 183 F. 2d 846.

No. 439. AMERICAN POTATO DRYERS, INC. ET AL. *v.* PETERS. C. A. 4th Cir. Certiorari denied. *Jane Elizabeth Newton Dew* for petitioners. *Charles F. Meroni* for respondent. Reported below: 184 F. 2d 165.

No. 440. SAMUEL DUNKEL & CO., INC. ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Isidor Enselman* and *Richard F. Wolfson* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *J. F. Bishop* for the United States. Reported below: 184 F. 2d 894.

No. 444. BELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *G. C. A. Anderson* and *George L. Hart* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for the United States. Reported below: 185 F. 2d 302.

No. 445. ENGEL ET AL. *v.* RECORDER'S COURT OF THE CITY OF DETROIT ET AL. Supreme Court of Michigan. Certiorari denied. *Craig Thompson* for petitioners. *James H. Lee* for Skillman, Judge, respondent.

No. 447. SMITHER *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Vanech* and *Roger P. Marquis* for the United States. Reported below: 117 Ct. Cl. 574, 91 F. Supp. 582.

No. 448. ETTEN *v.* KAUFFMAN ET AL. C. A. 3d Cir. Certiorari denied. *Charles F. Meroni* and *Isaac J. Silin* for petitioner. *Ralph Hammar* and *Frank Zugelter* for respondents. Reported below: 184 F. 2d 737.

No. 449. PETRONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *J. Vincent Keogh* and *Anthony A. Calandra* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Felicia H. Dubrovsky* for the United States. Reported below: 185 F. 2d 334.

No. 450. GARRETT ET AL. *v.* FAUST ET AL. C. A. 3d Cir. Certiorari denied. *Arthur H. Bartelt* for petitioners. Reported below: 183 F. 2d 625.

No. 454. UNDERWOOD *v.* CAPITAL TRANSIT CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Foster Wood* for petitioner. Reported below: 87 U. S. App. D. C. ——, 183 F. 2d 822.

No. 456. MERRITT-CHAPMAN & SCOTT CORP. *v.* NEW YORK TRUST CO., TRUSTEE, ET AL. C. A. 2d Cir. Certiorari denied. *John J. Manning* for petitioner. *Joseph M. Hartfield* and *Jesse E. Waid* for respondents. Reported below: 184 F. 2d 954.

No. 457. BROOKLYN WATERFRONT TERMINAL CORP. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Chester T. Lane* for petitioner. *Solicitor General Perl-*

man, Assistant Attorney General Vanech, Roger P. Marquis and *Harold S. Harrison* for the United States. Reported below: 117 Ct. Cl. 62, 90 F. Supp. 943.

No. 459. LAZAROV, DOING BUSINESS AS TENNESSEE METAL PRODUCTS CO. ET AL., *v.* ARNOLD SCHWINN & CO. C. A. 6th Cir. Certiorari denied. *Lovick P. Miles* for petitioner. *Hamilton E. Little* for respondent. Reported below: 183 F. 2d 673.

No. 460. MCKILLOP *v.* IOWA. Supreme Court of Iowa. Certiorari denied. *Clarence I. Spencer* for petitioner. Reported below: 241 Iowa 988, 42 N. W. 2d 381.

No. 468. MOLETON *v.* UNION PACIFIC RAILROAD CO. ET AL. Supreme Court of Utah. Certiorari denied. *Calvin W. Rawlings* and *Parnell Black* for petitioner. *T. W. Bockes* for respondents. Reported below: —— Utah ——, 219 P. 2d 1080.

No. 470. ADRIAANSE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Clapp* and *Paul A. Sweeney* for the United States. Reported below: 184 F. 2d 968.

No. 471. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Clifton Hildebrand* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Robert G. Maysack* for the United States. Reported below: 185 F. 2d 938.

No. 478. MINE HILL & SCHUYLKILL HAVEN RAILROAD CO. *v.* SMITH, COLLECTOR OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Morse Garwood* and *Harold*

Evans for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Harry Baum* for respondent. Reported below: 184 F. 2d 422.

No. 480. HANNA ET AL., DOING BUSINESS AS HERCULES COMPANY, *v.* THE METEOR ET AL. C. A. 2d Cir. Certiorari denied. *William R. Furlong* for petitioners. *Bernard Tompkins* for respondents. Reported below: 184 F. 2d 439.

No. 482. TUCKER ET AL. *v.* CUTLER. C. A. 6th Cir. Certiorari denied. Petitioners *pro se*. *Henry J. Cook, Carl H. Ebert* and *Walter J. Burke* for respondent. Reported below: 185 F. 2d 853.

No. 485. QUINCY *v.* TEXAS COMPANY ET AL. C. A. 10th Cir. Certiorari denied. *H. A. Ledbetter* for petitioner. *B. W. Griffith* and *A. Camp Bonds* for respondents. Reported below: 185 F. 2d 139.

No. 487. EDMONDSTON *v.* MOORE (MOHR) ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Acting Assistant Attorney General Clapp, Paul A. Sweeney* and *Herman Marcuse* for Moore (Mohr) et al., respondents.

No. 489. BOARD OF ZONING APPEALS OF HEMPSTEAD ET AL. *v.* CLARK ET AL. Court of Appeals of New York. Certiorari denied. *Louis A. D'Agosto* for petitioners. *Theodore L. Bailey* for respondents. Reported below: 301 N. Y. 86, 92 N. E. 2d 903.

No. 491. SMOOT SAND & GRAVEL CORP. *v.* DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David R. Shelton* and *Aaron L. Ford* for petitioner. *Vernon E.*

West, Chester H. Gray and *George C. Updegraff* for respondent. Reported below: 87 U. S. App. D. C. —, 184 F. 2d 987.

No. 492. FOUNTAIN ET AL. *v.* GEORGIA POWER CO. Supreme Court of Georgia. Certiorari denied. *Victor Davidson* for petitioners. *Wallace Miller* for respondent. Reported below: 207 Ga. 361, 61 S. E. 2d 454.

No. 497. INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Welly K. Hopkins, Harrison Combs* and *M. E. Boiarsky* for petitioners. *Solicitor General Perlman, David P. Findling, Mozart G. Ratner* and *William J. Avrutis* for respondent. Reported below: 87 U. S. App. D. C. —, 184 F. 2d 392.

No. 506. ZIMMERMAN ET AL. *v.* CHICAGO GREAT WESTERN RAILWAY CO. C. A. 7th Cir. Certiorari denied. *Ben W. Heineman* and *Alex Elson* for petitioners. *Harold A. Smith* and *Bryce L. Hamilton* for respondent. Reported below: 185 F. 2d 399.

No. 525. ALLEN ET AL. *v.* BROTHERHOOD OF RAILROAD TRAINMEN. Supreme Court of Texas. Certiorari denied. *Edward C. Fritz* for petitioners. *J. Hart Willis* for respondent. Reported below: 148 Tex. 629.

No. 407. FARMERS' UNION EDUCATIONAL & CO-OPERATIVE ASSOCIATION ET AL. *v.* NORTHWESTERN BELL TELEPHONE CO. Supreme Court of South Dakota. Certiorari denied. *Carl W. Berueffy* for petitioners. *Douglas F. Smith* and *T. J. Peycke* for respondent. Reported below: 73 S. D. —, 43 N. W. 2d 553.

No. 427. HEALY, ADMINISTRATRIX, *v.* PENNSYLVANIA RAILROAD CO. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *John H. Hoffman* for petitioner. *Philip Price, Hugh B. Cox* and *James G. Johnson, Jr.* for respondent. Reported below: 184 F. 2d 209.

No. 432. WALTER G. HOUGLAND, INC. ET AL. *v.* MUSCOVALLEY. C. A. 6th Cir. Certiorari denied. *James G. Wheeler* for petitioners. *Edward B. Hayes* for respondent. Reported below: 184 F. 2d 530.

No. 455. DOWLING *v.* ISTHMIAN STEAMSHIP CORP. C. A. 3d Cir. Certiorari denied. *Paul M. Goldstein* for petitioner. *Thomas E. Byrne, Jr.* for respondent. Reported below: 184 F. 2d 758.

No. 462. HERWIG *v.* SCHOENEMAN, COMMISSIONER OF INTERNAL REVENUE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *L. J. H. Herwig, pro se. Solicitor General Perlman, Acting Assistant Attorney General Clapp, Samuel D. Slade* and *Herman Marcuse* for respondents.

No. 463. CHAFFIN *v.* CHESAPEAKE & OHIO RAILWAY CO. C. A. 4th Cir. Certiorari denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Horace S. Meldahl* for petitioner. *C. W. Strickling* for respondent. Reported below: 184 F. 2d 948.

No. 465. COOKINGHAM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Clapp* and *Samuel D. Slade* for the United States. Reported below: 184 F. 2d 213.

No. 469. MELISH ET AL. *v.* THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF THE CHURCH OF THE HOLY TRINITY IN THE CITY OF BROOKLYN ET AL. Court of Appeals of New York. Certiorari denied. *Raphael H. Weissman* for petitioners. *Theodore Kiendl* and *William R. Meagher* for the Church of the Holy Trinity et al.; and *Jackson A. Dykman* for De Wolfe, respondents. Reported below: 301 N. Y. 679, 95 N. E. 2d 43.

No. 477. SMART *v.* WOODS, HOUSING EXPEDITER, ET AL. C. A. 6th Cir. Certiorari denied. *Stuart E. Fletcher* and *John W. Cowell* for petitioner. *Solicitor General Perlman, John R. Benney, Ed Dupree, Leon J. Libeu, Nathan Siegel* and *Walter A. Rochow* for respondents. Reported below: 184 F. 2d 714.

No. 501. HARTFORD ACCIDENT & INDEMNITY CO. *v.* CASALINO. Court of Appeals of New York. Certiorari denied. *William J. Junkerman* for petitioner. *Bernard A. Grossman* for respondent.

No. 218, Misc. MARKHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 184 F. 2d 512.

No. 237, Misc. TASHKOFF *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied. Petitioner *pro se*. *Harold R. Fatzer,* Attorney General of Kansas, and *Willis H. McQueary,* Assistant Attorney General, for respondent.

No. 259, Misc. PETILLO *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: 228 Ind. 97, 89 N. E. 2d 623.

No. 283, Misc. SMITH *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro*

se. Edmund G. Brown, Attorney General of California, and *Clarence A. Linn,* Deputy Attorney General, for respondents.

No. 289, Misc. JACKSON *v.* HUMPHREY, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 185 F. 2d 407.

No. 309, Misc. RUDNIK *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 316, Misc. NEAL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry Lincoln Johnson, Jr.* for petitioner. Reported below: 87 U. S. App. D. C. —, 185 F. 2d 441.

No. 317, Misc. CUMMINGS *v.* COOK COUNTY CIRCUIT COURT ET AL. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 324, Misc. WELLS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *George Olshausen* for petitioner. Reported below: 35 Cal. 2d 889, 221 P. 2d 947.

No. 326, Misc. SCHECTMAN *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 329, Misc. HALL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 407 Ill. 137, 94 N. E. 2d 873.

No. 331, Misc. TYLER *v.* WISCONSIN ET AL. Supreme Court of Wisconsin. Certiorari denied.

No. 332, Misc. JONES *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 333, Misc. PRYOR *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 338, Misc. HAWKS *v.* ROBINSON, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 343, Misc. SWAIN *v.* DUFFY, WARDEN. Supreme Court of California. Certiorari denied.

No. 344, Misc. QUEVREAUX *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 407 Ill. 176, 95 N. E. 2d 62.

No. 346, Misc. BERTRAND *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 348, Misc. BREES *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 351, Misc. SULLIVAN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 353, Misc. CLAYCOMB *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 354, Misc. DEL PINO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 355, Misc. HOOPER *v.* SCHNECKLOTH, WARDEN. Supreme Court of California. Certiorari denied.

No. 369, Misc. RAY *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: 228 Ind. 706, 95 N. E. 2d 212.

No. 359, Misc. KUBESH *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 161, Misc. BEST *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney, Philip R. Monahan* and *Robert G. Maysack* for the United States. Reported below: 184 F. 2d 131.

No. 288, Misc. BAKER, ADMINISTRATRIX, *v.* ATLANTIC COAST LINE RAILROAD CO. Supreme Court of North Carolina. Certiorari denied. MR. JUSTICE REED took no part in the consideration or decision of this application. *Douglas B. Maggs* for petitioner. *Charles Cook Howell* for respondent. Reported below: 232 N. C. 523, 61 S. E. 2d 621.

Rehearing Denied. (*See also Nos. 46 and 47, supra, p. 926.*)

No. 486, October Term, 1949. ROBERTSON ROCK BIT CO., INC. ET AL. *v.* HUGHES TOOL CO., 338 U. S. 948. Second petition for rehearing denied.

No. 12, Original. UNITED STATES *v.* LOUISIANA, *ante*, p. 899. The petition for rehearing is denied. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 297. KIEFER-STEWART CO. *v.* JOSEPH E. SEAGRAM & SONS, INC. ET AL., *ante*, p. 211;

No. 397. GAUNT *v.* UNITED STATES, *ante*, p. 917;

No. 419. DUBAN, EXECUTRIX, ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, *ante*, p. 917; and

No. 436. BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COL-

LEGE ET AL. *v.* WILSON, *ante*, p. 909. The petitions for rehearing in these cases are severally denied.

No. 81, Misc., October Term, 1949. EAGLE *v.* CHERNEY ET AL., 338 U. S. 837. Fifth petition for rehearing denied.

MARCH 3, 1951.

No. 240, Misc. FERNANDEZ *v.* NEW YORK, *ante*, p. 914. The petition for rehearing is denied.

MARCH 5, 1951.

Per Curiam Decisions.

No. 551. MARSH ET AL. *v.* CITY OF EL DORADO. Appeal from the Supreme Court of Arkansas. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Henry B. Whitley* for appellants. *J. A. O'Connor, Jr.* for appellee. Reported below: 217 Ark. 838, 233 S. W. 2d 536.

No. 89. UNITED STATES EX REL. KNAUFF *v.* MCGRATH, ATTORNEY GENERAL, ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the cause is remanded to the District Court with directions to vacate its order and to dismiss the proceeding upon the ground that the cause is moot. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Gunther Jacobson* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Philip R. Monahan* for respondents.

Miscellaneous Orders.

No. 376, Misc. FOSTER *v.* HUDSPETH, WARDEN. Petition for writ of certiorari to the Supreme Court of Kansas dismissed on motion of petitioner.

No. 302, Misc. DeVane, U. S. District Judge, *v.* U. S. Court of Appeals for the Fifth Circuit et al. The motion for leave to file petition for writ of prohibition, mandamus, and certiorari is denied. *Harry G. Fuerst* and *William Paul Allen* for petitioner. *Charles Cook Howell* for the Atlantic Coast Line Railroad Company, respondent.

No. 366, Misc. Murphy *v.* Robinson, Warden. The motion for leave to file petition for writ of habeas corpus is denied.

No. 377, Misc. Johnson *v.* Lawrence, Superintendent. The motion for leave to file petition for writ of certiorari is denied.

Certiorari Granted. (*See also No. 89, supra.*)

No. 453. Garner et al. *v.* Board of Public Works of the City of Los Angeles et al. District Court of Appeal of California, Second Appellate District. Certiorari granted. *John T. McTernan* for petitioners. *Ray L. Chesebro* and *Bourke Jones* for respondents. Reported below: 98 Cal. App. 2d 493, 220 P. 2d 958.

Certiorari Denied. (*See also Misc. Nos. 302 and 377, supra.*)

No. 328. Gross Income Tax Division, Indiana Department of State Revenue, *v.* W. B. Conkey Co. Supreme Court of Indiana. Certiorari denied. *J. Emmett McManamon,* Attorney General of Indiana, and *John J. McShane, Lloyd C. Hutchinson* and *Joseph E. Nowak,* Deputy Attorneys General, for petitioner. Reported below: 228 Ind. 352, 90 N. E. 2d 805.

No. 429. Sparks et al. *v.* Civil Aeronautics Board et al. C. A. 2d Cir. Certiorari denied. *Hardy K. Mac-*

lay for petitioners. *Solicitor General Perlman, Acting Assistant Attorney General Clapp, James L. Morrisson* and *Samuel D. Slade* for the Civil Aeronautics Board; *Henry J. Friendly* for Pan American World Airways, Inc.; and *Howard C. Westwood* and *Malcolm A. MacIntyre* for American Airlines et al., respondents. Reported below: 184 F. 2d 66.

No. 451. KOONS ET AL. *v.* KAISER ET AL.; and

No. 452. KOONS ET AL. *v.* KAUFMAN, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied. *William H. Timbers* for petitioners. *Samuel I. Rosenman, Godfrey Goldmark* and *Max Freund* for respondents.

No. 490. STANDARD BRANDS, INC. *v.* BATEMAN ET AL.; and

No. 496. MIDWEST REFRIGERATION, INC. *v.* BATEMAN ET AL. C. A. 8th Cir. Certiorari denied. *Fowler Hamilton* for Standard Brands, Inc., petitioner in No. 490 and respondent in No. 496. *Oliver J. Miller* for petitioner in No. 496. *Cornelius Roach* for respondents in No. 490. Reported below: 184 F. 2d 1002.

No. 495. HAYES ET AL. *v.* UNION PACIFIC RAILROAD CO. ET AL. C. A. 9th Cir. Certiorari denied. *Harold M. Sawyer* and *Richard Gladstein* for petitioners. *T. W. Bockes, Elmer Collins, Edward C. Renwick* and *Malcolm Davis* for the Union Pacific Railroad Company; and *Marion B. Plant* for the Dining Car Employees' Union Local 372, respondents. Reported below: 184 F. 2d 337.

No. 502. FIORELLA *v.* CITY OF BIRMINGHAM. Court of Appeals of Alabama. Certiorari denied. *James T. Gibson, Jr.* for petitioner. *Charles S. Rhyne* for respondent. Reported below: —— Ala. App. ——, 48 So. 2d 768.

No. 509. SUCKOW BORAX MINES CONSOLIDATED, INC. ET AL. *v.* BORAX CONSOLIDATED, LTD. ET AL. C. A. 9th Cir. Certiorari denied. *Sterling Carr* for petitioners. *Herman Phleger, Moses Lasky, John L. Reith* and *Michael F. McCarthy* for respondents. Reported below: 185 F. 2d 196.

No. 510. STEPOVICH, EXECUTRIX, *v.* KUPOFF ET AL. C. A. 9th Cir. Certiorari denied. *Francis R. Kirkham* and *Southall R. Pfund* for petitioner. *George B. Grigsby* for respondents. Reported below: 184 F. 2d 705.

No. 514. GAMBLE, ADMINISTRATOR, *v.* GAMBLE ET AL. Supreme Court of Georgia. Certiorari denied. *William G. McRae* for petitioner. *James K. Rankin* for respondents. Reported below: 207 Ga. 380, 61 S. E. 2d 836.

No. 516. BENTLEY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Howe P. Cochran* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Harry Baum* for respondent. Reported below: 184 F. 2d 668.

No. 481. MACARTHUR MINING CO., INC. *v.* RECONSTRUCTION FINANCE CORPORATION. C. A. 8th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Inghram D. Hook* and *John W. Hoffman, Jr.* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Clapp, Samuel D. Slade* and *Morton Hollander* for respondent. Reported below: 184 F. 2d 913.

No. 205, Misc. GILBERT *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se. Edmund E. Shepherd,* Solicitor General of Michigan, for respondent.

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No. 264, Misc. HACKWORTH *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 184 F. 2d 517.

No. 314, Misc. MCGUIRE *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. *Tyrah E. Maholm* for petitioner. Reported below: 228 Ind. 696, 94 N. E. 2d 589.

No. 315, Misc. HANSBROUGH *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. *Tyrah E. Maholm* for petitioner. Reported below: 228 Ind. 688, 94 N. E. 2d 534.

No. 330, Misc. ALLOWAY *v.* SIMPSON, SUPERINTENDENT. Supreme Court of Wisconsin. Certiorari denied.

No. 352, Misc. RUSSELL *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 361, Misc. BYARS *v.* WARDEN OF THE MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 368, Misc. WHITE *v.* INDIANA ET AL. Supreme Court of Indiana. Certiorari denied.

No. 379, Misc. WOJDAKOWSKI *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

MARCH 12, 1951.

Per Curiam Decision.

No. 294, Misc. MOORE, DOING BUSINESS AS MOORE'S BAKERY, *v.* MEAD SERVICE CO. ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. *Per Curiam:* The petition for writ

of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court for further consideration in the light of *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, ante,* p. 211. *Dee C. Blythe* for petitioner. *Edward W. Napier, Howard F. Houk* and *Leslie Humphrey* for respondents. Reported below: 184 F. 2d 338.

Miscellaneous Orders.

No. 209. EMICH MOTORS CORP. ET AL. *v.* GENERAL MOTORS CORP. ET AL. It is ordered that the concluding paragraph of the opinion of this Court in this case be amended to read as follows: "The case is remanded to the Court of Appeals with directions to modify its judgment to conform with this opinion." It is further ordered that the judgment of this Court entered on February 26, 1951, be amended accordingly. MR. JUSTICE MINTON took no part in the consideration or decision of this question.

[The opinion is reported as amended, *ante,* p. 558, the change being at p. 572.]

No. 414. MCMAKIN ET AL., TRUSTEES, *v.* CITY OF RICHLAWN ET AL. Petition for writ of certiorari to the Court of Appeals of Kentucky dismissed for failure to comply with the rules. Reported below: 313 Ky. 265, 230 S. W. 2d 902.

No. 320, Misc. IN RE JERONIS. The motion for leave to file petition for writ of habeas corpus and certiorari and the petition for appeal are denied.

No. 358, Misc. BIGGS *v.* SULLIVAN ET AL. The motion for leave to file petition for writ of mandamus and the petition for temporary restraining order are denied.

No. 370, Misc. HULL *v.* FRISBIE, WARDEN. The motion for leave to file petition for writ of certiorari is denied.

No. 391, Misc. BROADUS *v.* UNITED STATES. Application denied.

Certiorari Granted. (*See also No. 294, Misc., supra.*)

No. 513. HOFFMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. *Lester J. Schaffer* and *William A. Gray* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Philip R. Monahan* and *Robert G. Maysack* for the United States. Reported below: 185 F. 2d 617.

No. 364, Misc. Ross *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari granted. *W. J. Durham* for petitioner. *Price Daniel,* Attorney General of Texas, *Charles D. Mathews,* First Assistant Attorney General, and *E. Jacobson,* Assistant Attorney General, for respondent. Reported below: 154 Tex. Cr. R. —, 233 S. W. 2d 126.

Certiorari Denied. (*See also No. 414 and Misc. Nos. 320 and 370, supra.*)

No. 472. LAFAYETTE STEEL CO., INC. *v.* LUSTRON CORPORATION ET AL. C. A. 7th Cir. Certiorari denied. *Louis M. Mantynband, Sidney R. Zatz* and *Benjamin H. Schwartz* for petitioner. *William S. Collen* and *Jacob Cohen* for respondents. Reported below: 184 F. 2d 798.

No. 507. RECONSTRUCTION FINANCE CORPORATION *v.* LUSTRON CORPORATION ET AL. C. A. 7th Cir. Certiorari denied. *Solicitor General Perlman* for petitioner. *Michael Gesas, William S. Collen* and *Jacob Cohen* for respondents. Reported below: 184 F. 2d 789.

No. 475. BORG-WARNER CORPORATION, AS SUCCESSOR TO THE MARVEL CARBURETOR CO., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Charles D. Hamel,*

Lee I. Park and *Clarence F. Rothenburg* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Clapp* and *Samuel D. Slade* for the United States. Reported below: 117 Ct. Cl. 1, 89 F. Supp. 1013.

No. 512. REYNOLDS *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 7th Cir. Certiorari denied. *Frank E. Lorch* and *Evan A. McLinn* for petitioner. *E. H. Burgess* and *Kenneth H. Ekin* for respondent. Reported below: 185 F. 2d 27.

No. 518. MONTANA POWER CO. *v.* FEDERAL POWER COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *J. E. Corette, Jr., S. B. Chase, Jr., John C. Hauck, Herbert M. Bingham* and *H. Donald Kistler* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Clapp, Paul A. Sweeney, Melvin Richter, Herman Marcuse, Bradford Ross, Willard W. Gatchell* and *Bernard A. Foster, Jr.* for respondent. Reported below: 87 U. S. App. D. C. ——, 185 F. 2d 491.

No. 521. HART ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Donald S. Caruthers* and *Howard W. Smith, Jr.* for petitioners. *Solicitor General Perlman, Ed Dupree, Leon J. Libeu* and *Nathan Siegel* for the United States.

No. 523. GOLDMAN *v.* GENERAL MILLS, INC. C. A. 8th Cir. Certiorari denied. *David W. Louisell* and *Irving H. Green* for petitioner. *Frank J. Morley, D. E. Balch, A. Lyman Beardsley* and *Edward K. Thode* for respondent. Reported below: 184 F. 2d 359.

No. 484. VRILIUM PRODUCTS CO. ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Leslie E. Salter* for petitioners. *Solicitor General Perlman, Assist-*

ant Attorney General McInerney, Philip R. Monahan and *Felicia H. Dubrovsky* for the United States. Reported below: 185 F. 2d 3.

No. 520. HISS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Robert M. Benjamin, Harold Rosenwald* and *Chester T. Lane* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Philip R. Monahan* for the United States. Reported below: 185 F. 2d 822.

No. 528. MOFFETT *v.* ARABIAN AMERICAN OIL CO., INC., FORMERLY KNOWN AS CALIFORNIA ARABIAN STANDARD OIL CO., INC. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *William Power Maloney* and *Raymond N. Beebe* for petitioner. *Joseph M. Proskauer* for respondent. Reported below: 184 F. 2d 859.

No. 532. OTTLEY *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. Supreme Court of Missouri. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Guy W. Green* for petitioner. *C. H. Skinker, Jr.* for respondent. Reported below: 360 Mo. 1189, 232 S. W. 2d 966.

Nos. 353 and 552. LAND ET AL. *v.* DOLLAR ET AL. The petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in No. 552 is denied. The motion for leave to file petition for rehearing in No. 353 is denied. MR. JUSTICE BLACK and MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Solicitor General Perl-*

man for petitioners. *Gregory A. Harrison, Moses Lasky* and *Clinton M. Hester* for respondents in No. 552. Reported below: No. 552, 88 U. S. App. D. C. —, 188 F. 2d 629.

No. 265, Misc. BYERS *v.* HUNTER ET AL. C. A. 10th Cir. Certiorari denied.

No. 291, Misc. GEORGE *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. Petitioner *pro se. Bolivar E. Kemp, Jr.*, Attorney General of Louisiana, and *M. E. Culligan,* Assistant Attorney General, for respondent. Reported below: 218 La. 18, 48 So. 2d 265.

No. 305, Misc. DONNELLY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 185 F. 2d 559.

No. 325, Misc. MAHLER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Reported below: 329 Mich. 155, 45 N. W. 2d 14.

No. 363, Misc. BUDERUS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se. George Tilzer* for respondent.

No. 375, Misc. COLBERT *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 381, Misc. STATE EX REL. BAILEY *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. *W. Hayes Pettry* for petitioner.

No. 382, Misc. LORENZO *v.* PENNSYLVANIA ET AL. Supreme Court of Pennsylvania. Certiorari denied.

Rehearing Denied. (*See No. 353, supra.*)

March 26, 1951.

Per Curiam Decision.

No. 585. Prunk et al. *v.* Indianapolis Redevelopment Commission et al. Appeal from the Supreme Court of Indiana. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Edwin M. S. Steers* for appellants. Reported below: 228 Ind. 579, 93 N. E. 2d 171.

Miscellaneous Orders.

No. ——. Communist Party of the United States *v.* McGrath, Attorney General. The petition for an extension of the stay order is denied. *John J. Abt* and *Joseph Forer* for petitioner. *Solicitor General Perlman, Robert L. Stern, Robert W. Ginnane, Edward H. Hickey* and *Howard C. Wood* for respondent.

No. 511. Sickman et al. *v.* United States. Beatrice Sickman, Executrix, substituted as a party petitioner for Charles Sickman.

No. 392, Misc. Schneider *v.* California et al.; and No. 400, Misc. Williams *v.* Overholser. The motions for leave to file petitions for writs of habeas corpus in these cases are denied.

No. 402, Misc. Whetstone *v.* O'Donovan, U. S. Marshal, et al. The motion for leave to file petition for writ of mandamus is denied.

No. 417, Misc. McGee *v.* Jones, Sheriff, et al. The motion for leave to file petition for writs of habeas corpus and/or certiorari is denied. *James T. Wright* for petitioner. *J. P. Coleman,* Attorney General of Mississippi, for respondents.

Certiorari Granted.

No. 519. UNITED STATES *v.* JEFFERS. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Perlman* for the United States. Reported below: 88 U. S. App. D. C. —, 187 F. 2d 498.

Certiorari Denied. (*See also No. 417, Misc., supra.*)

No. 505. OBERMEIER *v.* UNITED STATES; and

No. 557. UNITED STATES *v.* OBERMEIER. C. A. 2d Cir. Certiorari denied. *Paul O'Dwyer* for Obermeier. *Solicitor General Perlman* for the United States. *Assistant Attorney General McInerney* and *Robert S. Erdahl* were with him on the brief in No. 505. Reported below: 186 F. 2d 243.

No. 515. REILLY *v.* GODDARD, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied. *John T. Cahill* for petitioner. *Edward C. Wallace* for respondent.

No. 524. LYDON ET UX. *v.* CARNEY ET UX. Supreme Court of Washington. Certiorari denied. Petitioners *pro se*. *Lane Summers* for respondents. Reported below: 36 Wash. 2d 881, 224 P. 2d 634.

No. 526. PARR ET AL. *v.* SCOFIELD, COLLECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *J. B. Lewright* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Helen Goodner* and *John R. Benney* for respondent. Reported below: 185 F. 2d 535.

No. 527. GEER ET AL., DOING BUSINESS AS LARRY GEER BALLROOMS, *v.* BIRMINGHAM ET AL., EXECUTORS. C. A. 8th Cir. Certiorari denied. *Thomas B. Roberts* and

Clyde B. Charlton for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, A. F. Prescott, Carlton Fox* and *John R. Benney* for respondents. Reported below: 185 F. 2d 82.

No. 531. DALLAS COUNTY WATER CONTROL & IMPROVEMENT DISTRICT NO. 3 ET AL. *v.* CITY OF DALLAS ET AL. Supreme Court of Texas. Certiorari denied. *Victor W. Bouldin* and *Marie McCutcheon* for petitioners. *H. P. Kucera* for respondents. Reported below: 149 Tex. —, 233 S. W. 2d 291.

No. 533. SOKOL BROTHERS FURNITURE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Crampton Harris* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 185 F. 2d 677.

No. 539. CRAVEN *v.* ATLANTIC COAST LINE RAILROAD CO. C. A. 4th Cir. Certiorari denied. *George E. Allen* for petitioner. *Collins Denny, Jr.* and *J. M. Townsend* for respondent. Reported below: 185 F. 2d 176.

No. 540. WASHINGTON GAS LIGHT CO. *v.* BAKER; and No. 548. PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA *v.* BAKER. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Stoddard M. Stevens, C. Oscar Berry* and *Houston H. Wasson* for petitioner in No. 540. *Vernon E. West* and *Lloyd B. Harrison* for petitioner in No. 548. *Herbert P. Leeman, William A. Roberts, Jerome M. Alper, Francis J. Ortman* and *Irene Kennedy* for respondent. Reported below: 88 U. S. App. D. C. —, 188 F. 2d 11.

No. 542. MINKOFF ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jesse Climenko* and *George Trosk* for petitioners. *Solicitor General Perlman, Assist-*

ant Attorney General McInerney, Philip R. Monahan and *Robert G. Maysack* for the United States. Reported below: 186 F. 2d 144.

No. 543. RODNEY, U. S. DISTRICT JUDGE, ET AL. *v.* PARAMOUNT PICTURES, INC. ET AL. C. A. 3d Cir. Certiorari denied. *Thurman Arnold* and *Clair J. Killoran* for petitioners. *Roy W. McDonald, Robert E. Sher, George S. Wright* and *Jos. Irion Worsham* for respondents. Reported below: 186 F. 2d 111.

No. 544. STECKEL *v.* LURIE ET AL., DOING BUSINESS AS LURIE & ALPER. C. A. 6th Cir. Certiorari denied. *Frederick Bernays Wiener* for petitioner. *John J. Adams* for respondents. Reported below: 185 F. 2d 921.

No. 545. CHARLES E. SMITH & SONS CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Sol Goodman* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Harry Marselli* for respondent. Reported below: 184 F. 2d 1011.

No. 549. JENNINGS-WATTS OIL CO., INC. *v.* GILBERT, DOING BUSINESS AS GILBERT STORAGE & TRANSFER CO., ET AL. C. A. 4th Cir. Certiorari denied. *Mac Asbill* for petitioner. *Max J. Gwertzman* and *William S. Mundy, Jr.* for respondents.

No. 553. MORAN TRANSPORTATION CORP. *v.* ADMINISTRATRIX OF MELLINO ET AL. C. A. 2d Cir. Certiorari denied. *Edward Ash* for petitioner. *Jacquin Frank* for respondents. Reported below: 185 F. 2d 386.

No. 555. R. H. OSWALD CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Walter E. Barton* for petitioner. *Solicitor General Perl-*

man, Assistant Attorney General Caudle, Ellis N. Slack, Helen Goodner and *Morton K. Rothschild* for respondent. Reported below: 185 F. 2d 6.

No. 563. MERRICK ET AL., DOING BUSINESS AS BROOKFIELD LABORATORIES, *v.* SHARP & DOHME, INC. C. A. 7th Cir. Certiorari denied. *Cyril A. Soans* and *William E. Anderson* for petitioners. *George E. Middleton* and *L. B. Mann* for respondent. Reported below: 185 F. 2d 713.

No. 570. LEVOY *v.* STYL-RITE OPTICAL CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Eugene L. Bondy* for petitioner. *Irving F. Goodfriend* for respondents. Reported below: 185 F. 2d 240.

No. 572. DELTA DRILLING CO. ET AL. *v.* ARNETT. C. A. 6th Cir. Certiorari denied. *Charles G. Middleton, Louis Seelbach, Leo T. Wolford, Ralph W. Garrett, Jack B. Blalock, Clarence Lohman, Edward Kliewer, Jr.* and *F. J. Pentecost* for petitioners. *Thomas E. Sandidge* and *Edwin M. Slote* for respondent. Reported below: 186 F. 2d 481.

No. 582. REDWINE, REVENUE COMMISSIONER, *v.* DAN RIVER MILLS, INC. Supreme Court of Georgia. Certiorari denied. *Eugene Cook,* Attorney General of Georgia, *M. H. Blackshear, Jr.,* Deputy Assistant Attorney General, and *Lamar W. Sizemore,* Assistant Attorney General, for petitioner. *William K. Meadow* and *Robert B. Troutman* for respondent. Reported below: 207 Ga. 381, 61 S. E. 2d 771.

No. 522. COLE *v.* LOEW'S INCORPORATED. C. A. 9th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Robert W. Kenny* and *Bartley C. Crum* for petitioner. *Irving M. Walker* for respondent. Reported below: 185 F. 2d 641.

No. 260, Misc. CLARK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Herbert K. Hyde* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Robert S. Erdahl* for the United States. Reported below: 184 F. 2d 952.

No. 279, Misc. TACOMA *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 184 F. 2d 569.

No. 298, Misc. SLAVIK *v.* MILLER, COMMISSIONER OF IMMIGRATION AND NATURALIZATION. C. A. 3d Cir. Certiorari denied. *Paul J. Winschel* for petitioner. Reported below: 184 F. 2d 575.

No. 327, Misc. TAYLOR *v.* MCGRATH, ATTORNEY GENERAL, ET AL. United States District Court for the Western District of Missouri. Certiorari denied.

No. 336, Misc. CALDWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 342, Misc. MARINO *v.* WEST VIRGINIA. Intermediate Court of Kanawha County, West Virginia. Certiorari denied. *Horace S. Meldahl* for petitioner.

No. 371, Misc. O'HARA *v.* BURFORD, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: —— Okla. Cr. ——, 226 P. 2d 327.

No. 378, Misc. POTTER TITLE & TRUST CO., ADMINISTRATOR, *v.* OHIO BARGE LINE, INC. C. A. 3d Cir. Certiorari denied. *William S. Doty* for petitioner. Reported below: 184 F. 2d 432.

No. 383, Misc. LAWRENCE *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 384, Misc. JOHNSON *v.* COOK COUNTY CRIMINAL COURT ET AL. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 389, Misc. JENNINGS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 394, Misc. KING *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 396, Misc. MEDLEY *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 397, Misc. VAN HORN *v.* ROBINSON, WARDEN. Circuit Court of Clay County, Illinois. Certiorari denied.

No. 401, Misc. HARRIS *v.* ROBINSON, WARDEN. Circuit Court of Sangamon County, Illinois. Certiorari denied.

No. 405, Misc. SMYTHE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 186 F. 2d 507.

No. 385, Misc. FRANKLIN *v.* MAXWELL, JUDGE, ET AL. The petition for writ of certiorari to the Circuit Court of Washington County, Nashville, Illinois, is denied without consideration of the questions raised therein and without prejudice to the institution by petitioner of proceedings in any Illinois state court of competent jurisdiction under the Act of August 4, 1949, entitled: "An Act to provide a remedy for persons convicted and imprisoned in the penitentiary, who assert that rights guaranteed them by the Constitution of the United States or the State of Illinois, or both, have been denied or violated, in proceedings in which they were convicted." Ill. Laws 1949, p. 722.

March 27, 1951.

Miscellaneous Orders.

No. 554. United States National Bank of Denver et al., Executors, *v.* Bartges. Petition for writ of certiorari to the Supreme Court of Colorado dismissed on motion of counsel for the petitioners. *Karl F. Crass, John P. Akolt, Harold D. Roberts, Robert E. More* and *Milton J. Keegan* for petitioners.

No. 565. Radio Corporation of America et al. *v.* United States et al. Upon consideration of the motion of the appellants for an extension of the stay granted by the District Court, it is ordered that the order of the Federal Communications Commission entered herein be, and the same is hereby, stayed pending the issuance of the mandate of this Court. *John T. Cahill, Simon H. Rifkind, B. C. Schiff, John J. Kelly, Jr., Frank S. Righeimer, Jr., Alfred Kamin* and *Gerald Ratner* for appellants. *Solicitor General Perlman, Stanley M. Silverberg, Benedict P. Cottone, Max Goldman, Samuel I. Rosenman* and *Richard S. Salant* for appellees.

INDEX

910798 O—51——56

I. Federal-State Relations.

Conflicting legislation—Public utility strikes—Supremacy Clause.—Wisconsin law forbidding strikes which would interrupt essential public utility service, invalid as in conflict with federal labor law. Street Railway Employees v. Wisconsin Board, 383.

II. Legislative Power.

Powers of Congress—Preference to ports—Transportation rates.—Order of I. C. C. prescribing barge-rail rates not unconstitutional as giving preference to ports of one State over those of another. Alabama G. S. R. Co. v. United States, 216.

JURISDICTION. See also **Administrative Law**; **Constitutional Law**, III; V, 2; IX; XI, 3; **Courts-Martial**; **Employers' Liability Act**, 2; **Judgments**; **Labor**, 1; **Tort Claims Act**, 2.

References to particular subjects under title Jurisdiction: Abatement, I, 2; Administrative Law, III, 2; Aliens, I, 1; Arbitration, II, 1; Articles of War, III, 2; Attachments, I, 4; Attorney General, I, 1; Certiorari, II, 6; Citizenship, I, 1; Continuance, II, 5; Court of Appeals, I, 2; Courts-Martial, III, 2–3; Declaratory Judgments, I, 1; Deportation, I, 1; Equity, III, 1; Evidence, III, 3; Federal Question, I, 4; II, 5; Findings, II, 2; Habeas Corpus, I, 1; III, 2–3; Judiciary Act, I, 2; Justiciable Question, I, 1; Labor Board, I, 3; Liens, I, 4; Moot Case, II, 1; New Trial, III, 2; Parties, I, 2; Patents, II, 3; Public Officers, I, 2; Remand, I, 2; Sentence, III, 2–3; Substitution, I, 2; Succession in Office, I, 2.

I. In General.

1. *Justiciable question—Suspension of deportation—Eligibility of alien for citizenship—Declaratory judgment.*—Alien's suit for declaratory judgment that Attorney General, on application for suspension of deportation, must treat him as eligible for citizenship, presented justiciable question; habeas corpus not exclusive remedy. McGrath v. Kristensen, 162.

2. *Action against officer of United States—Successor in office—Abatement of action.*—Action against U. S. officer pending in Court of Appeals on appeal from judgment for plaintiff abated where successor in office not substituted within six months; application of § 11 of Judiciary Act of 1925; remand with directions to dismiss complaint proper; review not barred by 28 U. S. C. § 2105. Snyder v. Buck, 15.

3. *Review of Labor Board orders—Scope—Responsibility.*—Scope of reviewing court's power governed by law in effect at time of exercise; normal responsibility on review of Labor Board is court of appeals', not this Court's. Universal Camera Corp. v. Labor Board, 474; Labor Board v. Pittsburgh S. S. Co., 498.

4. *Federal question.*—Priority as between federal tax lien and California attachment lien was federal question; effect of state court's classification of lien. United States v. Security Tr. & Sav. Bk., 47.

910798 O—51——57

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