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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1951

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ERRATUM.

341 U. S. LII: *Cassell* v. *Texas*, 339 U. S. 282, is cited also on p. 50 of 341 U. S.

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.)

DEATH OF MRS. BLACK.

SUPREME COURT OF THE UNITED STATES.

MONDAY, DECEMBER 10, 1951.

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

THE CHIEF JUSTICE said:

"Mrs. Black, wife of MR. JUSTICE BLACK, died on Friday last.

"Josephine Foster Black was a sweet and gracious lady—every day of her life. She combined the friendliness and warmth of the South with the stern discipline of the Scotch Presbyterian faith. She carried herself with dignity and brought to Washington a tolerance and understanding that made her universally beloved. She walked as a lady in the most elegant of drawing rooms and in the most humble of homes.

"Her consuming interest was her family, and yet she found time for many diverse activities outside the home. As a Gray Lady during the war years, she brought comfort and sympathy to the sick and wounded. In community causes, she was always found aiding the underprivileged. The oppressed of all races and religions knew her instinctively as a friend. Yet in spite of her wide interests and activities, she found time in recent years to develop her talents as a painter. Her works of art are receiving wider and wider recognition and reaching an ever-increasing audience.

"Whatever her expression—whether as mother, wife, hostess, artist, friend—it was always friendly and gentle. She showed by her life the great richness of love.

"As a mark of our sorrow and affection for our brother, Mr. Justice Black, and his family, and our respect and affection for Mrs. Black, the Court will transact no business today, will attend the funeral services in a body, and will adjourn until tomorrow."

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1951.

STACK ET AL. *v.* BOYLE, UNITED STATES MARSHAL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 400. Argued October 18, 1951.—Decided November 5, 1951.

1. The twelve petitioners were arrested on charges of conspiring to violate the Smith Act, 18 U. S. C. (Supp. IV) §§ 371, 2385, and their bail was fixed initially in amounts varying from $2,500 to $100,000. Subsequently, the District Court fixed bail pending trial in the uniform amount of $50,000 for each of them. They moved to reduce bail, claiming that it was "excessive" under the Eighth Amendment, and filed supporting statements of fact which were not controverted. The only evidence offered by the Government was a certified record showing that four other persons previously convicted under the Smith Act in another district had forfeited bail; and there was no evidence relating them to petitioners. The motion to reduce bail was denied. *Held:* Bail has not been fixed by proper methods in this case. Pp. 3–7.

(a) Bail set before trial at a figure higher than an amount reasonably calculated to fulfill the purpose of assuring the presence of the defendant is "excessive" under the Eighth Amendment. P. 5.

(b) The fixing of bail before trial for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. Rule 46 (c) of the Federal Rules of Criminal Procedure. P. 5.

(c) If bail in an amount greater than that usually fixed for serious charges of crimes is required in the case of any of the

petitioners, that is a matter to which evidence should be directed in a hearing, so that the constitutional rights of each petitioner may be preserved. P. 6.

2. After their motion to reduce bail was denied, petitioners did not appeal, but applied to the same District Court for habeas corpus. This was denied and the Court of Appeals affirmed. *Held:*

(a) Petitioners' remedy is by motion to reduce bail, with the right of appeal to the Court of Appeals. Pp. 6–7.

(b) The order denying the motion to reduce bail is appealable as a "final decision" of the District Court under 28 U. S. C. (Supp. IV) § 1291. P. 6.

(c) While habeas corpus is an appropriate remedy for one held in custody in violation of the Constitution, the District Court should withhold relief in this collateral habeas corpus action where an adequate remedy available in the criminal proceeding has not been exhausted. Pp. 6–7.

(d) The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to vacate its order denying petitioners' applications for writs of habeas corpus and to dismiss the applications without prejudice. P. 7.

(e) Petitioners may move for reduction of bail in the criminal proceeding, so that a hearing may be held for the purpose of fixing reasonable bail for each petitioner. P. 7.

192 F. 2d 56, judgment vacated and case remanded.

Petitioners' applications for habeas corpus were denied by the District Court. The Court of Appeals affirmed. 192 F. 2d 56. This Court grants certiorari, *post,* p. 4. *Judgment vacated and case remanded,* p. 7.

Benjamin Margolis and *A. L. Wirin* argued the cause for petitioners. With them on the brief was *Sam Rosenwein.*

Solicitor General Perlman argued the cause for respondent. With him on the brief were *Assistant Attorney General McInerney, Robert L. Stern, Robert W. Ginnane* and *Robert S. Erdahl.*

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

Indictments have been returned in the Southern District of California charging the twelve petitioners with conspiring to violate the Smith Act, 18 U. S. C. (Supp. IV) §§ 371, 2385. Upon their arrest, bail was fixed for each petitioner in the widely varying amounts of $2,500, $7,500, $75,000 and $100,000. On motion of petitioner Schneiderman following arrest in the Southern District of New York, his bail was reduced to $50,000 before his removal to California. On motion of the Government to increase bail in the case of other petitioners, and after several intermediate procedural steps not material to the issues presented here, bail was fixed in the District Court for the Southern District of California in the uniform amount of $50,000 for each petitioner.

Petitioners moved to reduce bail on the ground that bail as fixed was excessive under the Eighth Amendment.[1] In support of their motion, petitioners submitted statements as to their financial resources, family relationships, health, prior criminal records, and other information. The only evidence offered by the Government was a certified record showing that four persons previously convicted under the Smith Act in the Southern District of New York had forfeited bail. No evidence was produced relating those four persons to the petitioners in this case. At a hearing on the motion, petitioners were examined by the District Judge and cross-examined by an attorney for the Government. Petitioners' factual statements stand uncontroverted.

After their motion to reduce bail was denied, petitioners filed applications for habeas corpus in the same

[1] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U. S. Const., Amend. VIII.

District Court. Upon consideration of the record on the motion to reduce bail, the writs were denied. The Court of Appeals for the Ninth Circuit affirmed. 192 F. 2d 56. Prior to filing their petition for certiorari in this Court, petitioners filed with MR. JUSTICE DOUGLAS an application for bail and an alternative application for habeas corpus seeking interim relief. Both applications were referred to the Court and the matter was set down for argument on specific questions covering the issues raised by this case.

Relief in this type of case must be speedy if it is to be effective. The petition for certiorari and the full record are now before the Court and, since the questions presented by the petition have been fully briefed and argued, we consider it appropriate to dispose of the petition for certiorari at this time. Accordingly, the petition for certiorari is granted for review of questions important to the administration of criminal justice.[2]

First. From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See *Hudson* v. *Parker,* 156 U. S. 277, 285 (1895). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. *Ex*

[2] In view of our action in granting and making final disposition of the petition for certiorari, we have no occasion to determine the power of a single Justice or Circuit Justice to fix bail pending disposition of a petition for certiorari in a case of this kind.

parte Milburn, 9 Pet. 704, 710 (1835). Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment. See *United States* v. *Motlow,* 10 F. 2d 657 (1926, opinion by Mr. Justice Butler as Circuit Justice of the Seventh Circuit).

Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards as expressed in the Federal Rules of Criminal Procedure [3] are to be applied in each case to each defendant. In this case petitioners are charged with offenses under the Smith Act and, if found guilty, their convictions are subject to review with the scrupulous care demanded by our Constitution. *Dennis* v. *United States,* 341 U. S. 494, 516 (1951). Upon final judgment of conviction, petitioners face imprisonment of not more than five years and a fine of not more than $10,000. It is not denied that bail for each petitioner has been fixed in a sum much higher than that usually imposed for offenses with like penalties and yet there has been no factual showing to justify such action in this case. The Government asks the courts to depart from the norm by assuming, without the introduction of evidence, that each petitioner is a pawn in

[3] Rule 46 (c). "AMOUNT. If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."

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a conspiracy and will, in obedience to a superior, flee the jurisdiction. To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act. Such conduct would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute under which petitioners have been indicted.

If bail in an amount greater than that usually fixed for serious charges of crimes is required in the case of any of the petitioners, that is a matter to which evidence should be directed in a hearing so that the constitutional rights of each petitioner may be preserved. In the absence of such a showing, we are of the opinion that the fixing of bail before trial in these cases cannot be squared with the statutory and constitutional standards for admission to bail.

Second. The proper procedure for challenging bail as unlawfully fixed is by motion for reduction of bail and appeal to the Court of Appeals from an order denying such motion. Petitioners' motion to reduce bail did not merely invoke the discretion of the District Court setting bail within a zone of reasonableness, but challenged the bail as violating statutory and constitutional standards. As there is no discretion to refuse to reduce excessive bail, the order denying the motion to reduce bail is appealable as a "final decision" of the District Court under 28 U. S. C. (Supp. IV) § 1291. *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, 545–547 (1949). In this case, however, petitioners did not take an appeal from the order of the District Court denying their motion for reduction of bail. Instead, they presented their claims under the Eighth Amendment in applications for writs of habeas corpus. While habeas corpus is an appropriate remedy for one held in custody in violation of the Constitution, 28 U. S. C. (Supp. IV) § 2241 (c) (3), the District Court should withhold relief in this collateral

habeas corpus action where an adequate remedy available in the criminal proceeding has not been exhausted. *Ex parte Royall,* 117 U. S. 241 (1886); *Johnson* v. *Hoy,* 227 U. S. 245 (1913).

The Court concludes that bail has not been fixed by proper methods in this case and that petitioners' remedy is by motion to reduce bail, with right of appeal to the Court of Appeals. Accordingly, the judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to vacate its order denying petitioners' applications for writs of habeas corpus and to dismiss the applications without prejudice. Petitioners may move for reduction of bail in the criminal proceeding so that a hearing may be held for the purpose of fixing reasonable bail for each petitioner.

It is so ordered.

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

By MR. JUSTICE JACKSON, whom MR. JUSTICE FRANKFURTER joins.

I think the principles governing allowance of bail have been misunderstood or too casually applied in these cases and that they should be returned to the Circuit Justice or the District Courts for reconsideration in the light of standards which it is our function to determine. We have heard the parties on only four specific questions relating to bail before conviction—two involving considerations of law and of fact which should determine the amount of bail, and two relating to the procedure for correcting any departure therefrom. I consider first the principles which govern release of accused persons upon bail pending their trial.

The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons

in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense. To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one under charge of any offense not punishable by death, Fed. Rules Crim. Proc., 46 (a) (1) providing: "A person arrested for an offense not punishable by death shall be admitted to bail . . ." before conviction.

Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice. We know that Congress anticipated that bail would enable some escapes, because it provided a procedure for dealing with them. Fed. Rules Crim. Proc., 46 (f).

In allowance of bail, the duty of the judge is to reduce the risk by fixing an amount reasonably calculated to hold the accused available for trial and its consequence. Fed. Rules Crim. Proc., 46 (c). But the judge is not free to make the sky the limit, because the Eighth Amendment to the Constitution says: "Excessive bail shall not be required . . . ."

Congress has reduced this generality in providing more precise standards, stating that ". . . the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant." Fed. Rules Crim. Proc., 46 (c).

These statutory standards are not challenged as unconstitutional, rather the amounts of bail established for these petitioners are alleged to exceed these standards. We submitted no constitutional questions to argument by the parties, and it is our duty to avoid constitutional issues if possible. For me, the record is inadequate to say what amounts would be reasonable in any particular one of these cases and I regard it as not the function of this Court to do so. Furthermore, the whole Court agrees that the remedy pursued in the circumstances of this case is inappropriate to test the question and bring it here. But I do think there is a fair showing that these congressionally enacted standards have not been correctly applied.

It is complained that the District Court fixed a uniform blanket bail chiefly by consideration of the nature of the accusation and did not take into account the difference in circumstances between different defendants. If this occurred, it is a clear violation of Rule 46 (c). Each defendant stands before the bar of justice as an individual. Even on a conspiracy charge defendants do not lose their separateness or identity. While it might be possible that these defendants are identical in financial ability, character and relation to the charge—elements Congress has directed to be regarded in fixing bail—I think it violates the law of probabilities. Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them. The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance.

Complaint further is made that the courts below have been unduly influenced by recommendations of very high bail made by the grand jury. It is not the function of the grand jury to fix bail, and its volunteered advice is not

governing. Since the grand jury is a secret body, ordinarily hearing no evidence but the prosecution's, attended by no counsel except the prosecuting attorneys, it is obvious that it is not in a position to make an impartial recommendation. Its suggestion may indicate that those who have heard the evidence for the prosecution regard it as strongly indicative that the accused may be guilty of the crime charged. It could not mean more than that without hearing the defense, and it adds nothing to the inference from the fact of indictment. Such recommendations are better left unmade, and if made should be given no weight.

But the protest charges, and the defect in the proceedings below appears to be, that, provoked by the flight of certain Communists after conviction, the Government demands and public opinion supports a use of the bail power to keep Communist defendants in jail before conviction. Thus, the amount is said to have been fixed not as a reasonable assurance of their presence at the trial, but also as an assurance they would remain in jail. There seems reason to believe that this may have been the spirit to which the courts below have yielded, and it is contrary to the whole policy and philosophy of bail. This is not to say that every defendant is entitled to such bail as he can provide, but he is entitled to an opportunity to make it in a reasonable amount. I think the whole matter should be reconsidered by the appropriate judges in the traditional spirit of bail procedure.

The other questions we have heard argued relate to the remedy appropriate when the standards for amount of bail are misapplied. Of course, procedural rights so vital cannot be without means of vindication. In view of the nature of the writ of habeas corpus, we should be reluctant to say that under no circumstances would it be appropriate. But that writ will best serve its purpose and be best protected from discrediting abuse if it

is reserved for cases in which no other procedure will present the issues to the courts. Its use as a substitute for appeals or as an optional alternative to other remedies is not to be encouraged. Habeas corpus is not, in the absence of extraordinary circumstances, the procedure to test reasonableness of bail.

We think that, properly limited and administered, the motion to reduce bail will afford a practical, simple, adequate and expeditious procedure. In view of prevailing confusions and conflicts in practice, this Court should define and limit the procedure with considerable precision, in the absence of which we may flood the courts with motions and appeals in bail cases.

The first fixing of bail, whether by a commissioner under Rule 5 (b), or upon removal under Rule 40 (a), Fed. Rules Crim. Proc., or by the court upon arraignment after indictment, 18 U. S. C. § 3141, is a serious exercise of judicial discretion. But often it must be done in haste—the defendant may be taken by surprise, counsel has just been engaged, or for other reasons the bail is fixed without that full inquiry and consideration which the matter deserves. Some procedure for reconsideration is a practical necessity, and the court's power over revocation or reduction is a continuing power which either party may invoke as changing circumstances may require. It is highly important that such preliminary matters as bail be disposed of with as much finality as possible in the District Court where the case is to be tried. It is close to the scene of the offense, most accessible to defendant, has opportunity to see and hear the defendant and the witnesses personally, and is likely to be best informed for sound exercise of discretion. Rarely will the original determination be disturbed, if carefully made, but if the accused moves to reduce or the Government to revoke bail, a more careful deliberation may then be made on the relevant evidence presented by the parties,

and if the defendant or the Government is aggrieved by a denial of the motion an appeal may be taken on the record as it then stands.

It is my conclusion that an order denying reduction of bail is to be regarded as a final decision which may be appealed to the Court of Appeals. But this is not because every claim of excessive bail raises a constitutional question. It is because we may properly hold appeal to be a statutory right. While only a sentence constitutes a final *judgment* in a criminal case, *Berman* v. *United States,* 302 U. S. 211, 212, it is a final *decision* that Congress has made reviewable. 28 U. S. C. § 1291. While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment. The purpose of the finality requirement is to avoid piecemeal disposition of the basic controversy in a single case "where the result of review will be 'to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation . . . .'" *Cobbledick* v. *United States,* 309 U. S. 323, 326. But an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried—and unless it can be reviewed before sentence, it never can be reviewed at all. The relation of an order fixing bail to final judgment in a criminal case is analogous to an order determining the right to security in a civil proceeding, *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U. S. 541, or other interlocutory orders reviewable under 28 U. S. C. § 1292. I would hold, therefore, that such orders are appealable.

I cannot agree, however, that an order determining what amount of bail is reasonable under the standards prescribed does not call for an exercise of discretion. The Court of Appeals is not required to reexamine every order complained of. They represent exercises of discretion, upon questions, usually, of fact. Trivial differences or

frivolous objections should be dismissed. The Appellate Court should only reverse for clear abuse of discretion or other mistake of law. And it ought to be noted that this Court will not exercise its certiorari power in individual cases except where they are typical of a problem so important and general as to deserve the attention of the supervisory power.

If we would follow this course of reasoning, I think in actual experience it would protect every right of the accused expeditiously and cheaply. At the same time, it would not open the floodgates to a multitude of trivial disputes abusive of the motion procedure.

Having found that the habeas corpus proceeding was properly dismissed by the District Court, in which its judgment was affirmed by the Court of Appeals, we should to that extent affirm. Having thus decided that the procedure taken in this case is not the proper one to bring the question of excessiveness of bail before the courts, there is a measure of inconsistency and departure from usual practice in our discussion of matters not before us. Certainly it would be inappropriate to say now that any particular amount as to any particular defendant is either reasonable or excessive. That concrete amount, in the light of each defendant's testimony and that of the Government, should be fixed by the appropriate judge or Justice upon evidence relevant to the standards prescribed. It is not appropriate for the Court as a whole to fix bail where the power has been given to individual judges and Justices to do so. But there is little in our books to help guide federal judges in bail practice, and the extraordinary and recurring nature of this particular problem seems to warrant a discussion of the merits in which we would not ordinarily engage.

It remains to answer our own question as to whether the power to grant bail is in the Court or in the Circuit

Justice. There is considerable confusion as to the source and extent of that power.

Fed. Rules Crim. Proc., 46 (a) (1), with respect to noncapital cases does not state who has power to grant bail before conviction—it simply directs that in such case bail "shall" be granted. For an answer to the "who" question it is necessary to turn to the Criminal Code.

18 U. S. C. A. § 3141, entitled "Power of courts and magistrates," provides:

> "Bail may be taken by any court, judge or magistrate authorized to arrest and commit offenders, but in capital cases bail may be taken only by a court of the United States having original or appellate jurisdiction in criminal cases or by a justice or judge thereof."

The power to arrest and commit offenders is contained in 18 U. S. C. A. § 3041, which states that:

> "For any offense against the United States, the offender may, by *any justice* or judge of the United States, . . . be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense." (Italics added.)

The fact that this section specifically grants the power of arrest to "any justice . . . of the United States" supports the conclusion that Justices of this Court have the power of arrest, and, having that power under this section, they therefore also have power to grant bail under § 3141.

The Reviser's Notes to § 3141 disclose that it is the product of Rev. Stat. §§ 1015 and 1016, which were embodied verbatim in 18 U. S. C. (1940 ed.) §§ 596 and 597. The Reviser also states that, "Sections 596 and 597 of Title 18, U. S. C., 1940 ed., except as superseded by rule 46(a) (1) of the Federal Rules of Criminal Procedure *are consolidated and rewritten in this section without*

change of meaning. 80th Congress House Report No. 304." (Italics added.) Since no change of meaning was intended, the context of the old sections becomes pertinent.

Rev. Stat. § 1015 reads:

> "Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders."

"The preceding section," § 1014, is the predecessor of 18 U. S. C. A. § 3041, and reads the same as that section, namely:

> "For any *crime or* offense against the United States, the offender may, by any justice or judge of the United States, . . . be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. . . ." (Italicized words are those omitted in 18 U. S. C. A. § 3041.)

Going on in the Revised Statutes, § 1016 states that:

> "Bail may be admitted upon all arrests in criminal cases where the punishment may be death; but in such cases it shall be taken only by the Supreme Court or a circuit court, or by a justice of the Supreme Court, a circuit judge, or a judge of a district court, who shall exercise their discretion therein, having regard to the nature and circumstance of the offense, and of the evidence, and to the usages of law."

The evident tenor of §§ 1015 and 1016, taken together with § 1014, is that a Justice of this Court is one of many who can grant bail in a noncapital case but is one of a restricted class who can grant bail in a capital case.

Section 1016 appears to narrow the class included in § 1015.

To correlate the Revised Statutes with the present statutory scheme:

1. Rule 46 (a) (1), reading as follows, is taken from Rev. Stat. §§ 1015 and 1016 insofar as the latter govern who shall be admitted to bail and the considerations to be given the admission to bail of a capital case defendant.

> Rule 46 (a) (1), "Bail before conviction":
>
> "A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense."

2. 18 U. S. C. A. § 3041, governing power of arrest, is taken directly from Rev. Stat. § 1014.

3. 18 U. S. C. A. § 3141, setting out who may grant bail, is taken from Rev. Stat. §§ 1015 and 1016 insofar as the latter are apropos of that subject.

It thus appears that the scheme of the Revised Statutes has been taken over bodily into the present Code and Rules. The only change I perceive is that, under the Revised Statutes, there was no clear statutory authority for *a court* to grant bail in a noncapital case. Rev. Stat. § 1015 (and § 1014) applicable to such case speak only of individuals. 18 U. S. C. A. § 3141 confers the power on "any court, judge or magistrate authorized to arrest and commit offenders." The only reasonable construction of the latter is the obvious literal one, that is, that courts as well as the individuals empowered to arrest and com-

mit offenders by 18 U. S. C. A. § 3041 are authorized to grant bail. This is substantiated by the language of Fed. Rules Crim. Proc., 46 (c), "Amount [of bail]":

> "If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner *or court* or judge *or justice* will insure the presence of the defendant . . . ." (Italics added.)

That is the one difference between the Revised Statutes' scheme and the present—the power to grant bail in non-capital cases now clearly is vested in the courts as well as in individual judges and justices.

With the premise provided by the Revisor that the power to grant bail before conviction is the same now as under the Revised Statutes, the one exception being the extension to the courts just noted, the conclusion follows that bail can be granted by any court of the United States, including this Court, or by any judge of the United States, including the Justices of this Court.

The next problem is how Rule 45 of the Rules of this Court is to be assimilated with the foregoing. Only the first and fourth subsections of the Rule have any present pertinence. They read as follows:

> "1. Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.
>
> . . . . .
>
> "4. The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the intermediate appellate court but also the further possible review in this court; and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard."

The apparent conflict between the two subsections disappears when subsection 4 is viewed as a reservation of power in *this Court only,* not in an individual Justice of this Court, to issue an order in exceptional cases disturbing the custody of the prisoner. No other court and no individual judge or justice can disturb the custody of the prisoner. See *Carlson* v. *Landon,* 341 U. S. 918.

The next problem is the bearing, if any, of Fed. Rules Crim. Proc., 46 (a) (2), covering the right to bail "Upon Review." It reads:

> "Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice. . . ."

Insofar as it might be applicable to petitioners' case, since they were seeking a review when they filed their petition for bail, it would not seem that it has any efficacy. They have not yet been tried for the offense for which they have been indicted, so that the much wider powers of bail conferred by the statutes governing bail before conviction are applicable. Rule 46 (a) (2) is only intended to apply where a review of a conviction on the merits is sought.

Turning back to the case at hand, and treating the application to MR. JUSTICE DOUGLAS for bail as one for bail pending review of a denial of habeas corpus, I think it clear that he does not have power to grant bail, but the full Court does have that power. However, since the Court sustains the denial of habeas corpus, treating the application for bail strictly as one pending review of the denial of habeas corpus, the problems it raises are actually moot. If the application to MR. JUSTICE DOUGLAS be treated as one made for fixing bail in the original case, it is my opinion that he has power to entertain it.

Syllabus.

SUTPHEN ESTATES, INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 25. Argued October 11, 1951.—Decided November 5, 1951.

Pursuant to a decree in Sherman Act proceedings against certain motion picture companies, a plan for the reorganization of Warner Bros. provided for the separation of Warner's theatre business from its production and distribution business. Two new companies were to be formed, one to receive the theatre assets, the other to receive the production and distribution assets; and Warner Bros. was to be dissolved. Warner was guarantor of a long-term lease of theatre properties made by appellant to a Warner subsidiary; and, under the plan of reorganization, the guaranty was to be assumed only by the new theatre company. Appellant sought to intervene in the Sherman Act proceedings to protect its guaranty, but the District Court denied leave. *Held:*

1. If appellant was entitled to intervene as of right, the order denying leave is appealable. P. 20.

2. The decree in the Sherman Act proceedings is not *res judicata* of the rights which appellant sought to protect through intervention, and appellant was therefore not entitled to intervene as of right under Rule 24 (a) (2) of the Federal Rules of Civil Procedure. P. 21.

3. On the record in this case, appellant has not shown that it will be "adversely affected" by the reorganization, and hence may not intervene as of right under Rule 24 (a) (3). P. 22.

4. The claim of injury to appellant is too speculative and too contingent on unknown factors to conclude that the court's denial of leave to intervene was an abuse of its discretion under Rule 24 (b). P. 23.

Appeal dismissed.

In proceedings under the Sherman Antitrust Act, the District Court entered a consent decree against Warner Bros. and certain of its subsidiaries, and entered an order denying appellant's motion for leave to intervene. On

a direct appeal to this Court from this order and from the consent decree, *the appeal is dismissed,* p. 23.

H. G. Pickering argued the cause for appellant. With him on the brief was *Bertram F. Shipman.*

Charles H. Weston argued the cause for the United States. With him on the brief were *Solicitor General Perlman* and *Assistant Attorney General Morison.*

Joseph M. Proskauer argued the cause for Warner Bros. Pictures, Inc. et al., appellees. With him on the brief were *R. W. Perkins* and *Harold Berkowitz.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Rule 24 (a) of the Federal Rules of Civil Procedure provides in part as follows:

> "(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

Appellant claims intervention of right in the Sherman Act proceedings involving the reorganization of certain producers and distributors of motion picture films whose activities had been found to violate the Act. See *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131. If appellant may intervene as of right, the order of the court denying intervention is appealable. See *Railroad Trainmen* v. *B. & O. R. Co.,* 331 U. S. 519, 524; 32 Stat.

823, as amended, 15 U. S. C. (Supp. II) § 29. It was to resolve that question that we postponed the question of our jurisdiction of the appeal to the hearing on the merits.

The present controversy stems from the reorganization of Warner Bros. Pictures, Inc., pursuant to a decree of the court in the Sherman Act proceedings. Under this decree provision is made for the divorcement of Warner's theatre business from its production and distribution business. The various steps in the reorganization are not material here. It is sufficient to note that according to the plan the stockholders of Warner will vote a dissolution of Warner. Two new companies will be formed, one to receive the theatre assets, the other to receive the production and distribution assets. Each of the new companies will distribute its capital stock pro rata to Warner's stockholders.

Warner is a guarantor of a lease of theatre properties made by appellant to a subsidiary of a subsidiary of Warner. The lease, executed in 1928 and modified in 1948, is for a term of 98 years. The plan of reorganization submitted to the stockholders provides, as we read it and as construed by counsel for appellees on oral argument, that liabilities of the class in which the guaranty falls will be assumed by the new theatre company. Appellant seeks intervention to protect its guaranty.

There is intervention as of right under Rule 24 (a) (2) "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." Appellant, however, is not a privy of Warner; its rights not only do not derive from Warner, they are indeed adverse to Warner. The decree in this case, like that in *Credits Commutation Co.* v. *United States,* 177 U. S. 311, therefore is not *res judicata* of the rights sought to be protected through intervention.

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Nor is appellant entitled to intervene as of right by reason of Rule 24 (a) (3). It is true that this is a case of "a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court . . ." within the meaning of Rule 24 (a) (3). For it is the authority of the court under the Sherman Act that sanctions and directs the reorganization. *United States* v. *Paramount Pictures, Inc., supra,* pp. 170 *et seq.* Appellant argues that it is "adversely affected" by the disposition of the property. It points out that under the plan its guarantor is dissolved and his property divided among two new companies, only one of which assumes the guarantor's liabilities under the lease. It argues that it is entitled to a judicially ascertained equivalent for the Warner guaranty. And it claims that in this case that equivalent would be a guaranty by each of the new companies.

We do not think, however, that on this record appellant has shown that it will be "adversely affected" by the reorganization within the meaning of Rule 24 (a) (3). It will have the guaranty of the new theatre company. No showing is made or attempted that that company lacks the financial strength to assume the responsibilities of the guaranty. No showing is made or attempted that the contingent liability under the guaranty is so imminent and onerous as to make the guaranty of the new company substantially less valuable than the guaranty of Warner's. For all we know, a guaranty of a company in the theatre business, freed from the hazards of the production and distribution business, may be even more valuable than the guaranty of Warner's. We do not pass here on the fairness of the plan of reorganization. Cf. *Continental Co.* v. *United States,* 259 U. S. 156. We hold only that appellant has not maintained the burden of showing that under Rule 24 (a) (3) it may intervene as of right.

Permissive intervention is governed by Rule 24 (b). But we have said enough to show that the claim of injury to appellant is too speculative and too contingent on unknown factors to conclude that there was an abuse of discretion in denying leave to intervene. The court had ample reason to prevent the administration of the decree from being burdened with a collateral issue that on this record can properly be adjudicated elsewhere. The appeal is therefore

Dismissed.

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

MR. JUSTICE BLACK, dissenting.

Warner Brothers, Inc., has been guarantor on a lease of theater properties made by appellant Sutphen Estates. Under a court decree of dissolution Warner is to be split up into two companies, only one of which will expressly assume the Warner guarantee to Sutphen. Sutphen's lease can no longer be guaranteed by the combined assets of the illegal corporation we have ordered dissolved. Perhaps it is inevitable that the guarantee will be impaired to some extent, but we should insure that Sutphen suffers no more than its fair share of whatever losses may result from the enforcement of the antitrust laws.

I am of the opinion that the issue of impairment can best be and should be determined by the District Court as a part of the dissolution proceedings. Furthermore, I cannot assent to an opinion that permits this question of impairment to remain open for adjudication elsewhere at some indefinite time in the future.

Dissolution of Warner, which we have ordered, cannot be completely consummated if the decree leaves in doubt whether both new companies are jointly obligated on

Sutphen's lease. Cf. *Continental Insurance Co.* v. *United States,* 259 U. S. 156, 173–174. Surely, if we have the power to order a dissolution to prevent Sherman Act violations, we have power to insure that the newly created companies are permanently and totally disinterested in each other's future activities, and are in no way united by past obligations.

McMAHON *v.* UNITED STATES ET AL.

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

No. 17. Argued October 17, 1951.—Decided November 5, 1951.

1. Under the Clarification Act the claim of a seaman against the United States for injuries and maintenance and cure, "if administratively disallowed in whole or in part," may be enforced pursuant to the provisions of the Suits in Admiralty Act, which provides that any suit thereunder "shall be brought within two years after the cause of action arises." *Held:* The period of limitation begins to run from the date of the injury, not from the time of the administrative disallowance of the claim. Pp. 25–27.
2. Upon the record in this case, it is inappropriate to consider whether the statute of limitations is tolled for a maximum of sixty days while a claim is pending and not disallowed either by notice or by operation of the regulations. P. 28.

186 F. 2d 227, affirmed.

Petitioner's complaint in a suit against the United States was dismissed by the District Court as barred by limitations. 91 F. Supp. 593. The Court of Appeals affirmed. 186 F. 2d 227. This Court granted certiorari. 341 U. S. 930. *Affirmed,* p. 28.

Paul M. Goldstein argued the cause and filed a brief for petitioner.

Leavenworth Colby argued the cause for respondents. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Herman Marcuse.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

Petitioner, a seaman, brought this suit in admiralty alleging in the first count a cause of action based on negligence and unseaworthiness, while in the second

count he sought maintenance and cure. He alleged the actionable wrongs to have taken place in November and December of 1945, but he did not file his libel until January 22, 1948.

The Act which gives to seamen employed by the United States on government-owned vessels the same rights as those employed on privately owned and operated American vessels provides that claims like those of the petitioner, ". . . if administratively disallowed in whole or in part . . .," may be enforced pursuant to the provisions of the Suits in Admiralty Act.[1] That Act in turn provides that any suit thereunder ". . . shall be brought within two years after the cause of action arises. . . ." [2] Courts of Appeals have rendered conflicting decisions as to whether the date of injury or the date of disallowance of the claim commences the period of limitation. The District Court dismissed this petitioner's complaint on the ground set up by the Government that it was not filed within two years from the dates of his injuries.[3] The Court of Appeals for the Third Circuit affirmed on the same ground, adhering to its view expressed in an earlier case, and, it subsequently developed, in agreement with the Court of Appeals for the Second Circuit.[4]

The contention of the petitioner is that he could not sue until his claim had been administratively disallowed, and that he had no "cause of action" until he could sue. Accordingly, he argues that the period of limitations cannot start to run until his claim has been adminis-

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[1] Clarification Act of March 24, 1943, § 1 (a), 57 Stat. 45, 50 U. S. C. App. § 1291 (a).

[2] Suits in Admiralty Act, § 5, 41 Stat. 526, 46 U. S. C. § 745.

[3] 91 F. Supp. 593.

[4] 186 F. 2d 227; *Rodinciuc* v. *United States,* 175 F. 2d 479, 481 (C. A. 3d Cir.); *Gregory* v. *United States,* 187 F. 2d 101, 103 (C. A. 2d Cir.).

tratively disallowed because only then does his "cause of action" arise. In his support he points to *Thurston* v. *United States,* 179 F. 2d 514, in which the Court of Appeals for the Ninth Circuit held in accord with his present contentions.

We find ourselves unable to agree with petitioner and the Ninth Circuit, for we think it clear that the proper construction of the language used in the Suits in Admiralty Act is that the period of limitation is to be computed from the date of the injury. It was enacted several years before suits such as the present, on disallowed claims, were authorized. Certainly during those years the limitation depended upon the event giving rise to the claims, not upon the rejection. When later the right to sue was broadened to include such claims as this, there was no indication of any change in the limitation contained in the older Act. While, as the court below pointed out, legislation for the benefit of seamen is to be construed liberally in their favor, it is equally true that statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign.[5] Since no time is fixed within which the seaman is obliged to present his claim, under petitioner's position he would have it in his power, by delaying its filing, to postpone indefinitely commencement of the running of the statute of limitations and thus to delay indefinitely knowledge by the Government that a claim existed. We cannot construe the Act as giving claimants an option as to when they will choose to start the period of limitation of an action against the United States. Accordingly, we hold that the statute of limitations runs from the date of the injury, and affirm the court below.

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[5] *United States* v. *Michel,* 282 U. S. 656, 659; *United States* v. *Shaw,* 309 U. S. 495, 500–501; *United States* v. *Sherwood,* 312 U. S. 584, 586–587.

It is to be observed that the regulations applicable to the filing of such a claim provide that, if it is not rejected in writing within sixty days from filing, it shall be presumed to have been administratively disallowed and the claimant shall be entitled to enforce his claim.[6] The record filed with us does not disclose when petitioner's claim was filed or, with precision, when it was disallowed. In view of that state of the record making it uncertain whether the point would have any effect on the outcome and the fact that petitioner has not raised the point, we find it inappropriate to consider whether the statute of limitations is tolled for a maximum of sixty days while a claim is pending and not disallowed either by notice or by operation of the regulations.

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS think that, for reasons stated in *Thurston* v. *United States,* 179 F. 2d 514, the statute of limitations did not begin to run until the claim was disallowed and would therefore reverse this judgment.

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

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[6] General Order 32, Administrator, War Shipping Administration, 8 Fed. Reg. 5414, 46 CFR § 304.26.

GARDNER *v.* PANAMA RAILROAD CO.

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

No. 22. Argued October 11, 1951.—Decided November 5, 1951.

1. Upon the facts of this case, laches was not a defense to petitioner's suit in admiralty against respondent to recover damages for injuries alleged to have been sustained while a passenger on respondent's steamship, although an action at law was barred by the local statute of limitations. Pp. 30–32.

   (a) Although the question of laches is one primarily addressed to the discretion of the trial court, it should not be determined merely by a reference to and a mechanical application of the statute of limitations; the equities of the parties must also be considered. Pp. 30–31.

   (b) Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, relief should not be denied on the ground of laches. P. 31.

2. Public Law 172, 81st Cong., 1st Sess., 63 Stat. 444, 28 U. S. C. § 2680 (m), which excluded claims against the Panama Railroad Company from the provisions of the Tort Claims Act, is not to be interpreted as summarily cutting off the remedy of all who had sued the United States for torts which had been committed by the company during the year preceding its enactment, but as permitting outstanding claims upon which suit had been instituted against the United States to be enforced by prompt proceedings directly against the company. Pp. 31–32.

185 F. 2d 730, reversed.

Petitioner's suit in admiralty against respondent was dismissed by the District Court on the ground of laches. The Court of Appeals affirmed. 185 F. 2d 730. This Court granted certiorari. 341 U. S. 934. *Reversed,* p. 32.

Eugene Eisenmann argued the cause and filed a brief for petitioner.

Thomas J. Maginnis argued the cause for respondent. With him on the brief was *Paul M. Runnestrand.*

PER CURIAM.

This suit in admiralty, a libel *in personam* brought in the District Court for the Canal Zone, is petitioner's third attempt to secure damages for injuries alleged to have been sustained on December 3, 1947, while a passenger on board respondent's steamship *Panama*.

Petitioner instituted her first action against the respondent on April 10, 1948. This complaint was dismissed October 7, 1948, after the company successfully maintained that petitioner's only remedy was to sue the United States under the Federal Tort Claims Act; that respondent, whose entire stock is owned by the United States, was a "federal agency" within the meaning of that Act.[1]

An action against the United States filed on November 29, 1948—still within the one-year period of limitation—was dismissed by the District Court before reaching trial on the merits, after Congress had amended, on July 16, 1949, the Federal Tort Claims Act, excluding from its coverage "Any claim arising from the activities of the Panama Railroad Company." [2]

Five days later, on October 19, 1949, petitioner commenced the present suit. Respondent pleaded laches on the theory that, since the one-year Canal Zone statute of limitations [3] now barred any action at law, laches should bar any remedy in admiralty. The District Court sustained this defense, and entered judgment for the respondent. The Court of Appeals affirmed on that ground, 185 F. 2d 730. We granted certiorari, 341 U. S. 934.

Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter

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[1] 28 U. S. C. §§ 2671, 2679.

[2] Public Law 172, 81st Cong., 1st Sess., 63 Stat. 444, 28 U. S. C. § 2680 (m).

[3] Canal Zone Code, 1934, Tit. 4, § 87 (3).

should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief. *The Key City,* 14 Wall. 653 (1872); *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483 (1919); *Holmberg* v. *Armbrecht,* 327 U. S. 392 (1946); see *McGrath* v. *Panama R. Co.,* 298 F. 303, 304 (1924).

Petitioner has diligently sought redress in this case. Twice within the year following her injuries she brought suit. The second action abated through an Act of Congress and not through any fault of her own. There is no showing that respondent's position has suffered from the fact that the claim has not yet proceeded to trial on its merits.

Respondent contends that, in any event, the decision below must be affirmed because the petitioner at no time has had a cause of action against the company. It contends that, at the time of the injury, the United States and not the company was liable, and that Public Law 172, which now renders the company amenable to suit, should not operate retroactively to transfer the preexisting liability of the Government to the respondent.

We must reject this view. The company was subject to suit before passage of the Tort Claims Act, *Panama R. Co.* v. *Minnix,* 282 F. 47 (1922), and its inclusion within the scope of that Act meant only that the United States was responsible in damages for its torts. Without interval, from the time of respondent's incorporation, until July 16, 1949, those injured through fault of the company were never left without means of redress. Respondent would now have us attribute to Congress the intent to create an inequitable hiatus. Despite the fact that the stated "purpose" of Public Law 172 was simply

to "exclude claims against the . . . Company from the provisions" of the Tort Claims Act,[4] respondent would have us hold that Congress meant to cut off, summarily, the remedy of all who had sued the United States for torts which had been committed by the Panama Railroad Company during the year preceding enactment of Public Law 172.

In our view, the amendment permitted outstanding claims upon which suit had been instituted against the United States to be enforced by prompt proceedings directly against the company. The petitioner followed this course. This interpretation would seem to be sustained by the statement of the company's president when he endorsed the passage of Public Law 172, securing the exclusion of respondent from the Tort Claims Act, at which time he said that though the Act embraced "claims against the Panama Railroad Company," its provisions were not well designed to expedite the redress of such injuries, and that Congress should enact Public Law 172 "to continue unimpaired . . . the amenability of the Company to suit in the ordinary course." [5]

The decision of the Court of Appeals is reversed and the cause is remanded to the District Court for further proceedings.

Reversed.

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

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[4] H. R. Rep. No. 830, 81st Cong., 1st Sess.; S. Rep. No. 167, *id.*

[5] H. R. Rep. No. 830, *supra,* 3, 4; S. Rep. No. 167, *supra,* 3, 4.

DIXON *v.* DUFFY, WARDEN.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 79. Argued October 16, 1951.—Continued November 5, 1951.

This cause is continued for such period as will enable counsel for petitioner to secure a determination from the Supreme Court of California as to whether its judgment herein was intended to rest on an adequate independent state ground or whether decision of the federal claim was necessary to the judgment rendered. Pp. 33–34.

Franklin C. Stark, acting under appointment by the Court, argued the cause and filed a brief for petitioner.

Clarence A. Linn, Assistant Attorney General of California, argued the cause for respondent. With him on the brief were *Edmund G. Brown,* Attorney General, and *Howard S. Goldin,* Assistant Attorney General.

PER CURIAM.

Petitioner was convicted in the California Superior Court in 1949 of making and possessing counterfeiting dies or plates in violation of Cal. Penal Code, 1949, § 480. He did not appeal, but sought to challenge the validity of his conviction by filing successive petitions for a writ of habeas corpus in the California Superior Court and California District Court of Appeal.

Following denial of these petitions, he instituted this case by filing an original petition for a writ of habeas corpus in the Supreme Court of California. The Supreme Court of California denied the petition without opinion, two justices thereof voting for issuance of the writ. We granted certiorari, 341 U. S. 938, because of a serious claim that petitioner had been deprived of his rights under the Federal Constitution.

At the bar of this Court, the Attorney General of the State of California argued that habeas corpus was not a proper state remedy for determination of petitioner's federal claim. It is the position of the Attorney General that petitioner's failure to appeal in this case barred him from seeking post-conviction relief by way of a collateral habeas corpus proceeding. He admits that habeas corpus is available in California in cases involving certain exceptional circumstances, but contends that this is not such a case. If the Attorney General is correct, the judgment may rest on a non-federal ground, thus calling for dismissal of our writ of certiorari. In this state of uncertainty, we follow our precedents in *Herb* v. *Pitcairn,* 324 U. S. 117 (1945), and *Loftus* v. *Illinois,* 334 U. S. 804 (1948).

Accordingly, the cause is ordered continued for such period as will enable counsel for petitioner to secure a determination from the Supreme Court of California as to whether the judgment herein was intended to rest on an adequate independent state ground or whether decision of the federal claim was necessary to the judgment rendered.

Cause continued.

Mr. Justice Douglas dissents.

Mr. Justice Minton took no part in the consideration or decision of this case.

PALMER OIL CORP. ET AL. *v.* AMERADA PETROLEUM CORP. ET AL.

NO. 301. APPEAL FROM THE SUPREME COURT OF OKLAHOMA.*

Continued November 5, 1951.

These causes are continued for such period as will enable appellants with all convenient speed to secure in an appropriate state proceeding a determination as to the effect on these appeals of the repeal of the state statute whose constitutionality is drawn in question by these appeals.

The decision below is reported in 204 Okla. 543, 231 P. 2d 997.

Coleman Hayes, Mark H. Adams and *Charles E. Jones* for appellants in No. 301.

Reford Bond, Jr. for appellants in No. 302.

Harry D. Page for the Amerada Petroleum Corporation; *Earl A. Brown, Robert W. Richards* and *Charles B. Wallace* for the Magnolia Petroleum Co.; *M. D. Kirk* for the Sunray Oil Corporation; and *Rayburn L. Foster, Harry Turner* and *R. M. Williams* for the Phillips Petroleum Co., appellees.

PER CURIAM.

The Court is advised that, on May 26, 1951, the Oklahoma Legislature repealed Okla. Stat., 1941 (Cum. Supp. 1949), Tit. 52, §§ 286.1–286.17, the constitutionality of which is drawn in question by these appeals. The causes are therefore ordered continued for such period as will enable appellants with all convenient speed to secure in an appropriate state proceeding a determination as to the effect of this repeal on the matters raised in these appeals.

Cause continued.

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*Together with No. 302, *Farwell et al.* v. *Amerada Petroleum Corp. et al.*, also on appeal from the same court.

UNITED STATES *v.* CARIGNAN.

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

No. 5. Argued October 8, 1951.—Decided November 13, 1951.

1. Having confessed that he assaulted a woman with intent to commit rape, respondent was arrested and duly committed on that charge on a Friday. While in lawful custody on that charge, he was questioned on Saturday and Monday (but not on Sunday) about the murder of another woman during an attempt to commit rape; and he confessed to the murder on Monday, without having been arrested, indicted or committed on that charge. There was no evidence of violence, persistent questioning or deprivation of food or rest. Respondent was told that he did not have to make a statement and that no promises could be made to him in one way or another. Prior to his confession, he was permitted to consult privately with a priest on two different occasions. *Held:* On the uncontradicted facts in this record, the confession of murder was not inadmissible in evidence under the principles of *McNabb* v. *United States,* 318 U. S. 332, and *Upshaw* v. *United States,* 335 U. S. 410. Pp. 37–45.

   (a) So long as no coercive methods by threats or inducements to confess are employed, constitutional requirements do not forbid police examination in private of those in lawful custody or the use as evidence of information voluntarily given. P. 39.

   (b) The *McNabb* doctrine was not intended as a penalty or sanction for violation of Rule 5 of the Federal Rules of Criminal Procedure. *United States* v. *Mitchell,* 322 U. S. 65. P. 42.

   (c) Respondent's confession of murder was not given during unlawful detention, because he was being lawfully detained on another charge although he had not been arrested for or charged with murder when the confession of murder was made. Pp. 43–44.

   (d) This Court declines to extend the *McNabb* doctrine to statements to police or wardens concerning other crimes while prisoners are legally detained on criminal charges. P. 45.
2. Issues which were in controversy in the Court of Appeals, but which that court did not decide, are available to a respondent in certiorari as grounds for affirmance of the judgment, even though the respondent did not petition for certiorari. P. 38, n. 1.
3. When the admissibility of respondent's confession was in issue in the trial court, the judge committed reversible error in refusing to

permit respondent to testify in the absence of the jury to facts believed to indicate the involuntary character of his confession. P. 38.

4. The facts in this record surrounding the giving of the confession do not necessarily establish coercion, physical or psychological, so as to render the confession inadmissible. P. 39.

185 F. 2d 954, affirmed on other grounds.

In the District Court for the Territory of Alaska, respondent was convicted of first degree murder in attempting to perpetrate a rape and was sentenced to death. The Court of Appeals reversed. 185 F. 2d 954. This Court granted certiorari. 341 U. S. 934. *Affirmed on other grounds,* p. 45.

Philip Elman argued the cause for the United States. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Beatrice Rosenberg* filed a brief for the United States.

Harold J. Butcher argued the cause and filed a brief for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

Respondent Carignan was convicted in the District Court for the Territory of Alaska of first degree murder in attempting to perpetrate a rape. Alaska Compiled Laws Annotated, 1949, § 65–4–1. He was sentenced to death. The conviction was reversed by the United States Court of Appeals for the Ninth Circuit. *Carignan* v. *United States,* 185 F. 2d 954. The sole ground of the reversal was the admission of a confession obtained in a manner held to be contrary to the principles expounded by this Court in *McNabb* v. *United States,* 318 U. S. 332, and *Upshaw* v. *United States,* 335 U. S. 410.

The case is here on writ of certiorari granted on the petition of the Government. 341 U. S. 934. The question presented by the petition was whether it was error to admit at the trial respondent's confession of the mur-

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der. The confession was held inadmissible because given before arrest, indictment, or commitment on the murder charge. The confession was given after respondent had been duly committed to jail, Rule 5, Federal Rules of Criminal Procedure, under a warrant which charged that he had, at a time six weeks after the murder, perpetrated an assault with intent to rape.

Respondent advances three additional issues to support the reversal of the conviction besides the above point on detention. *First.* Error, it is argued, was committed by the trial court in admitting the confession because it was obtained by secret interrogation and psychological pressure by police officers. *Second.* Further error, it is said, followed from a failure of the trial court to submit to the jury, as a question of fact, the voluntary or involuntary character of the confession. *Third.* Error occurred when the trial court refused to permit respondent to take the stand and testify in the absence of the jury to facts believed to indicate the involuntary character of the confession.[1]

The United States concedes in regard to the third issue that the better practice, when admissibility of a confession is in issue, is for the judge to hear a defendant's offered testimony in the absence of the jury as to the surrounding facts. Therefore, the Government makes no objection to the reversal of the conviction on that ground. We think it clear that this defendant was entitled to such an opportunity to testify. An involuntary confession is inadmissible. *Wilson* v. *United States,* 162 U. S. 613, 623. Such evidence would be pertinent to the inquiry on admissibility and might be material and determinative. The refusal to admit the testimony was reversible error.

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[1] Since these issues were in controversy below, they are available to respondent as grounds for affirmance of the Court of Appeals. *Langnes* v. *Green,* 282 U. S. 531, 535, 538; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 330.

As this error makes necessary a new examination into the voluntary character of the confession, there is no need now to pursue on this record the first and second issues brought forward by respondent, except to say that the facts in this record surrounding the giving of the confession do not necessarily establish coercion, physical or psychological, so as to render the confession inadmissible. The evidence on the new trial will determine the necessity for or character of instructions to the jury on the weight to be accorded the confession, if it is admitted in evidence. Cf. *United States* v. *Lustig,* 163 F. 2d 85, 88–89. *McNabb* v. *United States,* 318 U. S. 332, 338, note 5. So long as no coercive methods by threats or inducements to confess are employed, constitutional requirements do not forbid police examination in private of those in lawful custody or the use as evidence of information voluntarily given.[2]

The following summary of the uncontradicted facts discloses the circumstances leading to the confession. Respondent Carignan was detained by the Anchorage police in connection with the subsequent assault case from about 11 a. m., Friday, September 16, 1949. He was identified in a line-up by the victim, and confessed to the assault. Around 4 p. m. on the same day he was arrested and duly committed for the assault. His trial on the assault charge took place subsequent to this confession.

During the time between his detention and commitment for the assault, respondent was questioned by the police about the murder which was the basis of the conviction now under review. A witness who had seen the man involved in the murder and his victim together at the scene of the crime was brought to the police station during this time. From a line-up he picked out respond-

[2] *Ziang Sung Wan* v. *United States,* 266 U. S. 1, 14; *Lisenba* v. *California,* 314 U. S. 219, 239; *McNabb* v. *United States,* 318 U. S. 332, 346. Cf. *Hardy* v. *United States,* 186 U. S. 224, 228.

ent Carignan as one appearing to be the person that he saw on that occasion. Carignan did not give any information about his activities on the day the murder was committed.

The night of Friday, September 16, Carignan was lodged in the city jail. The next morning, Saturday, Herring, the United States Marshal, undertook to question respondent in regard to the earlier crime of murder. No evidence appears of violence, of persistent questioning, or of deprivation of food or rest. Respondent was told that he did not have to make a statement, and that no promises could be made to him one way or another. There were pictures of Christ and of various saints on the walls of the office in which the conversation occurred. The Marshal evidently suggested to him that his Maker might think more of him if he told the truth about the crime. The evidence also shows that the Marshal told Carignan that he, the Marshal, had been in an orphan asylum as a youth, as had Carignan. On respondent's request a priest was called. The accused talked to the priest alone for some time and later told the Marshal he would give him a statement. After his return to the jail about 5 p. m. on Saturday, he was left undisturbed.

On Sunday he was not questioned, and on Monday morning the Marshal again took respondent out of jail and into the grand jury room in the courthouse. Upon the Marshal's inquiry if he had any statement to make, respondent answered that he had but that he wished to see the priest first.

After talking to the priest again for some time, he gave the Marshal a written statement. The statement was noncommittal as to the murder charge. Two other police officers who were with the Marshal and Carignan then suggested that perhaps Carignan would rather talk to the Marshal alone. They withdrew. The Marshal

told Carignan, in response to an inquiry, that he had been around that court for twenty-seven years and that during that time "there had been no hanging, what would happen to him I couldn't promise him or anyone else." There was also some talk about McNeil Island, the location of the nearest federal penitentiary, and the Marshal said, in reply to a question of Carignan's, that he, the Marshal, "had known men that had been there and learned a trade and that made something of their lives." After a few moments' further conversation Carignan completed the written statement that was later put in evidence. It then admitted the killing.

Whether involuntary confessions are excluded from federal criminal trials on the ground of a violation of the Fifth Amendment's protection against self-incrimination,[3] or from a rule that forced confessions are untrustworthy,[4] these uncontradicted facts do not bar this confession as a matter of law. The constitutional test for admission of an accused's confession in federal courts for a long time has been whether it was made "freely, voluntarily and without compulsion or inducement of any sort." [5] However, this Court in recent years has enforced a judicially created federal rule of evidence, to which the label "*McNabb* rule" has been applied, that confessions shall be excluded if obtained during "illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological.' " [6] Violation of the *McNabb* rule, in the view of the Court of Appeals,

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[3] *Bram* v. *United States,* 168 U. S. 532, 542; *Powers* v. *United States,* 223 U. S. 303, 313.

[4] Wigmore, Evidence (1940 ed.), § 822. Cf. *Ziang Sung Wan* v. *United States,* 266 U. S. 1, 14.

[5] *Wilson* v. *United States,* 162 U. S. 613, 623.

[6] *Upshaw* v. *United States,* 335 U. S. 410, 413; *McNabb* v. *United States,* 318 U. S. 332.

not the assertedly involuntary character of the confession, caused that court to reverse the conviction.[7] Our problem in this review is whether the *McNabb* rule covers this confession or, if not, whether that rule of evidence should now be judicially extended to these facts.

By *United States* v. *Mitchell,* 322 U. S. 65, 70–71, this Court decided that the *McNabb* rule was not intended as a penalty or sanction for violation of R. S. D. C. § 397, a commitment statute. The same conclusion applies to Rule 5, Federal Rules of Criminal Procedure.[8] This rule applies to Alaska. Rule 54 (a). See *Upshaw* v.

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[7] *Carignan* v. *United States,* 185 F. 2d 954:

Healy, Circuit Judge:

"What the court has to decide is whether the circumstances outlined were such as to bring the case within the spirit and intent of Rule 5 and the holding of the McNabb decision, supra, as further expounded in Upshaw v. United States, 335 U. S. 410, ...[4]

"[4] In the view of the writer of this opinion something approaching psychological pressure, not unmixed with deceit, contributed to the extraction of the confession. Since the majority are of a contrary opinion this possible aspect has not been given weight in the decision to reverse." P. 958.

Bone, Circuit Judge:

"However, I emphasize that my concurrence rests *solely* upon the fact that appellant was not arraigned prior to being interrogated by the Marshal and prior to the making of the confession. The evidence in this case convinces me that the confession was freely made and was not the product of any form of promises or inducement that would or should vitiate it." P. 961.

See also Pope, Circuit Judge, dissenting, p. 962.

[8] Federal Rules of Criminal Procedure:

"Rule 5. Proceedings before the Commissioner.

"(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a

United States, 335 U. S. 410, 411. Mitchell's confession, made before commitment, but also before his detention had been illegally prolonged, was admitted as evidence because it was not elicited "through illegality." The admission, therefore, was not "use by the Government of the fruits of wrongdoing by its officers." *Upshaw* v. *United States, supra,* 413.[9]

The *McNabb* rule has been stated thus:

> ". . . that a confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological . . . .'" *Upshaw* v. *United States,* 335 U. S. at 413.

One cannot say that this record justifies characterization of this confession as given during unlawful detention. Rule 5, Federal Rules of Criminal Procedure, does not apply in terms, because Carignan was neither arrested for nor charged with the murder when the confession to that crime was made. He had been arrested and committed for the assault perpetrated six weeks after

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person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

"(b) STATEMENT BY THE COMMISSIONER. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules."

[9] In the *Mitchell* case, defendant's confession was given at the police station before commitment, a few minutes after two policemen had jailed him following his arrest on a charge of housebreaking and larceny. For the purpose of aiding in clearing up a series of housebreakings, Mitchell's appearance for commitment was illegally postponed for eight days.

the murder. His detention, therefore, was legal. Further, before the confession, there was basis for no more than a strong suspicion that Carignan was the murderer. That suspicion arose from a doubtful identification by a person who had in passing seen a man resembling the respondent at the scene of the murder and from a similarity of circumstances between the murder and the assault.[10] The police could hardly be expected to make a murder charge on such uncertainties without further inquiry and investigation. This case falls outside the reason for the rule, *i. e.*, to abolish

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[10] The weakness of this evidence is shown by the record.

"Q. Now, at any later time, Mr. Keith, were you called upon to identify anyone that resembled the person that you saw, the male person in the grass that night?

"A. I was taken to the police station and viewed the line-up.

"Q. Do you recall how many were in that line-up?

"A. There was either four or five, I don't exactly recollect.

"Q. Did you pick out some person that appeared to be the person that you saw on this particular occasion?

"A. I did.

"Q. Do you see anyone in the courtroom today that resembles the party that you saw that night in question?

"A. I do.

"Q. Will you point him out?

"A. He is right over there." R. 120–121.

. . . . .

"Q. Now, were you able to remember the person you saw there so that when you saw him in the courtroom today you were able to recognize him as the same person?

"A. I couldn't positively swear that he is the same person." R. 128.

. . . . .

"Q. When did you next see the man whom you identified as the person you saw in the park in the grass?

"A. In the police line-up.

"Q. Did you have any difficulty recognizing him at that time?

"A. Well, no. I picked him out as looking nearer like the man that I saw there than any man I have seen." R. 130.

unlawful detention. Such detention was thought to give opportunity for improper pressure by police before the accused had the benefit of the statement by the commissioner. Rule 5 (b), *supra,* note 8. *Upshaw* v. *United States, supra,* 414; *McNabb* v. *United States, supra,* 344. Carignan had received that information at his commitment for the assault.

Another extension of the *McNabb* rule would accentuate the shift of the inquiry as to admissibility from the voluntariness of the confession to the legality of the arrest and restraint. Complete protection is afforded the civil rights of an accused who makes an involuntary confession or statement when such confession must be excluded by the judge or disregarded by the jury upon proof that it is not voluntary. Such a just and merciful rule preserves the rights of accused and society alike. It does not sacrifice justice to sentimentality. An extension of a mechanical rule based on the time of a confession would not be a helpful addition to the rules of criminal evidence. We decline to extend the *McNabb* fixed rule of exclusion to statements to police or wardens concerning other crimes while prisoners are legally in detention on criminal charges.

The decision of the Court of Appeals is modified and, as modified by this opinion, the judgment is

Affirmed.

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

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER join, concurring.

I agree that the judgment of conviction was properly set aside. But my reason strikes deeper than the one on which the Court rests its opinion. There are time-honored police methods for obtaining confessions from an

accused. One is detention without arraignment, the problem we dealt with in *McNabb* v. *United States,* 318 U. S. 332. Then the accused is under the exclusive control of the police, subject to their mercy, and beyond the reach of counsel or of friends. What happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country—the free as well as the despotic, the modern as well as the ancient. In the *McNabb* case we tried to rid the federal system of those breeding grounds for coerced confessions.

Another time-honored police method for obtaining confessions is to arrest a man on one charge (often a minor one) and use his detention for investigating a wholly different crime. This is an easy short cut for the police. How convenient it is to make detention the vehicle of investigation! Then the police can have access to the prisoner day and night. Arraignment for one crime gives some protection. But when it is a pretense or used as the device for breaking the will of the prisoner on long, relentless, or repeated questionings, it is abhorrent. We should free the federal system of that disreputable practice which has honeycombed the municipal police system in this country.* We should make illegal such a perversion of a "legal" detention.

The rule I propose would, of course, reduce the "efficiency" of the police. But so do the requirements for arraignment, the prohibition against coerced confessions, the right to bail, the jury trial, and most of our other procedural safeguards. We in this country, however, early made the choice—that the dignity and privacy of the individual were worth more to society than an all-powerful police.

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*See, for example, 29 City Club Bulletin of Portland, Oregon, No. 7, June 18, 1948.

We are framing here a rule of evidence for criminal trials in the federal courts. That rule must be drawn in light not of the facts of the particular case but of the system which the particular case reflects. Hence, the fact that the charge on which this respondent was arraigned was not a minor one nor one easily conceived by the police is immaterial. The rule of evidence we announce today gives sanction to a police practice which makes detention the means of investigation. Therein lies its vice. Hence, we do not reach the question whether a confession so obtained violates the Fifth Amendment.

UNITED STATES *v.* JEFFERS.

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

No. 3. Argued October 15, 1951.—Decided November 13, 1951.

1. Without a warrant for search or arrest, but with reason to believe that respondent had narcotics unlawfully concealed there, officers entered the hotel room of respondent's aunts, in their absence and in the absence of respondent, searched it, and seized narcotics claimed by respondent. The search and seizure were not incident to a valid arrest; and there were no exceptional circumstances to justify their being made without a warrant. *Held:* The seizure violated the Fourth Amendment; and, on respondent's motion, the narcotics so seized should have been excluded as evidence in his trial for violation of the narcotics laws. Pp. 49–54.

   (a) That the evidence seized in these circumstances was not on respondent's premises, did not deprive him of standing to suppress it. Pp. 51–52.

   (b) Nor is a different result required by the provision of 26 U. S. C. § 3116 that "no property rights shall exist" in such contraband goods. Pp. 52–54.

2. Since the evidence illegally seized was contraband, the respondent was not entitled to have it returned to him. P. 54.

88 U. S. App. D. C. 58, 187 F. 2d 498, affirmed.

In the District Court, respondent's motion to suppress evidence seized without a warrant was denied and he was convicted of violating the narcotics laws, 26 U. S. C. § 2553 (a) and 21 U. S. C. § 174. The Court of Appeals reversed. 88 U. S. App. D. C. 58, 187 F. 2d 498. This Court granted certiorari. 340 U. S. 951. *Affirmed,* p. 54.

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney* and *John F. Davis.*

T. Emmett McKenzie argued the cause for respondent. With him on the brief was *James K. Hughes.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Here we are faced with troublesome questions as to the exclusion from evidence, on motion of the accused, of contraband narcotics claimed by him which were seized on the premises of other persons in the course of a search without a warrant. On the basis of the seized narcotics, the accused, respondent here, was convicted of violation of the narcotics laws, 26 U. S. C. § 2553 (a) and 21 U. S. C. § 174.[1] Prior to trial the District Court had denied respondent's motion to suppress, as evidence at the trial, the property seized. The Court of Appeals reversed the conviction by a divided court, 88 U. S. App. D. C. 58, 187 F. 2d 498. Since a determination of the question is important in the administration of criminal justice, we brought the case here. 340 U. S. 951.

The evidence showed that one Roberts came to the Dunbar Hotel in the District of Columbia on Monday,

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[1] "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; . . . ." 26 U. S. C. § 2553 (a).

"If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." 21 U. S. C. § 174.

September 12, 1949, at about 3 p. m., sought out the house detective, Scott, and offered him $500 to let him into a room in the hotel occupied by respondent's two aunts, the Misses Jeffries. Roberts told Scott that respondent had "some stuff stashed" in the room. The house detective told Roberts to call back later in the evening and he would see about it. He then immediately reported the incident to Lieut. Karper, in charge of the narcotics squad of the Metropolitan Police, who came to the hotel about 4 p. m. Karper went with Scott to the room occupied by the Misses Jeffries. When there was no answer to their knock on the door the two officers then went to the assistant manager and obtained a key to the room. Although neither officer had either a search or an arrest warrant they unlocked the door, entered the room and, in the absence of the Misses Jeffries as well as the respondent, proceeded to conduct a detailed search thereof. On the top shelf of a closet they discovered a pasteboard box containing 19 bottles of cocaine, of which only two had U. S. tax stamps attached, and one bottle of codeine, also without stamps. The bottles were seized and taken to Scott's office, where Lieut. Karper telephoned the federal narcotics agent and upon the latter's arrival turned the seized articles over to him. Respondent was arrested the following day on the charges before us, at which time he claimed ownership of the narcotics seized.

It appeared from the evidence at the pretrial hearing that the Misses Jeffries had given respondent a key to their room, that he had their permission to use the room at will, and that he often entered the room for various purposes. They had not given him permission to store narcotics there and had no knowledge that any were so stored. The hotel records reflected that the room was assigned to and paid for by them alone.

We agree with the Court of Appeals that the seizure was made in violation of the Fourth Amendment and on

motion of respondent its fruits should have been excluded as evidence on his trial.

The Fourth Amendment [2] prohibits both unreasonable searches and unreasonable seizures, and its protection extends to both "houses" and "effects." Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes. See *Weeks* v. *United States,* 232 U. S. 383 (1914); *Agnello* v. *United States,* 269 U. S. 20 (1925). Only where incident to a valid arrest, *United States* v. *Rabinowitz,* 339 U. S. 56 (1950), or in "exceptional circumstances," *Johnson* v. *United States,* 333 U. S. 10 (1948), may an exemption lie, and then the burden is on those seeking the exemption to show the need for it, *McDonald* v. *United States,* 335 U. S. 451, 456 (1948). In so doing the Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended. *Johnson* v. *United States, supra.* Officers instead of obeying this mandate have too often, as shown by the numerous cases in this Court, taken matters into their own hands and invaded the security of the people against unreasonable search and seizure.

The law does not prohibit every entry, without a warrant, into a hotel room. Circumstances might make exceptions and certainly implied or express permission is given to such persons as maids, janitors or repairmen in the performance of their duties. But here the Government admits that the search of the hotel room, as to the

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[2] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Misses Jeffries, was unlawful. They were not even present when the entry, search and seizure were conducted; nor were exceptional circumstances present to justify the action of the officers. There was no question of violence, no movable vehicle was involved, nor was there an arrest or imminent destruction, removal, or concealment of the property intended to be seized. In fact, the officers admit they could have easily prevented any such destruction or removal by merely guarding the door. Instead, in entering the room and making the search for the sole purpose of seizing respondent's narcotics, the officers not only proceeded without a warrant or other legal authority, but their intrusion was conducted surreptitiously and by means denounced as criminal.

The Government argues, however, that the search did not invade respondent's privacy and that he, therefore, lacked the necessary standing to suppress the evidence seized. The significant act, it says, is the seizure of the goods of the respondent without a warrant. We do not believe the events are so easily isolable. Rather they are bound together by one sole purpose—to locate and seize the narcotics of respondent. The search and seizure are, therefore, incapable of being untied. To hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right. The respondent unquestionably had standing to object to the seizure made without warrant or arrest unless the contraband nature of the narcotics seized precluded his assertion, for purposes of the exclusionary rule, of a property interest therein.

It is urgently contended by the Government that no property rights within the meaning of the Fourth Amendment exist in the narcotics seized here, because they are contraband goods in which Congress has declared that

"no property rights shall exist." [3] The Government made the same contention in *Trupiano* v. *United States,* 334 U. S. 699 (1948). See Brief for the United States, pp. 24–45. This Court disposed of the contention saying:

> "It follows that it was error to refuse petitioners' motion to exclude and suppress the property which was improperly seized. But since this property was contraband, they have no right to have it returned to them." 334 U. S. at 710.

The same section declaring that "no property rights shall exist" in contraband goods provides for the issuance of search warrants "for the seizure" of such property. The Government's view in *Trupiano* was that the latter provision applies "when the entry must be made to seize"; but not "where, after a lawful entry for *another purpose,* the contraband property is before the eyes of the enforcing officers." [4] This construction would make it necessary for the officers to have a search warrant here. We are of the opinion that Congress, in abrogating property rights in

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[3] "It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of the act of June 15, 1917, 40 Stat. 228 (U. S. C., Title 18, §§ 611–633) [since superseded by Fed. Rules Crim. Proc. 41], for the seizure of such liquor or property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal-revenue laws, or of any other law. The seizure and forfeiture of any liquor or property under the provisions of this part, and the disposition of such liquor or property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal-revenue laws." 26 U. S. C. § 3116.

[4] Brief for the United States, pp. 35–36 (emphasis added).

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such goods, merely intended to aid in their forfeiture and thereby prevent the spread of the traffic in drugs rather than to abolish the exclusionary rule formulated by the courts in furtherance of the high purposes of the Fourth Amendment. See *In re Fried,* 161 F. 2d 453 (1947).

Since the evidence illegally seized was contraband the respondent was not entitled to have it returned to him. It being his property, for purposes of the exclusionary rule, he was entitled on motion to have it suppressed as evidence on his trial.

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE REED dissent.

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

GALLEGOS *v.* NEBRASKA.

CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

No. 94. Argued October 8, 1951.—Decided November 26, 1951.

Petitioner, a 38-year-old Mexican farm hand who can neither speak nor write English, was arrested, jailed and questioned in Texas, and after four days, during which he claims he was mistreated, he confessed to a homicide in Nebraska. Thereafter he was taken to Nebraska, where he again confessed, although he makes no claim of mistreatment by the Nebraska authorities. Twenty-five days after his arrest and fourteen days after his arrival in Nebraska, he was brought before a magistrate for the first time, and he pleaded guilty. Two days later, before trial, counsel was appointed to defend him. At his trial in a state court, the two confessions and the plea were admitted in evidence over his objection and he was convicted of manslaughter. The State Supreme Court affirmed. *Held:* Upon the record in this case, it cannot be said that the admission in evidence of the confessions and plea violated petitioner's rights under the Due Process Clause of the Fourteenth Amendment. Pp. 56–68; 68–73.

(a) The rule of *McNabb* v. *United States*, 318 U. S. 332, is not a limitation imposed by the Constitution and is not applicable to trials of criminal cases in state courts. Pp. 63–65; 71–72.

(b) On the record in this case, it cannot be said that Nebraska violated the requirements of due process in this conviction. Pp. 60–63, 65–68; 68–73.

152 Neb. 831, 43 N. W. 2d 1, affirmed.

Petitioner's conviction in a state court of Nebraska for manslaughter, claimed to have been in violation of rights under the Fourteenth Amendment, was affirmed by the State Supreme Court. 152 Neb. 831, 43 N. W. 2d 1. This Court granted certiorari. 341 U. S. 947. *Affirmed,* p. 68.

Robert G. Simmons, Jr. argued the cause for petitioner. With him on the brief were *James G. Mothersead* and *Floyd E. Wright.*

Walter E. Nolte, Deputy Attorney General of Nebraska, and *Homer L. Kyle,* Assistant Attorney General, argued the cause for respondent. With them on the brief was *Clarence S. Beck,* Attorney General.

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

Petitioner, Agapita Gallegos, was convicted in a District Court of Nebraska of manslaughter and sentenced to ten years' imprisonment, the maximum penalty. The charge was the slaying of his paramour without deliberation or premeditation. This judgment of conviction was sustained by the Supreme Court of Nebraska over the objection that introduction at the trial of petitioner's prior statements admitting the homicide violated the Fourteenth Amendment of the Constitution. In view of certain undenied incidents giving color to petitioner's allegation of unfairness in the prosecution, certiorari was granted to determine whether the due process requirements of the Fourteenth Amendment were violated by the admission of the statements. 341 U. S. 947.

On September 19, 1949, at the request of the United States Immigration and Naturalization Service, petitioner, a thirty-eight-year-old Mexican farm hand who can neither speak nor write English, was arrested, together with his brother, by police officers of El Paso County, at the southwest corner of Texas, and there booked on a charge of vagrancy. Gallegos had been an itinerant farm worker in this country before his arrest and had recently returned here for such work.

We gather from the abbreviated record that information was sought by the Texas authorities as to petitioner's acts in Nebraska, where he had worked the preceding year. After arrest, petitioner was questioned regarding his identity. He at once gave a false name. Thereafter,

he was jailed in a small room for the next twenty-one hours. Further questioning to establish identity was had on September 20, 1949, without result. Following his second interrogation, petitioner was left alone for forty-eight hours. On September 22, 1949, petitioner was removed from his cell and interrogated. After he gave his name and an admission that he had been in Nebraska, he was reconfined; this time confinement ran for a period of twenty-four hours.

On September 23, 1949, petitioner disclosed details of this Nebraska crime. A statement in respect of the crime was immediately prepared in English. This was read to the petitioner in Spanish, and he thereafter signed it. His Texas detention continued until September 27, 1949. During the entire time no charge was filed against him in any state or federal court nor was he brought before a magistrate.

We have Gallegos' evidence as to his Texas confinement, the rooms he was placed in, their condition as to furnishings, and the food provided. His testimony on these points is met only in part by the testimony of the Chief Deputy Sheriff of El Paso, his interrogator. There were times when Gallegos was not under his direct observation. Nebraska had no other witness for the trial familiar with conditions of the Texas restraint. Gallegos' testimony through the interpreter concerning these matters is vague. From it one gathers that Gallegos sought to convey the impression that the rooms were cells, that the one he occupied for twenty-one hours was without a bed, that one he occupied was without light or poorly lighted, and that the food was sparse, perhaps not more than a meal a day.

During the questioning in the four-day period from September 19th through the 23d, the state says petitioner was not treated or threatened with violence. His questioning did not last longer than an hour or two on any

day and according to the record was conducted almost entirely by the state's witness, the Chief Deputy Sheriff. However, Gallegos testifies that he was told that he might be turned over to the Mexican authorities for more severe questioning and that a lie detector might be used upon him. The record shows no flat denial of Gallegos' assertions contained in the last sentence, but it does show, by testimony of the Deputy Sheriff, that no threats or promises were made and that reference to the Mexican authorities, if made, was that Gallegos would be turned over to the United States Immigration Service who, in turn, would deliver him to the Mexican Immigration Service. Gallegos also spoke of threatened violence.[1]

On September 27, 1949, a Nebraska sheriff reached Texas and took petitioner to the Scotts Bluff County, Nebraska, jail, arriving Thursday, September 29, at 1 a. m. Gallegos was questioned on Saturday, October 1, at which time he was interviewed through an interpreter by three county police officers. He described the crime

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[1] "Q. At any time when anybody was talking to you at the jail in El Paso, Texas, did they act like they were trying to scare you?

. . . . . .

"A. Yes, sir.

"Q. Tell us when that was?

"A. When they started to investigate me.

"Q. Was that the first day you were in jail or the second day or the third day?

"A. The first day.

"Q. Tell us what happened.

"A. They tried to get words out of my forcibly by another sheriff that is there.

"Q. Do you know who that other sheriff was?

"A. I don't know what his name is.

"Q. Have you seen him here in this court room?

"A. No, sir.

"Q. What did he do?

"A. He would not take his eyes away from me and he seemed

for which he was convicted. A transcript in English of the interpreter's translations of the interview was made and some days later read back to petitioner in a Spanish retranslation. The evidence is that Gallegos confirmed this record. The record shows no claim of mistreatment by Nebraska authorities.

By § 29–406, Neb. Rev. Stat., 1943, a police officer is commanded to take an accused before a magistrate. This was not done until October 13, 1949, when petitioner was brought before the county judge of Scotts Bluff County for a preliminary hearing on a complaint charging murder in the second degree. This was the first time petitioner was brought before any magistrate or court. As an incident to the hearing, petitioner was asked to plead. He pleaded guilty. These two confessions and the plea were introduced at petitioner's trial by the state. On October 15, 1949, before trial, the District Court of Scotts Bluff County found petitioner to be entitled to

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like he wanted to hit me and I was frightened and I didn't know what to do." [R. 84–85.]

"Q. But you say no one struck you?

"A. No.

"Q. And no one ever raised their arm as if they were going to strike you?

"A. The other fellow.

"Q. What other fellow?

"A. The other one that investigated me.

"Q. Where did he do that?

"A. In one room that he had there where he was investigating me.

"Q. How did he threaten to strike you?

"A. With his hand.

"Q. Did he strike you at that time?

"A. He just raised his hand.

"Q. Did he say he was going to strike you?

"A. He said he was going to hit me because I would not tell him the truth.

"Q. But he still did not hit you?

"A. No, he did not hit me." [R. 90–91.]

counsel appointed by the court, and counsel was then for the first time appointed.

Petitioner presents in his brief only the following question:

> "Are confessions and a plea obtained from a prisoner during a period of twenty-five days illegal detention by federal and state officers before being brought before a magistrate and before counsel is appointed to assist the prisoner admissible in evidence?"

An answer requires an examination into the circumstances of record surrounding the statements.

Before the Supreme Court of Nebraska, on the basis of facts in the record of the trial, it was urged that the confessions and plea were inadmissible because they were the result of "physical torture and threats of torture, mental duress, illegal transportation and illegal detention," in violation of the federal and state constitutions. As conviction without acceptance of the voluntary character of the confessions would logically have been impossible, we assume that the jury, under applicable instructions, found the statements voluntary. 152 Neb. 831, 837–840, 43 N. W. 2d 1, 4–6. Evidently, neither judge nor jury accepted the testimony of Gallegos on disputed facts as to coercion. Where direct contradiction of petitioner's assertions as to conditions of his detention in Texas was unavailable or unobtainable, the jury disregarded or minimized or disbelieved Gallegos to such an extent that his confessions were accepted as voluntary. The Deputy Sheriff, the prosecution witness in the best position to know, denied any coercion by promise, threat or violence. A criminal prosecution approved by the state should not be set aside as violative of due process without clear proof that such drastic action is required to protect federal constitutional rights. While our conclusion on due process

does not necessarily follow the ultimate determinations of judges or juries as to the voluntary character of a defendant's statements prior to trial, the better opportunity afforded those state agencies to appraise the weight of the evidence, because the witnesses gave it personally before them, leads us to accept their judgment insofar as facts upon which conclusions must be reached are in dispute. The state's ultimate conclusion on guilt is examined from the due process standpoint in the light of facts undisputed by the state.[2] That means not only admitted facts but also those that can be classified from the record as without substantial challenge.

As this Court has been entrusted with power to interpret and apply our Constitution to the protection of the right of an accused to federal due process in state criminal trials, the proper performance of that duty requires us to examine, in cases before us, such undisputed facts as form the basis of a state court's denial of that right. *Kansas City Southern R. Co.* v. *Albers Comm'n Co.*, 223 U. S. 573, 591; *Norris* v. *Alabama*, 294 U. S. 587, 594; *Watts* v. *Indiana*, 338 U. S. 49, 51. A contrary rule would deny to the Federal Government ultimate authority to redress a violation of constitutional rights. As state courts also are charged with applying constitutional standards of due process, in recognition of their superior opportunity to appraise conflicting testimony, we give deference to their conclusions on disputed and essential issues of what actually happened. See note 2, *infra*. Its duty compels this Court, however, to decide for itself, on the facts that are undisputed, the constitutional validity of a judgment that denies claimed constitutional rights.

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[2] *Lyons* v. *Oklahoma*, 322 U. S. 596, 603; *Malinski* v. *New York*, 324 U. S. 401, 404; *Haley* v. *Ohio*, 332 U. S. 596, 599; *Watts* v. *Indiana*, 338 U. S. 49, 51. Cf. *Lisenba* v. *California*, 314 U. S. 219, 238–241.

Controversies as to facts take various forms. The jury may reach a verdict of guilty although they resolved some subsidiary fact in favor of the accused. In Gallegos' case we do not know whether his assertions not directly contradicted as to questionable conditions of his Texas detention and examination were accepted as true by the jury. It is quite possible that the jury thought the confession voluntary even though it believed all of Gallegos' testimony. As we cannot accept the verdict as a finding solely on disputed facts, we must weigh Gallegos' uncontradicted testimony along with the undisputed facts. We are not free, as Nebraska was, to leave to the jury determinations of facts upon which the admissibility of the statements is based.[3]

The issue of federal due process now tendered is to be considered only on uncontroverted facts. The answer to the question presented depends upon whether there is a violation of the Due Process Clause of the Fourteenth Amendment from the admitted circumstances that

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[3] 152 Neb. 839, 43 N. W. 2d 5:

"While there is testimony given by the defendant from which the jury could have found that the confessions made were involuntary due to the manner in which defendant was held in confinement, the treatment received while so held, and the threats made; however, the testimony of the authorities in charge, both at El Paso and Scottsbluff, deny these facts and when their testimony is taken together with certain testimony of the defendant, it presents a factual situation from which the jury could properly find that the confessions were freely and voluntarily made. This includes the issue presented by the evidence offered as to whether or not the complaint was properly translated at the preliminary hearing so it was understood by the defendant in making his plea thereto. It also includes the question of whether or not he understood the nature or degree of the crime with which he was charged. These issues both relate themselves directly to the question of whether or not he understood what he was doing when he made his admission of guilt and consequently relate directly to whether it was voluntarily or involuntarily made."

the two confessions of September 23 and October 1 were given to police officers after arrest in Texas on September 19, 1949, while no magistrate with supervisory power over the examinations was present and while the accused was without counsel. Circumstances surrounding the Texas, as well as the Nebraska, confession must be appraised because Nebraska introduced the Texas confession in evidence in the trial. The use of any confession obtained in violation of due process requires the reversal of a conviction even though unchallenged evidence, adequate to convict, remains. *Malinski* v. *New York,* 324 U. S. 401, 404. Both states require fugitives from justice to be promptly taken before a magistrate on arrest for extradition. Texas, Vernon's Code of Criminal Procedure, Arts. 998, 999, 217. Neb. Rev. Stat., 1943, §§ 29–713, 29–715. The question must be weighed in the light of the uncontradicted portion of Gallegos' own testimony of harsh treatment and the answers of the prosecution and the judge and the jury. The plea of guilty at the preliminary hearing on October 13 is also a factor. We therefore limit our examination to an inquiry as to whether use at trial of these admissions of guilt theretofore made by an accused violates the Fourteenth Amendment.

The decision and judgment below determine for us that under the law of Nebraska such detention and examination, without appearance or arraignment, do not require exclusion of the confessions or plea as involuntary.[4] The rule of the *McNabb* case, considered recently in *United States* v. *Carignan,* 342 U. S. 36, is not a limitation im-

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[4] *Gallegos* v. *State,* 152 Neb. 831, 839-840, 43 N. W. 2d 1, 6:

"In regard to how soon after a person is arrested he must be given a preliminary hearing we said in Maher v. State, 144 Neb. 463, 13 N. W. 2d 641: 'The question as to the time in which the defendant should be given a preliminary hearing is a question for the court. There can be no precise length of time, after the arrest of a person, in which he must be given a hearing. The theory of the law is that

posed by the Due Process Clause. *McNabb* v. *United States,* 318 U. S. 332, 340; *Lyons* v. *Oklahoma,* 322 U. S. 596, 597, note 2. Compliance with the *McNabb* rule is required in federal courts by this Court through its power of supervision over the procedure and practices of federal courts in the trial of criminal cases. That power over state criminal trials is not vested in this Court. A confession can be declared inadmissible in a state criminal trial by this Court only when the circumstances under which it is received violate those "fundamental principles of liberty and justice" protected by the Fourteenth Amendment against infraction by any state.[5]

The Federal Constitution does not command a state to furnish defendants counsel as a matter of course, as is required by the Sixth Amendment in federal prosecutions.[6] Lack of counsel at state noncapital trials denies federal constitutional protection only when the absence results in a denial to accused of the essentials of justice.[7]

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he must be given a hearing as soon as possible. A person charged should be given a preliminary hearing just as soon as the nature and circumstances of the case will permit.'

". . . Here the court, in the first instance, heard all of the evidence relating thereto and determined that sufficient foundation had been laid for their admission. The evidence was then presented to the jury and the question as to their character, whether voluntary or involuntary, was submitted to it by the court's instructions Nos. 12, 13, and 14. We find the facts and circumstances relating to the giving of the two confessions and the admission of guilt at the preliminary hearing justified the trial court in admitting them in evidence in the first instance and submitting their character, whether voluntary or involuntary, to the jury. See Kitts v. State [151 Neb. 679, 39 N. W. 2d 283]."

[5] *Hebert* v. *Louisiana,* 272 U. S. 312, 316; *Adamson* v. *California,* 332 U. S. 46, 54.

[6] *Quicksall* v. *Michigan,* 339 U. S. 660; *Bute* v. *Illinois,* 333 U. S. 640; *Foster* v. *Illinois,* 332 U. S. 134.

[7] *Uveges* v. *Pennsylvania,* 335 U. S. 437, 441; *Betts* v. *Brady,* 316 U. S. 455, 462; compare *Hawk* v. *Olson,* 326 U. S. 271, 278.

Lack of counsel prior to trial certainly has no greater effect. *Lyons* v. *Oklahoma, supra,* p. 599. "The mere fact that a confession was made while in the custody of the police does not render it inadmissible." *McNabb* v. *United States,* 318 U. S. 332, 346; cf. *United States* v. *Carignan,* 342 U. S. 36, 39.

Prolonged detention without a charge of crime or without preliminary appearance before a magistrate, the lack of counsel before, during, or after arraignment, and confession to the police in private, are, however, elements that should be considered in determining whether a confession, permitted to be introduced and relied upon at a trial, has been obtained under such circumstances that its use violates due process. *Watts* v. *Indiana,* 338 U. S. 49, 54. Of course, the plea of guilty at the preliminary hearing should be treated in the same way as the confessions.

So far as due process affects admissions before trial of the defendant, the accepted test is their voluntariness.[8] This requires appraisal of the facts of each particular case open to consideration by this Court. In recent cases, where undisputed facts existed far more likely to produce involuntary confessions than those in this case, there was disagreement as to whether due process was violated.[9]

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[8] *Brown* v. *Mississippi,* 297 U. S. 278, 285–286; *Chambers* v. *Florida,* 309 U. S. 227, 236, 238; *Lisenba* v. *California,* 314 U. S. 219, 238.

[9] *Watts* v. *Indiana,* 338 U. S. 49, 51, 52:

"On November 12, 1947, a Wednesday, petitioner was arrested and held as the suspected perpetrator of an alleged criminal assault earlier in the day. Later the same day, in the vicinity of this occurrence, a woman was found dead under conditions suggesting murder in the course of an attempted criminal assault. Suspicion of murder quickly turned towards petitioner and the police began to question him. They took him from the county jail to State Police Headquarters, where he was questioned by officers in relays from about 11:30 that night until sometime between 2:30 and 3 o'clock the following morning. The same procedure of persistent

The facts here to support a claim of denial of due process are not so convincing.

Certiorari was granted in this case because the record disclosed a serious charge under the Due Process Clause against Nebraska procedure in a criminal case. We have carefully weighed the circumstances of the petitioner's

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interrogation from about 5:30 in the afternoon until about 3 o'clock the following morning, by a relay of six to eight officers, was pursued on Thursday the 13th, Friday the 14th, Saturday the 15th, Monday the 17th. Sunday was a day of rest from interrogation. About 3 o'clock on Tuesday morning, November 18, the petitioner made an incriminating statement after continuous questioning since 6 o'clock of the preceding evening. The statement did not satisfy the prosecutor who had been called in and he then took petitioner in hand. Petitioner, questioned by an interrogator of twenty years' experience as lawyer, judge and prosecutor, yielded a more incriminating document.

"Until his inculpatory statements were secured, the petitioner was a prisoner in the exclusive control of the prosecuting authorities. He was kept for the first two days in solitary confinement in a cell aptly enough called 'the hole' in view of its physical conditions as described by the State's witnesses. Apart from the five night sessions, the police intermittently interrogated Watts during the day and on three days drove him around town, hours at a time, with a view to eliciting identifications and other disclosures. Although the law of Indiana required that petitioner be given a prompt preliminary hearing before a magistrate, with all the protection a hearing was intended to give him, the petitioner was not only given no hearing during the entire period of interrogation but was without friendly or professional aid and without advice as to his constitutional rights. Disregard of rudimentary needs of life—opportunities for sleep and a decent allowance of food—are also relevant, not as aggravating elements of petitioner's treatment, but as part of the total situation out of which his confessions came and which stamped their character."

Turner v. *Pennsylvania*, 338 U. S. 62, 63–64:

"The officers making the arrest had no warrant and did not tell the petitioner why he was being arrested. These officers began to question the petitioner as soon as they reached the City Hall police station. One of them examined the petitioner for three hours on that afternoon and again that night from eight to eleven o'clock. From

lack of education and familiarity with our law, his experience and condition in life, his need for advice of counsel as to the law of homicide and the probable effect on such a man of interrogation during confinement. We have also taken into consideration Gallegos' uncontradicted testimony about his accommodations, his limited amounts of

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time to time other officers joined in the interrogation. Petitioner persistently denied any knowledge of the murder.

"The next morning, June 4, the petitioner was booked on the police records as being held for questioning. Later that day he was questioned for about four hours more. On June 5 he was interrogated for another four hours and on the 6th for day and night sessions totaling six hours. The questioning was conducted sometimes by one officer and at other times by several working together; it appears, in fact, that whenever one of the police officers interested in the investigation had any free time he would have the petitioner brought from his cell for questioning.

"On June 7, the day when a confession was finally obtained, questioning began in the afternoon and continued for three hours. Later that day the officers who had been present during the afternoon returned with others to resume the examination of petitioner. Despite the fact that he was falsely told that other suspects had 'opened up' on him, petitioner repeatedly denied guilt. But finally, at about eleven o'clock, petitioner stated that he had killed the person for whose murder he was later arraigned."

Harris v. *South Carolina*, 338 U. S. 68, 69–70:

"On Monday night questioning began in earnest. At least five officers worked in relays, relieving each other from time to time to permit respite from the stifling heat of the cubicle in which the interrogation was conducted. Throughout the evening petitioner denied that he had killed the Bennetts. On Tuesday the questioning continued under the same conditions from 1:30 in the afternoon until past one the following morning with only an hour's interval at 5:30. On Wednesday afternoon the Chief of the State Constabulary, with half a dozen of his men, questioned petitioner for about an hour, and the local authorities carried on the interrogation for three and a half hours longer. At 6:30 that evening the examination resumed. Petitioner continued to deny implication in the killings. The sheriff then threatened to arrest petitioner's mother for handling stolen property. Petitioner replied, 'Don't get my mother mixed up in

food and certain threats made by a Texas assistant sheriff not present at the trial. The uncertain character of this uncontradicted testimony, its lack of definiteness, and the action of the trial judge and jury lead us to place little weight upon it. Our position is confirmed by Gallegos' reiteration of his confession while in custody in Nebraska, when he charges no coercion except detention. See *Lyons* v. *Oklahoma*, 322 U. S. 596, 603.

We cannot say that Nebraska has here violated standards of decency or justice in this conviction.

Affirmed.

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

MR. JUSTICE JACKSON, whom MR. JUSTICE FRANKFURTER joins, concurring.

The State of Nebraska is the party that we have summoned to answer for state action claimed to violate the Fourteenth Amendment. I begin, therefore, by considering just what Nebraska itself has done that may be said to violate rights of the petitioner.

Nebraska authorities were not pursuing Gallegos. They did not know that murder had been done in that

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it and I will tell you the truth.' Petitioner then stated in substance what appears in the confession introduced at the trial. The session ended at midnight.

"Petitioner was not informed of his rights under South Carolina law, such as the right to secure a lawyer, the right to request a preliminary hearing, or the right to remain silent. No preliminary hearing was ever given and his confession does not even contain the usual statement that he was told that what he said might be used against him. During the whole period of interrogation he was denied the benefit of consultation with family and friends and was surrounded by as many as a dozen members of a dominant group in positions of authority. It is relevant to note that Harris was an illiterate."

State and were under no pressure to pin guilt on someone. Gallegos, a Mexican illegally in this country, had been a transient worker in Nebraska beet fields and had with him a woman and two children. The whence and whither of their comings and goings made no impression on the community, and when they disappeared no one asked how or why.

From Texas authorities, however, came word that a Mexican, held there at request of the United States Immigration and Naturalization Service, had confessed to murdering his woman in Nebraska and had told where the body was buried. Nebraska does not charge murder on the basis of a confession without proof of the *corpus delicti,* so the Nebraska officers—from information given by Gallegos in Texas—found a grave and a decomposed body ultimately identified as that of the woman who had been living there with Gallegos without benefit of clergy. Only after this discovery and identification were they in a position to make a murder charge.

Gallegos was brought from Texas to Scotts Bluff County, Nebraska. That was the first time he was in the custody of Nebraska. There is not the slightest proof or suggestion by the defendant or his counsel that Nebraska officials abused, threatened, or unduly questioned him. On the contrary, he willingly told how he beat his paramour to death in a fit of jealousy. The only complaint against Nebraska is that it detained Gallegos an unduly long time before arraignment. Even if it did, the delay was *after* confession and therefore could not have been for any sinister purpose of coercing one, nor could the detention have been the cause of confession. There is not, from any state action by Nebraska, the slightest ground for inference that the confession to its officials was not given voluntarily.

Upon the trial, however, the prosecution proved not only the Nebraska confession but also an earlier one made

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in Texas. In connection with the latter, vague allegations are made against the Texas officials. Perhaps the prosecution would have been well advised not to have proved how the murder originally came to light. But the prosecution chose to lay the whole matter before the jury, and had it failed to do so it would no doubt have been charged with some sinister purpose in its suppression.

Even if we should assume that Texas officials coerced this confession, they were not acting at the request of Nebraska nor in any sense as her agent. Before we could reverse the conviction, we would have to decide a question not heretofore answered in any decision that I recall, namely, whether Nebraska merely by admitting a coerced foreign confession in evidence would deny due process. Insofar as the reason for exclusion is to prevent convictions on coerced confessions, which are shown by legal experience to be intrinsically unreliable, I should suppose that any defect in its origin would inhere in the confession wherever offered. Insofar, however, as the reason for exclusion is to deter states from attempting coercion in order to bring about convictions, the reason would hardly apply to a case where a state of confession sought no conviction and the state of conviction did not seek the confession. But here there is no need to resolve such difficult questions in affirming the conviction, for I find no coercion such as would require exclusion of this confession, even if Nebraska be held to answer for the conduct of every official involved.

Gallegos was taken into custody by the Texas authorities at the request of the United States immigration service. They had probable cause to believe he was illegally in the country, as indeed he was, and I should not suppose his detention was illegal. The defendant himself does not claim that he was beaten, unduly questioned, or threatened, except that he was told he might be shipped

back to Mexico and turned over to the Mexican authorities—a statement which, if made, was patently true.

It should be borne in mind that the detaining officers did not know of this murder except that the immigration officials apparently had some information that the woman in the case had disappeared. The Texas authorities were not under pressure to solve a local murder. It is not even clear that they accused Gallegos of murder and certainly they had no theory of a crime which they were trying to support by obtaining a confession.

But "The guilty flee when no man pursueth." For three days, Gallegos refused to tell his name. But when he finally revealed his identity, he went on and told all. He may have been of the impression that the authorities who were holding him knew more than they did. Only the fact that he was in custody, the fear that his deeds were known, and the weight of the crime on his conscience can be said to have coerced this confession.

This defendant's trial appears to have been scrupulously fair and dispassionate. The jury and the Nebraska courts appear to have weighed all of the claims of Gallegos fairly and found, what I do not see how they could avoid finding, that the confessions were voluntary within the meaning of the law. These are not confessions obtained to fit the facts known to the officials. It is a case where the officials were directed to facts that fitted details of the confession. Nor is it a case where the confession was altered or embellished in a prolonged process of examination. The story first given to the authorities in Texas is substantially identical with that recited to the Nebraska authorities in greater detail.

Indeed no contention is brought to this Court that the confessions were in fact coerced or involuntary. The reason no such contention is made is that capable and zealous counsel cannot support them on this record. But the contention is that both confessions should be made inad-

missible in evidence because we should convert the so-called *McNabb* rule, a rule of evidence for federal courts, into a constitutional limitation upon the States. *McNabb* v. *United States,* 318 U. S. 332. The claim, and the only claim, is that because Gallegos was not arraigned by Texas immediately after arrest and again by Nebraska immediately after arrival in that State, each detention was illegal and the confessions, even if made without abuse or threat of it, but as a result of questioning during this detention, are inadmissible in evidence. The only "question presented" by the petition to this Court reads: "Are confessions of an accused obtained from him during a prolonged period of unlawful detention before he was brought before a magistrate and before a counsel was appointed to assist him, admissible in evidence?" Every one of the three specifications of error urged in petitioner's brief is based on "twenty-five days of unlawful detention" and on that alone.

Let us see what this would mean as applied to Texas. Texas made the arrest at the request of the immigration authorities and it is not denied that they had probable cause to believe he was an alien who had entered the country illegally. But, for three days he would not tell his name. I should not suppose the authorities were obliged to release an obvious alien so charged before they could learn his identity. Then he disclosed the murder. But the murder did not take place in Texas. That State obviously could not arraign him for it. Was it obliged to turn loose a confessed murderer because the murder occurred outside of their jurisdiction? It does not seem to me that to hold such a person without arraignment under these circumstances denies due process, unless due process prohibits society from taking common-sense steps to solve a murder.

But it is complained that Nebraska held him too long (just how long is too long we never are told) without arraignment. As I have pointed out, Nebraska knew nothing of the murder and had to conduct an investigation before it could make a properly supported charge of murder. Certainly due process does not require that charges be placed hurriedly and recklessly. Scotts Bluff County is a rural county with less than forty thousand inhabitants, more than half of whom are concentrated in two towns, the largest of which has a population of only twelve thousand. The small prosecuting staff that such a county would maintain cannot be expected to move with the speed of the Federal Government, with its many thousand agents and countless attorneys, or with the speed of big city police forces. What was there to hurry about? Gallegos had already confessed and he was not prejudiced by the delay. The authorities took their time drawing papers and getting proof of the *corpus delicti* in order. There seems to have been no passion or revenge at work in the case. A small prosecuting office in a town where life is leisurely made a simple effort to go about its duty with convenient speed.

Even if, as some members of the Court ardently desire, the *McNabb* rule were ever to be converted into a constitutional limitation upon the States, the facts in this case would afford a poor foundation for it. I concur in the affirmance.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

Americans justly complain when their fellow citizens in certain European countries are pounced upon at will by state police, held in jail incommunicado, and later convicted of crime on confessions obtained during such in-

carceration. Yet in part* upon just such a confession, this Court today affirms Nebraska's conviction of a citizen of Mexico who can neither read nor understand English.

The record shows the following facts without any dispute at all: While working in a field in El Paso County, Texas, on September 19, 1949, the petitioner was arrested by a local deputy sheriff without a warrant. The excuse given for the arrest was that immigration officers had requested it. No charge was ever filed against petitioner in any Texas state court nor was any warrant sworn out against him during the eight days he was kept in the Texas jail. His detention was incommunicado except for repeated questioning by the deputies. Part of the time petitioner was kept in an 8′ x 8′ cell with no windows, a cell which a Texas deputy testifying in this case referred to as the "dark room" or the "punishment room," although petitioner was a "docile prisoner" and did all he was told to do by the officers. It was during this incarceration of eight days that the petitioner gave a confession used to convict him in this case. As is usual in this type of case the deputies say that the confession was wholly "voluntary"; petitioner says that it was due to fear engendered by his incarceration and the actions of the deputies. Even if the officers' story should happen to be correct, I believe the Constitution forbids the use of confessions obtained by the kind of secret inquisition these deputies conducted.

There are countries where arbitrary arrests like this, followed by secret imprisonment and systematic question-

*During petitioner's trial an alleged confession made in Texas, an alleged confession made in Nebraska and a plea of guilty entered in a Nebraska court were introduced in evidence against him. His conviction should be reversed if any one of these three items of evidence were secured in violation of due process of law which the Federal Constitution guarantees. For this reason I consider the Texas confession only.

ing until confessions are obtained, are still recognized and permissible legal procedures. See "The Trap Closes" by Robert A. Vogeler with Leigh White, The Saturday Evening Post, November 3, 1951, p. 36 *et seq.* My own belief is that only by departure from the Constitution as properly interpreted can America tolerate such practices. See *Ashcraft* v. *Tennessee,* 322 U. S. 143, 154–155; *Chambers* v. *Florida,* 309 U. S. 227; *Bram* v. *United States,* 168 U. S. 532, 556, 562–563. I would reverse this judgment.

BINDCZYCK *v.* FINUCANE, CHAIRMAN OF THE BOARD OF IMMIGRATION APPEALS, ET AL.

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

No. 18. Argued October 10, 1951.—Decided November 26, 1951.

1. The procedure prescribed by § 338 of the Nationality Act of 1940, 8 U. S. C. § 738, is the exclusive procedure for revoking naturalization on the ground of fraud or illegal procurement, based on evidence outside the record. Pp. 77–88.
2. A state court granted petitioner a certificate of citizenship. At the same term, as permitted by state practice, it granted a motion of the Government, based on evidence outside the record, to vacate and set aside its order of naturalization on the ground of fraud in procurement. Petitioner appeared personally and admitted the fraud. *Held:* This revocation of petitioner's naturalization is void, because it was not in accordance with the uniform procedure prescribed by § 338 of the Nationality Act. Pp. 77–88.

   (a) Congress intended to prescribe a uniform and carefully safeguarded procedure for revoking naturalization on the ground of fraud or illegal procurement based on evidence outside the record; and this purpose would be defeated if state courts could follow instead widely diverse state rules affecting the finality of local judgments. Pp. 79–86.

   (b) A different result is not required by *Tutun* v. *United States*, 270 U. S. 568, sustaining the right of an alien to appeal from an order denying naturalization. Pp. 86–88.

87 U. S. App. D. C. 137, 184 F. 2d 225, reversed.

The District Court granted petitioner a judgment declaring him to be a citizen of the United States. The Court of Appeals reversed. 87 U. S. App. D. C. 137, 184 F. 2d 225. This Court granted certiorari. 341 U. S. 919. *Reversed,* p. 88.

Joseph A. Fanelli argued the cause and filed a brief for petitioner.

James L. Morrisson argued the cause for respondents. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Edward S. Szukelewicz.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

On December 2, 1943, the Circuit Court of Frederick County, Maryland, issued a certificate of naturalization to petitioner after proceedings that conformed with the requirements of the Nationality Act of 1940. 54 Stat. 1137, 8 U. S. C. § 501 ff. Seven days later, and at the same term of court, the Government moved to vacate and set aside the order of naturalization, claiming on evidence outside the record that it was obtained by fraud and that therefore the citizenship was illegally procured.

It is admitted that the requirements of § 338 of the Nationality Act, wherein Congress made specific provision for "revoking . . . the order admitting . . . to citizenship . . . on the ground of fraud or on the ground that such order . . . [was] illegally procured," [1] were not

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[1] 54 Stat. 1137, 1158, 8 U. S. C. § 738. The pertinent portions of the section are:

"(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

"(b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the

followed. Instead, the Maryland court exercised its general power under Maryland law to set aside judgments during the term of court in which they were rendered.[2]

We brought this case here to determine whether the requirements of § 338 control the revocation of citizenship on the ground of fraud or on the ground that it was illegally procured; or whether the grant of citizenship by the courts of the forty-eight States is subject to whatever summary control State courts may have over their merely local judgments. The questions are of obvious importance in the administration of the naturalization laws, apart from the conflict between the views of the court below and those of the Court of Appeals for the Seventh Circuit in *United States ex rel. Volpe* v. *Jordan,* 161 F. 2d 390.

The issue was raised by petitioner's action in the District Court for the District of Columbia for a judgment declaring him to be a citizen of the United States and for an order restraining respondents from deporting him. Upon a motion by the Government to dismiss the complaint, petitioner moved for summary judgment which was granted by the District Court, declaring petitioner "to be a national and citizen of the United States" but "without prejudice to the government's right to institute appropriate proceedings for denaturalization under Sec. 338 of the Nationality Act of 1940." The Court of Appeals reversed, 87 U. S. App. D. C. 137, 184 F. 2d 225, and we granted certiorari. 341 U. S. 919.

United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought."

[2] See *Eddy* v. *Summers,* 183 Md. 683, 687, 39 A. 2d 812, 814 (1944).

Due regard for § 338, including the history of its origin, and for the nature of a judgment of naturalization, together with a consideration of the conflicting and capricious diversities of local law affecting the finality of local judgments, compel us to hold that § 338 is the exclusive procedure for canceling citizenship on the score of fraudulent or illegal procurement based on evidence outside the record.

Section 338 of the Nationality Act of 1940 is for our purpose the reenactment of § 15 of the Act of June 29, 1906, 34 Stat. 596, 601. That Act was the culmination of half a century's agitation directed at naturalization frauds, particularly in their bearing upon the suffrage.[3] On the basis of a nationwide survey to determine the incidence and causes of naturalization frauds with a view to devising recommendations for corrective legislation, Pres-

[3] As early as 1844, a Senate resolution called for an inquiry into these frauds and into the possibility of a judicial procedure for canceling fraudulent naturalization certificates. S. J., 28th Cong., 2d Sess. 40, 44. For a summary of pre-Civil War legislative activity in regard to naturalization see Franklin, The Legislative History of Naturalization in the United States. Annual messages of the Presidents, from Grant onward, urged remedial legislation. Richardson, Messages and Papers of the Presidents: Grant, 1st Annual Message, 1869, 6th Annual Message, 1874, 7th Annual Message, 1875, 8th Annual Message, 1876; Arthur, 4th Annual Message, 1884; Cleveland, 1st Annual Message, 1885, 2d Annual Message, 1886, 4th Annual Message, 1888; Harrison, 1st Annual Message, 1889, 2d Annual Message, 1890; Roosevelt, 3d Annual Message, 1903, 4th Annual Message, 1904, 5th Annual Message, 1905. Grant and Cleveland asserted specifically that there was no way for the Government to obtain a revocation of fraudulently acquired citizenship and asked for correction of this deficiency. *Id.*, Grant, 6th Annual Message, 1874; Cleveland, 1st Annual Message, 1885. But Harrison called attention to a "new application of a familiar equity jurisdiction" whereby over a hundred naturalization orders had been vacated at the instance of the Attorney General by the United States Circuit Courts in original equity suits. As he saw it, the urgent remaining need was

ident Theodore Roosevelt's Commission on Naturalization prepared a report which was the foundation of the Act of 1906. H. R. Doc. No. 46, 59th Cong., 1st Sess. This report, the hearings before congressional committees and their reports, the floor debates on the proposed measure, leave no doubt that the target of legislation was fraudulent naturalization.[4] It is equally clear that the remedy for the disclosed evil lay in the effective exercise of the power of Congress "To establish an uniform Rule of Naturalization." U. S. Const., Art. I, § 8, cl. 4.

To prevent fraud in a proceeding before a naturalization court, the Act devised a scheme of administrative oversight for the naturalization process. The Government was given the right to appear. § 11, 34 Stat. 596, 599. This right was fortified by requiring notice of the petition to the newly created Bureau of Immigration and Naturalization and a ninety-day waiting period between the filing of the petition and the final hearing. §§ 6 and 12, 34 Stat. 596, 598 and 599. These were safeguards to enable verification by the Bureau of the

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for an adequate prenaturalization investigation. *Id.*, Harrison, 2d Annual Message, 1890.

In 1903, a federal grand jury investigated and a Special Assistant United States Attorney was charged with prosecution of naturalization frauds in New York City. See Rep. Atty. Gen. v, 392 (1903); H. R. Doc. No. 46, 59th Cong., 1st Sess. 76. A special examiner for the Department of Justice made a nationwide investigation, a report of which was transmitted to Congress. See Rep. Atty. Gen. 393 (1903). See generally Roche, Pre-Statutory Denaturalization, 35 Cornell L. Q. 120.

[4] See, *e. g.*, H. R. Doc. No. 46, 59th Cong., 1st Sess. 11–15, 20–23, 76–78, 79–92; Hearings before the House Committee on Immigration and Naturalization on the Bills to Establish a Bureau of Naturalization, and to Provide for a Uniform Rule for the Naturalization of Aliens Throughout the United States, 59th Cong., 1st Sess. 3–54; H. R. Rep. No. 1789, 59th Cong., 1st Sess. 2; S. Rep. No. 4373, 59th Cong., 1st Sess. 2; 40 Cong. Rec. 3640 ff.

facts alleged in the petition and investigation of the qualifications of the applicant for citizenship.[5] By these provisions Congress recognized that enforcement is the heart of the law.

But Congress was not content to devise measures against fraud in procuring naturalization only. In § 15 of the Act of 1906 it formulated a carefully safeguarded method for denaturalization. Though the principal criticism leading to the enactment concerned the evils inherent in widely diverse naturalization procedures, experience was not wanting of the dangers and hardships

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[5] These provisions were suggested by the special Commission on Naturalization. See H. R. Doc. No. 46, 59th Cong., 1st Sess. 17, 99. In his Second Annual Message, President Harrison had recommended a waiting period for investigation. See Richardson, Messages and Papers of the Presidents, Harrison, 2d Annual Message, 1890. See also Rep. Atty. Gen. 397 (1903) for a similar suggestion from the Special Examiner in Relation to Naturalization.

No section of the Act was more thoroughly debated than this one. Three separate amendments to reduce the waiting period were rejected. 40 Cong. Rec. 7762–7770. The period was cut to thirty days in the Nationality Act of 1940, 54 Stat. 1137, 1156, 8 U. S. C. § 734 (c). But the codifiers reiterated that the purpose of the delay was to permit the Government "to make further inquiry as to the eligibility of the applicant and the competency of his witnesses." Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, superseded by H. R. 9980, 76th Cong., 1st Sess. 466.

The opportunity for investigation provided by these sections was taken full advantage of by the Bureau. See H. R. Rep. No. 1328, 69th Cong., 1st Sess. 1. Indeed, in 1926, the investigations were made a formal part of the naturalization process in the federal courts by permitting officers of the Bureau to conduct the examination of the applicant's witnesses prior to final hearing on the petition and authorizing the naturalization judge to forego such examination on final hearings if the recommendation of the Bureau was favorable. 44 Stat. 709. This procedure was extended to state naturalization courts as well in 1940. 54 Stat. 1137, 1156, 8 U. S. C. § 733.

attendant on haphazard denaturalization. Information was before Congress that ever since 1890 the then circuit courts had vacated naturalization orders at the suit of the Attorney General,[6] although when the validity of § 15 was before it, this Court left open the question whether a court of equity had such power without express legislative authority. *Johannessen* v. *United States,* 225 U. S. 227, 240. But the revocation of citizenship before 1906 was not always surrounded by the safeguards of an original equity proceeding. See, *e. g., Tinn* v. *United States District Attorney,* 148 Cal. 773, 84 P. 152 (1906).[7] Indeed, the history of the Act of 1906 makes clear that elections could be influenced by irregular denaturalizations as well as by fraudulent naturalizations. The only instance in the extensive legislative materials of vacation of naturalization orders by what appears to have been the procedure urged by the Government in this case involved just such a situation. A judge who had naturalized seven aliens on the supposition that they were members of his own political party promptly vacated

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[6] See Richardson, Messages and Papers of the Presidents, Harrison, 2d Annual Message, 1890. 1,916 fraudulently obtained naturalization certificates were canceled in civil proceedings in New York City in the two-year period to May 29, 1905. H. R. Doc. No. 46, 59th Cong., 1st Sess. 76; H. R. Rep. No. 1789, 59th Cong., 1st Sess. 2.

[7] In that case, nine citizenship orders were revoked in an *ex parte* proceeding on oral motion of the United States District Attorney, purporting to be made as in the course of the original proceedings, over three years after the orders admitting to citizenship. This action was, however, reversed on appeal. See also 40 Cong. Rec. 7045 where it is stated that upon the announcement by the United States District Attorney in San Francisco that immunity from prosecution would be given to any holder of a fraudulently acquired certificate who surrendered it for cancellation, 204 certificates were turned in in the first thirty days.

his order when this supposition was corrected. See Rep. Atty. Gen. 394 (1903).[8]

Significantly, floor action on § 15 in the House reveals a specific purpose to deprive the naturalizing court as such of power to revoke. The original bill authorized United States attorneys to institute revocation proceedings in the court issuing the certificate as well as in a court having jurisdiction to naturalize in the district of the naturalized citizen's residence. H. R. 15442, 59th Cong., 1st Sess., § 17. A committee amendment adopted just before final passage put the section in the form in which it was enacted. That amendment, in the words of Congressman Bonynge, the manager of the bill, "takes away the right to institute [a revocation proceeding] in the court out of which the certificate of citizenship may have been issued, unless the alien happens to reside within the jurisdiction of that court." 40 Cong. Rec. 7874.

In the light of this legislative history we cannot escape the conclusion that in its detailed provisions for revoking a naturalization because of fraud or illegal procurement not appearing on the face of the record, Congress formulated a self-contained, exclusive procedure. With a view to protecting the Government against fraud while safeguarding citizenship from abrogation except by a clearly defined procedure, Congress insisted on the detailed, explicit provisions of § 15. To find that at the same time it left the same result to be achieved by the confused and conflicting medley, as we shall see, of State procedures for setting aside local judgments is to read congressional enactment without respect for reason.

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[8] Objections were raised, on similar grounds, to the section in the original bill providing for appeal from naturalization orders and requiring a stay of the issuance of the certificate pending appeal. It was argued that a partisan district attorney might influence a close election by judiciously choosing the cases in which to appeal and obtain the stay. 40 Cong. Rec. 7786.

Between them, these two sections, § 11 and § 15, provided a complete and exclusive framework for safeguarding citizenship against unqualified applicants. Under the first, the Government was given ample opportunity to interpose objections prior to the order of naturalization. If proper account was not taken of the evidence, the Government had recourse to appeal for examination of the action of the naturalizing court on the record. *Tutun* v. *United States,* 270 U. S. 568. Congress, however, thought that ninety days was quite enough time for the Government to develop its case—indeed many members deemed it too long. 40 Cong. Rec. 7766–7770. At the expiration of that time, if citizenship was granted, it was to be proof against attacks for fraud or illegal procurement based on evidence outside the record, except through the proceedings prescribed in § 15. The congressional scheme, providing carefully for the representation of the Government's interest before the grant of citizenship and a detailed, safeguarded procedure for attacking the decree on evidence of fraud outside the record,[9] covers the whole ground. Every national interest is thereby protected.

Neither uncontested practice nor adjudication by lower courts has rendered a verdict which is disregarded by our construction of § 338. Nor as a rule for future conduct is any burden thereby placed on the Government in setting

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[9] It deserves emphasis that we are dealing here with the revocation of naturalization "on the ground of fraud or on the ground that . . . [the naturalization was] illegally procured," to be established outside the record. We have not before us, and therefore do not decide, the power of a State court to control its naturalization judgment to the extent of correcting some clerical error.

And, of course, the present case does not touch situations where under State law a judgment does not come into being until a defined period or event after a decision is rendered. Compare *Commissioner* v. *Estate of Bedford,* 325 U. S. 283, 284–288.

aside a naturalization order where it can prove illegality or fraud.

An abstract syllogism is pressed against this natural, because rational, treatment of § 338 as the exclusive and safeguarding procedure for voiding naturalizations granted after compliance with the careful formalities of § 334.[10] Grant of citizenship is a judgment; a judgment is within the control of the issuing court during the court's term; therefore naturalization is subject to revocation for fraud or illegal procurement during the term of the court that granted it. So runs the argument. Such abstract reasoning is mechanical jurisprudence in its most glittering form. It disregards all those decisive considerations by which a provision like § 338 derives the meaning of life from the context of its generating forces and its purposes. It also disregards the capricious and haphazard results that would flow from applying such an empty syllogism to the actualities of judicial administration.

By giving State courts jurisdiction in naturalization cases, Congress empowered some thousand State court judges to adjudicate citizenship. If the requirements specifically defined in § 338 for revocation of citizenship were to be supplemented by State law regarding control over judgments by way of the "term rule" or otherwise, the retention of citizenship would be contingent upon application of myriad discordant rules by a thousand judges scattered over the land.

Wide and whimsical diversities are revealed by the local law of the forty-eight States in the power of their courts to set aside local judgments.[11] The courts of some States have no power to set aside their own judgments; courts

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[10] 54 Stat. 1137, 1156, 8 U. S. C. § 734.

[11] The conflicting varieties of State rules for vacating judgments are illustratively summarized in an Appendix, *post*, p. 88.

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in other States have almost unlimited power. Not only is there this great diversity among the States. There are capricious differences within individual States. That Congress, composed largely of lawyers, should have gone through the process of the elaborate definition in § 338 but impliedly also allowed denaturalization through the eccentricities and accidents of variegated State practice, is an assumption that ought to have a solider foundation than an abstract syllogism. Without more, we cannot believe that Congress would subject a naturalized citizen—who has achieved that status only by the protecting formalities of the Nationality Act—to such unpredictable attack.[12]

Finally, it is suggested that since § 15 was found not to prevent the taking of appeals from a naturalization order, *Tutun* v. *United States, supra,* and since there are diversities in the time for appeal among State courts with power to naturalize, the diversities among State courts in the power to vacate their own judgments ought not to require resort to § 338 as the exclusive, uniform procedure for denaturalization.

One answer is that the Act of 1906 and its successor, the Nationality Act of 1940, had no provision whatever as to appellate review of errors appearing of record in a naturalization court. On the other hand, Congress laboriously dealt with the revocation of naturalization

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[12] That Congress was not inattentive to existing variations in State practice, where it wished to absorb them, is shown by the last portion of § 338 (b) which reads:

". . . and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees *by the laws of the State or the place where such suit is brought.*" (Emphasis added.)

obtained by fraud or otherwise illegally. And since appellate review is so ingrained a part of American justice, this Court in the *Tutun* case naturally held that it was not to be assumed that Congress denied the right of appeal merely because it did not affirmatively confer it. Of course there are differences among State judiciaries as to the time within which an appeal can be taken. But the differences are within a narrow and unimportant range [13] compared with the enormous and quixotic differences relating to a court's control over its judgments on the score of fraud or illegality. It is one thing to allow some play for the joints in a statutory scheme like the Nationality Act, enforceable by both State and federal courts. It is quite another to inject a wholly dislocating factor by incorporating the diverse State rules for vacating judgments into the revocation process, which Congress specifically and comprehensively dealt with in § 338.

Congressional concern for uniformity in post-naturalization proceedings was shown in this very connection. The bill before Congress in 1906 provided for a uniform mode of appeal to the United States Circuit Courts of Appeals from naturalization judgments rendered by State, as well as federal, courts. H. R. 15442, 59th Cong., 1st Sess., § 13. Constitutional doubts and the practical problems which such an anomalous procedure would raise led to the omission of this section, leaving appeal procedure to the States. 40 Cong. Rec. 7784–7787. It is not to be supposed, however, that where, as with denaturalization, such doubts and anomalies were not present, Congress

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[13] Vagaries among the States as to time for appeals are not substantial. The times for appeal fixed by States range principally from thirty days to three months. See Pound, Appellate Procedure in Civil Cases, 340–342.

would gratuitously abandon the constitutional mandate to establish "an uniform Rule of Naturalization." It established such a rule in § 338.

Accordingly, the judgment below must be reversed and that of the District Court reinstated.

It is so ordered.

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

[For dissenting opinion of MR. JUSTICE REED, joined by MR. JUSTICE BURTON, see *post*, p. 92.]

APPENDIX.

POWER OF STATE COURTS TO VACATE THEIR OWN JUDGMENTS [1]

The diversities in State rules governing the power to vacate judgments are illustrated by the following:

(1) The common law rule, still followed by many States, including Maryland, is that for the duration of the term in which the judgment is entered the court may en-

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[1] It is hardly necessary to note that the best effort to secure fastidious accuracy and currency in such matters as the local rules here summarized cannot assure them. The interpretation of local law, especially as to practice, is treacherous business for an outsider. The very uncertainty of the local rules makes it all the more unlikely that Congress intended to subject citizenship by naturalization to such attack.

Of course only State courts with power to naturalize, that is, "having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited," 54 Stat. 1137, 1140, 8 U. S. C. § 701 (a), are here canvassed.

A great many States provide procedures—statutory or common law—for vacating judgments by a separate proceeding in the nature

tertain a motion to change it.[2] This "term rule" inevitably would produce erratic results as to naturalization: [3]

(a) States differ very substantially in the length of court terms set by legislature or court. See 3 Martindale-Hubbell Law Directory, "Court Calendars" (1951). For example, in several counties of Kentucky the Circuit Court holds terms of only six *days'* duration; in contrast, the terms of the Oklahoma District Courts are six *months* in length.

(b) Even within a State the length of terms may vary greatly. Consider Indiana, for example. The Marion County (Indianapolis) Superior Court has monthly terms; some judges of the Lake County Superior Court hold terms lasting for six months.[4]

(c) In a good many States the length of term may fluctuate with the amount of business that happens

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of an equity suit. See, *e. g.*, Kan. Gen. Stat., 1949, § 60–3007 *et seq.* The Government in this case does not argue that these collateral procedures are available in the face of § 338. But it is not obvious why the argument of implied State control over a State judgment is not also relevant as to these State methods for controlling judgments.

[2] The medieval idea of dividing the calendar year for judicial purposes into terms and vacations developed from the necessities of sowing and harvesting, and from the demands of the Church for religious peace at certain seasons of the year. See 1 Reeves, History of English Law, 191–192; 3 Holdsworth, A History of English Law, 674–675.

[3] The States used as illustration under this division (1) are only those which, as far as investigation discloses, follow the common law "term rule."

[4] Texas provides striking illustrations of diversity within a single State. The Texas District Courts vary greatly from county to county in the number of terms per year and in the specified length of the terms; many District Courts are in continuous session, others

to be before the court, and with the untrammelled discretion of a judge in adjourning *sine die*. Unless adjourned *sine die* or concluded by the terminal date set by statute, a term, in general, ends only at the commencement of the next succeeding term held at the same place. See, *e. g., Comes* v. *Comes,* 190 Iowa 547, 178 N. W. 403 (1920); *Hensley* v. *State,* 53 Okla. Cr. 22, 3 P. 2d 211 (1931). Thus, a term may be less than a day in length, or it might be a full year where the court has only one prescribed term annually.

(d) There is an inherent uncertainty in the "term rule." Consider a court with a prescribed or permitted term of ten months. *E. g.,* Rhode Island Superior Court in Providence, R. I. Gen. Laws, 1938, c. 498, § 2. A citizenship obtained by naturalization on the first day of the term might be vacated at any time within 10 months—under the reasoning of the Government; whereas the alien fortunate enough to be naturalized on the last day of the term would have citizenship indefeasibly except by the safeguarded procedure of § 338.

(2) A number of States have statutes similar to that of Alabama reading: "The circuit courts . . . shall be open for the transaction of any and all business, or judicial proceedings of every kind, at all times." Ala. Code, 1940, Tit. 13, § 114. In those States wide disparity in the time within which a judgment may be vacated is introduced by the following circumstances:

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sit "till finished," and others have fixed terms of 3, 4, 6, 8 or 10 weeks. The judgments of certain District Courts with terms of 3 months or longer become "as final . . . 30 days after the date of judgment . . . as if the term of court had expired." Vernon's Tex. Civ. Stat., 1926, Art. 2092 (30); *Joy* v. *Young,* 194 S. W. 2d 159 (Tex. Civ. App. 1946).

(a) Some of these States provide by statute that a court has control of its judgments and may vacate them within some fixed time; the times vary greatly:

One year:

Minnesota—Minn. Stat., 1949, § 544.32.

60 days:

Kentucky (courts in continuous session)—Ky. Rev. Stat., 1946, § 451.130 (1).

30 days:

Alabama—Ala. Code, 1940, Tit. 13, § 119.

Illinois—Ill. Rev. Stat., 1949, c. 77, § 82.

Maryland (Baltimore City Court)—See *Harvey* v. *Slacum,* 181 Md. 206, 29 A. 2d 276 (1942).

New Mexico—N. M. Stat., 1941, § 19–901.

(b) Other States provide that only the motion for setting aside the judgment need be filed within a fixed period; the length of these periods also varies considerably:

"A reasonable time not exceeding six months:"

Arizona—Ariz. Code Ann., 1939, § 21–1502.

California—Deering's Cal. Code Civ. Proc., 1949, § 473.

6 months:

Nevada—See *Lauer* v. *Eighth Judicial District Court,* 62 Nev. 78, 140 P. 2d 953 (1943).

(c) At any rate either the fixed period or the reasonable time for vacating judgments produces quite different results from the erratic consequences of the "term rule."

(3) In some States, it appears, a court has no control over its judgments after they are signed and entered. See, *e. g., Louisiana Bank* v. *Hampton,* 4 Mart. 94 (La. 1816); *Nelson & Co.* v. *Rocquet & Co.,* 123 La. 91, 48 So. 756 (1909). In Massachusetts a court has no jurisdiction

to vacate a judgment "on mere motion" except for clerical error. *Shawmut Commercial Paper Co.* v. *Cram,* 212 Mass. 108, 98 N. E. 696 (1912). But see Mass. Gen. Laws, 1932, c. 250, §§ 14–20.

MR. JUSTICE REED, with whom MR. JUSTICE BURTON joins, dissenting.

Upon filing of his petition for naturalization, an order and a certificate of naturalization were issued immediately by the Circuit Court of Frederick County, Maryland, on December 2, 1943, to petitioner Bindczyck, a soldier in the United States Army. Nationality Act of 1940, § 324, 54 Stat. 1149. On the next day he disclaimed loyalty to the United States and stated his desire to leave the country after the war.

Seven days after the naturalization and within the same term of the circuit court, the United States filed in the naturalization proceeding a motion to vacate and set aside the order of naturalization on the ground that newly discovered evidence showed Bindczyck swore falsely concerning his loyalty toward the United States and its defense. Bindczyck in open court admitted the charge. Thereupon the Maryland court directed that the order of citizenship be vacated, the certificate of naturalization voided, and the case restored to the pending calendar for immediate hearing. The record shows no further proceedings in Maryland, either by further hearing or by appeal.

On June 15, 1948, while he was in custody for deportation, Bindczyck filed a complaint in the District Court for the District of Columbia praying a declaration that he was a citizen of the United States. This was based on the contention that the order vacating his admission to citizenship was void because it had been issued without compliance with § 338 of the Nationality Act of 1940, set out in note 1 of the Court's opinion, *ante,* p. 77.

The Court upholds Bindczyck's contention. By that judgment the Court in a collateral proceeding determines that the vacation by the Maryland court of its order and the cancellation by that court of the certificate of naturalization are void because the proceedings were not taken in accordance with the above-mentioned § 338. That is, a state court with the alien before it has no power so to act, although it had jurisdiction to hear his application and enter an order for his naturalization. § 301.

The Court's judgment, we think, flows from its disregard of a postulate of statutory construction. This important principle is that new legislation is to be construed in the setting of existing law and practice.[1] Since sound methods of statutory interpretation are important in the administration of justice, it seems worthwhile to state the reasons for disagreement. A dissent may help to avoid another and further departure from normal statutory interpretation.

Even the most comprehensive legislation cannot be considered as though it were the entire body of the law. The continuation of courts and practices is assumed. Congress may give concurrent jurisdiction over federal matters to both state and federal courts. Of course, the jurisdiction of federal courts over federal matters may be made exclusive of all other tribunals by Congress.[2] That body may also, we assume, put limits on state court powers concerning federal rights. When Congress grants concurrent jurisdiction over federal matters, however, such a grant of power is to be exercised in accordance with the normal practices and procedure of the respective

[1] See *United States* v. *Sanges*, 144 U. S. 310, 311; Crawford, Statutory Construction (1940), c. XXII; 1 Bishop on Criminal Law (9th ed., Zane & Zollman, 1923) § 291*b*. Cf. *Stark* v. *Wickard*, 321 U. S. 288, 309; *Burnet* v. *Harmel*, 287 U. S. 103, 108.

[2] For examples, see 28 U. S. C. §§ 1333, 1334, 1338 (a), 1351, 1355, and 1356.

courts unless specifically or by necessary implication the federal legislation requires such limitation.[3]

We have had provisions for naturalization since March 26, 1790.[4] They have grown in complexity through the years. Under the Act of 1906, as shown by the Court's opinion, the Congress sought to remedy the evils of fraudulent naturalization and to protect the new citizen against cancellation of his certificate in an inconvenient forum or without proper notice. This purpose has been carried out in the present 1940 Act practically by the same words, so far as the sections here involved are concerned. Power over naturalization has remained in both state and federal courts of general jurisdiction.[5]

There is not a suggestion in the acts or in the legislative history that, by the enactment of § 15 of the earlier Act

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[3] This principle was adverted to in the *Second Employers' Liability Cases*, 223 U. S. 1, 56, in these words:

"Because of some general observations in the opinion of the Supreme Court of Errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure."

[4] Act of March 26, 1790, 1 Stat. 103. See Statutory History of Naturalization in the United States, Report of Secretary of State, January 19, 1904, appended to Report to the President of the Commission on Naturalization, H. R. Doc. No. 46, 59th Cong., 1st Sess., p. 58.

[5] Act to Establish a Bureau of Immigration and Naturalization, 34 Stat. 596, §§ 3 and 15; Nationality Act of 1940, 54 Stat. 1137, §§ 301 and 338.

or § 338 of the present Act, the Congress intended to affect the power which state and federal courts have to grant new trials or rehearings or to set aside orders during a term or within such other limited time as statute or practice may prescribe. Section 338 in providing a method for "revoking and setting aside" the order and "canceling the certificate" of naturalization refers to the method of overturning a judgment of naturalization after the judicial procedure required for the grant is at an end. Section 338, in our view, covers only those new cases where circumstances call for the Government, in the words of the section "to institute proceedings in any court specified in subsection (a) of section 301 [54 Stat. 1140] in the judicial district in which the naturalized citizen may reside at the time of bringing suit." Under subsection (b) of § 338 the defendant is to "make answer to the petition of the United States." This language is aimed at new litigation, not at steps in a pending case.[6] Action on judgments during term time is a step in a pending case.[7]

The certificate of naturalization, as evidence of citizenship, is issued when the judge signs the order. 8 CFR (1949 ed.) § 377.1. A successful appeal by the Government from an order of naturalization would result in can-

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[6] See *Johannessen* v. *United States*, 225 U. S. 227, 236:

"It does not follow that Congress may not authorize a direct attack upon certificates of citizenship in an independent proceeding such as is authorized by § 15 of the act of 1906." Compare also *United States* v. *Ness*, 245 U. S. 319, 326, where the Court speaks of § 15 as affording a remedy by "independent suit."

[7] "Knowing that the court had full power during the term to vacate its own decree, he took these leases subject to the possibility of such vacating of the decree." *Henderson* v. *Carbondale Coal & Coke Co.*, 140 U. S. 25, 40; *Goddard* v. *Ordway*, 101 U. S. 745, 749–751; *Zimmern* v. *United States*, 298 U. S. 167. See *Eddy* v. *Summers*, 183 Md. 683, 687, 39 A. 2d 812, 814.

cellation of an issued certificate. It is settled law, however, that appeals are allowable from federal and state courts. *Tutun* v. *United States,* 270 U. S. 568, 575, note 3, 580. This conclusion was reached in the face of the arguments there advanced that "exclusive jurisdiction" was conferred on the trial courts by the Act and that a means of review was granted to the United States by § 15. The reason which led this Court to allow appeals under the Naturalization Act was the same reason that should guide us here, that is, "A denial of a review in naturalization cases would engraft an exception upon an otherwise universal rule." P. 579; see pp. 578–580.

The ruling in the *Tutun* case compels a distinction sought to be made in today's opinion. The Court now holds that "§ 338 is the exclusive procedure for canceling citizenship on the score of fraudulent or illegal procurement based on evidence outside the record." Since *Tutun* sustained review that would on appeal set aside naturalization orders and cancel certificates on facts of record, the judgment today differentiates that case by making the existence of facts *dehors* the record, at least where they amount to fraud or illegal procurement, the decisive incident to bar state action on rehearing for newly discovered evidence. We think today's decision departs from the reasoning of the *Tutun* case and engrafts "an exception upon an otherwise universal rule."

The certainty that naturalization may be revoked by appeal determines another point. There is a suggestion in the Court's opinion, not elaborated, that Congress intended to bar state action for rehearing or vacation during term on facts *dehors* the record because to do otherwise "would gratuitously abandon the constitutional mandate to establish 'an uniform Rule of Naturalization.' " To allow procedure to be determined according to the particular court that the alien might utilize would not violate

the principle of uniformity.[8] That is the kind of uniformity that the *Tutun* case approves by impliedly allowing appeals under state procedure.

Interpretation of a statute by government officials charged with its administration carries weight.[9] A practice under that interpretation increases its importance. Apparently the Government avails itself of the local methods of directly attacking a judgment of naturalization within the term, or within limited periods under appropriate rules.[10] The Government, and in this *Bindczyck* case the Service, thus makes clear its understanding that § 338 does not limit the power of courts over judgments during term time.

When we consider that Congress was concerned with preventing fraud and illegal practices in naturalization, the Court's conclusion does not seem justified. It disregards well-established principles of statutory construction, without furthering the congressional purpose, and puts a useless burden on the Government without any ultimate benefit to the naturalized citizen. Such a formalistic approach to legal problems is not helpful to the administration of justice.

We think the judgment should be affirmed.

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[8] *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 189; *Wright* v. *Vinton Bank,* 300 U. S. 440, 463, n. 7; *Fernandez* v. *Wiener,* 326 U. S. 340, 359.

[9] Cf. *United States* v. *American Trucking Assns.,* 310 U. S. 534, 545.

[10] See, *e. g., Petition of Weltzien,* 68 F. Supp. 1000; *United States ex rel. Volpe* v. *Jordan,* 161 F. 2d 390.

UNITED STATES *v.* WUNDERLICH ET AL.

CERTIORARI TO THE COURT OF CLAIMS.

No. 11. Argued November 6, 1951.—Decided November 26, 1951.

Under the standard provision of a government contract that all disputes involving questions of fact shall be decided by the contracting officer, with the right of appeal to the head of the department, "whose decision shall be final and conclusive upon the parties thereto," a finding by the head of a department on a question of fact may not be set aside by the Court of Claims, unless it was founded on fraud, alleged and proved. Pp. 98–101.

(a) By fraud is meant conscious wrongdoing, an intention to cheat or be dishonest. P. 100.

(b) A finding by the Court of Claims that the decision of the department head was "arbitrary," "capricious" and "grossly erroneous" is not sufficient to justify setting it aside. P. 100.

117 Ct. Cl. 92, reversed.

The Court of Claims set aside a decision of a department head on a question of fact arising under a standard-form government contract. 117 Ct. Cl. 92. This Court granted certiorari. 341 U. S. 924. *Reversed,* p. 101.

Paul A. Sweeney argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Morton Liftin.*

Harry D. Ruddiman argued the cause for respondents. With him on the brief was *John W. Gaskins.*

MR. JUSTICE MINTON delivered the opinion of the Court.

This Court is again called upon to determine the meaning of the "finality clause" of a standard form government contract. Respondents agreed to build a dam for the United States under a contract containing the usual

"Article 15."* That Article provides that all disputes involving questions of fact shall be decided by the contracting officer, with the right of appeal to the head of the department "whose decision shall be final and conclusive upon the parties thereto." Dissatisfied with the resolution of various disputes by the department head, in this instance the Secretary of the Interior, respondents brought suit in the Court of Claims. That court reviewed their contentions, and in the one claim involved in this proceeding set aside the decision of the department head. 117 Ct. Cl. 92. Although there was some dispute below, the parties now agree that the question decided by the department head was a question of fact. We granted certiorari, 341 U. S. 924, to clarify the rule of this Court which created an exception to the conclusiveness of such administrative decision.

The same Article 15 of a government contract was before this Court recently, and we held, after a review of the authorities, that such Article was valid. *United States* v. *Moorman*, 338 U. S. 457. Nor was the *Moorman* case one of first impression. Contracts, both governmental and private, have been before this Court in several cases in which provisions equivalent to Article 15 have been approved and enforced "in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment . . . ." *Kihlberg* v. *United States*, 97 U. S. 398, 402; *Sweeney* v. *United States*, 109 U. S. 618, 620; *Martinsburg & P. R.*

*"ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

Co. v. *March,* 114 U. S. 549, 553; *Chicago, S. F. & C. R. Co.* v. *Price,* 138 U. S. 185, 195.

In *Ripley* v. *United States,* 223 U. S. 695, 704, gross mistake implying bad faith is equated to "fraud." Despite the fact that other words such as "negligence," "incompetence," "capriciousness," and "arbitrary" have been used in the course of the opinions, this Court has consistently upheld the finality of the department head's decision unless it was founded on fraud, alleged and proved. So fraud is in essence the exception. By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest. The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract.

If the decision of the department head under Article 15 is to be set aside for fraud, fraud should be alleged and proved, as it is never presumed. *United States* v. *Colorado Anthracite Co.,* 225 U. S. 219, 226. In the case at bar, there was no allegation of fraud. There was no finding of fraud nor request for such a finding. The finding of the Court of Claims was that the decision of the department head was "arbitrary," "capricious," and "grossly erroneous." But these words are not the equivalent of fraud, the exception which this Court has heretofore laid down and to which it now adheres without qualification.

Respondents were not compelled or coerced into making the contract. It was a voluntary undertaking on their part. As competent parties they have contracted for the settlement of disputes in an arbitral manner. This, we have said in *Moorman,* Congress has left them free to do. *United States* v. *Moorman, supra,* at 462. The limitation upon this arbitral process is fraud, placed there by this Court. If the standard of fraud that we adhere to is too limited, that is a matter for Congress.

Since there was no pleading of fraud, and no finding of fraud, and no request for such a finding, we are not

disposed to remand the case for any further findings, as respondents urge. We assume that if the evidence had been sufficient to constitute fraud, the Court of Claims would have so found. In the absence of such finding, the decision of the department head must stand as conclusive, and the judgment is

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE REED concurs, dissenting.

Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.

The instant case reveals only a minor facet of the age-long struggle. The result reached by the Court can be rationalized or made plausible by casting it in terms of contract law: the parties need not have made this contract; those who contract with the Government must turn square corners; the parties will be left where their engagement brought them. And it may be that in this case the equities are with the Government, not with the contractor. But the rule we announce has wide application and a devastating effect. It makes a tyrant out of every contracting officer. He is granted the power of a tyrant even though he is stubborn, perverse or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. Power granted is seldom neglected.

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The principle of checks and balances is a healthy one. An official who is accountable will act more prudently. A citizen who has an appeal to a body independent of the controversy has protection against passion, obstinacy, irrational conduct, and incompetency of an official. The opinion by Judge Madden in this case expresses a revulsion to allowing one man an uncontrolled discretion over another's fiscal affairs. We should allow the Court of Claims, the agency close to these disputes, to reverse an official whose conduct is plainly out of bounds whether he is fraudulent, perverse, captious, incompetent, or just palpably wrong. The rule we announce makes government oppressive. The rule the Court of Claims espouses gives a citizen justice even against his government.

MR. JUSTICE JACKSON, dissenting.

It is apparent that the Court of Claims, which deals with many such cases while we deal with few, has reached a conclusion that contracting officers and heads of departments sometimes are abusing the power of deciding their own lawsuits which these contract provisions give to them. It also is apparent that the Court of Claims does not believe that our decision in *United States* v. *Moorman,* 338 U. S. 457, completely closed the door to judicial relief from arbitrary action unless it also is fraudulent in the sense of "conscious wrongdoing, an intention to cheat or be dishonest." Nor could I have believed it.

Granted that these contracts are legal, it should not follow that one who takes a public contract puts himself wholly in the power of contracting officers and department heads. When we recently repeated in *Moorman* that their decisions were " 'conclusive, unless impeached on the ground of fraud, *or such gross mistake as necessarily implied bad faith,*' " *id.,* at 461 (emphasis supplied), I supposed that we meant that part of the reservation for which I have supplied emphasis. Today's

decision seems not only to read that out of the *Moorman* decision, but also to add an exceedingly rigid meaning to the word "fraud."

Undoubtedly contracting parties can agree to put decision of their disputes in the hands of one of them. But one who undertakes to act as a judge in his own case or, what amounts to the same thing, in the case of his own department, should be under some fiduciary obligation to the position which he assumes. He is not at liberty to make arbitrary or reckless use of his power, nor to disregard evidence, nor to shield his department from consequences of its own blunders at the expense of contractors. He is somewhat in the position of the lawyer dealing with his client or the doctor with his patient, for the superiority of his position imposes restraints appropriate to the trust. Though the contractor may have covenanted to be satisfied with what his adversary renders to him, it must be true that he who bargains to be made judge of his own cause assumes an implied obligation to do justice. This does not mean that every petty disagreement should be readjudged, but that the courts should hold the administrative officers to the old but vanishing standard of good faith and care.

I think that we should adhere to the rule that where the decision of the contracting officer or department head shows "such gross mistake as necessarily to imply bad faith" there is a judicial remedy even if it has its origin in overzeal for the department, negligence of the deciding official, misrepresentations—however innocent—by subordinates, prejudice against the contractor, or other causes that fall short of actual corruption. Men are more often bribed by their loyalties and ambitions than by money. I still believe one should be allowed to have a judicial hearing before his business can be destroyed by administrative action, although the Court again thinks otherwise. Cf. *Ewing* v. *Mytinger & Casselberry,* 339 U. S. 594, 604.

JENNINGS *v.* ILLINOIS.

NO. 95. CERTIORARI TO THE SUPREME COURT OF ILLINOIS.*

Argued November 5–6, 1951.—Decided December 3, 1951.

Under the Illinois Post-Conviction Hearing Act, petitioner, a prisoner in an Illinois penitentiary, filed in the state court in which he had been convicted a petition alleging facts sufficient to establish a prima facie violation of his rights under the Federal Constitution through the admission of a coerced confession in evidence at his trial. The State's Attorney did not deny these allegations but moved to dismiss the petition on grounds of *res judicata* and failure to state a cause of action. The court dismissed the petition without a hearing or otherwise determining the factual issues presented. The State Supreme Court, without argument and without opinion, dismissed a writ of error by a form order reciting that it had examined and reviewed the petition and record in the post-conviction hearing and found the same to disclose no violation or denial of petitioner's constitutional rights. *Held:* Judgment vacated and cause remanded for further proceedings. Pp. 105–112.

1. If his allegations are true and if his claim has not been waived at or after trial, petitioner is held in custody in violation of federal constitutional rights; and he is entitled to his day in court for resolution of these issues. Pp. 110–111.

2. On remand, petitioner should be advised whether his claim that his constitutional rights were infringed at his trial may be determined under the Post-Conviction Hearing Act, or whether that Act does not provide an appropriate state remedy in this case. P. 111.

3. If petitioner's claim may be resolved in a proceeding under that Act, either by an inquiry into the verity of his factual allegations or a finding that his federal rights were waived during or after his trial, such resolution may proceed without further action by this Court. Pp. 111–112.

4. If Illinois does not provide an appropriate remedy for such a determination, petitioner may proceed without more to apply to the United States District Court for a writ of habeas corpus. P. 112.

Judgments vacated and causes remanded.

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*Together with No. 96, *La Frana* v. *Illinois;* and No. 375, *Sherman* v. *Illinois*, also on certiorari to the same court.

Illinois trial courts dismissed petitioners' petitions under the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat., 1951, c. 38, §§ 826–832. The Illinois Supreme Court dismissed writs of error. This Court granted certiorari. 341 U. S. 947; 342 U. S. 811. *Judgments vacated and causes remanded,* p. 112.

Nathaniel L. Nathanson, acting under appointment by the Court, argued the causes and filed briefs for petitioners in all three cases. In No. 95, *Calvin P. Sawyier,* acting under appointment by the Court as associate counsel for petitioner, was with *Mr. Nathanson* on the brief and, by special leave of Court, argued the cause *pro hac vice.*

William C. Wines, Assistant Attorney General of Illinois, argued the causes for respondent. With him on the briefs were *Ivan A. Elliott,* Attorney General, and *Raymond S. Sarnow* and *John T. Coburn,* Assistant Attorneys General.

Mr. Chief Justice Vinson delivered the opinion of the Court.

Each of the three petitioners is confined in an Illinois penitentiary following conviction of serious crimes. Petitioners' factual allegations need not be described, except to note petitioners' specific claims that confessions introduced at their trials were wrung from them by force and violence. Although such allegations set forth a prima facie violation of federal constitutional rights,[1] there has been no determination, either by review of the trial record or by hearing of evidence, as to whether petitioners, in fact, are being imprisoned in violation of their rights under the Constitution.

Prior to the case of *United States ex rel. Bongiorno* v. *Ragen,* 54 F. Supp. 973, 975–976 (D. C. N. D. Ill. 1944),

[1] *Brown* v. *Mississippi,* 297 U. S. 278 (1936).

inmates of Illinois penitentiaries were denied the right of sending papers to the courts. Since that decision, many Illinois prisoners have presented claims of denial of constitutional rights and courts have sought to determine what, if any, is the post-conviction remedy available in Illinois to raise such claims. The problem has been here before. *White* v. *Ragen,* 324 U. S. 760 (1945); *Woods* v. *Nierstheimer,* 328 U. S. 211 (1946); *Carter* v. *Illinois,* 329 U. S. 173 (1946); *Foster* v. *Illinois,* 332 U. S. 134 (1947); *Marino* v. *Ragen,* 332 U. S. 561 (1947); *Loftus* v. *Illinois,* 334 U. S. 804 (1948), 337 U. S. 935 (1949). Finally, in *Young* v. *Ragen,* 337 U. S. 235 (1949), it became apparent that unless habeas corpus was available, the Illinois courts afforded no remedy for the eight prisoners then before the Court, including petitioner Sherman, now here in No. 375. On remand to the Criminal Court of Cook County, that court held that habeas corpus was not an appropriate remedy, a holding that could not be reviewed by the Illinois Supreme Court under state practice.

Meanwhile, the Illinois General Assembly passed the Illinois Post-Conviction Hearing Act[2] to provide a remedy for—

> "[a]ny person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both . . . ."

Under this Act, the court in which conviction took place is authorized to grant relief in a proceeding initiated by the filing of a petition setting forth the respects in which a prisoner's constitutional rights were violated. The State may then answer or move to dismiss the petition and the trial court is authorized to receive oral testimony

[2] Ill. Rev. Stat., 1951, c. 38, §§ 826–832.

or documentary proof. A final judgment on a petition filed under the Act is made reviewable in the Illinois Supreme Court on writ of error.[3]

In *People* v. *Dale,* 406 Ill. 238, 92 N. E. 2d 761 (1950), the Illinois Supreme Court sustained the Post-Conviction Hearing Act against attack on Illinois constitutional grounds. The Act was described as providing a new proceeding to afford the required inquiry into the constitutional integrity of a conviction. In the *Dale* case, the court also stated that the Act does not afford a rehearing of issues that had already been finally adjudicated, referring to cases where the Illinois Supreme Court had made such an adjudication.

In the three cases now before the Court, petitioners presented their factual allegations to the trial court in petitions filed under the Post-Conviction Hearing Act. The State's Attorney filed motions to dismiss on grounds of res judicata and failure to state a cause of action and the trial court dismissed each petition without conducting a hearing or otherwise determining the factual issues presented. The Illinois Supreme Court dismissed writ of error in each case without argument and without opinion, entering form orders providing that—

> "after having examined and reviewed the petition and record in the post conviction hearing the same is found to disclose no violation or denial of any substantial constitutional rights of the petitioner under the constitution of the United States or of the constitution of the State of Illinois."

We granted certiorari, 341 U. S. 947, 342 U. S. 811 (1951).

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[3] In a number of recent cases in which other Illinois procedures were invoked, this Court has denied certiorari with the express statement that denial was without prejudice to petitioners' proceeding under the new Act. *E. g., Walker* v. *Ragen,* 338 U. S. 833 (1949).

The form order entered in these three cases has been entered in each of the twenty-five cases arising under the Post-Conviction Hearing Act that have reached this Court. Certiorari has been denied in many of these cases where petitioners alleged facts which, if true, presented no federal question. In several other cases, the trial court refused to grant the State's motion to dismiss the post-conviction petition. Instead, the trial court obtained a transcript of the petitioner's trial, reviewed the entire record and found that there had been no denial of substantial constitutional rights.[4] However, in the cases now before the Court, the petitions filed in the trial court raised substantial federal claims, petitioners' factual allegations were not denied by the State's Attorney and the courts below have denied relief without inquiring into the verity of the allegations or whether petitioners had waived their claims.

Again in these cases, as in *Young* v. *Ragen, supra,* the Attorney General of Illinois concedes that petitioners have alleged facts showing an infringement of federal rights. Again he agrees that petitioners are or were entitled to a resolution of the factual issues raised. But, again, the Attorney General explains the action of the state court as resting upon an adequate ground of state procedure. Citing certain language in *People* v. *Dale, supra,* he urges that the judgments below mean that the Post-Conviction Hearing Act does not provide an appropriate remedy for consideration of claims which were, or could have been, adjudicated at petitioners' trials.

Petitioners claim that they are held in custody in violation of the Federal Constitution in that coerced confessions were used to obtain their convictions. Where, as

[4] *E. g., People* v. *Supero,* No. 1169, and *People* v. *Gehant,* No. 1146, both cases decided by the Illinois Supreme Court on May 24, 1951. Certiorari was also denied in these cases. 342 U. S. 836, 840 (1951).

here, a federal claim can be raised at the trial, it may be forfeited by failure to make a timely assertion of the claim.[5] And, if a state provides a post-conviction corrective process, that process must be invoked and relief denied before a claim of denial of substantial federal rights may be entertained by a federal court.[6] In inquiring whether any such corrective process was available to petitioners following their conviction, we note that under Illinois practice, writ of error can be used to bring the trial record, including a transcript of the proceedings, before the Illinois Supreme Court for review. However, petitioners could obtain review by writ of error only if a bill of exceptions or the report of proceedings at the trial had been submitted to the trial court within a limited period after conviction.[7] While Illinois provides a transcript without cost to indigent defendants who have been sentenced to death, in the absence of some Illinois procedure to permit other indigent defendants to secure an adequate record petitioners could utilize the writ of error procedure only by purchasing the transcript within the limited period following conviction.[8] Since petitioners in these

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[5] See *Yakus* v. *United States*, 321 U. S. 414, 444 (1944), and cases cited therein. As a result of the fact that the transcripts of petitioners' trials are not included in the records in these post-conviction proceedings, note 8, *infra*, it cannot be known at this stage of the proceedings that petitioners waived all of their federal claims at their trials.

[6] See *Frank* v. *Mangum*, 237 U. S. 309, 327 (1915). Petitioners do not allege that any coercion was used to bar objection to the use of the confessions or from having their convictions set aside on review.

[7] Ill. Rev. Stat., 1951, c. 110, § 259.70A. At the time of petitioners' convictions, the period was 50 days, subject to extension on motion filed within that period. Recently, the period was extended to 100 days. Compare Ill. Rev. Stat., 1949, c. 110, § 259.70A.

[8] Ill. Rev. Stat., 1951, c. 37, § 163b; *id.* c. 38, § 769a. Compare 28 U. S. C. (Supp. IV) §§ 1915, 2245, 2250. The transcripts of petitioners' trials have not been made part of the record in their

cases have taken paupers' oaths, the Attorney General of Illinois concedes that writ of error has not been available to review their claims, and we find nothing in this record to justify a different position.[9] We do not consider here any independent question that might be raised by a state's failure to provide to an indigent defendant the transcript of his trial. It is sufficient for the purpose of this case that, if writ of error was not available to petitioners and if the Attorney General is correct in stating that the Post-Conviction Hearing Act does not provide an appropriate remedy in this type of case, there never has been, and is not now, any state post-conviction remedy available for determination of petitioners' claims that their federal rights have been infringed.

If their allegations are true and if their claims have not been waived at or after trial, petitioners are held in custody in violation of federal constitutional rights. Petitioners are entitled to their day in court for resolution

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post-conviction proceedings. Incomplete excerpts have been purchased, according to petitioners, out of their meager earnings while in prison. Those excerpts were attached as exhibits to the petitions filed in the trial court.

[9] This does not, of course, foreclose the State from showing that any of the petitioners, in fact, could have obtained review of their claims by writ of error and from determining what, if any, effect such a showing would have on the availability of any other remedy under Illinois law. The State is also free to require more particularity in the allegations and assertions of these petitioners who have filed their papers *pro se* throughout these proceedings. *Pyle* v. *Kansas*, 317 U. S. 213, 216 (1942).

In rejecting the suggestion that these writs of certiorari be dismissed, we note that it is at least highly questionable whether, if the judgments below are permitted to stand, petitioners would be permitted to raise again in new proceedings any claims that were or could have been raised in these proceedings. Ill. Rev. Stat., 1951, c. 38, §§ 828, 832. See Jenner, The Illinois Post-Conviction Hearing Act, 9 F. R. D. 347, 358, 360 (1949).

of these issues. Where the state does not afford a remedy, a state prisoner may apply for a writ of habeas corpus in the United States District Court to secure protection of his federal rights.[10]

The Attorney General of Illinois asks us to affirm the judgments below as resting upon an independent state ground even though he acknowledges that such action would permit petitioners to proceed in the District Court without more. But we do not lightly assume that a state has failed to provide any post-conviction remedy if a defendant is imprisoned in violation of constitutional rights.[11] Accordingly, we consider it appropriate that the Illinois Supreme Court be permitted to provide definite answers to the questions of state law raised by these cases.

Unlike our action in *Loftus* v. *Illinois, supra,* however, we do not continue these cases on our docket pending further consideration by the Illinois Supreme Court. Instead, we vacate the judgments below and remand the cases to the Illinois Supreme Court for further proceedings. See *Minnesota* v. *National Tea Co.,* 309 U. S. 551 (1940). On remand, petitioners should be advised whether their claims that constitutional rights were infringed at their trials may be determined under the Post-Conviction Hearing Act, or whether that Act does not provide an appropriate state remedy in these cases. If petitioners' claims may be resolved in a proceeding under the Act, either by an inquiry into the verity of their factual allegations or a finding that federal rights were waived during or after their trials, such resolution may

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[10] 28 U. S. C. (Supp. IV) §§ 2241 (c)(3), 2254; *Hawk* v. *Olson,* 326 U. S. 271, 276 (1945); *House* v. *Mayo,* 324 U. S. 42, 46 (1945); *Ex parte Hawk,* 321 U. S. 114, 118 (1944); *Moore* v. *Dempsey,* 261 U. S. 86 (1923).

[11] *Young* v. *Ragen, supra; Smith* v. *O'Grady,* 312 U. S. 329, 331 (1941).

proceed without further action by this Court. If Illinois does not provide an appropriate remedy for such a determination, petitioners may proceed without more in the United States District Court.

It is so ordered.

[For dissenting opinion of MR. JUSTICE MINTON, see *post*, p. 116.]

MR. JUSTICE FRANKFURTER, dissenting.

We all agree, I assume, that we ought not to impute an obstinate flouting of this Court's repeated adjudications to the highest court of a State unless its action precludes any other fair inference. This is more than a mere gesture of courtesy. It goes to the very conception of the relationship of the State courts to this Court in our federal system. Accordingly, just as reasonable legal ground must be attributed to our dispositions without opinion, so explanations rationally consonant with legality must be attributed to the Illinois orders.

One difficulty with the remand of the cases to Illinois is that the explanatory opinion leaves uncertainty regarding the issue on which this Court is asking the Illinois Supreme Court for clarification. The orders under review may rest on one of two legally entertainable grounds: that (a) the Illinois proceedings disclose no infraction of the Fourteenth Amendment, or (b) as a matter of local procedural law, the claim of such infraction was not properly presented.

If we think that a substantial federal claim is raised in these cases, for which a hearing was required but denied, and the denial could only be justified because allowable local procedure was disregarded in the manner in which this federal right was pursued, it would be appropriate, of course, for us to ask the Illinois Supreme Court to tell us explicitly whether these cases went off

on such a non-federal ground, and if so what it is. See *Minnesota* v. *National Tea Co.*, 309 U. S. 551. If this is what the Court means to do, it ought not to be too difficult for the opinion to say so very simply. But to adopt this course, we must be convinced that a federal claim of substance is presented by the record which, but for the legitimate State procedural requirement, is entitled to be heard. We should, then, at least suggest what that claim is.

Alternatively, these Illinois orders may rest, not on a procedurally justifiable refusal to entertain a substantial federal claim, but on the view of the Illinois court that no such substantial federal claim is in issue. If the Court disagrees, it is certainly proper to remand the case to the State court with instructions to accord a hearing to the claim of federal right presented.

But in either case, is it not incumbent on this Court to state without any roundaboutness what the substantial federal question is and how it is properly before us? It seems to me that the formulation of the substantial federal claim, to which the Illinois Supreme Court is said to have been deaf, is the crucial issue in these cases. We would be exactly where we now are if the Illinois Supreme Court were most respectfully to reply to our request for clarification by saying: "Why of course a hearing is required under Illinois law of a substantial claim under the United States Constitution. But in these cases we found no such substantial federal claim." [1]

What is the substantial federal question? Certainly whether a claim which could have been raised by the

[1] Indeed, it is difficult to interpret the orders before us for review as saying anything else: "It is further considered by the Court that after having examined and reviewed the petition and record in the post conviction hearing the same is found to disclose no violation or denial of any substantial constitutional rights of the petitioner under the constitution of the United States . . . ."

method of direct review of the trial proceedings but was not, must be allowed to be raised in some collateral attack, is not a substantial federal question. Such a requirement cannot be made of the States under the Fourteenth Amendment. It is not enforceable even as to federal prosecutions. *Sunal* v. *Large*, 332 U. S. 174.

Is then the federal claim the denial by Illinois of stenographic minutes of a trial to an indigent defendant? I appreciate that such a denial might be found to be in violation of the Fourteenth Amendment, and more particularly of its Equal Protection Clause, in a State which has a system of criminal appeals. Is this being decided now? And is so far-reaching a general claim decided inferentially, without argument or consideration of all the relevant subsidiary questions that the general proposition would raise? [2]

Or does the Court hold that, in the circumstances of this case, the petitioners are entitled, as a matter of federal right, to an independent inquiry into the constitutional validity of their convictions even though the questions raised were, or could have been, determined at the

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[2] It is at least relevant to remind that under existing federal habeas corpus procedure, the judge who presided at the trial resulting in conviction may prepare a certificate "setting forth the facts occurring at the trial" for use in the habeas corpus court. 28 U. S. C. § 2245 (I am not unmindful of § 2250 enacted in 1948). And the "judge's notes" is the historic basis for appellate review in England, which, I take it, is a mode not unlike that of the "bystander's record" in some of the States. I do not now mean to argue the main question nor its subsidiary problems nor to intimate any considered view upon them. But as an indication of the kind of issues that are raised before reaching a conclusion on the general and abstract proposition that failure to provide stenographic minutes without cost to an indigent defendant is a violation of a guaranty of the Fourteenth Amendment, it is useful to recall something of the history touching the means by which errors at *nisi* are brought to the attention of an appellate court.

trials? And if so what are the circumstances which provide a basis for that conclusion?

A reading of the Court's opinion with the care and deference that should be accorded it by a doubter has not revealed which if any of these possible federal claims has been denied so as to provide the necessary basis for a remand to the State court.

My difficulty, however, is not merely with ambiguity or, perhaps, obscurity in defining the federal right which was, or may have been, denied by the Illinois proceedings here for review. The fatal weakness, as I see it, is that the question of a denial of one or more putative federal rights is nowhere properly raised on the record before us.

It is true that petitioners allege they were convicted on the basis of coerced confessions and perjured testimony admitted in evidence in violation of the Fourteenth Amendment. But so far as appears from the record, these issues were fully litigated and determined at the trials. Until the cases came to this Court, no showing was made, or sought to be made, that circumstances were such as to warrant a new and independent inquiry into those determinations as a matter of federal right.

Whether these petitioners could have appealed from their convictions but did not, what procedures were available for perfecting an appeal, whether the circumstances were such as effectively to deny to these petitioners the opportunity for direct review of their convictions—answers to all these questions are indispensable to a judgment on the nature and scope of the federal right, if any, which Illinois may have denied these prisoners in this proceeding. But they are questions entangled in the procedural law of Illinois and in the facts and circumstances surrounding the conviction of these petitioners. The Illinois courts have never passed on them because they were never raised. And neither they nor we can

pass on them unless they are raised in some appropriate way. *Whitney* v. *California,* 274 U. S. 357, 379–380 (Mr. Justice Brandeis, concurring).

Of course, we read the self-composed claims of an indigent defendant with generous inferences and do not require elegance of pleading. We do not make such an exaction even of lawyers' pleadings. We ought to dig out of a complaint what is in it, and State courts surely feel themselves under a similar obligation when questions of constitutional right are involved. But this is entirely different from constructing a new case not even vaguely adumbrated in the complaint which moves a court to action. Still less ought this Court to originate litigation in this way when to do so is to disrespect the judgment of a State court and to decide, at least implicitly, difficult constitutional questions without the foundation of fact and circumstance needed to illumine their consideration.

In light of these views, I cannot join the Court's disposition of these cases. I think the writs should be dismissed for want of a properly presented federal question. Such a dismissal would not, of course, bar a new proceeding, differently conceived, tendering one or more of the federal questions here discussed. Certainly if, for whatever reason, the Illinois courts fail to afford corrective relief for the denial of a right guaranteed by the United States Constitution, the road to the federal court is open. *Mooney* v. *Holohan,* 294 U. S. 103; *Dowd* v. *United States ex rel. Cook,* 340 U. S. 206. At the core of the problem remains the precise definition of the basis for invoking the Fourteenth Amendment.

MR. JUSTICE MINTON, dissenting.

I dissent as I am of the opinion the Illinois Supreme Court based its judgment and opinion upon an adequate state ground.

STEFANELLI ET AL. *v.* MINARD ET AL.

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

No. 2. Argued October 16, 1951.—Decided December 3, 1951.

1. In civil proceedings brought in the Federal District Court under R. S. § 1979, 8 U. S. C. § 43 (Civil Rights Act), petitioners sought an injunction against the use, in pending state criminal proceedings against them in New Jersey, of evidence claimed to have been obtained by an unlawful search by state police. *Held:* The District Court properly dismissed the complaints. Pp. 117–125.
2. Federal courts should refuse to intervene in state criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. Pp. 120–125.

184 F. 2d 575, affirmed.

In suits brought by petitioners under R. S. § 1979, 8 U. S. C. § 43, to enjoin the use, in a state criminal trial, of evidence claimed to have been obtained by an unlawful search by state police, the District Court dismissed the complaints. The Court of Appeals affirmed. 184 F. 2d 575. This Court granted certiorari. 341 U. S. 930. *Affirmed,* p. 125.

Mordecai Michael Merker argued the cause for petitioners, and *Anthony A. Calandra* filed a brief for petitioners.

Richard J. Congleton and *Charles Handler* argued the cause for respondents. With them on the brief were *Theodore D. Parsons,* Attorney General of New Jersey, *C. William Caruso* and *Vincent J. Casale.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioners asked equitable relief from the Federal District Court to prevent the fruit of an unlawful search by New Jersey police from being used in evidence in a State

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criminal trial. The suit was brought under R. S. § 1979, 8 U. S. C. § 43, providing for redress against "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ."[1] Upon respondents' motion, the District Court dismissed the complaints, "it appearing that the plaintiffs have not exhausted their remedies under state law." The Court of Appeals affirmed. 184 F. 2d 575. Since it raises important questions touching the Civil Rights Act in the context of our federal system we brought the case here. 341 U. S. 930.

Two suits, arising out of separate series of events, were consolidated in the Court of Appeals and are before us as one case. The facts do not differ materially. Newark police officers entered petitioners' homes without legal authority. There they seized property of petitioners useful in bookmaking, a misdemeanor under N. J. Rev.

[1] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Jurisdiction was founded, without regard to citizenship of the parties or amount in controversy, on 28 U. S. C. § 1343 (3):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." *Hague* v. *C. I. O.*, 307 U. S. 496.

Stat. 2:135–3. It is not disputed that these searches, if made by federal officers, would have violated the Fourth Amendment. Stefanelli was arrested, arraigned and subsequently indicted for bookmaking. He pleaded not guilty. The other petitioners, after hearing, were held on the same charge to await the action of the Essex County grand jury. All allege that the seized property is destined for evidence against them in the New Jersey criminal proceedings. Petitioners have made no move in the State courts to suppress the evidence, justifying their failure to do so on the ground that under existing New Jersey law the seized property is admissible without regard to the illegality of its procurement.

Petitioners invoke our decision in *Wolf* v. *Colorado,* 338 U. S. 25. The precise holding in that case was "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." *Id.,* at 33. Although our holding was thus narrowly confined, in the course of the opinion it was said: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. . . . Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment." *Id.,* at 27–28. There was disagreement as to the legal consequences of this view, but none as to its validity. We adhere to it. Upon it is founded the argument of petitioners.

If the Fourteenth Amendment forbids unreasonable searches and seizures by the States, they contend, such a search and seizure by State police officers subjects its victims to the deprivation, under color of State law, of a

right, privilege or immunity secured by the Constitution for which redress is afforded by R. S. § 1979. Appropriate redress, they urge, is a suit in equity to suppress the evidence in order to bar its further use in State criminal proceedings.

There is no occasion to consider such constitutional questions unless their answers are indispensable to the disposition of the cause before us. In the view we take, we need not decide whether the complaint states a cause of action under R. S. § 1979. For even if the power to grant the relief here sought may fairly and constitutionally be derived from the generality of language of the Civil Rights Act, to sustain the claim would disregard the power of courts of equity to exercise discretion when, in a matter of equity jurisdiction, the balance is against the wisdom of using their power. Here the considerations governing that discretion touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States.

We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law. It is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue. The special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law, has been an historic concern of congressional enactment, see, *e. g.*, 28 U. S. C. §§ 1341, 1342, 2283, 2284 (5). This concern has been reflected in decisions of this Court, not governed by explicit congressional requirement, bearing on a

State's enforcement of its criminal law. *E. g., Watson* v. *Buck,* 313 U. S. 387; *Beal* v. *Missouri Pacific R. Co.,* 312 U. S. 45; *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89; *Fenner* v. *Boykin,* 271 U. S. 240. It has received striking confirmation even where an important countervailing federal interest was involved. *Maryland* v. *Soper* (No. 1), 270 U. S. 9; *Maryland* v. *Soper* (No. 2), 270 U. S. 36; *Maryland* v. *Soper* (No. 3), 270 U. S. 44.[2]

These considerations have informed our construction of the Civil Rights Act. This Act has given rise to differences of application here. Such differences inhere in the attempt to construe the remaining fragments of a comprehensive enactment, dismembered by partial repeal and invalidity, loosely and blindly drafted in the first instance,[3] and drawing on the whole Constitution itself for its scope and meaning. Regardless of differences in particular cases, however, the Court's lodestar of adjudication has been that the statute "should be construed so as to respect the proper balance between the States and the federal government in law enforcement." *Screws* v. *United States,* 325 U. S. 91, 108. Only last term we reiterated our conviction that the Civil Rights Act "was not to be used to centralize power so as to upset the federal system." *Collins* v. *Hardyman,* 341 U. S. 651, 658. Discretionary refusal to exercise equitable power under the Act to interfere with State criminal prosecution is

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[2] In those cases, despite the obvious concern of Congress for enforcement of revenue laws unimpeded by local opposition, the Court duly respected State criminal justice by carefully limiting the power of removing to the federal courts State criminal prosecutions involving federal revenue officers who claimed that such prosecutions were "on account of any act done under the color of [their] office." R. S. § 643, now 28 U. S. C. § 1442.

[3] We recently commented on the circumstances surrounding the enactment of this legislation in *United States* v. *Williams,* 341 U. S. 70, 74, and *Collins* v. *Hardyman,* 341 U. S. 651, 657.

one of the devices we have sanctioned for preserving this balance. *Douglas* v. *City of Jeannette,* 319 U. S. 157. And under the very section now invoked, we have withheld relief in equity even when recognizing that comparable facts would create a cause of action for damages. Compare *Giles* v. *Harris,* 189 U. S. 475, with *Lane* v. *Wilson,* 307 U. S. 268.

In *Douglas* v. *City of Jeannette, supra,* the Court, speaking through Chief Justice Stone, said:

> "Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; . . . ." *Id.,* at 163.[4]

No such irreparable injury, clear and imminent, is threatened here. At worst, the evidence sought to be suppressed may provide the basis for conviction of the petitioners in the New Jersey courts. Such a conviction, we have held, would not deprive them of due process of law. *Wolf* v. *Colorado, supra.*

If these considerations limit federal courts in restraining State prosecutions merely threatened, how much more cogent are they to prevent federal interference with pro-

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[4] *Hague* v. *C. I. O., supra,* was distinguished in the *Jeannette* case: "In these respects the case differs from *Hague* v. *C. I. O., supra,* 501–02, where local officials forcibly broke up meetings of the complainants and in many instances forcibly deported them from the state without trial." *Douglas* v. *City of Jeannette, supra,* at 164.

ceedings once begun. If the federal equity power must refrain from staying State prosecutions outright to try the central question of the validity of the statute on which the prosecution is based, how much more reluctant must it be to intervene piecemeal to try collateral issues.[5]

The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand [6] and petit [7] juries, in the failure to appoint counsel,[8] in the admission of a confession,[9] in the creation of an unfair trial atmosphere,[10] in the misconduct of the trial court [11]—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective pros-

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[5] Congress has consistently demonstrated concern that the orderly course of judicial proceedings should not, in the absence of compelling circumstances defined by statute, be broken up for the piecemeal determination of the issues involved. See, *e. g.*, 28 U. S. C. § 1291; *Cobbledick* v. *United States*, 309 U. S. 323 (appeals from "final decisions" of the district courts); 28 U. S. C. § 1441 (c) (removal of "separable controversies"); and cf. *Hurn* v. *Oursler*, 289 U. S. 238.

[6] See *Smith* v. *Texas*, 311 U. S. 128.

[7] See *Strauder* v. *West Virginia*, 100 U. S. 303; *Pierre* v. *Louisiana*, 306 U. S. 354.

[8] See *Powell* v. *Alabama*, 287 U. S. 45.

[9] See *Watts* v. *Indiana*, 338 U. S. 49.

[10] See *Moore* v. *Dempsey*, 261 U. S. 86.

[11] See *Townsend* v. *Burke*, 334 U. S. 736.

ecution of local crime in local courts. To suggest these difficulties is to recognize their solution.[12]

Mr. Justice Holmes dealt with this problem in a situation especially appealing: "The relation of the United States and the Courts of the United States to the States

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[12] Although this is the first such case to reach us, instances are not wanting where the fairness of State court proceedings has been attacked in the lower federal courts under R. S. § 1979 and related sections. We refer to them by way of illustration. An action for damages was sustained against a motion to dismiss where plaintiff alleged that she was arrested without warrant, that defendants, a justice of the peace and a constable, maliciously secured the appointment of a biased jury and subjected her to a fraudulent trial resulting in a conviction reversed on appeal. *McShane* v. *Moldovan,* 172 F. 2d 1016; cf. *Picking* v. *Pennsylvania R. Co.,* 151 F. 2d 240 (complaint seeking damages for false arrest and detention in violation of the Uniform Extradition Act sustained against motion to dismiss). But see *Campo* v. *Niemeyer,* 182 F. 2d 115; *Lyons* v. *Baker,* 180 F. 2d 893; *Bottone* v. *Lindsley,* 170 F. 2d 705; *Mitchell* v. *Greenough,* 100 F. 2d 184; *Llano Del Rio Co.* v. *Anderson-Post Hardwood Lumber Co.,* 79 F. Supp. 382, aff'd *per curiam,* 187 F. 2d 235. Closer to the case before us are suits for injunctions grounded on the contention that particular phases of criminal proceedings are unfair. The lower courts have refused to intervene. *Cooper* v. *Hutchinson,* 184 F. 2d 119 (refusal of State court to allow criminal defendant counsel of his own choosing; case remanded for district court to retain jurisdiction pending exhaustion of State remedies); *Ackerman* v. *International Longshoremen's & Warehousemen's Union,* 187 F. 2d 860, reversing 82 F. Supp. 65, which had enjoined prosecutions in part on the ground of discrimination in selection of grand jury panel; *McGuire* v. *Amrein,* 101 F. Supp. 414 (refusal to suppress wire tap evidence; alternate ground); *Erickson* v. *Hogan,* 94 F. Supp. 459 (suppression of evidence obtained through unlawful search and seizure); *Refoule* v. *Ellis,* 74 F. Supp. 336 (court would not enjoin use of allegedly coerced confession in State prosecution although enjoining future unlawful arrest, detention and interrogation of plaintiff); cf. *Eastus* v. *Bradshaw,* 94 F. 2d 788. And see *Hoffman* v. *O'Brien,* 88 F. Supp. 490, where an action under R. S. § 1979 to enjoin the enforcement of the New York wire tap law was dismissed for want of a justiciable controversy.

and the Courts of the States is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years and can not be disposed of by a summary statement that justice requires me to cut red tape and to intervene." Memorandum of Mr. Justice Holmes in 5 The Sacco-Vanzetti Case, Transcript of the Record (Henry Holt & Co., 1929) 5516. A proper respect for those relations requires that the judgment below be

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE CLARK concur in the result.

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

MR. JUSTICE DOUGLAS, dissenting.

Mr. Justice Murphy, Mr. Justice Rutledge, and I voted in *Wolf* v. *Colorado,* 338 U. S. 25, that evidence obtained as a result of an unreasonable search and seizure should be excluded from state as well as federal trials. In retrospect the views expressed by Mr. Justice Murphy and Mr. Justice Rutledge grow in power and persuasiveness. I adhere to them. I therefore think that any court may with propriety step in to prevent the use of this illegal evidence. To hold first that the evidence may be admitted and second that its use may not be enjoined is to make the Fourth Amendment an empty and hollow guarantee so far as state prosecutions are concerned.

COOK *v.* COOK.

CERTIORARI TO THE SUPREME COURT OF VERMONT.

No. 30. Argued November 7, 1951.—Decided December 3, 1951.

1. It is to be presumed, in the absence of evidence to the contrary, that a Florida court which granted a decree of divorce had jurisdiction over both parties, thereby rendering the issue of jurisdiction over the cause *res judicata* on a collateral attack in another state. Pp. 127–128.
2. Upon the record in this case, the Vermont court could not consistently with the Full Faith and Credit Clause sustain a collateral attack upon a Florida divorce decree, since the presumption of jurisdiction over the cause and the parties, to which the Florida decree was entitled, was not overcome by extrinsic evidence or by the record itself. Pp. 126–129.

116 Vt. 374, 76 A. 2d 593, reversed.

In a proceeding brought by respondent in a Vermont state court for the annulment of his marriage and remarriage to petitioner, the State Supreme Court held both marriages null and void. 116 Vt. 374, 76 A. 2d 593. This Court granted certiorari. 341 U. S. 914. *Reversed,* p. 129.

Henry Lincoln Johnson, Jr. argued the cause and filed a brief for petitioner.

H. Mason Welch argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Shortly after petitioner and respondent were married on February 5, 1943, respondent discovered that petitioner was the lawful wife of one Mann. At that time petitioner and respondent were living in Virginia and agreed that petitioner would go to Florida and obtain there a divorce from Mann, so that they could be remarried. That course

was followed, respondent paying a part of the expenses of the trip to Florida and of the divorce action. Petitioner received a Florida decree and a few weeks later, December 18, 1943, again married respondent. Marital difficulties developed and petitioner secured in Hawaii a decree of separation and maintenance. Thereafter respondent brought the present action in the Vermont courts to have the marriages declared null and void. Petitioner was served by publication and appeared. There was a trial, after which the Windsor County Court granted a judgment of annulment. It found that under Florida law it was necessary for petitioner to have had an intention to live and remain in Florida, which she did not have; that she testified falsely in the Florida proceedings respecting her domicile in Florida; and that she secured the Florida decree by deceiving the Florida court as to her domicile. The Windsor County Court annulled the marriage of February 5, 1943, and dismissed the petition as respects the second marriage. The Supreme Court of Vermont affirmed the judgment annulling the first marriage but reversed the dismissal as to the second marriage and held it also null and void. 116 Vt. 374, 76 A. 2d 593. The case is here on certiorari. 341 U. S. 914.

On this record we do not know what happened in the Florida divorce proceedings except that the Florida court entered a divorce decree in favor of petitioner and against Mann. So far as we know, Mann was a party to the proceedings. So far as we know, the issue of domicile was contested, litigated and resolved in petitioner's favor. If the defendant spouse appeared in the Florida proceedings and contested the issue of the wife's domicile (*Sherrer* v. *Sherrer,* 334 U. S. 343) or appeared and admitted her Florida domicile (*Coe* v. *Coe,* 334 U. S. 378) or was personally served in the divorce state (*Johnson* v. *Muelberger,* 340 U. S. 581, 587), he would be barred from attacking the decree collaterally; and so would a stranger

to the Florida proceedings, such as respondent, unless Florida applies a less strict rule of *res judicata* to the second husband than it does to the first. See *Johnson* v. *Muelberger, supra.* On the other hand, if the defendant spouse had neither appeared nor been served in Florida, the Vermont court, under the ruling in *Williams* v. *North Carolina,* 325 U. S. 226, could reopen the issue of domicile.

But the burden of undermining the decree of a sister state "rests heavily upon the assailant." *Williams* v. *North Carolina, supra,* p. 234; *Esenwein* v. *Commonwealth,* 325 U. S. 279, 280–281. A judgment presumes jurisdiction over the subject matter and over the persons. See *Titus* v. *Wallick,* 306 U. S. 282, 287. As stated for the Court by Justice Stone in *Adam* v. *Saenger,* 303 U. S. 59, 62, "If it appears on its face to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself."

The Florida decree is entitled to that presumption. That presumption may of course be overcome by showing, for example, that Mann never was served in Florida nor made an appearance in the case either generally or specially to contest the jurisdictional issues. The Vermont Supreme Court recognized that there were no findings on those issues in the present record. The Court in referring to the case of *Williams* v. *North Carolina,* 325 U. S. 226, said, "It was there held that the question of bona fide domicile was open to attack, notwithstanding the full faith and credit clause when the other spouse neither had appeared nor been served with process in the state. The findings here do not show either of these criteria." 116 Vt. 374, 378, 76 A. 2d 593, 595. Yet it is essential that the court know what transpired in Florida before this collateral attack on the Florida decree can be resolved. For until Florida's jurisdiction is shown to be vulnerable, Vermont may not relitigate the issue of domi-

cile on which the Florida decree rests. It was said on argument that the first husband appeared in the Florida proceeding. But the record does not contain the Florida decree nor any stipulation concerning it.

We deal only with the presumption, not with the issues on which the Vermont court made its findings. We also reserve the question, discussed on argument, whether respondent would now be in a position to attack the Florida decree collaterally if it were found to be collusive and he participated in the fraud.

The judgment is reversed and the cause is remanded to the Supreme Court of Vermont for proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE BURTON concurs in the result.

MR. JUSTICE FRANKFURTER, dissenting.

Concededly, when a Florida court, on September 10, 1943, purported to grant a decree of divorce to the petitioner, then Mrs. Albert Mann, she secured the decree "by deceiving the Florida Court as to the facts of her domicile" in that she "went to Florida for the express purpose of getting a divorce" and without any "intention to live and remain in Florida," whence she departed immediately on securing her decree. Therefore, the Full Faith and Credit Clause does not require Vermont to respect this Florida decree, unless Mr. Mann has been served in Florida or had personally participated in the Florida divorce proceeding. If there were fair doubt that Mrs. Mann's husband had subjected himself to the jurisdiction of the Florida decree, the things which it imports would not have been undermined and Vermont would have to respect it.

It is the view of my Brethren that the Vermont Supreme Court held the Florida decree to be a nullity, although

it "recognized that there were no findings on those issues in the present record"—the issues being, whether petitioner's husband "was served in Florida [or] made an appearance in the case." If this were what the Vermont Supreme Court "recognized" I would join my Brethren. But so to read what the Vermont Supreme Court wrote is to misread. In its own Vermont way, the Vermont Supreme Court wrote just the opposite. Referring to the second *Williams* case, 325 U. S. 226, the Vermont Supreme Court went on:

> "It was there held that the question of bona fide domicile was open to attack, notwithstanding the full faith and credit clause when the other spouse neither had appeared nor been served with process in the state. The findings here do not show either of these criteria." *Cook* v. *Cook,* 116 Vt. 374, 378, 76 A. 2d 593, 595.

In the light of the whole record, is not the meaning of this, however obliquely expressed, that the circumstance was wanting which alone would have given the Florida court jurisdiction over Mrs. Mann's suit, namely, Mr. Mann's submission to it? A fair reading of this record implies that the Florida decree was neither consented to nor contested by Mann. In such circumstances, it would be formalism of the most arid kind if a State in a third-party proceeding may deny full faith and credit to an *ex parte* divorce fraudulently secured by a spouse in a sister State only if it makes formal findings that such an *ex parte* fraudulent decree was obtained without the jurisdictional participation of the husband.

If Mrs. Mann did not have a Florida domicile and her husband did not submit, under the *Sherrer* doctrine, 334 U. S. 343, to the State's jurisdiction, Florida had no power to terminate the marriage. If there was no jurisdiction to grant a divorce, there was no divorce. The sham di-

vorce was a nullity, no more binding on the Vermont courts than would have been a private letter to the lady by the local Florida judge. And while Vermont could, if that State chose, deny relief to Cook because of his "unclean hands," the Constitution of the United States has nothing to do with that defense.

It is important to remember that throughout this proceeding the petitioner here appeared personally and was represented by counsel. The findings of the Windsor County Court were based on "a consideration of the statements of counsel, oral testimony and the exhibits in the case." The findings are inescapable that the Florida decree was a cooked-up affair not between Mr. and Mrs. Mann but between Mrs. Mann and Cook. "Florida was chosen as the place where the divorce was to be obtained because Florida would be the nearest and best place to secure a divorce." All this took place two months after Mrs. Mann and Cook had supposedly been married, when he discovered she was the wife of Mann. The present proceedings, begun in December, 1949, did not come to issue until March, 1950, the findings of fact were made in May, 1950, and the case disposed of by the Supreme Court of Vermont in November, 1950. The Florida decree was urged as a defense against the prayer for a declaration of annulment on two grounds, as one reads the record, and two grounds only: unclean hands and condonation—unclean hands in that Cook cooperated with Mrs. Mann in deceiving the Florida court as to the falsity of her domiciliary claim; condonation by conduct on Cook's part subsequent to, and with knowledge of, Mrs. Mann's fraudulently obtained divorce decree.

It is important to remember that the judgments of the Windsor County Court and of the Supreme Court of Vermont came two years after this Court's decisions in *Sherrer* v. *Sherrer, supra,* and *Coe* v. *Coe,* 334 U. S. 378. These were not puss-in-the-corner adjudications. It is

inconceivable that the Vermont courts did not know that the fraudulent claim of domicile by a divorcing spouse is irrelevant to the enforceability in sister States of a decree of divorce if the other spouse contests or consents to the proceeding leading to the decree. When the Supreme Court of Vermont in 1950 finds a decree of divorce to have been fraudulently obtained by a spouse and says that there are no findings that the other spouse had either appeared or been served with process, and rejects the claim that the divorce decree must be respected by reason of unclean hands or condonation, plainly part of the case is the assumption that this was not a *Sherrer* v. *Sherrer* or *Coe* v. *Coe* situation. An issue which is established by the assumptions in a litigation is as truly established as though put into words.

In view of what this record discloses—the explicit findings as to the fraudulently prearranged divorce from the husband between a wife and her putative husband, the issues that were tendered in the personally contested proceeding for annulment of marriage by the disillusioned third party, the charges of unclean hands and condonation as grounds on which the wife sought to rely on the divorce, the only issues thus tendered to the Vermont courts and their disposition two years after *Sherrer* v. *Sherrer* and *Coe* v. *Coe*—to hold that there must be a finding in explicit words that Mann did not appear in the Florida proceedings is to go back to the days antedating Baron Parke, when certain words in the law were indispensable. Not to use them was fatal. The Florida decree is not set forth in the record before us. For all we know, the decree may recite the non-appearance of Mann. And yet the Vermont Supreme Court is reversed on the unwarranted presumption that Mann appeared in the Florida suit.

The case now goes back to Vermont. It would not be surprising if, in the proceedings to follow, it will be

formally established that inasmuch as Mann was neither served nor appeared in Florida the decree was a nullity, to which the Constitution of the United States does not require obedience from Vermont. I am not one of those who think that procedure is just folderol or noxious moss. Procedure—the fair, orderly and deliberative method by which claims are to be litigated—goes to the very substance of law. But to deny the meaning of what lies on the surface of a record simply because it is ineptly conveyed is to revert to archaisms and not to respect essentials.

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PALMER *v.* ASHE, WARDEN.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 38. Argued November 5, 1951.—Decided December 11, 1951.

1. The Due Process Clause of the Fourteenth Amendment requires a state to afford a defendant assistance of counsel in a noncapital criminal case when there are special circumstances showing that without a lawyer the defendant could not have an adequate and fair defense. P. 134.
2. Without counsel and without being offered counsel or advised of his right to counsel, petitioner pleaded guilty and was sentenced to two consecutive terms of five to fifteen years each on charges of armed robbery and attempted armed robbery. Years later, in a habeas corpus proceeding in a Pennsylvania court, he alleged that, both upon his arrest and at his arraignment, he was told that he was charged with "breaking and entering," that he was then a young, irresponsible boy who had spent several years in a mental institution, and that he did not know that he was charged with armed robbery until after he reached prison. The record was not sufficient to refute these allegations; but the state court dismissed his petition without affording him an opportunity to prove them. *Held:* Judgment reversed and cause remanded for further proceedings. Pp. 135–138.

   (a) If petitioner's allegations are proven, they would present compelling reasons why he desperately needed legal counsel and services. Pp. 136–137.

   (b) In a habeas corpus proceeding challenging the constitutionality of a conviction for crime, the trial record may relevantly be considered; but the record in this case does not even inferentially deny petitioner's charge that the officers deceived him, nor show an understanding plea of guilty. Pp. 137–138.

Reversed and remanded.

A Pennsylvania trial court dismissed petitioner's habeas corpus proceeding. The Superior Court affirmed. 167 Pa. Super. 88, 74 A. 2d 725. The State Supreme Court refused to allow an appeal. This Court granted certiorari. 341 U. S. 919. *Reversed and remanded,* p. 138.

Louis B. Schwartz, acting under appointment by the Court, argued the cause and filed a brief for petitioner.

Leonard H. Levenson argued the cause for respondent. With him on the brief was *William S. Rahauser.*

Opinion of the Court by MR. JUSTICE BLACK, announced by MR. JUSTICE FRANKFURTER.

This Court has repeatedly held that the Due Process Clause of the Fourteenth Amendment requires states to afford defendants assistance of counsel in noncapital criminal cases when there are special circumstances showing that without a lawyer a defendant could not have an adequate and a fair defense.* Petitioner, a prisoner in a Pennsylvania penitentiary, is serving the second of two five-to-fifteen-year sentences simultaneously imposed after pleas of guilty to state offenses. He sought release in these habeas corpus proceedings filed in a Pennsylvania Court of Common Pleas. His petition alleged that his pleas of guilty were entered without benefit of counsel and that other special circumstances existed which deprived him of opportunity and capacity fairly to defend himself. Answers of the warden and district attorney admitted that petitioner had not been represented by counsel, but asserted that the trial record sufficiently refuted petitioner's allegations. On consideration of the petition and answers the court held that petitioner's allegations, in light of the record, failed to show probable cause for his discharge. The case was then dismissed, thereby depriving petitioner of any opportunity to offer

**Uveges* v. *Pennsylvania,* 335 U. S. 437; *Bute* v. *Illinois,* 333 U. S. 640, 677, and cases cited. It was pointed out in the *Uveges* opinion that a minority of the Court believed the Fourteenth and Sixth Amendments require both state and federal courts to afford defendants in *all* criminal prosecutions the assistance of counsel for their defense.

evidence to prove his allegations. The Superior Court affirmed, 167 Pa. Super. 88, 74 A. 2d 725, and the State Supreme Court refused to allow an appeal. The right to counsel being an important constitutional safeguard, we granted petitioner's motion to proceed *in forma pauperis* and his petition for certiorari. 341 U. S. 919.

We must look to the petition and answers to determine whether the particular circumstances alleged are sufficient to entitle petitioner to a judicial hearing. In summary these allegations are: When petitioner was arrested December 20, 1930, the officers told him that he was charged with "breaking and entering the Leaders Dry Goods Store." Later, before a magistrate, he was again told that the charge was "breaking and entering." Petitioner never saw the indictments against him nor were they read to him. He never knew he had been charged with robbery and never intended to plead guilty to such a crime. Taken to the courtroom "the District Attorney informed the Court, that 'the defendant wishes to plead guilty' and in the matter of a minute, more or less, the foregoing sentence was entered after he answered 'Yes' to the Court's query, 'Do you plead guilty to this charge?' " Petitioner "was not represented by counsel, nor offered counsel, or advised of his right to have counsel . . . ." After arrival at the penitentiary, petitioner first learned, according to his petition, that he had been sentenced for robbery and not for the lesser charge of "breaking and entering." The petition also alleges that petitioner when arrested was "a young irresponsible boy, having spent several years in Polk (because he was mentally abnormal), as well as several years in Morganza." This allegation of mental abnormality is supported by the penitentiary warden's answer showing that petitioner had been confined in Polk (a state institution) from August, 1918, to September, 1920, because he was an "Imbecile." The warden's answer also shows that petitioner was born

in 1909; was a state orphanage inmate for a year beginning in 1916; and was in reformatories for larceny or "breaking and entering" for eight of the ten years between the time of his release from the mental institution and the time of the offense for which he is now in prison.

All of the foregoing allegations, if proven, would present compelling reasons why petitioner desperately needed legal counsel and services. Incarceration as a boy for imbecility, followed by repeated activities wholly incompatible with normal standards of conduct, indicates no qualities of mind or character calculated to enable petitioner to protect himself in the give-and-take of a courtroom trial. Moreover, if there can be proof of what he charges, he is the victim of inadvertent or intentional deception by officers who, so he alleges, persuaded him to plead guilty to armed robbery by telling him he was only charged with breaking and entering, an offense for which the maximum imprisonment is only ten years as compared to twenty years for armed robbery. 18 Purdon's Pa. Stat. Ann. (1930) § 2892, § 3041. In this aspect of the case the allegations are strikingly like those that we held entitled the petitioner to a hearing in *Smith* v. *O'Grady*, 312 U. S. 329.

It is strongly urged here, however, that petitioner's allegations are satisfactorily refuted by the trial record, and that the Court should not now look behind that record, particularly in view of the long time that has elapsed since petitioner pleaded guilty. Of course the trial record may relevantly be considered in the habeas corpus proceeding. In some respects petitioner's allegations are refuted by the record. But that record does not even inferentially deny petitioner's charge that the officers deceived him, nor does the record show an understanding plea of guilty from this petitioner, unless by a resort to speculation and surmise. The right to counsel is too valuable in our system to dilute it by such untrustworthy

reasoning. Cf. *Hawk* v. *Olson,* 326 U. S. 271, 278. The judgment dismissing the petition is reversed and the cause is remanded to the State Supreme Court for further action not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MINTON, with whom THE CHIEF JUSTICE, MR. JUSTICE REED and MR. JUSTICE JACKSON join, dissenting.

Petitioner's contention is that because of the special circumstances of his case the failure to provide him counsel was a denial of due process of law.

The following facts of record were before the Pennsylvania courts: Most of petitioner's life had been spent in Pennsylvania mental and correctional institutions. At the age of eight he was placed in Polk State School, a mental institution, from which he was discharged in less than two years. About a year after his discharge from Polk, he was sent at the age of eleven to Thorn Hill School on a charge of larceny. He was paroled in less than three years, returned in less than three months for delinquency and larceny, and finally discharged two years later. Approximately fourteen months after his discharge from Thorn Hill, he was sent to the Pennsylvania Training School at Morganza for breaking and entering. In two and one-half years he was paroled and in less than one year returned as a parole violator. He was discharged finally about four months later, December 18, 1930, his twenty-first birthday. On that day, the robbery and attempted robbery were committed for which petitioner was indicted, pleaded guilty and was sentenced to the penitentiary on February 18, 1931, for a term of five to fifteen years for each offense, the sentences to run consecutively. These are the sentences attacked by petitioner. He was paroled on the first sentence, attempted armed robbery, on August 26, 1942, to enable him to begin serving the armed

robbery sentence. He was paroled on his second sentence September 19, 1947, returned as a parole violator April 1, 1949, and has since been incarcerated in the penitentiary.

In this record and petitioner's allegations in his petition for habeas corpus to the state courts must be found the "special circumstances" which would warrant this Court to hold that he had shown sufficient probable cause why his conviction and sentencing, on February 18, 1931, were violative of the Due Process Clause.

Petitioner did not allege that *at the time of sentencing* he was mentally incompetent. His only allegation concerning mental incompetency is a recital in Paragraph 2 of his petition as follows:

> "Your petitioner, a young irresponsible boy, having spent several years in Polk (because he was mentally abnormal) . . . ."

Yet his discharge from Polk was more than ten years before he entered the plea of guilty now before us.

Petitioner did allege that when he pleaded guilty to the robbery indictments he thought he was pleading guilty to an offense of breaking and entering, as the police had told him when he was arrested that that was the charge. However, at the argument before this Court it was contended by the state, and not denied, that the record showed that at the time he pleaded guilty to the robbery indictments, petitioner also pleaded guilty to breaking and entering Leaders' Dry Goods Store, for which he received a suspended sentence. Petitioner also alleged that he discovered his mistake for the first time when he was being examined by the penitentiary's psychology department upon his admission. With that knowledge, he remained silent for eighteen years, a year and a half of which time he was on parole.

A continuous life of crime, extending throughout his entire youth, was the experience of this unhappy boy. One would think that such a propensity for crime would

or should alert a court to his mental condition. He did not allege that he was mentally incompetent at the time he was serving almost nine years in Thorn Hill and Morganza, from 1921 until 1930. If he had shown any such infirmity, surely the officials in charge of these two institutions would have had the fact called to their attention and would have had him sent to a mental institution. The officials of Pennsylvania correctional institutions had such duty imposed by statute in 1927, so that the Morganza officials, where he was confined from 1927 to 1930, clearly had such duty as to petitioner. Pa. Laws 1927, No. 281, Purdon's Pa. Stat. Ann., 1931, Tit. 50, § 51. This duty was imposed also upon the court that sentenced him. I cannot believe that the trial court which accepted his plea in open court would have done so if it had known or had any intimation that he was mentally defective. I think the courts of Pennsylvania had a right to assume under all the circumstances of record, which under Pennsylvania practice was before them at the time of sentencing and at the disposition of the rule to show cause in the habeas corpus proceedings, that petitioner was a mentally competent man of twenty-one years at the time he was sentenced.* It was not alleged otherwise.

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*The majority states that petitioner's allegation of mental abnormality is "supported by the penitentiary warden's answer showing that petitioner had been confined in Polk (a state institution) from August, 1918, to September, 1920, because he was an 'Imbecile.'"

If he were an imbecile, it would seem probable that in his many encounters with the courts they would have observed such low grade of mentality. An imbecile has next to the lowest grade of intelligence among mental defectives, "with an intelligence quotient of from 25 to 49, or a mental age for an adult equivalent to that of a child of from 3 to 7 years." Fairchild, Dictionary of Sociology (1944), 149. Petitioner's brief in the Pennsylvania Superior Court stated that when he was examined at the penitentiary upon his admission he had an IQ of 74.

When petitioner entered his plea of guilty to the robbery indictments on February 18, 1931, did he know he was doing so? He alleged he did not; that he thought he was pleading guilty to breaking and entering Leaders' Dry Goods Store, as the police had told him that was why he was being arrested. Aside from the fact that he pleaded guilty also to the breaking and entering of Leaders' and received a suspended sentence thereon and that he first made known his error more than eighteen years after he discovered it, the courts of Pennsylvania in seeking to determine from the petition and the answers of the warden and district attorney whether there was probable cause for discharging him, took into consideration these further facts of record:

The record revealed that after petitioner was arrested, he was presented before a magistrate on an information filed by a police officer which charged petitioner and two others, separately, with armed robbery of David Brinn, a grocery store owner, and attempted armed robbery of Peter Rosella, also a grocery store owner. The victims appeared at the hearing and testified, together with two other witnesses. The three defendants were charged in two indictments with the armed robbery of Brinn and attempted armed robbery of Rosella, who were in court with several other witnesses, prepared to testify. Their names were endorsed upon the indictments as witnesses against the defendants. Petitioner's plea of guilty in open court to these indictments was also so endorsed.

I think it an allowable judgment for the Pennsylvania courts to conclude that petitioner's allegations, made eighteen years after trial, were improbable in the light of the matters of record, that probable cause did not exist for his discharge, and that the necessity of a hearing was not indicated. The courts had a right to assume, in the absence of allegations or record to the contrary, that petitioner was a mentally competent young man of twenty-

one years, and that his contention, made eighteen years late, that he had pleaded guilty to crimes other than he thought he was pleading to was a bit hard to believe, especially in the absence of an allegation that he did not commit the offenses charged in the indictments to which he pleaded guilty. For aught that appears in his petition, he did commit the offenses—he alleged only that he did not plead guilty to them. To me it appears plain that the record on the whole is against petitioner. Under the practice of Pennsylvania, petitioner is entitled to the writ of habeas corpus only when the court is satisfied there is probable cause for it to issue. *Commonwealth ex rel. McGlinn* v. *Smith,* 344 Pa. 41, 47–48, 24 A. 2d 1, 4–5. On this record it was permissible for the courts of Pennsylvania to conclude that there was no probable cause shown why the writ should issue, and that a hearing was not necessary.

LORAIN JOURNAL CO. ET AL. *v.* UNITED STATES.

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

No. 26. Argued October 17, 1951.—Decided December 11, 1951.

For 15 years a newspaper publisher enjoyed a substantial monopoly of the mass dissemination of local and national news and advertising in its community, and 99% coverage of the community's families. After the establishment of a competing radio station, the publisher refused to accept local advertising from those who advertised over the radio station. The purpose of the publisher was to destroy the broadcasting company. *Held:* The publisher was engaged in an attempt to monopolize interstate commerce, in violation of § 2 of the Sherman Antitrust Act, and was properly enjoined under § 4 from continuing the attempt. Pp. 144–157.

1. The conduct of the publisher was an attempt to monopolize interstate commerce. Pp. 149–152.

(a) The distribution within the community of the news and advertising transmitted there in interstate commerce for the sole purpose of immediate and profitable reproduction and distribution to the reading public is an inseparable part of the flow of the interstate commerce involved. P. 152.

(b) Without the protection of competition at the outlets of the flow of interstate commerce, the protection of its earlier stages is of little worth. P. 152.

2. The publisher's attempt to regain its monopoly of interstate commerce by forcing advertisers to boycott a competing radio station violated § 2 of the Sherman Act. Pp. 152–155.

(a) In order to establish this violation of § 2, it was not necessary to show that the publisher's attempt to monopolize was successful. Pp. 153–154.

(b) A lone newspaper, already enjoying a substantial monopoly in its area, violates the "attempt to monopolize" clause of § 2 when it uses its monopoly to destroy threatened competition. P. 154.

(c) The right claimed by the publisher as a private business concern to select its customers and to refuse to accept advertisements from whomever it pleases is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act. P. 155.

3. The injunction against the newspaper publisher's continuing to attempt to monopolize interstate commerce does not violate the First Amendment's guaranty of freedom of the press.- Pp. 155–156.

4. There is no obvious error in the form or substance of the decree of the District Court; and, in the circumstances of the case, this Court relies upon that court's retention of jurisdiction over the cause for whatever modification the decree may need in the light of the entire proceedings and of subsequent events. Pp. 156–157.

92 F. Supp. 794, affirmed.

In a civil action brought by the United States under the Sherman Act, the District Court enjoined appellants from violation of the Act. 92 F. Supp. 794. A direct appeal to this Court was taken under the Expediting Act. *Affirmed*, p. 157.

William E. Leahy argued the cause for appellants. With him on the brief were *William J. Hughes, Jr., Parker Fulton* and *King E. Fauver*. *Robert M. Weh* was also of counsel.

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Assistant Attorney General Morison, J. Roger Wollenberg, Robert L. Stern, Baddia J. Rashid* and *Victor H. Kramer*.

MR. JUSTICE BURTON delivered the opinion of the Court.

The principal question here is whether a newspaper publisher's conduct constituted an attempt to monopolize interstate commerce, justifying the injunction issued against it under §§ 2 and 4 of the Sherman Antitrust Act.[1] For the reasons hereafter stated, we hold that the injunction was justified.

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[1] "SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several

This is a civil action, instituted by the United States in the District Court for the Northern District of Ohio, against The Lorain Journal Company, an Ohio corporation, publishing, daily except Sunday, in the City of Lorain, Ohio, a newspaper here called the Journal. The complaint alleged that the corporation, together with four of its officials, was engaging in a combination and conspiracy in restraint of interstate commerce in violation of § 1 of the Sherman Antitrust Act, and in a combination and conspiracy to monopolize such commerce in violation of § 2 of the Act, as well as attempting to monopolize such commerce in violation of § 2.[2] The District Court declined to issue a temporary injunction but, after trial, found that the parties were engaging in an attempt to monopolize as charged. Confining itself to that issue, the court enjoined them from continuing the attempt. 92 F. Supp. 794. They appealed to this Court under the Expediting Act of 1903, 32 Stat. 823, as amended, 62 Stat. 989, 15 U. S. C. (Supp. IV) § 29, and the issues before us are those arising from that finding and the terms of the injunction.

States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . .

. . . . . .

"SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. . . ." 26 Stat. 209, 36 Stat. 1167, 15 U. S. C. §§ 2 and 4.

[2] The individual defendants named in the complaint were Samuel A. Horvitz, vice president, secretary and a director of the corporation; Isadore Horvitz, president, treasurer and a director; D. P. Self, business manager; and Frank Maloy, editor. Each participated in the conduct alleged to constitute the attempt to monopolize. Maloy has died pending the appeal.

The appellant corporation, here called the publisher, has published the Journal in the City of Lorain since before 1932. In that year it, with others, purchased the Times-Herald which was the only competing daily paper published in that city. Later, without success, it sought a license to establish and operate a radio broadcasting station in Lorain. 92 F. Supp. 794, 796, and see *Lorain Journal Co.* v. *Federal Communications Comm'n,* 86 U. S. App. D. C. 102, 180 F. 2d 28.

The court below describes the position of the Journal, since 1933, as "a commanding and an overpowering one. It has a daily circulation in Lorain of over 13,000 copies and it reaches ninety-nine per cent of the families in the city." 92 F. Supp. at 796. Lorain is an industrial city on Lake Erie with a population of about 52,000 occupying 11,325 dwelling units. The Sunday News, appearing only on Sundays, is the only other newspaper published there.[3]

While but 165 out of the Journal's daily circulation of over 20,000 copies are sent out of Ohio, it publishes not only Lorain news but substantial quantities of state, national and international news. It pays substantial sums for such news and for feature material shipped to it from various parts of the United States and the rest of the world. It carries a substantial quantity of national ad-

[3] The Sunday News has a weekly circulation of about 3,000 copies, largely in Lorain. The Chronicle-Telegram is a newspaper published daily, except Sunday, eight miles away in Elyria. It has a daily circulation in that city of about 9,000 but none in Lorain. The Cleveland Plain Dealer, News and Press are metropolitan newspapers published daily, except Sunday, in Cleveland, 28 miles east of Lorain. They have a combined daily circulation in Lorain of about 6,000. The Cleveland Sunday Plain Dealer has a Sunday circulation in Lorain of about 11,000. The Cleveland papers carry no Lorain advertising and little Lorain news. No reference has been made in the record or in the argument here to competition from any radio station other than WEOL.

vertising sent to it from throughout the United States. Shipments and payments incidental to the above matters, as well as the publisher's purchases of paper and ink, involve many transactions in interstate or foreign commerce.

From 1933 to 1948 the publisher enjoyed a substantial monopoly in Lorain of the mass dissemination of news and advertising, both of a local and national character. However, in 1948 the Elyria-Lorain Broadcasting Company, a corporation independent of the publisher, was licensed by the Federal Communications Commission to establish and operate in Elyria, Ohio, eight miles south of Lorain, a radio station whose call letters, WEOL, stand for Elyria, Oberlin and Lorain.[4] Since then it has operated its principal studio in Elyria and a branch studio in Lorain. Lorain has about twice the population of Elyria and is by far the largest community in the station's immediate area. Oberlin is much smaller than Elyria and eight miles south of it.

While the station is not affiliated with a national network it disseminates both intrastate and interstate news and advertising. About 65% of its program consists of music broadcast from electrical transcriptions. These are shipped and leased to the station by out-of-state suppliers. Most of them are copyrighted and the station pays royalties to the out-of-state holders of the copy-

[4] The license also covers WEOL–FM but the two stations are here treated as one. WEOL operates on a frequency of 930 kilocycles and WEOL–FM of 107.6 megacycles. The station outlines its primary listening or market area on the basis of a half millivolt daytime pattern and a two millivolt nighttime pattern. Its day pattern reaches an area containing all or part of 20 counties and an estimated population of over 2,250,000. Its night pattern reaches an area containing parts of nine of these counties and an estimated population of about 450,000. Lorain County, which includes the communities of Lorain, Elyria and Oberlin, contains about 120,000 people, 52,000 of whom live in the City of Lorain.

rights. From 10 to 12% of the station's program consists of news, world-wide in coverage, gathered by United Press Associations. The news is received from outside of Ohio and relayed to Elyria through Columbus or Cleveland. From April, 1949, to March, 1950, the station broadcast over 100 sponsored sports events originating in various states.

Substantially all of the station's income is derived from its broadcasts of advertisements of goods or services. About 16% of its income comes from national advertising under contracts with advertisers outside of Ohio. This produces a continuous flow of copy, payments and materials moving across state lines.[5]

The court below found that appellants knew that a substantial number of Journal advertisers wished to use the facilities of the radio station as well. For some of them it found that advertising in the Journal was essential for the promotion of their sales in Lorain County. It found that at all times since WEOL commenced broadcasting, appellants had executed a plan conceived to eliminate the threat of competition from the station. Under this plan the publisher refused to accept local advertisements in the Journal from any Lorain County advertiser who advertised or who appellants believed to be about to advertise over WEOL. The court found expressly that the

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[5] Other findings show that the station broadcasts advertisements of goods and services on behalf of suppliers outside of Ohio. These sometimes result in interstate orders and shipments. Orders received by its local advertisers are sometimes filled by out-of-state suppliers. The station's broadcasts inevitably reach across state lines. They are heard with some regularity by many people in southeastern Michigan. The application which led to WEOL's license was considered by the Federal Communications Commission in conjunction with an application for another license, sought by a Michigan station, involving possible conflicts between its coverage and that of WEOL.

purpose and intent of this procedure was to destroy the broadcasting company.

The court characterized all this as "bold, relentless, and predatory commercial behavior." 92 F. Supp. at 796. To carry out appellants' plan, the publisher monitored WEOL programs to determine the identity of the station's local Lorain advertisers. Those using the station's facilities had their contracts with the publisher terminated and were able to renew them only after ceasing to advertise through WEOL. The program was effective. Numerous Lorain County merchants testified that, as a result of the publisher's policy, they either ceased or abandoned their plans to advertise over WEOL.

> "Having the plan and desire to injure the radio station, no more effective and more direct device to impede the operations and to restrain the commerce of WEOL could be found by the Journal than to cut off its bloodstream of existence—the advertising revenues which control its life or demise.
>
> . . . . .
>
> ". . . the very existence of WEOL is imperiled by this attack upon one of its principal sources of business and income." *Id.*, at 798, 799.

The principal provisions of the injunction issued by the District Court are not set forth in the published report of the case below but are printed in an Appendix, *infra,* pp. 157–159. Sections IV and V B of the decree, relating to notices, are stayed pending final disposition of this appeal.

1. *The conduct complained of was an attempt to monopolize interstate commerce.* It consisted of the publisher's practice of refusing to accept local Lorain advertising from parties using WEOL for local advertising. Because of the Journal's complete daily newspaper monopoly of local advertising in Lorain and its practically

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indispensable coverage of 99% of the Lorain families, this practice forced numerous advertisers to refrain from using WEOL for local advertising. That result not only reduced the number of customers available to WEOL in the field of local Lorain advertising and strengthened the Journal's monopoly in that field, but more significantly tended to destroy and eliminate WEOL altogether. Attainment of that sought-for elimination would automatically restore to the publisher of the Journal its substantial monopoly in Lorain of the mass dissemination of all news and advertising, interstate and national, as well as local. It would deprive not merely Lorain but Elyria and all surrounding communities of their only nearby radio station.

There is a suggestion that the out-of-state distribution of some copies of the Journal, coupled with the considerable interstate commerce engaged in by its publisher in the purchase of its operating supplies, provided, in any event, a sufficient basis for classifying the publisher's entire operation as one in interstate commerce. It is pointed out also that the Journal's daily publication of local news and advertising was so inseparably integrated with its publication of interstate news and national advertising that any coercion used by it in securing local advertising inevitably operated to strengthen its entire operation, including its monopoly of interstate news and national advertising.

It is not necessary, however, to rely on the above suggestions. The findings go further. They expressly and unequivocally state that the publisher's conduct was aimed at a larger target—the complete destruction and elimination of WEOL. The court found that the publisher, before 1948, enjoyed a substantial monopoly in Lorain of the mass dissemination not only of local news and advertising, but of news of out-of-state events transmitted to Lorain for immediate dissemination, and of

advertising of out-of-state products for sale in Lorain. WEOL offered competition by radio in all these fields so that the publisher's attempt to destroy WEOL was in fact an attempt to end the invasion by radio of the Lorain newspaper's monopoly of interstate as well as local commerce.[6]

There can be little doubt today that the immediate dissemination of news gathered from throughout the nation or the world by agencies specially organized for that purpose is a part of interstate commerce. *Associated Press* v. *United States,* 326 U. S. 1, 14; *Associated Press* v. *Labor Board,* 301 U. S. 103. The same is true of national advertising originating throughout the nation and offering products for sale on a national scale. The local dissemination of such news and advertising requires continuous interstate transmission of materials and payments, to say nothing of the interstate commerce involved in the sale and delivery of products sold. The decision in *Blumenstock Bros.* v. *Curtis Pub. Co.,* 252 U. S. 436, related to the making of contracts for advertising rather than to the preparation and dissemination of advertising. Moreover, the view there stated, that the making of contracts by parties outside of a state for the insertion of advertising material in periodicals of nationwide circulation did not amount to interstate commerce, rested ex-

[6] The reference in § 2 to an attempt to monopolize "any part of the trade or commerce among the several States" relates not merely to interstate commerce within any geographical part of the United States but also to any appreciable part of such interstate commerce. "The provisions of §§ 1 and 2 have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce." *Indiana Farmer's Guide Pub. Co.* v. *Prairie Farmer Pub. Co.,* 293 U. S. 268, 279. See also, *United States* v. *Griffith,* 334 U. S. 100, 106; *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 225; *Montague & Co.* v. *Lowry,* 193 U. S. 38.

pressly on a line of cases holding "that policies of insurance are not articles of commerce, and that the making of such contracts is a mere incident of commercial intercourse." *Id.*, at 443. See *Paul* v. *Virginia*, 8 Wall. 168, and *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495. That line of cases no longer stands in the way. *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533. See also, *North American Co.* v. *Securities & Exchange Comm'n*, 327 U. S. 686; *Indiana Farmer's Guide Pub. Co.* v. *Prairie Farmer Pub. Co.*, 293 U. S. 268.

The distribution within Lorain of the news and advertisements transmitted to Lorain in interstate commerce for the sole purpose of immediate and profitable reproduction and distribution to the reading public is an inseparable part of the flow of the interstate commerce involved. See *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 309; *Stafford* v. *Wallace*, 258 U. S. 495, 516; *Illinois Central R. Co.* v. *Louisiana R. Comm'n*, 236 U. S. 157, 163; *Swift & Co.* v. *United States*, 196 U. S. 375, 398. Unless protected by law, the consuming public is at the mercy of restraints and monopolizations of interstate commerce at whatever points they occur. Without the protection of competition at the outlets of the flow of interstate commerce, the protection of its earlier stages is of little worth.

2. *The publisher's attempt to regain its monopoly of interstate commerce by forcing advertisers to boycott a competing radio station violated § 2.* The findings and opinion of the trial court describe the conduct of the publisher upon which the Government relies. The surrounding circumstances are important. The most illuminating of these is the substantial monopoly which was enjoyed in Lorain by the publisher from 1933 to 1948, together with a 99% coverage of Lorain families. Those factors made the Journal an indispensable medium of advertising for many Lorain concerns. Accordingly, its

publisher's refusals to print Lorain advertising for those using WEOL for like advertising often amounted to an effective prohibition of the use of WEOL for that purpose. Numerous Lorain advertisers wished to supplement their local newspaper advertising with local radio advertising but could not afford to discontinue their newspaper advertising in order to use the radio.

WEOL's greatest potential source of income was local Lorain advertising. Loss of that was a major threat to its existence. The court below found unequivocally that appellants' conduct amounted to an attempt by the publisher to destroy WEOL and, at the same time, to regain the publisher's pre-1948 substantial monopoly over the mass dissemination of all news and advertising.

To establish this violation of § 2 as charged, it was not necessary to show that success rewarded appellants' attempt to monopolize. The injunctive relief under § 4 sought to forestall that success. While appellants' attempt to monopolize did succeed insofar as it deprived WEOL of income, WEOL has not yet been eliminated. The injunction may save it. "[W]hen that intent [to monopolize] and the consequent dangerous probability exist, this statute [the Sherman Act], like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." *Swift & Co.* v. *United States,* 196 U. S. 375, 396. See also, *American Tobacco Co.* v. *United States,* 328 U. S. 781; *United States* v. *Aluminum Co.,* 148 F. 2d 416, 431.

> "[T]he second section [of the Sherman Act] seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted

to be brought about or are brought about be not embraced within the general enumeration of the first section." *Standard Oil Co.* v. *United States,* 221 U. S. 1, 61.[7]

Assuming the interstate character of the commerce involved, it seems clear that if all the newspapers in a city, in order to monopolize the dissemination of news and advertising by eliminating a competing radio station, conspired to accept no advertisements from anyone who advertised over that station, they would violate §§ 1 and 2 of the Sherman Act. Cf. *Fashion Originators' Guild* v. *Federal Trade Comm'n,* 312 U. S. 457, 465; *Binderup* v. *Pathe Exchange,* 263 U. S. 291; *Federal Trade Comm'n* v. *Beech-Nut Packing Co.,* 257 U. S. 441; *Loewe* v. *Lawlor,* 208 U. S. 274; *William Goldman Theatres* v. *Loew's, Inc.,* 150 F. 2d 738. It is consistent with that result to hold here that a single newspaper, already enjoying a substantial monopoly in its area, violates the "attempt to monopolize" clause of § 2 when it uses its monopoly to destroy threatened competition.[8]

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[7] "Section 2 is not restricted to conspiracies or combinations to monopolize but also makes it a crime for any person to monopolize or to attempt to monopolize any part of interstate or foreign trade or commerce. . . . It is indeed 'unreasonable, *per se,* to foreclose competitors from any substantial market.' . . . The anti-trust laws are as much violated by the prevention of competition as by its destruction. . . . It follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *United States* v. *Griffith,* 334 U. S. 100, 106–107.

[8] Appellants have sought to justify their conduct on the ground that it was part of the publisher's program for the protection of the Lorain market from outside competition. The publisher claimed to have refused advertising from Elyria or other out-of-town advertisers for the reason that such advertisers might compete with Lorain concerns. The publisher then classified WEOL as the publisher's own competitor from Elyria and asked its Lorain advertisers to refuse

The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisements from whomever it pleases. We do not dispute that general right. "But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified." *American Bank & Trust Co.* v. *Federal Bank,* 256 U. S. 350, 358. The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act. The operator of the radio station, equally with the publisher of the newspaper, is entitled to the protection of that Act. *"In the absence of any purpose to create or maintain a monopoly,* the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." (Emphasis supplied.) *United States* v. *Colgate & Co.,* 250 U. S. 300, 307. See *Associated Press* v. *United States,* 326 U. S. 1, 15; *United States* v. *Bausch & Lomb Co.,* 321 U. S. 707, 721–723.

3. *The injunction does not violate any guaranteed freedom of the press.* The publisher suggests that the injunction amounts to a prior restraint upon what it may publish. We find in it no restriction upon any guaranteed freedom of the press. The injunction applies to a pub-

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to employ WEOL as an advertising medium in competition with the Journal. We find no principle of law which required Lorain advertisers thus to boycott an Elyria advertising medium merely because the publisher of a Lorain advertising medium had chosen to boycott some Elyria advertisers who might compete for business in the Lorain market. Nor do we find any principle of law which permitted this publisher to dictate to prospective advertisers that they might advertise either by newspaper or by radio but that they might not use both facilities.

lisher what the law applies to others. The publisher may not accept or deny advertisements in an "attempt to monopolize . . . any part of the trade or commerce among the several States . . . ." *Associated Press* v. *United States, supra,* at 6–7, 20; *Indiana Farmer's Guide Pub. Co.* v. *Prairie Farmer Pub. Co.,* 293 U. S. 268. See also, *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, 192; *Mabee* v. *White Plains Pub. Co.,* 327 U. S. 178, 184; *Associated Press* v. *Labor Board,* 301 U. S. 103. Injunctive relief under § 4 of the Sherman Act is as appropriate a means of enforcing the Act against newspapers as it is against others.

4. *The decree is reasonably consistent with the requirements of the case and remains within the control of the court below.*[9] We have considered the objections made to the form and substance of the decree and do not find obvious error. It is suggested, for example, that the decree covers a broader scope of activities than is required by the evidence and requires unnecessary supervision of future conduct of the publisher, that notice of its terms must be published at least once a week for 25 weeks and that the publisher for five years must maintain records relating to the subject of the judgment and keep them accessible for governmental inspection.

While the decree should anticipate probabilities of the future, it is equally important that it do not impose unnecessary restrictions and that the procedure prescribed for supervision, giving notice, keeping records and making inspections be not unduly burdensome.

In the instant case the printed record contains neither the entire testimony nor all the exhibits which were before the court below. It omits also material mentioned during the trial as having been considered by the court

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[9] A substantial part of the decree is printed in the Appendix, *infra,* pp. 157–159.

when denying the Government's motion for a temporary injunction. Under the circumstances we are content to rely upon the trial court's retention of jurisdiction over the cause for whatever modification the decree may require in the light of the entire proceedings and of subsequent events. See *Associated Press* v. *United States, supra,* at 22–23; *United States* v. *Bausch & Lomb Co., supra,* at 727–729.

The judgment accordingly is

Affirmed.

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

APPENDIX.

"FINAL JUDGMENT— . . .

. . . . .

"III

"Defendant The Lorain Journal Company is enjoined and restrained from:

"A. Refusing to accept for publication or refusing to publish any advertisement or advertisements or discriminating as to price, space, arrangement, location, commencement or period of insertion or any other terms or conditions of publication of advertisement or advertisements where the reason for such refusal or discrimination is, in whole or in part, express or implied, that the person, firm or corporation submitting the advertisement or advertisements has advertised, advertises, has proposed or proposes to advertise in or through any other advertising medium.

"B. Accepting for publication or publishing any advertisement or making or adhering to any contract for the publication of advertisements on or accompanied by any

condition, agreement or understanding, express or implied:

"1. That the advertiser shall not use the advertising medium of any person, firm or corporation other than defendant The Lorain Journal Company;

"2. That the advertiser use only the advertising medium of defendant The Lorain Journal Company;

"C. Cancelling, terminating, refusing to renew or in any manner impairing any contract, agreement or understanding, involving the publication of advertisements, between the defendants, or any of them, and any person, firm or corporation for the reason, in whole or in part, that such person, firm or corporation advertised, advertises or proposes to advertise in or through any advertising medium other than the newspaper published by the corporate defendant.

"IV

"Commencing fifteen (15) days after the entry of this judgment and at least once a week for a period of twenty-five weeks thereafter the corporate defendant shall insert in the newspaper published by it a notice which shall fairly and fully apprise the readers thereof of the substantive terms of this judgment and which notice shall be placed in a conspicuous location.

"V

"Defendant The Lorain Journal Company and the individual defendants are ordered and directed to:

"A. Maintain for a period of five (5) years from the date of this judgment, all books and records, which shall include all correspondence, memoranda, reports and other writings, relating to the subject matter of this judgment;

"B. Advise in writing within ten (10) days from the date of this judgment any officers, agents, employees, and

any other persons acting for, through or under defendants or any of them of the terms of this judgment and that each and every such person is subject to the provisions of this judgment. The defendants shall make readily available to such persons a copy of this judgment and shall inform them of such availability.

. . . . .

"VII

"Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate in relation to the construction of, or carrying out of this judgment, for the amendment or modification of any of the provisions thereof, or the enforcement of compliance therewith and for the punishment of violations thereof."

UNITED STATES *v.* FORTIER ET AL.

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

No. 14. Argued October 10, 1951.—Decided December 11, 1951.

A maximum sale price stipulated by a builder of houses, in securing permission to build and priorities assistance under the Veterans' Emergency Housing Act of 1946 and Priorities Regulation 33, does not survive the repeal of the statutory authority for that Regulation by the Housing and Rent Act of 1947 and may not be enforced as to houses sold after such repeal. Pp. 160–162.

185 F. 2d 608, affirmed.

Oscar H. Davis argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade.*

Stanley M. Brown argued the cause for respondents and filed a brief for Fortier, respondent. With *Mr. Brown* on the brief was *Meyer Green* for Marino et al., respondents.

Briefs of *amici curiae* supporting respondents were filed by *Alvan J. Goodbar* for Doernhoefer; and by *John G. Simms.*

PER CURIAM.

The United States brought this action under the Veterans' Emergency Housing Act of 1946 [1] to compel restitution of allegedly excessive prices charged by respondents in the sale of two houses. The District Court entered judgment for respondents, 89 F. Supp. 708, and the Court of Appeals for the First Circuit affirmed, 185 F. 2d 608. We granted certiorari, 341 U. S. 925.

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[1] 50 U. S. C. App. § 1821 *et seq.*

Maximum sales prices for the two houses had been stipulated by respondents in securing the permission to build required under Priorities Regulation 33.[2] Statutory authority for that regulation had been repealed before the sale of respondents' houses, except for a proviso continuing in full force and effect priorities for building materials issued under the Veterans' Emergency Housing Act of 1946.[3] The Government views the maximum prices stipulated by respondents as a condition of construction authorization and priorities assistance that survived repeal under the proviso. We reject this view.

The 1946 Act contained detailed authorization for price restrictions on houses and for priorities on building materials. When that Act was repealed in 1947, Congress provided for veterans' preferences in the sale and rental of housing and for rent ceilings on certain accommodations constructed with the assistance of priorities secured under the 1946 Act.[4] Congress addressed itself to the

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[2] 10 Fed. Reg. 15301, as amended, 11 Fed. Reg. 6598. Respondents were required to comply with this regulation by Veterans' Housing Program Order No. 1, 11 Fed. Reg. 3190.

[3] 50 U. S. C. App. (Supp. IV) § 1881 (a), in repealing the 1946 Act, provided:

"That any allocations made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act [June 30, 1947], with respect to veterans of World War II, their immediate families, and others, shall remain in full force and effect."

Respondents' houses were not sold until November and December, 1947, months after repeal of the 1946 Act. As a result, no "penalty, forfeiture, or liability" had been incurred under the 1946 Act which would survive repeal under the general saving clause, 1 U. S. C. (Supp. IV) § 109. Compare *United States* v. *Carter,* 171 F. 2d 530 (C. A. 5th Cir. 1948).

[4] 50 U. S. C. App. (Supp. IV) § 1884 (a); *id.,* § 1892 (c) (1) (B) (3) (A).

problem of veterans' housing, but refrained from imposing any price restrictions on the sale of houses. Congress having indicated a contrary purpose, we will not impose such restrictions by implication.

Affirmed.

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

EX PARTE COGDELL ET AL.

PETITION FOR WRIT OF MANDAMUS.

No. 71, Misc. Continued December 11, 1951.

Because the question whether a court of three judges is required by 28 U. S. C. § 2282 in a suit to restrain on constitutional grounds enforcement of congressional enactments affecting only the District of Columbia is a question of general importance to judicial administration within the District of Columbia and is necessarily before the Court of Appeals for the District of Columbia Circuit in a pending appeal taken by petitioners, the case arising on their petition for a writ of mandamus filed in this Court and raising the same question is continued on the docket to await the views of the Court of Appeals. Pp. 163–164.

Cause continued.

George E. C. Hayes, James M. Nabrit, Jr. and *George M. Johnson* for petitioners.

Vernon E. West, Chester H. Gray and *Milton D. Korman* for McGuire et al., respondents.

PER CURIAM.

Petitioners brought suit in the District Court for the District of Columbia to restrain on constitutional grounds the enforcement of certain legislation passed by Congress for the administration of the District of Columbia school system. Petitioners' request that a court of three judges be convened under Section 2282 of the Judicial Code [1] was denied. Subsequently, the motion of defendant school

[1] 28 U. S. C. (Supp. IV) § 2282:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

officials to dismiss the suit for failure to state a cause of action was granted.

Petitioners filed a motion in this Court for leave to file a petition for a writ of mandamus directing that a court of three judges be convened to hear and determine their constitutional claims. As substantial jurisdictional questions were raised, we granted the motion and issued a rule to show cause why mandamus should not be granted. 342 U. S. 805. In addition to this mandamus action, appeals were taken by petitioners to the Court of Appeals for the District of Columbia Circuit and are now pending in that court.

One of the jurisdictional questions raised by this case is whether a court of three judges is required by Section 2282 in a suit to enjoin enforcement of congressional enactments affecting only the District of Columbia. The Section uses the words "any Act of Congress." As against petitioners' contention that all legislation passed by Congress is embraced within that language, it is urged that a proper interpretation of Section 2282 confines the phrase "Act of Congress" to laws having general application throughout the United States. Resolution of this issue determines whether this Court has exclusive appellate jurisdiction in this class of case,[2] or whether the Court of Appeals has jurisdiction. As a result, the same question is necessarily before the Court of Appeals for the District of Columbia Circuit in its consideration of petitioners' appeals now pending in that court.[3] Because the question is one of general importance to judicial administration within the District of Columbia, we continue this case on our docket to await the views of the Court of Appeals.

Cause continued.

MR. JUSTICE DOUGLAS dissents.

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[2] 28 U. S. C. (Supp. IV) § 1253.

[3] *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10 (1930).

ROCHIN *v.* CALIFORNIA.

CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT OF CALIFORNIA.

No. 83. Argued October 16, 1951.—Decided January 2, 1952.

Having "some information" that petitioner was selling narcotics, three state officers entered his home and forced their way into the bedroom occupied by him and his wife. When asked about two capsules lying on a bedside table, petitioner put them in his mouth. After an unsuccessful struggle to extract them by force, the officers took petitioner to a hospital, where an emetic was forced into his stomach against his will. He vomited two capsules which were found to contain morphine. These were admitted in evidence over his objection and he was convicted in a state court of violating a state law forbidding possession of morphine. *Held:* The conviction is reversed, because it was obtained by methods violative of the Due Process Clause of the Fourteenth Amendment. Pp. 166–174.
101 Cal. App. 2d 140, 225 P. 2d 1, reversed.

In a California state court, petitioner was convicted of violating a state law forbidding the possession of morphine. The District Court of Appeal affirmed. 101 Cal. App. 2d 140, 225 P. 2d 1. The State Supreme Court denied a review. This Court granted certiorari. 341 U. S. 939. *Reversed,* p. 174.

Dolly Lee Butler and *A. L. Wirin* argued the cause and filed a brief for petitioner.

Howard S. Goldin, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Edmund G. Brown,* Attorney General, *Clarence A. Linn,* Assistant Attorney General, and *Frank W. Richards,* Deputy Attorney General.

Fred Okrand, A. L. Wirin, Edward J. Ennis, Morris L. Ernst, Osmond K. Fraenkel, Arthur Garfield Hays, Herbert M. Levy and *Clore Warne* filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

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MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Having "some information that [the petitioner here] was selling narcotics," three deputy sheriffs of the County of Los Angeles, on the morning of July 1, 1949, made for the two-story dwelling house in which Rochin lived with his mother, common-law wife, brothers and sisters. Finding the outside door open, they entered and then forced open the door to Rochin's room on the second floor. Inside they found petitioner sitting partly dressed on the side of the bed, upon which his wife was lying. On a "night stand" beside the bed the deputies spied two capsules. When asked "Whose stuff is this?" Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers "jumped upon him" and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance. He was handcuffed and taken to a hospital. At the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This "stomach pumping" produced vomiting. In the vomited matter were found two capsules which proved to contain morphine.

Rochin was brought to trial before a California Superior Court, sitting without a jury, on the charge of possessing "a preparation of morphine" in violation of the California Health and Safety Code, 1947, § 11,500. Rochin was convicted and sentenced to sixty days' imprisonment. The chief evidence against him was the two capsules. They were admitted over petitioner's objection, although the means of obtaining them was frankly set forth in the testimony by one of the deputies, substantially as here narrated.

On appeal, the District Court of Appeal affirmed the conviction, despite the finding that the officers "were

guilty of unlawfully breaking into and entering defendant's room and were guilty of unlawfully assaulting and battering defendant while in the room," and "were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the alleged hospital." 101 Cal. App. 2d 140, 143, 225 P. 2d 1, 3. One of the three judges, while finding that "the record in this case reveals a shocking series of violations of constitutional rights," concurred only because he felt bound by decisions of his Supreme Court. These, he asserted, "have been looked upon by law enforcement officers as an encouragement, if not an invitation, to the commission of such lawless acts." *Ibid.* The Supreme Court of California denied without opinion Rochin's petition for a hearing.[1] Two justices dissented from this denial, and in doing so expressed themselves thus: ". . . a conviction which rests upon evidence of incriminating objects obtained from the body of the accused by physical abuse is as invalid as a conviction which rests upon a verbal confession extracted from him by such abuse. . . . Had the evidence forced from the defendant's lips consisted of an oral confession that he illegally possessed a drug . . . he would have the protection of the rule of law which excludes coerced confessions from evidence. But because the evidence forced from his lips consisted of real objects the People of this state are permitted to base a conviction upon it. [We] find no valid ground of distinction between a verbal confession extracted by physical abuse and a confession wrested from defendant's body by physical abuse." 101 Cal. App. 2d 143, 149–150, 225 P. 2d 913, 917–918.

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[1] The petition for a hearing is addressed to the discretion of the California Supreme Court and a denial has apparently the same significance as the denial of certiorari in this Court. Cal. Const., Art. VI, §§ 4, 4c; "Rules on Appeal," Rules 28, 29, 36 Cal. 2d 24–25 (1951). See 3 Stan. L. Rev. 243–269 (1951).

This Court granted certiorari, 341 U. S. 939, because a serious question is raised as to the limitations which the Due Process Clause of the Fourteenth Amendment imposes on the conduct of criminal proceedings by the States.

In our federal system the administration of criminal justice is predominantly committed to the care of the States. The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers. U. S. Const., Art. I, § 8, cl. 18. Broadly speaking, crimes in the United States are what the laws of the individual States make them, subject to the limitations of Art. I, § 10, cl. 1, in the original Constitution, prohibiting bills of attainder and *ex post facto* laws, and of the Thirteenth and Fourteenth Amendments.

These limitations, in the main, concern not restrictions upon the powers of the States to define crime, except in the restricted area where federal authority has preempted the field, but restrictions upon the manner in which the States may enforce their penal codes. Accordingly, in reviewing a State criminal conviction under a claim of right guaranteed by the Due Process Clause of the Fourteenth Amendment, from which is derived the most far-reaching and most frequent federal basis of challenging State criminal justice, "we must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes." *Malinski* v. *New York,* 324 U. S. 401, 412, 418. Due process of law, "itself a historical product," *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 31, is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice.

However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Malinski* v. *New York, supra,* at 416–417. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts,* 291 U. S. 97, 105, or are "implicit in the concept of ordered liberty." *Palko* v. *Connecticut,* 302 U. S. 319, 325.[2]

The Court's function in the observance of this settled conception of the Due Process Clause does not leave us without adequate guides in subjecting State criminal procedures to constitutional judgment. In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content. Thus the requirements of the Sixth and Seventh Amendments for trial by jury in the federal

[2] What is here summarized was deemed by a majority of the Court, in *Malinski* v. *New York,* 324 U. S. 401, 412 and 438, to be "the controlling principles upon which this Court reviews on constitutional grounds a state court conviction for crime." They have been applied by this Court many times, long before and since the *Malinski* case.

courts have a rigid meaning. No changes or chances can alter the content of the verbal symbol of "jury"—a body of twelve men who must reach a unanimous conclusion if the verdict is to go against the defendant.[3] On the other hand, the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application.

When the gloss has thus not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges. Even more specific provisions, such as the guaranty of freedom of speech and the detailed protection against unreasonable searches and seizures, have inevitably evoked as sharp divisions in this Court as the least specific and most comprehensive protection of liberties, the Due Process Clause.

The vague contours of the Due Process Clause do not leave judges at large.[4] We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. See Cardozo,

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[3] This is the federal jury required constitutionally although England and at least half of the States have in some civil cases juries which are composed of less than 12 or whose verdict may be less than unanimous. See County Courts Act, 1934, 24 & 25 Geo. V, c. 53, § 93; Arizona State Legislative Bureau, Legislative Briefs No. 4, Grand and Petit Juries in the United States, v–vi (Feb. 15, 1940); The Council of State Governments, The Book of the States, 1950–1951, 515.

[4] Burke's observations on the method of ascertaining law by judges are pertinent:

"Your committee do not find any positive law which binds the judges of the courts in Westminster-hall publicly to give a reasoned opinion from the bench, in support of their judgment upon matters that are stated before them. But the course hath prevailed from

The Nature of the Judicial Process; The Growth of the Law; The Paradoxes of Legal Science. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions.

Due process of law thus conceived is not to be derided as resort to a revival of "natural law." [5] To believe that this judicial exercise of judgment could be avoided by freezing "due process of law" at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges, for whom the independence safeguarded by Article III of the Constitution was designed and who are presumably guided by established standards of judicial behavior. Even cybernetics has not yet made that haughty claim. To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. But

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the oldest times. It hath been so general and so uniform, that it must be considered as the law of the land." Report of the Committee of Managers on the Causes of the Duration of Mr. Hastings's Trial, 4 Speeches of Edmund Burke (1816) 200–201.

And Burke had an answer for those who argue that the liberty of the citizen cannot be adequately protected by the flexible conception of due process of law:

". . . the English jurisprudence has not any other sure foundation, nor consequently the lives and properties of the subject any sure hold, but in the maxims, rules, and principles, and juridical traditionary line of decisions . . . ." *Id.*, at 201.

[5] Morris R. Cohen, "Jus Naturale Redivivum," 25 Philosophical Review 761 (1916), and "Natural Rights and Positive Law," Reason and Nature (1931), 401–426; F. Pollock, "The History of the Law of Nature," Essays in the Law (1922), 31–79.

these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.

Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, see *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon

confessions, however much verified, obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice." See Mr. Chief Justice Hughes, speaking for a unanimous Court in *Brown* v. *Mississippi,* 297 U. S. 278, 285–286. It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.[6]

To attempt in this case to distinguish what lawyers call "real evidence" from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing

[6] As to the difference between the privilege against self-crimination protected, in federal prosecutions, under the Fifth Amendment, and the limitations which the Due Process Clause of the Fourteenth Amendment imposes upon the States against the use of coerced confessions, see *Brown* v. *Mississippi, supra,* at 285.

would be more calculated to discredit law and thereby to brutalize the temper of a society.

In deciding this case we do not heedlessly bring into question decisions in many States dealing with essentially different, even if related, problems. We therefore put to one side cases which have arisen in the State courts through use of modern methods and devices for discovering wrongdoers and bringing them to book. It does not fairly represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record. Indeed the California Supreme Court has not sanctioned this mode of securing a conviction. It merely exercised its discretion to decline a review of the conviction. All the California judges who have expressed themselves in this case have condemned the conduct in the strongest language.

We are not unmindful that hypothetical situations can be conjured up, shading imperceptibly from the circumstances of this case and by gradations producing practical differences despite seemingly logical extensions. But the Constitution is "intended to preserve practical and substantial rights, not to maintain theories." *Davis* v. *Mills*, 194 U. S. 451, 457.

On the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause. The judgment below must be

Reversed.

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

MR. JUSTICE BLACK, concurring.

Adamson v. *California*, 332 U. S. 46, 68–123, sets out reasons for my belief that state as well as federal courts and law enforcement officers must obey the Fifth Amendment's command that "No person . . . shall be com-

pelled in any criminal case to be a witness against himself." I think a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him by a contrivance of modern science. Cf. *Boyd* v. *United States,* 116 U. S. 616; *Counselman* v. *Hitchcock,* 142 U. S. 547, 562; *Bram* v. *United States,* 168 U. S. 532; *Chambers* v. *Florida,* 309 U. S. 227. California convicted this petitioner by using against him evidence obtained in this manner, and I agree with MR. JUSTICE DOUGLAS that the case should be reversed on this ground.

In the view of a majority of the Court, however, the Fifth Amendment imposes no restraint of any kind on the states. They nevertheless hold that California's use of this evidence violated the Due Process Clause of the Fourteenth Amendment. Since they hold as I do in this case, I regret my inability to accept their interpretation without protest. But I believe that faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards stated by the majority.

What the majority hold is that the Due Process Clause empowers this Court to nullify any state law if its application "shocks the conscience," offends "a sense of justice" or runs counter to the "decencies of civilized conduct." The majority emphasize that these statements do not refer to their own consciences or to their senses of justice and decency. For we are told that "we may not draw on our merely personal and private notions"; our judgment must be grounded on "considerations deeply rooted in reason and in the compelling traditions of the legal profession." We are further admonished to measure the validity of state practices, not by our reason, or by the traditions of the legal profession, but by "the community's sense of fair play and decency"; by the "traditions and conscience of our people"; or by "those canons of decency and fair-

ness which express the notions of justice of English-speaking peoples." These canons are made necessary, it is said, because of "interests of society pushing in opposite directions."

If the Due Process Clause does vest this Court with such unlimited power to invalidate laws, I am still in doubt as to why we should consider only the notions of English-speaking peoples to determine what are immutable and fundamental principles of justice. Moreover, one may well ask what avenues of investigation are open to discover "canons" of conduct so universally favored that this Court should write them into the Constitution? All we are told is that the discovery must be made by an "evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts."

Some constitutional provisions are stated in absolute and unqualified language such, for illustration, as the First Amendment stating that no law shall be passed prohibiting the free exercise of religion or abridging the freedom of speech or press. Other constitutional provisions do require courts to choose between competing policies, such as the Fourth Amendment which, by its terms, necessitates a judicial decision as to what is an "unreasonable" search or seizure. There is, however, no express constitutional language granting judicial power to invalidate *every* state law of *every* kind deemed "unreasonable" or contrary to the Court's notion of civilized decencies; yet the constitutional philosophy used by the majority has, in the past, been used to deny a state the right to fix the price of gasoline, *Williams* v. *Standard Oil Co.*, 278 U. S. 235; and even the right to prevent bakers from palming off smaller for larger loaves of bread, *Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 504. These cases, and others,[1]

[1] See n. 12 of dissenting opinion, *Adamson* v. *California, supra,* at p. 83.

show the extent to which the evanescent standards of the majority's philosophy have been used to nullify state legislative programs passed to suppress evil economic practices. What paralyzing role this same philosophy will play in the future economic affairs of this country is impossible to predict. Of even graver concern, however, is the use of the philosophy to nullify the Bill of Rights. I long ago concluded that the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights.[2] Reflection and recent decisions [3] of this Court sanctioning abridgment of the freedom of speech and press have strengthened this conclusion.

MR. JUSTICE DOUGLAS, concurring.

The evidence obtained from this accused's stomach would be admissible in the majority of states where the question has been raised.[1] So far as the reported cases reveal, the only states which would probably exclude the evidence would be Arkansas, Iowa, Michigan, and Mis-

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[2] *E. g., Adamson* v. *California, supra,* and cases cited in the dissent.

[3] *American Communications Assn.* v. *Douds,* 339 U. S. 382; *Feiner* v. *New York,* 340 U. S. 315; *Dennis* v. *United States,* 341 U. S. 494.

[1] See *People* v. *One 1941 Mercury Sedan,* 74 Cal. App. 2d 199, 168 P. 2d 443 (pumping of accused's stomach to recover swallowed narcotic); *Rochin* v. *California,* 101 Cal. App. 2d 140, 225 P. 2d 1 (pumping of accused's stomach to recover swallowed narcotic); *People* v. *Tucker,* 88 Cal. App. 2d 333, 198 P. 2d 941 (blood test to determine intoxication); *State* v. *Ayres,* 70 Idaho 18, 211 P. 2d 142 (blood test to determine intoxication); *Davis* v. *State,* 189 Md. 640, 57 A. 2d 289 (blood typing to link accused with murder); *Skidmore* v. *State,* 59 Nev. 320, 92 P. 2d 979 (examination of accused for venereal disease); *State* v. *Sturtevant,* 96 N. H. 99, 70 A. 2d 909

souri.[2] Yet the Court now says that the rule which the majority of the states have fashioned violates the "decencies of civilized conduct." To that I cannot agree. It is a rule formulated by responsible courts with judges as sensitive as we are to the proper standards for law administration.

As an original matter it might be debatable whether the provision in the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" serves the ends of justice. Not all civilized legal procedures recognize it.[3] But the choice was made by the Framers, a choice which sets a standard for legal trials in this country. The Framers made it

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(blood test to determine intoxication); *State* v. *Alexander,* 7 N. J. 585, 83 A. 2d 441 (blood typing to establish guilt); *State* v. *Gatton,* 60 Ohio App. 192, 20 N. E. 2d 265 (commenting on refusal to submit to blood test or urinalysis to determine intoxication); *State* v. *Nutt,* 78 Ohio App. 336, 65 N. E. 2d 675 (commenting on refusal to submit to urinalysis to determine intoxication); but cf. *Booker* v. *Cincinnati,* 1 Ohio Supp. 152 (examination and urinalysis to determine intoxication); *State* v. *Cram,* 176 Ore. 577, 160 P. 2d 283, 164 A. L. R. 952, 967 (blood test to determine intoxication); *Commonwealth* v. *Statti,* 166 Pa. Super. 577, 73 A. 2d 688 (blood typing linking accused to assault).

[2] *Bethel* v. *State,* 178 Ark. 277, 10 S. W. 2d 370 (examination for venereal disease); *State* v. *Height,* 117 Iowa 650, 91 N. W. 935 (examination for venereal disease); *State* v. *Weltha,* 228 Iowa 519, 292 N. W. 148 (blood test to determine intoxication, limiting rules on search and seizure); but cf. *State* v. *Benson,* 230 Iowa 1168, 300 N. W. 275 (comment on refusal to submit to blood test to determine intoxication); *People* v. *Corder,* 244 Mich. 274, 221 N. W. 309 (examination for venereal disease); but see *People* v. *Placido,* 310 Mich. 404, 408, 17 N. W. 2d 230, 232; *State* v. *Newcomb,* 220 Mo. 54, 119 S. W. 405 (examination for venereal disease); *State* v. *Matsinger,* 180 S. W. 856 (examination for venereal disease).

[3] See Ploscowe, The Investigating Magistrate in European Criminal Procedure, 33 Mich. L. Rev. 1010 (1935).

a standard of due process for prosecutions by the Federal Government. If it is a requirement of due process for a trial in the federal courthouse, it is impossible for me to say it is not a requirement of due process for a trial in the state courthouse. That was the issue recently surveyed in *Adamson* v. *California,* 332 U. S. 46. The Court rejected the view that compelled testimony should be excluded and held in substance that the accused in a state trial can be forced to testify against himself. I disagree. Of course an accused can be compelled to be present at the trial, to stand, to sit, to turn this way or that, and to try on a cap or a coat. See *Holt* v. *United States,* 218 U. S. 245, 252–253. But I think that words taken from his lips, capsules taken from his stomach, blood taken from his veins are all inadmissible provided they are taken from him without his consent. They are inadmissible because of the command of the Fifth Amendment.

That is an unequivocal, definite and workable rule of evidence for state and federal courts. But we cannot in fairness free the state courts from that command and yet excoriate them for flouting the "decencies of civilized conduct" when they admit the evidence. That is to make the rule turn not on the Constitution but on the idiosyncrasies of the judges who sit here.

The damage of the view sponsored by the Court in this case may not be conspicuous here. But it is part of the same philosophy that produced *Betts* v. *Brady,* 316 U. S. 455, denying counsel to an accused in a state trial against the command of the Sixth Amendment, and *Wolf* v. *Colorado,* 338 U. S. 25, allowing evidence obtained as a result of a search and seizure that is illegal under the Fourth Amendment to be introduced in a state trial. It is part of the process of erosion of civil rights of the citizen in recent years.

KEROTEST MANUFACTURING CO. *v.* C-O-TWO FIRE EQUIPMENT CO.

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

No. 180. Argued November 30, 1951.—Decided January 2, 1952.

Under the Federal Declaratory Judgments Act, a Pennsylvania manufacturer, whose customer was already being sued in Illinois by a Delaware corporation for patent infringement, sued in a federal court in Delaware for a declaratory judgment that the patents were invalid and that devices which the manufacturer supplies to its customers did not infringe them. Subsequently, the manufacturer was joined as a defendant in the Illinois infringement suit. The District Court in Delaware denied a stay of the Delaware suit and enjoined the patentee from proceeding against the manufacturer in the Illinois suit. The Court of Appeals reversed, on the ground that all interests would be best served by prosecution of the suit in Illinois. *Held:* The judgment of the Court of Appeals is affirmed. Pp. 181–186.

(a) Ample discretion must be left to the lower courts for the wise judicial administration of the Federal Declaratory Judgments Act, which has created complicated problems for coordinate courts by facilitating the initiation of litigation by different parties to many-sided transactions. Pp. 183–184.

(b) It is not to be assumed that the lower courts will permit owners of weak patents to avoid real tests of their patents' validity by successive suits against customers in forums inconvenient to the manufacturers or selected because of greater hospitality to patents. Pp. 184–185.

(c) A manufacturer who is charged with infringing a patent cannot stretch the Federal Declaratory Judgments Act to give him a paramount right to choose the forum for trying out questions of infringement and validity. Pp. 185–186.

189 F. 2d 31, affirmed.

A federal district court in Delaware temporarily stayed a declaratory judgment proceeding against respondent to test the validity of its patents and denied an injunction against respondent proceeding against petitioner in a

pending infringement suit in Illinois against petitioner's customer. 85 U. S. P. Q. 185. The Court of Appeals affirmed. 182 F. 2d 773. After petitioner had been joined as a defendant in the Illinois proceedings, the District Court in Delaware denied a stay of the declaratory judgment proceeding and enjoined respondent from proceeding against petitioner in the Illinois suit. 92 F. Supp. 943. The Court of Appeals reversed. 88 U. S. P. Q. 335. On rehearing, the Court of Appeals, sitting *en banc,* adhered to the reversal. 189 F. 2d 31. This Court granted certiorari. 342 U. S. 810. *Affirmed,* p. 186.

Walter J. Blenko argued the cause for petitioner. With him on the brief were *John F. C. Glenn* and *Aaron Finger.*

P. Morton Adams argued the cause for respondent. With him on the brief were *Arthur G. Connolly* and *Edward T. Connors.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The C-O-Two Fire Equipment Company, the respondent here, owns two patents, one issued on November 23, 1948, and the other reissued on August 23, 1949, for squeeze-grip valves and discharge heads for portable fire extinguishers. C-O-Two, incorporated in Delaware, has offices in Newark, New Jersey. On January 17, 1950, it commenced in the District Court for the Northern District of Illinois an action against the Acme Equipment Company for "making and causing to be made and selling and using" devices which were charged with infringing C-O-Two's patents.

On March 9, 1950, the petitioner Kerotest began in the District Court of Delaware this proceeding against C-O-Two for a declaration that the two patents sued on in the Illinois action are invalid and that the devices which Kerotest manufactures and supplies to Acme, the

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Illinois defendant, do not infringe the C-O-Two patents. Kerotest, a Pennsylvania corporation, has its offices in Pittsburgh, but was subject to service of process in Illinois. C-O-Two on March 22, 1950, filed an amendment to its complaint joining Kerotest as a defendant in the Illinois action.

In Delaware, C-O-Two moved for a stay of the declaratory judgment action and Kerotest sought to enjoin C-O-Two from prosecuting the Illinois suit "either as against Kerotest alone, or generally, as [the Delaware District Court might] deem just and proper." The District Court stayed the Delaware proceeding and refused to enjoin that in Illinois, subject to reexamination of the questions after 90 days. 85 U. S. P. Q. 185. On appeal by Kerotest, the Court of Appeals for the Third Circuit affirmed, holding that the District Court had not abused its discretion in staying the Delaware action for 90 days to permit it to get "more information concerning the controverted status of Kerotest in the Illinois suit." 182 F. 2d 773, 775.

During the 90-day period the Illinois District Court allowed the joinder of Kerotest as a defendant, denying a motion by Acme to stay the Illinois proceeding pending disposition of the Delaware suit, and Kerotest made a general appearance. After 90 days both parties renewed their motions in Delaware, with Kerotest this time asking that C-O-Two be enjoined from prosecuting the Illinois suit only as to Kerotest. The District Court, a different judge sitting, enjoined C-O-Two from proceeding in the Illinois suit against Kerotest, and denied the stay of the Delaware action, largely acting on the assumption that rulings by its own and other Courts of Appeals required such a result except in "exceptional cases," since the Delaware action between C-O-Two and Kerotest was commenced before Kerotest was made a defendant in the

Illinois suit. 92 F. Supp. 943. On appeal, the Court of Appeals for the Third Circuit reversed, saying in part:

> ". . . the whole of the war and all the parties to it are in the Chicago theatre and there only can it be fought to a finish as the litigations are now cast. On the other hand if the battle is waged in the Delaware arena there is a strong probability that the Chicago suit nonetheless would have to be proceeded with for Acme is not and cannot be made a party to the Delaware litigation. The Chicago suit when adjudicated will bind all the parties in both cases. Why should there be two litigations where one will suffice? We can find no adequate reason. We assume, of course, that there will be prompt action in the Chicago theatre." 88 U. S. P. Q. 335, 337.

A petition for rehearing was granted and the Court of Appeals, the seven circuit judges sitting *en banc,* in an expanded opinion from which two judges dissented, adhered to the views of the court of three judges. 189 F. 2d 31, 89 U. S. P. Q. 411. Inasmuch as a question of importance to the conduct of multiple litigation in the federal judicial system was involved, we granted certiorari. 342 U. S. 810.

The Federal Declaratory Judgments Act,[1] facilitating as it does the initiation of litigation by different parties to many-sided transactions, has created complicated problems for coordinate courts.[2] Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of

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[1] 48 Stat. 955, 28 U. S. C. §§ 2201–2202.

[2] See Developments in the Law—Declaratory Judgments, 1941–1949, 62 Harv. L. Rev. 787, 814–815, 866 (1949).

discretion, appropriate for disciplined and experienced judges, must be left to the lower courts. The conclusion which we are asked to upset derives from an extended and careful study of the circumstances of this litigation. Such an estimate has led the Court of Appeals twice to conclude that all interests will be best served by prosecution of the single suit in Illinois. Even if we had more doubts than we do about the analysis made by the Court of Appeals, we would not feel justified in displacing its judgment with ours.[3]

It was strongly pressed upon us that the result below may encourage owners of weak patents to avoid real

[3] Other cases in Courts of Appeals which present at all comparable situations do not show any rigid rule such as that under which the District Court felt constrained. In view of the basis of our decision it would not be profitable to discuss these cases in detail. It will suffice to indicate the concurrent controversies for which adjustment was sought. *Triangle Conduit & Cable Co.* v. *National Elec. Prod. Corp.*, 125 F. 2d 1008 (C. A. 3d Cir.) (suit 1—declaratory action by manufacturer against patentee; suit 2—patentee sues manufacturer and customer for infringement: suit 2 enjoined as to manufacturer); *Cresta Blanca Wine Co.* v. *Eastern Wine Corp.*, 143 F. 2d 1012 (C. A. 2d Cir.) (suit 1—declaratory action by manufacturer against trademark owner; suit 2—trademark owner sues manufacturer and distributor for infringement; thereafter, distributor seeks to intervene as plaintiff in suit 1: intervention denied and suit 2 enjoined as to manufacturer); *Speed Products Co.* v. *Tinnerman Products, Inc.*, 83 U. S. App. D. C. 243, 171 F. 2d 727 (suit 1—A sues Commissioner of Patents in District of Columbia for registration of trademark; suit 2—suit by A in N. Y. against B alone for registration of trademark and for declaration of noninfringement of B's mark; thereafter, B joins as defendant in suit 1 and files counterclaim for infringement of B's mark: suit 2 not enjoined and suit 1 not advanced for trial); *Hammett* v. *Warner Bros. Pictures, Inc.*, 176 F. 2d 145 (C. A. 2d Cir.) (suit 1—alleged copyright owner sues broadcaster for infringement; suit 2—declaratory action by writer for broadcaster against alleged copyright owner; thereafter, writer joined as defendant in suit 1: suit 2 dismissed); *Remington Prod. Corp.* v. *American Aerovap, Inc.*, 192 F. 2d 872 (C. A. 2d Cir.),

tests of their patents' validity by successive suits against customers in forums inconvenient for the manufacturers, or selected because of greater hospitality to patents. Such apprehension implies a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure. It reflects an attitude against which we were warned by Mr. Justice Holmes, speaking for the whole Court, likewise in regard to a question of procedure: "Universal distrust creates universal incompetence." *Graham* v. *United States,* 231 U. S. 474, 480. If in a rare instance a district judge abuses the discretionary authority the want of which precludes an effective, independent judiciary, there is always the opportunity for corrective review by a Court of Appeals and ultimately by this Court.

The manufacturer who is charged with infringing a patent cannot stretch the Federal Declaratory Judgments Act to give him a paramount right to choose the forum for trying out questions of infringement and validity. He is given an equal start in the race to the courthouse, not a headstart. If he is forehanded, subsequent suits against him by the patentee can within the trial court's discretion be enjoined pending determination of the declaratory judgment suit,[4] and a judgment in his favor bars

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December 4, 1951 (suit 1—manufacturer and customer A bring declaratory action against patentee; suit 2—patentee sues customers A, B, C, and D for infringement; thereafter, customer B joins as plaintiff in suit 1: suit 2 enjoined). By endorsing what was in effect an exercise of discretion by the Court of Appeals below upon consideration of the specific circumstances here, we neither approve nor throw doubt upon decisions by it or other Courts of Appeals.

[4] See, *e. g., Crosley Corp.* v. *Westinghouse Elec. & Mfg. Co.,* 130 F. 2d 474 (C. A. 3d Cir.); *Carbide & Carbon Chemicals Corp.* v. *United States Industrial Chemicals, Inc.,* 140 F. 2d 47 (C. A. 4th Cir.); *Independent Pneumatic Tool Co.* v. *Chicago Pneumatic Tool Co.,* 167 F. 2d 1002 (C. A. 7th Cir.).

suits against his customers.[5] If he is anticipated, the court's discretion is broad enough to protect him from harassment of his customers. If the patentee's suit against a customer is brought in a district where the manufacturer cannot be joined as a defendant, the manufacturer may be permitted simultaneously to prosecute a declaratory action against the patentee elsewhere. And if the manufacturer is joined as an unwilling defendant in a *forum non conveniens,* he has available upon an appropriate showing the relief provided by § 1404 (a) of the Judicial Code. 62 Stat. 869, 937, 28 U. S. C. § 1404 (a).[6]

The judgment below must be

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE BLACK dissent.

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[5] *Kessler* v. *Eldred,* 206 U. S. 285.

[6] It is suggested that Rule 15 (c) of the Federal Rules of Civil Procedure makes the joinder of Kerotest take the date, as it were, of the original action against Acme, which of course preceded the Delaware action. The equities of the situation do not depend on this argument.

DESPER, ADMINISTRATRIX, *v.* STARVED ROCK FERRY CO.

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

No. 231. Argued December 6, 1951.—Decided January 2, 1952.

1. The scope of the word "seaman," as used in the Jones Act, was not extended by the 1939 Amendment to the Federal Employers' Liability Act to include one who was not a "seaman" before. Pp. 189–190.
2. Whether an injured person was a "seaman" entitled to the benefits of the Jones Act depends largely on the facts of the particular case and the activity in which he was engaged at the time of injury. P. 190.
3. Decedent had been employed as an operator of one of a fleet of motorboats carrying sightseers on a river during the summer months only. His employment had terminated in December, after he had helped to lay the boats up for the winter. He was reemployed the next March and injured in April while helping to paint, clean and waterproof the boats, preparing them for navigation. At that time, none of the boats was afloat, none had a captain or crew, and the work being done was of the kind that, in the case of larger vessels, would customarily be done exclusively by shore-based personnel. *Held:* At the time of his injury, decedent was not a "seaman" within the purview of the Jones Act. Pp. 188–192.
4. The fact that decedent had been, or expected in the future to be, a seaman did not render maritime work which was not maritime in its nature. P. 191.

188 F. 2d 177, affirmed.

The District Court awarded petitioner a judgment under the Jones Act for the death of her son from injuries sustained in his employment by respondent. The Court of Appeals reversed. 188 F. 2d 177. This Court granted certiorari. 342 U. S. 847. *Affirmed,* p. 192.

Joseph D. Ryan argued the cause and filed a brief for petitioner.

Charles T. Shanner argued the cause for respondent. With him on the brief was *Charles Wolff.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

Petitioner brought suit under the Jones Act [1] to recover damages for the death of her intestate son from injuries sustained during the course of his employment by respondent. The Court of Appeals for the Seventh Circuit reversed the judgment of the District Court entered on a jury's verdict in petitioner's favor.[2] This Court granted certiorari.[3]

Respondent operates a small fleet of sightseeing motorboats on the Illinois River in the vicinity of Starved Rock. The boats are navigated under Coast Guard regulations by personnel licensed by the Department of Commerce. Operations are necessarily restricted to summer months. Each fall the boats are beached and put up on blocks for the winter. In the spring each is overhauled before being launched for the season. The decedent, Thomas J. Desper, Jr., was first employed by respondent in April, 1947, to help prepare the boats for their seasonal launching. In June of the same year he acquired the necessary operator's license from the Department of Commerce and, for the remainder of that season, he was employed as a boat operator. When the season closed, he helped take the boats out of the water and block them up for the winter. His employment terminated December 19, 1947.

Desper was re-employed March 15, 1948. There was testimony that he was then engaged for the season and was to resume his operator's duties when the boats were back in the water. For the time being, however, he was put to cleaning, painting, and waterproofing the boats, preparing them for navigation. On the date of the acci-

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[1] 38 Stat. 1185, 41 Stat. 1007, 46 U. S. C. § 688.

[2] 188 F. 2d 177.

[3] 342 U. S. 847.

dent, April 26th, the boats were still blocked up on land. Several men, Desper among them, were on board a moored barge, maintained by respondent as a machine shop, warehouse, waiting room and ticket office, engaged in painting life preservers for use on the boats. One man was working on a fire extinguisher. It exploded, killing him and Desper.

The Jones Act confers a cause of action on "any seaman." [4] In opposition to petitioner's suit under the Act, respondent contended that Desper, at the time of his death, was not a "seaman" within the meaning of the Act. Whether he was such a "seaman" is the critical issue in the case which reached this Court.

Petitioner contends that the 1939 Amendment to the Federal Employers' Liability Act [5] extended the scope of the word "seaman," as used in the Jones Act, to include those whose work "substantially affects" navigation. The Amendment provides that:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way

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[4] 38 Stat. 1185, 41 Stat. 1007, 46 U. S. C. § 688, entitled "Recovery for injury to or death of seaman" provides that:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

[5] 53 Stat. 1404, 45 U. S. C. § 51.

> directly or closely and substantially, affect such commerce as above set forth shall . . . be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Petitioner reads with that Amendment the provision of the Jones Act that statutes "modifying or extending the common-law right or remedy in cases of personal injury to railway employees" shall apply in a seaman's action. We agree with the court below that the Amendment has no effect on the "right or remedy" of railway employees but merely redefines for the purposes of the Federal Employers' Liability Act the scope of the word "employee" to include certain persons not theretofore covered, because they were not directly engaged in interstate or foreign commerce. It does not extend the meaning of "seaman" in the Jones Act to include one who was not a "seaman" before. Seamen were given the rights of railway employees by the Jones Act, but the definition of "seaman" was never made dependent on the meaning of "employee" as used in legislation applicable to railroads.

The next question is whether, without reference to this 1939 Amendment, decedent was a "seaman" at the time of his death. The many cases turning upon the question whether an individual was a "seaman" demonstrate that the matter depends largely on the facts of the particular case and the activity in which he was engaged at the time of injury. The facts in this case are unique. The work in which the decedent was engaged at the time of his death quite clearly was not that usually done by a "seaman." The boats were not afloat and had neither captain nor crew. They were undergoing seasonal repairs, the work being of the kind that, in the case of larger vessels, would customarily be done by exclusively shore-based personnel. For a number of reasons the ships might not be launched, or he might not operate one. To be sure,

he was a probable navigator in the near future, but the law does not cover probable or expectant seamen but seamen in being. It is our conclusion that while engaged in such seasonal repair work Desper was not a "seaman" within the purview of the Jones Act. The distinct nature of the work is emphasized by the fact that there was no vessel engaged in navigation at the time of the decedent's death. All had been "laid up for the winter." *Hawn* v. *American S. S. Co.*, 107 F. 2d 999, 1000 (C. A. 2d Cir.); cf. *Seneca Washed Gravel Corp.* v. *McManigal*, 65 F. 2d 779, 780 (C. A. 2d Cir.). In the words of the court in *Antus* v. *Interocean S. S. Co.*, 108 F. 2d 185, 187 (C. A. 6th Cir.), where it was held that one who had been a member of a ship's crew and was injured while preparing it for winter quarters could not maintain a Jones Act suit for his injuries: "The fact that he had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature."

Both petitioner and respondent filed applications with the Industrial Commission of Illinois seeking the benefits provided by the Workmen's Compensation Act of that State. The Commission rendered an award in petitioner's favor, but she states that she has taken an appeal to the appropriate state court on the ground that the Commission was "without jurisdiction." She does not specify why she thinks so, but we surmise that her reason is to avoid conflict with her contention that exclusive jurisdiction in the premises is vested in the federal courts by the Jones Act. We do not understand her to have taken the position that if the Jones Act is not applicable the Longshoremen's and Harbor Workers' Compensation Act [6] is, and that the state Commission, therefore, is without jurisdiction in any event. The question of the applicability of the Longshoremen's Act

[6] 44 Stat. 1424 as amended, 33 U. S. C. § 901 *et seq.*

does not appear from the record to have been raised by either party in the courts below.[7] Neither has raised it in this Court. We, therefore, find it inappropriate to resolve the conflict, if any, between the Illinois Compensation Act and the Longshoremen's and Harbor Workers' Compensation Act. Cf. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Parker* v. *Motor Boat Sales,* 314 U. S. 244; *Davis* v. *Department of Labor,* 317 U. S. 249.

We think the court below properly disposed of the question presented. Accordingly, its judgment is

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent, and would affirm the judgment of the District Court.

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[7] The Court of Appeals, however, in phrasing the question presented in the case, advanced the proposition that if petitioner was not entitled to recovery under the Jones Act she "is restricted to the remedy afforded by the Longshoremen's and Harbor Workers' Compensation Act . . . ." We take that as meaning that petitioner's only *federal* remedy, if she cannot prevail under the Jones Act, is in the Longshoremen's Act. It was not intended to decide whether she could proceed under the state compensation act.

UNITED STATES *v.* KELLY ET AL.

CERTIORARI TO THE COURT OF CLAIMS.

No. 209. Argued November 30, 1951.—Decided January 2, 1952.

Under the applicable wage agreement quoted in the opinion and the Joint Resolution of June 29, 1938, 5 U. S. C. § 86a, granting per diem employees of the Government gratuity pay for holidays on which they are prevented from working, per diem employees of the Government Printing Office who were required to work on holidays during World War II are entitled to aggregate pay therefor at the rate of 2½ times the regular rate. Pp. 193–196.

(a) Merely because the Resolution itself may not award gratuity pay for holidays worked is no ground for vitiating a wage agreement that does. Pp. 194–195.

(b) A different result is not required by the Presidential Directive of May 12, 1943, that, for the duration of the war, all holidays except Christmas should be considered regular workdays for government employees. Pp. 195–196.

119 Ct. Cl. 197, 96 F. Supp. 611, affirmed.

The Court of Claims awarded respondent a judgment for premium pay and gratuity pay for work performed by him on certain holidays during World War II. 119 Ct. Cl. 197, 96 F. Supp. 611. The Government sought review of that part of the judgment awarding gratuity pay, and this Court granted certiorari. 342 U. S. 808. *Affirmed*, p. 196.

Saul R. Gamer argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Herman Marcuse.*

Henry J. Fox argued the cause and filed a brief for respondents.

MR. JUSTICE MINTON delivered the opinion of the Court.

The Court of Claims awarded judgment to respondent, a per diem employee of the Government Printing Office,

for premium pay and gratuity pay for work performed by him on certain holidays during World War II. 119 Ct. Cl. 197, 96 F. Supp. 611. Thus, respondent was held entitled to the aggregate of:

1. His regular compensation for the days worked;
2. Fifty per cent of his regular compensation as premium pay;
3. A full day's compensation as gratuity pay.

The Government sought review of that part of the judgment which awarded gratuity pay to respondent and others like him,[1] and we granted certiorari, 342 U. S. 808.

Respondent's compensation was fixed by a wage agreement which provides in pertinent part:

> "*Holiday Rate.* Employees required to work on a legal holiday or a special holiday declared by Executive Order shall be paid at the day rate plus 50 per cent for all the time actually employed in addition to their gratuity pay for the holiday as provided by law . . . ."

By a 1938 Resolution, the applicable law during the period in question, Congress provided that whenever per diem employees were "relieved or prevented from working solely because of the occurrence of" holidays declared by statute or executive order, "they shall receive the same pay for such days as for other days on which an ordinary day's work is performed." [2] The question thus presented is whether the Resolution somehow precludes the awarding of the gratuity pay which the agreement seems to grant.

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[1] The parties have stipulated that the disposition of the claim of respondent Kelly will be determinative of claims filed by 613 other employees of the Printing Office.

[2] 52 Stat. 1246, 5 U. S. C. § 86a.

The 1938 Resolution amended the Act of 1895 [3] which had been consistently administered as providing for gratuity pay in addition to regular compensation if the employee worked on a holiday.[4] The Government contends that Congress intended to repeal the earlier statute in this respect, and that the Resolution provided gratuity pay only for holidays on which an employee is "relieved or prevented from working."

We think this argument misses the point. The 1938 Resolution established the holidays for which gratuity pay was to be allowed. It was silent on the subject of gratuity pay for holidays on which work was performed, and we may even assume that it did not provide gratuity pay for those days. But the wage agreement is not silent on the subject. It provides that when an employee works on a holiday he is to receive regular compensation, premium pay, and gratuity pay "for the holiday as provided by law." The holidays "as provided by law" are the days provided for in the 1938 Resolution. Nothing in the Resolution prohibits such a wage agreement, and, indeed, the Government concedes this fact. Merely because the Resolution itself may not award gratuity pay for holidays worked is no ground for vitiating a wage agreement which does.

The Government points to the 1943 Presidential Directive to federal agencies, under which all holidays except Christmas were to be considered as regular workdays for the duration of the war,[5] and urges that the Directive

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[3] 28 Stat. 601, 607, § 46.

[4] 8 Comp. Dec. 322 (1901); 13 Comp. Dec. 40 (1906); 3 Comp. Gen. 411 (1924).

[5] See Digest of Provisions of Law Fixing Pay for Employees in the Executive Branch of the Federal Government (U. S. Civil Service Commission, 1945), at p. 94, note 2; H. R. Rep. No. 514, 79th Cong., 1st Sess., Appendix, p. 94, note 2.

indicated a policy against the payment of gratuity pay for holidays worked. Clearly, the Presidential Directive was not intended to abrogate the wage agreement.

We need not stop to consider the anomalous results which would stem from the Government's position.[6] Since the agreement provided for gratuity pay for holidays worked, respondent was entitled to such pay. Accordingly, the judgment below is

Affirmed.

MR. JUSTICE REED, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK join, dissenting.

The 1938 Resolution refers only to holidays that "relieved or prevented" work. It requires a gratuity payment to them equal to the regular daily wage. Where work is done, as by these per diem employees, no gratuity is "provided by law." Under the wage agreement, however, an employee working should be paid time and a half for holiday work—a premium of fifty per cent more than the gratuity paid to an employee who does not work.

The Government concedes that the wage agreement entitles the employees to this premium pay for work on holidays. In our opinion respondents are not entitled to any gratuity pay, and this has been the consistent administrative interpretation of the Comptroller General. 18 Comp. Gen. 191. It is significant that the journeymen printers acquiesced in this interpretation for eight years after 1938.

We would reverse.

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[6] Thus, under the Government's view an employee who worked five hours on a holiday would receive his regular compensation plus premium pay, or seven and one-half hours' pay; if he stayed home all day, he would receive eight hours' pay.

PILLSBURY ET AL., DEPUTY COMMISSIONERS, *v.* UNITED ENGINEERING CO. ET AL.

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

No. 229. Argued December 6, 1951.—Decided January 2, 1952.

Under § 13 (a) of the Longshoremen's and Harbor Workers' Compensation Act, the one-year period of limitation on the filing of claims for compensation for disability begins to run on the date of the injury and not on some subsequent date when disability occurs. Pp. 197–200.

187 F. 2d 987, affirmed.

The District Court vacated certain awards of compensation under the Longshoremen's and Harbor Workers' Compensation Act. 92 F. Supp. 898. The Court of Appeals affirmed. 187 F. 2d 987. This Court granted certiorari. 342 U. S. 847. *Affirmed,* p. 200.

Samuel D. Slade argued the cause for petitioners. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Baldridge, Leavenworth Colby* and *Benjamin Forman.*

Edward R. Kay argued the cause for respondents. With him on the brief was *Lyman Henry.*

MR. JUSTICE MINTON delivered the opinion of the Court.

These four cases present the same question, namely, the construction and application of the statute of limitations provision of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, § 13 (a), 33 U. S. C. § 913 (a), which provides in pertinent part as follows:

> "The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury . . . ."

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The claims here involved were filed from eighteen to twenty-four months from the dates the employees were injured. The Deputy Commissioner held that the claims were nevertheless timely, since they had been filed within one year after the claimants had become *disabled* because of their injuries. The District Court vacated the awards, 92 F. Supp. 898, and the Court of Appeals affirmed on the ground that the claims were barred because not "filed within one year after the injury," 187 F. 2d 987, 990. We granted certiorari, 342 U. S. 847, because of a conflict between circuits,[1] identical to the present conflict between the holdings of the Deputy Commissioner and the Court of Appeals, as to the construction to be given the limitations provision. This same question was before us in 1940 in *Kobilkin* v. *Pillsbury,* 103 F. 2d 667, affirmed by an equally divided Court, 309 U. S. 619.

Petitioners contend that the word "injury" as used in the statute should be construed to mean "disability." This contention is premised on petitioners' conclusion that § 6 (a) of the Act, which provides that "No compensation shall be allowed for the first seven days of the disability," [2] ("disability" is elsewhere defined in the Act as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment") [3] and § 19 (a), which provides that "a claim . . . may be filed . . . at any time after the first seven days of disability following any injury," [4] operate to prevent the filing of a claim *before* seven days of disability have occurred. Since, as was

[1] The conflict is between the instant decision of the Court of Appeals for the Ninth Circuit and the decision of the Court of Appeals for the District of Columbia Circuit in *Great American Indemnity Co.* v. *Britton,* 86 U. S. App. D. C. 44, 179 F. 2d 60.

[2] 44 Stat. 1426, 33 U. S. C. § 906 (a).

[3] 44 Stat. 1425, 33 U. S. C. § 902 (10).

[4] 44 Stat. 1435, 33 U. S. C. § 919 (a).

the case of each of the claimants here, an injured employee may fail to accrue seven days' "disability" within a year after his injury, petitioners argue that such an employee will be barred from filing his claim before his right to file it arises, if "injury" is construed to mean "injury." Thus, petitioners conclude that the limitation should not be made to run until the injury becomes compensable, *i. e.*, after seven days' "disability."

But the right to recover for disability is one thing, and the right to file a claim is another. It has long been the practice of the Deputy Commissioner to permit filing to avoid the running of the one-year limitation period here involved. A proper interpretation of §§ 6 (a) and 19 (a) does not prohibit the filing of a claim before the accrual of seven days' disability. Each of the claimants here was immediately aware of his injury, received medical treatment, and suffered continuous pain. We are not here dealing with a latent injury or an occupational disease.

We are not free, under the guise of construction, to amend the statute by inserting therein before the word "injury" the word "compensable" so as to make "injury" read as if it were "disability." Congress knew the difference between "disability" and "injury" and used the words advisedly. This view is especially compelling when it is noted that the two words are used in the same sentence of the limitations provision; therein "disability" is related to the right to compensation, while "injury" is related to the period within which the claim must be filed. Furthermore, Congress defined both "disability" and "injury" in the Act,[5] and its awareness of the difference is

[5] "SEC. 2. When used in this Act—

. . . . . .

"(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally

apparent throughout. Thus, we think that when Congress used "disability" and "injury" in the same sentence, making each word applicable to a different thing, it did not intend the carefully distinguished and separately defined words to mean the same thing. Congress meant what it said when it limited recovery to one year from date of injury, and "injury" does not mean "disability."

We are aware that this is a humanitarian Act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all. Petitioners' construction would have the effect of extending the limitation indefinitely if a claim for disability had not been filed; the provision would then be one of extension rather than limitation. While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us.

The judgments are

Affirmed.

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

The Court's computation of the period allowed for filing claims under the Longshoremen's and Harbor Workers' Compensation Act is so opposed to the beneficial purpose of the Act that it is not justified in the absence of a more express basis for it. The purpose of the Act is to provide

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or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

. . . . . .

"(10) 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 44 Stat. 1424–1425, 33 U. S. C. § 902 (2), (10).

compensation for the disability or death of employees in certain maritime employments when caused by injuries arising out of and in the course of their employment. The Court now restricts the beneficial effect of the Act by its computation of the period allowed an employee for filing his claim under the Act. The Court computes it from the date of the employee's accident rather than from that of his right to compensation. One year after his accident the employee is thus barred from claiming compensation for any disability later resulting from it unless, within that year, he has filed a claim for compensation—although during the year he has suffered no disability and has acquired no right to compensation under the Act.

The Act does not call for or justify such a frustrating interpretation. Section 13 (a) does not say that an employee's claim must be filed within one year after the "accident." It says that his claim must be filed "within one year after the injury." 44 Stat. 1432, 33 U. S. C. § 913 (a). The Act deals only with disabling injuries and provides compensation only for the loss of earning power or death resulting from them. If it is recognized that the word "injury" in § 13 (a) means a disabling or compensable injury, a natural result flows from it. So interpreted, the section requires only that a claim for compensation must be filed within one year after a right to compensation first arises.

That the Act is concerned solely with compensation for disability or death appears on its face. Compensation is not payable to an employee merely because he has been in an accident in the course of his employment, nor even because he has suffered physical damage from that accident. The Act allows compensation only when the employee also has suffered a resulting loss of earning power.

The Act expressly limits "injuries" to those of a certain origin by stating that they must arise out of and in the

course of the employee's employment.[1] It allows compensation only for resulting disability or death.[2] It defines the required disability as a diminution of earning power.[3]

Section 13 (a), which limits the period for filing claims under the Act, has a reasonable effect if it is read as concerned only with compensable injuries.[4] On the other hand, to interpret § 13 (a) as cutting off the period for filing claims one year after the date of the accident is to

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[1] "SEC. 2. When used in this Act—

. . . . . .

"(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment." 44 Stat. 1424–1425, 33 U. S. C. § 902 (2).

[2] "SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. . . ." 44 Stat. 1426, 33 U. S. C. § 903 (a).

[3] "SEC. 2. When used in this Act—

. . . . . .

"(10) 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 44 Stat. 1424–1425, 33 U. S. C. § 902 (10).

[4] "SEC. 13. (a) The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. . . ." 44 Stat. 1432, 33 U. S. C. § 913 (a).

measure the period from a date bearing no certain relation to the time when a right to compensation arises. If an employee's injury causes him no diminution of earning power within one year after the accident, he is entitled to no compensation within that year. Yet, under the Court's interpretation of § 13 (a), he will be barred also from claiming compensation for subsequently resulting disabilities unless, within that first year following his accident, he has filed a claim for compensation. The instant cases show how readily such situations may arise.

The legislative history of § 13 (a) is consistent with the petitioners' interpretation.[5] Their interpretation also has had judicial support from the appellate courts of the District of Columbia Circuit and of the Third Circuit. See *Great American Indemnity Co.* v. *Britton,* 86 U. S. App. D. C. 44, 179 F. 2d 60; *Potomac Electric Power Co.* v. *Cardillo,* 71 App. D. C. 163, 107 F. 2d 962; *Di Giorgio Fruit Corp.* v. *Norton,* 93 F. 2d 119 (C. A. 3d Cir.).

Before the enactment of this Compensation Act by Congress, several states had interpreted "injury" in comparable provisions of their Compensation Acts to mean "compensable injury" rather than "accident." *Esposito* v. *Marlin-Rockwell Corp.,* 96 Conn. 414, 114 A. 92; *Guder-*

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[5] The provisions in the bill which became § 13 of the Compensation Act (S. 3170, 69th Cong., 1st Sess.; 67 Cong. Rec. 4119) were amended so as to reduce the time limit for filing claims from two years to one year and so as to substitute the word "injury" in place of the word "accident" as the starting point of the period. A like substitution of "injury" for "accident" was made in several other places and a provision for compensation for disability or death resulting from occupational disease was added. These changes emphasize the impropriety of now reading "injury" as meaning "accident." In the case of an occupational disease, it is especially restrictive of an employee's rights to limit his filing period to one year from some date of early contact constituting the "accident," rather than from the date of his first compensable diminution of earning power due to the disease.

ian v. *Sterling S. & R. Co.*, 151 La. 59, 91 So. 546; *Hustus' Case*, 123 Me. 428, 123 A. 514. Cf. *Hornbrook-Price Co.* v. *Stewart*, 66 Ind. App. 400, 118 N. E. 315; *In re McCaskey*, 65 Ind. App. 349, 117 N. E. 268. Contra: *Cooke* v. *Holland Furnace Co.*, 200 Mich. 192, 166 N. W. 1013.

To determine when the one-year period for filing claims begins it is necessary to determine the date when the employee's injury resulted in a diminution of his earning power. That date is not necessarily coincident with that of the first physical damage to the employee or the first reduction in the rate of wages actually paid him. In the instant cases the respective Deputy Commissioners expressly found that each claim was filed within one year after the employee's disability occurred, although none of the claims were filed within one year after the accident in question. These findings are supported by substantial evidence in the record taken as a whole. See *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504. Accordingly, I would hold each of the claims timely and would reverse the judgment of the Court of Appeals with directions to remand the cases to the District Court for dismissal of the several complaints.

UNITED STATES *v.* HAYMAN.

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

No. 23. Argued October 15, 1951.—Decided January 7, 1952.

Under 28 U. S. C. § 2255, which provides that a federal prisoner may move the sentencing court to vacate, set aside or correct any sentence subject to collateral attack, respondent, confined in a federal penitentiary in the State of Washington, filed in the Federal District Court in California a motion to vacate his sentence and grant a new trial. He alleged that at his trial he did not have the effective assistance of counsel guaranteed by the Sixth Amendment, because his counsel was also counsel for another person, who was the principal witness against respondent and was defendant in a related case. The District Court, without notice to respondent and without ordering the presence of respondent, found that the counsel's dual representation was with respondent's knowledge and consent, and denied respondent's motion. *Held:* The District Court erred in determining the factual issues raised by respondent's motion under § 2255 without notice to respondent and without his presence. Pp. 206–224.

1. A review of the history of § 2255 shows that it was passed at the instance of the Judicial Conference to meet practical problems that had arisen in administering the habeas corpus jurisdiction of the federal courts. Pp. 210–219.

2. Section 2255 was not intended to impinge upon prisoners' rights of collateral attack upon their convictions; its sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum. Pp. 214–219.

3. In making findings on controverted issues of fact relating to respondent's own knowledge without notice to respondent and without his being present, the District Court did not proceed in conformity with § 2255. Pp. 219–223.

(a) The crucial issue of fact presented by respondent's motion under § 2255 was whether his counsel represented the other person with respondent's knowledge and consent, and respondent's presence at a hearing on this issue is necessary if the pro-

cedure under § 2255 is to be adequate and effective in this case. Pp. 219–220.

(b) Issuance of an order to produce the prisoner is auxiliary to the jurisdiction of the trial court over respondent granted in § 2255 itself and invoked by respondent's filing of a motion under that section. *Ahrens* v. *Clark*, 335 U. S. 188, distinguished. Pp. 220–222.

(c) Where, as here, there are substantial issues of fact as to events in which the prisoner participated, the trial court should require his production for a hearing. Pp. 222–223.

4. The procedure prescribed by § 2255 will be adequate and effective if respondent is present for a hearing in the District Court on remand of this case; and, in the circumstances, this Court does not reach the constitutional questions presented. P. 223.

5. The Court of Appeals correctly reversed the order of the District Court, but should have remanded the case for a hearing under § 2255 instead of ordering that respondent's motion be dismissed. Pp. 223–224.

187 F. 2d 456, judgment vacated.

Respondent's motion under 28 U. S. C. § 2255, to vacate his sentence and grant a new trial, was denied by the District Court. The Court of Appeals reversed and ordered the motion dismissed. 187 F. 2d 456. This Court granted certiorari. 341 U. S. 930. *Vacated and remanded,* p. 224.

Robert L. Stern argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney* and *James L. Morrisson.*

Paul A. Freund, acting under appointment by the Court, argued the cause and filed a brief for respondent.

Mr. Chief Justice Vinson delivered the opinion of the Court.

In its 1948 revision of the Judicial Code, Congress provided that prisoners in custody under sentence of a fed-

eral court may move the sentencing court to vacate, set aside or correct any sentence subject to collateral attack. 28 U. S. C. (Supp. IV) § 2255.[1]

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[1] "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

Respondent, confined at the McNeil Island penitentiary in the Western District of Washington,[2] invoked this new procedure by filing a motion to vacate his sentence and grant a new trial in the District Court for the Southern District of California. That court had imposed a sentence of twenty years' imprisonment in 1947 for forging Government checks and related violations of federal law.[3]

In his motion, respondent alleged that he did not enjoy the effective assistance of counsel guaranteed defendants in federal courts by the Sixth Amendment. Specifically, he alleged that one Juanita Jackson, a principal witness against respondent at his trial and a defendant in a related case, was represented by the same lawyer as respondent. Respondent claims that he was not told of the dual representation and that he had no way of discovering the conflict until after the trial was over. It appeared from court records that Juanita Jackson testified against respondent after entering a plea of guilty but before sentence. Since a conflict in the interests of his attorney might have prejudiced respondent under these circumstances, the sentencing court and the court below, one judge dissenting, found that the allegations of respondent's motion warranted a hearing. Respondent's motion requested the issuance of an order to secure his presence at such a hearing.

For three days, the District Court received testimony in connection with the issues of fact raised by the motion. This proceeding was conducted without notice to respondent and without ordering the presence of respondent. On the basis of this *ex parte* investigation, the District Court found as a fact that respondent's counsel had also

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[2] Respondent is now confined at Alcatraz in the Northern District of California.

[3] The judgment of conviction was affirmed by the Court of Appeals for the Ninth Circuit. 163 F. 2d 1018 (1947).

represented Juanita Jackson but that he "did so only with the knowledge and consent, and at the instance and request of [respondent]." Pursuant to this finding, the District Court entered an order denying respondent's motion to vacate his sentence and to grant a new trial.

On appeal to the Court of Appeals for the Ninth Circuit,[4] the majority, acting *sua sponte,* raised questions as to the adequacy and constitutionality of Section 2255. The court addressed itself to the provision that an application for a writ of habeas corpus "shall not be entertained" where the sentencing court has denied relief "unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." Considering that the proceedings in the District Court were proper under the terms of Section 2255, the court below held, one judge dissenting, that the Section 2255 procedure could not be adequate or effective in this case and, in the alternative, that the Section, in precluding resort to habeas corpus, amounted to an unconstitutional "suspension" of the writ of habeas corpus as to respondent.[5]

On rehearing below, and again in this Court, the Government conceded that respondent's motion raised factual issues which required respondent's presence at a hearing. The Court of Appeals, however, refused either to affirm the denial of respondent's motion or to accept the Government's concession and remand the case for a hearing with respondent present. Instead, it treated Section 2255 as a nullity and ordered respondent's motion dis-

[4] The appeal was timely. Appeals from orders denying motions under Section 2255 are governed by the civil rules applicable to appeals from final judgments in habeas corpus actions. See *Mercado* v. *United States,* 183 F. 2d 486 (C. A. 1st Cir. 1950).

[5] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U. S. Const., Art. I, § 9, cl. 2.

missed so that respondent might proceed by habeas corpus in the district of his confinement. 187 F. 2d 456.

We granted certiorari in this case, 341 U. S. 930 (1951), to review the decision that Section 2255 must be considered a nullity, a holding that stands in conflict with cases decided in other circuits.[6] We do not reconsider the concurrent findings of both courts below that respondent's motion states grounds to support a collateral attack on his sentence and raises substantial issues of fact calling for an inquiry into their verity.

First. The need for Section 2255 is best revealed by a review of the practical problems that had arisen in the administration of the federal courts' habeas corpus jurisdiction.

Power to issue the writ of habeas corpus, "the most celebrated writ in the English law," [7] was granted to the federal courts in the Judiciary Act of 1789, 1 Stat. 73, 81–82. Since Congress had not defined the term "habeas corpus," resort to the common law was necessary.[8] Al-

[6] *Martin* v. *Hiatt*, 174 F. 2d 350 (C. A. 5th Cir. 1949), and *Barrett* v. *Hunter*, 180 F. 2d 510 (C. A. 10th Cir. 1950), have held expressly that Section 2255 is constitutional. Habeas corpus was also denied on the basis of Section 2255 in the following cases in other circuits without any suggestion that the Section was invalid: *Smith* v. *Reid*, 89 U. S. App. D. C. —, 191 F. 2d 491 (C. A. D. C. Cir. 1951); *Meyers* v. *Welch*, 179 F. 2d 707 (C. A. 4th Cir. 1950); *Weber* v. *Steele*, 185 F. 2d 799 (C. A. 8th Cir. 1950). And in the following cases, other circuits remanded Section 2255 proceedings for hearing without suggesting that the Section was unconstitutional or inadequate: *United States* v. *Paglia*, 190 F. 2d 445 (C. A. 2d Cir. 1951); *Howard* v. *United States*, 186 F. 2d 778 (C. A. 6th Cir. 1951); *United States* v. *Von Willer*, 181 F. 2d 774 (C. A. 7th Cir. 1950).

[7] 3 Blackstone's Commentaries 129. The ancient origins of habeas corpus are traced in 9 Holdsworth, History of English Law (1926), 108–125; Jenks, The Story of Habeas Corpus, 18 L. Q. Rev. 64 (1902); Longsdorf, Habeas Corpus: A Protean Writ and Remedy, 8 F. R. D. 179 (1948).

[8] *Ex parte Bollman*, 4 Cranch 75, 93–94 (1807).

though the objective of the Great Writ long has been the liberation of those unlawfully imprisoned, at common law a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that confinement was legal. Such a judgment prevented issuance of the writ without more.[9]

In 1867, Congress changed the common-law rule by extending the writ of habeas corpus to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States," and providing for inquiry into the facts of detention. 14 Stat. 385. In commenting on the 1867 Act this Court has said:

> "The effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the act of 31 Car. II, c. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'
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> . . . . .
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> ". . . a prisoner in custody pursuant to the final judgment of a . . . court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the . . . court to proceed to judgment against him. . . ." [10]

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[9] *Ex parte Watkins,* 3 Pet. 193 (1830).

[10] *Johnson* v. *Zerbst,* 304 U. S. 458, 466 (1938) (federal prisoner); *Frank* v. *Mangum,* 237 U. S. 309, 330–331 (1915) (state prisoner).

Under the 1867 Act,[11] United States District Courts have jurisdiction to determine whether a prisoner has been deprived of liberty in violation of constitutional rights, although the proceedings resulting in incarceration may be unassailable on the face of the record. Under that Act, a variety of allegations have been held to permit challenge of convictions on facts *dehors* the record.[12]

One aftermath of these developments in the law has been a great increase in the number of applications for habeas corpus filed in the federal courts by state and federal prisoners. The annual volume of applications had nearly tripled in the years preceding enactment of Section 2255.[13] In addition to the problems raised by a large volume of applications for habeas corpus that are repetitious[14] and patently frivolous, serious administrative problems developed in the consideration of applications which appear meritorious on their face. Often, such ap-

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[11] Now incorporated in 28 U. S. C. (Supp. IV) § 2241 *et seq.*

[12] *Moore* v. *Dempsey,* 261 U. S. 86 (1923) (mob domination of trial); *Mooney* v. *Holohan,* 294 U. S. 103 (1935) (knowing use of perjured testimony by prosecution); *Johnson* v. *Zerbst,* 304 U. S. 458 (1938) (no intelligent waiver of counsel in federal court); *Waley* v. *Johnston,* 316 U. S. 101 (1942) (coerced plea of guilty); *United States ex rel. McCann* v. *Adams,* 320 U. S. 220 (1943) (no intelligent waiver of jury trial in federal court); *House* v. *Mayo,* 324 U. S. 42 (1945) (denial of right to consult with counsel).

[13] During 1936 and 1937, an annual average of 310 applications for habeas corpus were filed in the District Courts and an annual average of 22 prisoners were released. By 1943, 1944 and 1945, however, the annual average of filings reached 845, although an average of only 26 prisoners were released per year. Figures from tables submitted to the Chairmen of the House and Senate Judiciary Committees. See pp. 215–216, *infra.*

These figures do not include the District Court for the District of Columbia where a similar increase in the volume of applications for habeas corpus had been reported. See *Dorsey* v. *Gill,* 80 U. S. App. D. C. 9, 14, 148 F. 2d 857, 862 (C. A. D. C. Cir. 1945).

[14] In several districts, up to 40% of all applications for habeas corpus filed during the years 1943, 1944 and 1945 were so-called

plications are found to be wholly lacking in merit when compared with the records of the sentencing court. But, since a habeas corpus action must be brought in the district of confinement,[15] those records are not readily available to the habeas corpus court.

Walker v. *Johnston,* 312 U. S. 275 (1941), illustrates a further practical problem presented when an application for habeas corpus alleges a meritorious claim not controverted by the records of the trial court. In the Northern District of California, Walker alleged that he had been denied counsel and coerced into pleading guilty by the United States Attorney, his assistant and a deputy marshal in the Northern District of Texas. The District Court for the Northern District of California refused to grant the writ after receiving *ex parte* affidavits from the federal officers denying the allegations. This Court reversed, finding that Walker's application raised material issues of fact and holding that the District Court must determine such issues by the taking of evidence, not by *ex parte* affidavits.[16] Granting the need for such a hearing to resolve the factual issues, the required hearing had to be held in the habeas corpus court in California although the federal officers involved were stationed in Texas and the facts occurred in Texas.[17]

These practical problems have been greatly aggravated by the fact that the few District Courts in whose territorial jurisdiction major federal penal institutions are lo-

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repeater petitions. Speck, Statistics on Federal Habeas Corpus, 10 Ohio St. L. J. 337, 352 (1949). See also *Price* v. *Johnston,* 334 U. S. 266 (1948); *Dorsey* v. *Gill,* note 13, *supra;* Goodman, Use and Abuse of the Writ of Habeas Corpus, 7 F. R. D. 313 (1947).

[15] *Ahrens* v. *Clark,* 335 U. S. 188 (1948).

[16] Nor can the factual issues be heard before a commissioner. *Holiday* v. *Johnston,* 313 U. S. 342 (1941).

[17] It was to meet this problem that the Advisory Committee on the Federal Rules of Criminal Procedure proposed that a motion for new trial on the ground that a defendant has been deprived of a

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cated were required to handle an inordinate number of habeas corpus actions far from the scene of the facts, the homes of the witnesses and the records of the sentencing court solely because of the fortuitous concentration of federal prisoners within the district.[18]

Second. The Judicial Conference of the United States,[19] addressing itself to the problems raised by the increased habeas corpus business in 1942, created a committee of federal judges "to study the entire subject of procedure on applications for habeas corpus in the federal courts." [20] At the next session of the Conference, the Committee on Habeas Corpus Procedure submitted its report. After extensive consideration, the Judicial Conference recom-

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constitutional right might be made at any time after judgment. Report of the Advisory Committee (1944) Rule 35. This proposal was not included in the Rules as finally promulgated. See Dession, The New Federal Rules of Criminal Procedure: II, 56 Yale L. J. 197, 233 (1947).

[18] Of all habeas corpus applications filed by federal prisoners, 63% were filed in but five of the eighty-four District Courts. And, although habeas corpus trials average only 3% of all trials in all districts, the proportion of habeas corpus trials in those five districts has run from 20% to as high as 65% of all trials conducted in the district.

The basic data, compiled by Speck, note 14, *supra*, covers the six years immediately preceding enactment of Section 2255 in 1948. Again, the figures do not include the District Court for the District of Columbia. The five districts are: Northern California (Alcatraz); Northern Georgia (Atlanta); Kansas (Leavenworth); Western Washington (McNeil Is.); and Western Missouri (Springfield Medical Center).

[19] The Judicial Conference of the United States, established by Congress in 1922, 42 Stat. 838, is a conference of the chief judges of the judicial circuits and The Chief Justice of the United States. It is the function of the Judicial Conference to make a comprehensive survey of the condition of business in the courts of the United States. Its proceedings, together with its recommendations for legislation, are submitted to Congress. 28 U. S. C. (Supp. IV) § 331.

[20] Report of the Judicial Conference (1942) 18.

mended adoption of two proposed bills, a "procedural bill" containing provisions designed to prevent abuse of the habeas corpus writ and a "jurisdictional bill," Section 2 of which established a procedure whereby a federal prisoner might collaterally attack his conviction in the sentencing court.[21] The Judicial Conference repeatedly reaffirmed its approval of this forerunner of Section 2255.[22]

In 1944, the two bills approved by the Judicial Conference were submitted to the Congress on behalf of the Conference. In the letter of transmittal and accompanying memorandum, Section 2 of the "jurisdictional bill" was described as requiring prisoners convicted in federal courts to apply by motion in the sentencing court "instead of making application for habeas corpus in the district in which they are confined." [23] At the request of the Chairmen of the House and Senate Judiciary Committees, a "Statement" describing the necessity and purposes of the bills was submitted to Congress on behalf of the Judicial

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[21] Report of the Judicial Conference (1943) 22–24.

[22] Report of the Judicial Conference (1944) 22; *id.* (1945) 18.

[23] Letter of transmittal, dated March 2, 1944. The complete description of Section 2 of the jurisdictional bill in the memorandum is as follows:

"Section two of the jurisdictional bill refers to prisoners who have been convicted in a federal court, and requires them, instead of making application for habeas corpus in the district in which they are confined, to apply by motion to the trial court to vacate or set aside the judgment. That court is then required to grant a prompt hearing and render its decision on the motion, from which an appeal lies to the circuit court of appeals. If it appears that it is not practicable for the prisoner to have his motion determined in the trial court because of his inability to be present at the hearing, 'or for other reasons,' then he has the right to make application to the court in the district where he is confined. Such an instance might occur where a dangerous prisoner, who had been convicted in the Southern District of New York, was confined in Alcatraz Penitentiary. The bill expressly provides that no circuit or district judge of the United States shall entertain an application for a writ in behalf of any prisoner

Conference Committee on Habeas Corpus Procedure. In this Statement, Congress was furnished statistics showing in detail the increased volume of applications for habeas corpus.[24] The Statement, stressing the practical difficulties encountered in hearings held in the district of confinement rather than the district of sentence, described Section 2 of the "jurisdictional bill" as follows:

> "This section applies only to Federal sentences. It creates a statutory remedy consisting of a motion before the court where the movant has been convicted. The remedy is in the nature of, but much

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unless it appears that his right to discharge cannot be determined by motion made in the trial court."

As submitted to Congress, Section 2 of the jurisdictional bill provided:

"No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other reasons. Where the prisoner has sought relief on such a motion, if the circuit or district judge concludes that it has not been practicable to determine the prisoner's rights on such motion, the findings, order, or judgment on the motion shall not be asserted as a defense to the prisoner's application for relief on habeas corpus."

H. R. 4232 and S. 1452, 79th Cong., 1st Sess. (procedural bill); H. R. 4233 and S. 1451, 79th Cong., 1st Sess. (jurisdictional bill) were introduced in 1945, but no action was taken by Congress.

H. R. 6723, 79th Cong., 2d Sess., introduced as a substitute for the jurisdictional bill, would have placed a time limit within which motion to vacate sentences could be filed by federal prisoners. The substitute bill was considered by the Judicial Conference, and ordered circulated among the federal judges. Report of the Judicial Conference (1946) 21. No action was taken by Congress on this substitute bill.

[24] This statistical data is summarized in note 13, *supra*.

broader than, *coram nobis*. The motion remedy broadly covers all situations where the sentence is 'open to collateral attack.' As a remedy, it is intended to be as broad as habeas corpus." [25]

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[25] The Statement, prepared by Circuit Judge Stone and approved by Chief Justice Stone, described the practical considerations as follows:

"Most habeas corpus cases raise fact issues involving the trial occurrences or the alleged actions of judges, United States attorneys, marshals or other court officials. Obviously, it involves interruption of judicial duties if the trial judge, the United States attorney, the court clerk or the marshal (one or all of them) are required to attend the habeas corpus hearing as witnesses. Such attendance is sometimes necessary to refute particular testimony which the prisoner may give and, obviously, such attendance is the safest course. This is so because experience has demonstrated that often petitioner will testify to anything he may think useful, however false; and, without the witnesses present to refute such, he is encouraged to do so and may make out a case for discharge from merited punishment. Some realization of the possible extent of this burden on Court officials may be gained from the bare statement that, while convictions occur in all of the Districts throughout the country, federal prisoners are confined in a very small number of penal institutions; and habeas corpus must now be brought in the District where the petitioner is confined. Even if the testimony of these officials is taken by deposition, the interference and interruption is merely lessened in degree and the above danger is risked.

"The main disadvantages of the motion remedy are as follows: The risk during or the expense of transporting the prisoner to the District where he was convicted; and the incentive to file baseless motions in order to have a 'joy ride' away from the prison at Government expense.

"Balancing these, as well as less important, considerations, the Conference is of opinion that the advantages outweigh and that the motion remedy is preferable. As to the risk (escape or delivery) while transporting the prisoner to the District of conviction, the difference is only one of degree—of distance and, therefore, of opportunity. As to the expense, it is highly probable that it would be more expensive for the Government witnesses to go from the District where sentence was imposed and return than for the prisoner

While the bills proposed by the Judicial Conference were pending, the Committee on Revision of the Laws of the House of Representatives had drafted a bill revising the entire Judicial Code. Portions of this bill dealing with habeas corpus were drafted to conform with the bills approved by the Judicial Conference,[26] including Section 2255, modeled after Section 2 of the "jurisdictional bill" approved by the Judicial Conference. According to the Reviser's Note on Section 2255:

> "This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis. It provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus. It has the approval of the Judicial Conference of the United States. Its principal provisions are incorporated in H. R. 4233, Seventy-ninth Congress [the so-called jurisdictional bill]." [27]

After the House of Representatives had passed the bill revising the Judicial Code, the Judicial Conference reconsidered the two bills drafted by its Committee on Habeas Corpus Procedure. The Conference noted the importance of securing legislation along the lines of its proposals, approved the habeas corpus chapter of the Judicial Code revision bill with two amendments not affecting Section 2255 and directed that Congress be informed of

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to be brought to such District and returned. As to the incentive to file petitions, the difference is between a longer and a shorter trip to the Court. It is thought that the provision in Section 2 providing for habeas corpus (in the District of confinement) where it is not 'practicable to determine his rights . . . on such a motion' will furnish a sufficient discretion in the judge or court before whom habeas corpus is filed to evaluate and defeat the above 'disadvantages' to a large degree." P. 8.

[26] H. R. Rep. No. 2646, 79th Cong., 2d Sess. (1946) 7.

[27] H. R. Rep. No. 2646, 79th Cong., 2d Sess. (1946) A172; H. R. Rep. No. 308, 80th Cong., 1st Sess. (1947) A180.

the interest of the Conference in the enactment of the habeas corpus provisions of the revised Judicial Code.[28]

This review of the history of Section 2255 shows that it was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.[29]

Third. The crucial issue of fact presented by respondent's motion under Section 2255 was whether his attorney appeared as counsel for Juanita Jackson "with the knowledge and consent" of respondent. The Court of Appeals found, and the Government now agrees, that respondent's presence at a hearing on this issue is required if the Section 2255 procedure is to be adequate and effective in this case. In holding that Section 2255 should be treated as a nullity in this case, the court below found that the Section contemplated and permitted the *ex parte* investigation conducted by the District Court without notice to respondent and without respondent's presence.

We do not find in Section 2255 the disturbing inadequacies found by the court below. The issues raised by respondent's motion were not determined by the "files and records" in the trial court. In such circumstances, Section 2255 requires that the trial court act on the motion as follows: ". . . cause notice thereof to be served upon the United States attorney, *grant a prompt hearing*

[28] Report of the Judicial Conference (1947) 17–18. See S. Rep. No. 1559, 80th Cong., 2d Sess. (1948) 8–10.

[29] Parker, Limiting the Abuse of Habeas Corpus, 8 F. R. D. 171, 175 (1948). Judge Parker served as Chairman of the Judicial Conference Committee on Habeas Corpus Procedure.

thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." (Emphasis supplied.) In requiring a "hearing," the Section "has obvious reference to the tradition of judicial proceedings." [30] Respondent, denied an opportunity to be heard, "has lost something indispensable, however convincing the *ex parte* showing." [31] We conclude that the District Court did not proceed in conformity with Section 2255 when it made findings on controverted issues of fact relating to respondent's own knowledge without notice to respondent and without his being present.

The court below also held that the sentencing court could not hold the required hearing because it was without power to order the presence of a prisoner confined in another district. This want of power was thought to follow from our decision in *Ahrens* v. *Clark,* 335 U. S. 188 (1948), where we held that the phrase "within their respective jurisdictions" in the habeas corpus statute [32] required the presence of the prisoner within the territorial jurisdiction of the District Court as a prerequisite to his filing an application for habeas corpus. This is not a habeas corpus proceeding. The sentencing court in the Southern District of California would not be issuing an original writ of habeas corpus to secure respondent's presence from another district. Issuance of an order to produce the prisoner is auxiliary to the jurisdiction of the trial court over respondent granted in Section 2255 itself and invoked by respondent's filing of a motion under that Section.

The very purpose of Section 2255 is to hold any required hearing in the sentencing court because of the inconvenience of transporting court officials and other nec-

[30] See *Morgan* v. *United States,* 298 U. S. 468, 480 (1936).

[31] *Snyder* v. *Massachusetts,* 291 U. S. 97, 116 (1934).

[32] 28 U. S. C. § 452 (now 28 U. S. C. (Supp. IV) § 2241).

essary witnesses to the district of confinement. The District Court is not impotent to accomplish this purpose, at least so long as it may invoke the statutory authority of federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." [33] An order to secure respondent's presence in the sentencing court to testify or otherwise prosecute his motion is "necessary or appropriate" [34] to the exercise of its jurisdiction under Section 2255 and finds ample precedent in the common law.[35] The express language of Section 2255 that a "court may entertain and determine such motion without requiring the production of the prisoner at the hearing" negatives any purpose to leave the sentencing court powerless to require production of the prisoner in an appropriate case.[36] Other federal courts conducting Section 2255

[33] 28 U. S. C. (Supp. IV) § 1651 (a).

[34] See *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 272–273 (1942).

[35] In determining what auxiliary writs are "agreeable to the usages and principles of law," we look first to the common law. See *Price* v. *Johnston,* 334 U. S. 266, 281 (1948). In addition to "the great and efficacious writ," *habeas corpus ad subjiciendum,* other varieties of the writ were known to the common law. Blackstone described the writs of habeas corpus "*ad prosequendum, testificandum, deliberandum,* etc.; which issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed." 3 Blackstone's Commentaries 129–130. See *Ex parte Bollman,* 4 Cranch 75, 97–98 (1807).

[36] It is argued that the reference to the common law writ of error *coram nobis* in the Reviser's Note on Section 2255 shows an intention to adopt an *ex parte* investigation in lieu of a hearing in the usual sense. Congress did not adopt the *coram nobis* procedure as it existed at common law, the Reviser's Note merely stating that the Section 2255 motion was "in the nature of" the *coram nobis* writ in the sense that a Section 2255 proceeding, like *coram nobis,* is an independent action brought in the court that entered judgment. Note

proceedings have not encountered difficulties in securing the presence of prisoners confined outside the district.[37]

The existence of power to produce the prisoner does not, of course, mean that he should be automatically produced in every Section 2255 proceeding. This is in accord with procedure in habeas corpus actions.[38] Unlike the criminal trial where the guilt of the defendant is in issue and his presence is required by the Sixth Amendment, a proceeding under Section 2255 is an independent and collateral inquiry into the validity of the conviction.

27, *supra*. Further, it by no means follows that an issue of fact could be determined in a *coram nobis* proceeding without the presence of the prisoner, the New York Court of Appeals recently holding that his presence was required under the common law. *People* v. *Richetti*, 302 N. Y. 290, 297–298, 97 N. E. 2d 908, 911–912 (1951).

[37] Among the reported cases are: *United States* v. *Parker*, 91 F. Supp. 996 (M. D. N. C. 1950), aff'd, 184 F. 2d 488 (C. A. 4th Cir. 1950); *Jones* v. *United States*, 179 F. 2d 303 (C. A. 4th Cir. 1950); *Sturgeon* v. *United States*, 187 F. 2d 9 (C. A. 5th Cir. 1951); *Foster* v. *United States*, 184 F. 2d 571 (C. A. 5th Cir. 1950); *Woolard* v. *United States*, 83 F. Supp. 521 (N. D. Ala. 1949), aff'd, 178 F. 2d 84 (C. A. 5th Cir. 1949); *United States* v. *Jones*, 177 F. 2d 476 (C. A. 7th Cir. 1949); *Cherrie* v. *United States*, 179 F. 2d 94 (C. A. 10th Cir. 1949) (rev'd for hearing), 90 F. Supp. 261 (D. Wyo. 1950), aff'd, 184 F. 2d 384 (C. A. 10th Cir. 1950); *Hurst* v. *United States*, 180 F. 2d 835 (C. A. 10th Cir. 1950); *Moss* v. *United States*, 177 F. 2d 438 (C. A. 10th Cir. 1949); *Doll* v. *United States*, 175 F. 2d 884 (C. A. 10th Cir. 1949); *Payne* v. *United States*, 85 F. Supp. 404 (M. D. Pa. 1949); *United States* v. *Bowen*, 94 F. Supp. 1006 (N. D. Ga. 1951); *United States* v. *Kratz*, 97 F. Supp. 999 (D. Nebr. 1951).

The Court of Appeals for the Second Circuit has ordered in a Section 2255 proceeding that a "hearing" be held in open court with the prisoner present and free to testify. *United States* v. *Paglia*, 190 F. 2d 445, 448 (1951).

[38] *Walker* v. *Johnston*, *supra*, at 284. According to the Reviser's Note, 28 U. S. C. (Supp. IV) § 2243, governing the requirements for presence of a prisoner in habeas corpus actions, was drafted to conform with the practice described in the *Walker* case.

Whether the prisoner should be produced depends upon the issues raised by the particular case. Where, as here, there are substantial issues of fact as to events in which the prisoner participated, the trial court should require his production for a hearing.[39]

Fourth. Nothing has been shown to warrant our holding at this stage of the proceeding that the Section 2255 procedure will be "inadequate or ineffective" if respondent is present for a hearing in the District Court on remand of this case. In a case where the Section 2255 procedure is shown to be "inadequate or ineffective," the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing.[40] Under such circumstances, we do not reach constitutional questions. This Court will not pass upon the constitutionality of an act of Congress where the question is properly presented unless such adjudication is unavoidable,[41] much less anticipate constitutional questions.[42]

We conclude that the District Court erred in determining the factual issues raised by respondent's motion under Section 2255 without notice to respondent and without his presence. We hold that the required hearing can be afforded respondent under the procedure established in Section 2255. The Court of Appeals correctly reversed

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[39] See *Barrett* v. *Hunter,* 180 F. 2d 510, 514 (C. A. 10th Cir. 1950).

[40] If Section 2255 had not expressly required that the extraordinary remedy of habeas corpus be withheld pending resort to established procedures providing the same relief, the same result would have followed under our decisions. *Stack* v. *Boyle,* 342 U. S. 1, 6–7 (1951); *Johnson* v. *Hoy,* 227 U. S. 245 (1913); *Ex parte Royall,* 117 U. S. 241 (1886).

[41] *Alma Motor Co.* v. *Timken-Detroit Axle Co.,* 329 U. S. 129 (1946); *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 347 (1936) (Brandeis, J., concurring).

[42] *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 568–569 (1947); *Ashwander* v. *Tennessee Valley Authority,* note 41, *supra,* at 346–347, and cases cited therein.

the order of the District Court but should have remanded the case for a hearing under Section 2255 instead of ordering that respondent's motion be dismissed. Accordingly, we vacate the judgment of the Court of Appeals and remand the case to the District Court for further proceedings in conformity with this opinion.

Vacated and remanded.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur in the result.

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

UNITED STATES *v.* SMITH.

NO. 20. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS.*

Argued December 4, 1951.—Decided January 7, 1952.

The Wartime Suspension of Limitations Act of 1942, as amended, which provided that the "running" of the statute of limitations on frauds against the United States "shall be suspended until three years after the termination of hostilities," is inapplicable to crimes committed after December 31, 1946, when hostilities were declared terminated by Presidential Proclamation. Pp. 225–230. Affirmed.

In each of these cases, an indictment of the appellee was dismissed by the District Court as barred by limitations. On direct appeals by the United States to this Court, *affirmed*, p. 230.

Robert S. Erdahl argued the cause for the United States. With him on the briefs were *Solicitor General Perlman* and *Assistant Attorney General McInerney*. Also with them were *John R. Benney* on a brief in both cases and *John R. Wilkins* on a brief in No. 162.

Bernard Margolius, acting under appointment by the Court, argued the cause and filed a brief for appellee in No. 162.

No appearance for appellee in No. 20.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellee Smith (No. 20) was indicted October 2, 1950, for having on or about July 1, 1947, forged the name of the payee on a check drawn on the Treasurer of the United States.

*Together with No. 162, *United States* v. *Dailey*, on appeal from the United States District Court for the District of Colorado.

Appellee Dailey (No. 162) was indicted September 29, 1950, for having on or about March 14, 1947, knowingly made a false statement in connection with his application for Farmers Home Administration services.

In each case the crime charged was committed more than three years before the indictment was returned and therefore would be barred by the three-year statute of limitations (18 U. S. C. § 3282), unless that statute has been tolled. The prosecution argued that it was tolled by the Wartime Suspension of Limitations Act of 1942, as amended, 18 U. S. C. (1946 ed.) § 590a. The District Court in each case disagreed with the prosecution and dismissed the indictment. The cases are here on appeal. 18 U. S. C. § 3731.

The Act derives from the Act of August 24, 1942, which suspended the running of the statute of limitations applicable to offenses involving frauds against the United States until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. 56 Stat. 747. That Act was amended by the Contract Settlement Act of 1944, 58 Stat. 649, 667, to provide among other things that the term of suspension of the statute of limitations was "until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress." Offenses in connection with the negotiation, award, termination, or settlement of contracts were included by that Act. And offenses in connection with the care, handling, and disposal of property were added by the Surplus Property Act of 1944. 58 Stat. 765, 781. At the time of the alleged offenses the Act read in relevant part: [1]

> "The running of any existing statute of limitations applicable to any offense against the laws of the

[1] The Act of June 25, 1948, 62 Stat. 683, which revised the Criminal Code, repealed the Suspension Act (*id.*, 862, 868) and, with a

> United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, . . . shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress."

The hostilities of World War II were declared terminated December 31, 1946, by Presidential Proclamation No. 2714, 61 Stat. (Pt. 2) 1048–1049; 12 Fed. Reg. 1. It is therefore clear that if the designated offenses were committed within the three-year period prior to the date of the Act or between the date of the Act and December 31, 1946, the statute of limitations would be suspended. The question is whether the Act is likewise applicable to offenses committed after December 31, 1946, the date of the proclamation of termination of hostilities.

The argument of the prosecution is that the language of the Act makes no distinction between offenses committed before and offenses committed after the termination of hostilities, the emphasis of the Act being on the suspension of the "running" of the statutes of limitations. It is contended that the extension of the Act to offenses prescribed by the Contract Settlement Act and the Surplus Property Act—offenses of the type likely to

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few changes in wording, reenacted it. *Id.*, 828, 18 U. S. C. § 3287. Section 21 of the 1948 Act preserved all "rights or liabilities" under the repealed sections. We assume, without deciding, that this reservation has no effect on the running of a statute of limitations. See *United States* v. *Obermeier,* 186 F. 2d 243, 251. The Reviser added at the beginning of the section a new clause reading "when the United States is at war" to make the section "permanent instead of temporary legislation, and to obviate the necessity of reenacting such legislation in the future." See Reviser's note following 18 U. S. C. (Supp. II) § 3287.

be committed during the post-hostilities period—is persuasive indication that Congress made the Act operative after, as well as before, the termination of hostilities.

We take the contrary view. We conclude that the Suspension Act is inapplicable to crimes committed after the date of termination of hostilities. The words of the Act are that the "running" of the statute of limitations "shall be suspended until three years after the termination of hostilities." The connotation is that offenses occurring prior to the termination of hostilities shall not be allowed legally to be forgotten in the rush of the war activities. That is the gist of the Reports.[2] The fear was that the

[2] S. Rep. No. 1544, 77th Cong., 2d Sess., pp. 1–2:

"The purpose of the proposed legislation is to suspend any existing statutes of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, for the period of the present war. Contracting for the United States is done through its various agencies, including the departments and independent establishments and Government-owned and Government-controlled corporations, and frauds against all of these agencies are intended to be embraced by the bill.

. . . . . .

"During normal times the present 3-year statute of limitations may afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute frauds against the Government. The United States, however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and to prosecute frauds against the Government, it is recognized that in the varied dealings opportunities will no doubt be presented for unscrupulous persons to defraud the Government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law-enforcement branch of the Government is also busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws.

"Your committee is of the opinion that action should be taken at this time to extend the limitations statute so that frauds may be

law-enforcement officers would be so preoccupied with prosecution of the war effort that the crimes of fraud perpetrated against the United States would be forgotten until it was too late. The implicit premise of the legislation is that the frenzied activities, existing at the time the Act became law, would continue until hostilities terminated and that until then the public interest should not be disadvantaged. The prosecution would have us change the function of the date of termination of hostilities. It would be used to provide various periods of suspension for crimes committed within the three-year period commencing with the termination of hostilities. That seems to us to be an alteration in the statutory scheme, one that destroys its symmetry. Since under our construction the three-year period prescribed by the Suspension Act starts to run at the date of termination of hostilities, all crimes to which the Act is applicable are treated uniformly. The time when law-enforcement officers were busy with war activities is not counted; when the pressure was off, the time began to run again. No reasons

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discovered and punished even after the termination of the present conflict, and to insure that the limitations statute will not operate, under stress of the present-day events, for the protection of those who would defraud or attempt to defraud the United States."

The history of the 1944 Amendment supports the same view. S. Rep. No. 1057, 78th Cong., 2d Sess., p. 14, states:

"As was provided in the Contract Settlement Act of 1944, the statute of limitations with respect to offense against the laws of the United States arising in connection with activities under this act was suspended until 3 years after termination of hostilities in the present war. This provision has been necessitated by the magnitude of the operations involved under this act, and the intensive preoccupation of both participants and witnesses with the war effort. It is clear that the bulk of the offenses cognizable under this statute will not be apprehended or investigated until the end of the war and will then require considerable time before they advance to the stage of litigation."

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of policy are suggested for straining the language of the Act to suspend the running of the statute beyond the emergency which made the suspension seem advisable.

Affirmed.

MR. JUSTICE CLARK, concurring.

I join in the opinion and judgment of the Court. Soon after the beginning of World War II, Congress realized that it would be impossible for the Department of Justice currently to investigate and prosecute the large number of offenses arising out of the war effort. Therefore Congress suspended the running of the statute of limitations as to frauds against the Government, first until June 30, 1945, and subsequently until three years after the termination of hostilities. It is clear that Congress intended to give the Department more time to apprehend, investigate, and prosecute offenses occurring "under the stress of present-day events" of the war "even after the termination of the present conflict." H. R. Rep. No. 2051, 77th Cong., 2d Sess. 2; S. Rep. No. 1544, 77th Cong., 2d Sess. 2; see *United States* v. *Gottfried,* 165 F. 2d 360 (1948). V-E Day was May 8, 1945, and V-J Day was September 2, 1945. Immediately after V-J Day all war procurement stopped, contracts were canceled, and renegotiation was speeded up. The President did not proclaim the cessation of hostilities until December 31, 1946, sixteen months after the fighting ceased. During this period, the pressing problems of demobilization and reconversion—problems likely to cause the continued perpetration of frauds on the Government—were for the most part brought to an end.

The present cases had nothing to do with the war or the reconversion thereafter, Smith being charged with forgery of a Government check for $90 dated June 30, 1947, and Dailey being indicted for having made a false statement on March 14, 1947, to the Department of Agri-

culture as to value of his farm, cows, poultry, etc., in connection with an application for the services of the Farmers Home Administration. Both of the offenses occurred long after the fighting war was over and after "the intensive preoccupation of both participants and witnesses with the war effort"* had ceased, if ever those persons were so employed.

These cases clearly illustrate that the suspension statute was not intended to and should not embrace offenses committed subsequent to December 31, 1946. It applies only to offenses committed between August 25, 1939, and December 31, 1946. For those offenses which occurred between the date of the 1942 Act and the cessation of hostilities, Congress' intention was to give the Department of Justice six years from the latter date to investigate and prosecute. For those offenses which occurred before the date of the 1942 Act, Congress' intention was to give the Department three years after the cessation of hostilities plus whatever portion of the regular three-year limitations' period had not yet run when the 1942 Act was passed.

MR. JUSTICE MINTON, with whom MR. JUSTICE REED, MR. JUSTICE JACKSON and MR. JUSTICE BURTON join, dissenting.

As I read the statute, Congress intended the statute of limitations to be suspended until three years after the termination of hostilities, which would be December 31, 1949. Until that time, there was to be no statute of limitations. On that date the suspension was lifted, and the statute began to run again. The Court's construction that the suspension was lifted at the termination of hostilities gives no effect to the three-year period. I would reverse the judgments in these cases.

*S. Rep. No. 1057, 78th Cong., 2d Sess. 14.

CARSON, COMMISSIONER OF FINANCE & TAXATION, *v.* ROANE-ANDERSON COMPANY ET AL.

NO. 186. CERTIORARI TO THE SUPREME COURT OF TENNESSEE.*

Argued December 5, 1951.—Decided January 7, 1952.

1. The Tennessee Retailers' Sales Tax Act imposes a sales tax on the sale of goods within the State and a use tax on the use within the State of goods purchased elsewhere. Respondents are private companies who are contractors for the Atomic Energy Commission and vendors of those contractors who paid under protest sales taxes and use taxes imposed under the Act on articles used in the performance of contracts with the Commission. *Held:* The challenged taxes are prohibited by § 9 (b) of the Atomic Energy Act of 1946. Pp. 233–236.
2. The contracts which the respondents have with the United States, and the performance thereunder, are Commission "activities" which § 9 (b) exempts from state taxation. Pp. 234–236.

192 Tenn. 150, 239 S. W. 2d 27, affirmed.

In suits brought by respondents to recover amounts paid as state sales and use taxes and to enjoin future collections, the State Supreme Court held that the challenged taxes were prohibited by § 9 (b) of the Atomic Energy Act of 1946. 192 Tenn. 150, 239 S. W. 2d 27. This Court granted certiorari. 342 U. S. 847. *Affirmed,* p. 236.

Allison B. Humphreys, Jr., Assistant Attorney General of Tennessee, argued the cause for petitioner. With him on the briefs were *Roy H. Beeler,* Attorney General, and *William F. Barry,* Solicitor General.

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*Together with No. 187, *Carson, Commissioner of Finance & Taxation,* v. *Carbide & Carbon Chemicals Corp. et al.,* also on certiorari to the same court.

Oscar H. Davis argued the cause for the United States, respondent. With him on the brief were *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *Berryman Green.*

S. Frank Fowler submitted on brief for respondents.

Smith Troy, Attorney General, and *C. John Newlands,* Assistant Attorney General, filed a brief for the State of Washington, as *amicus curiae,* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Retailers' Sales Tax Act of Tennessee, Tenn. Acts 1947, c. 3, imposes a sales tax on the sale of goods in Tennessee and a use tax on the use within the state of goods purchased elsewhere. Tennessee collected these taxes from respondents who paid them under protest and then brought these suits to recover them and to enjoin future collections. Two of the respondents are private companies who are contractors for the Atomic Energy Commission and who paid use taxes; two are merchants who paid sales taxes on sales to those contractors and who passed the taxes on to them. The use taxes and the sales taxes were on articles used by the contractors in the performance of their contracts with the Commission.

The Tennessee Supreme Court held by a divided vote (192 Tenn. 150, 239 S. W. 2d 27) that the challenged taxes, though not forbidden by the Constitution, were prohibited by § 9 (b) of the Atomic Energy Act of 1946, 60 Stat. 765, 42 U. S. C. § 1809 (b). The cases are here on certiorari. 342 U. S. 847.

Sec. 9 (b) provides in part that "The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof." The constitutional power of

Congress to protect any of its agencies from state taxation (*Pittman* v. *Home Owners' Corporation,* 308 U. S. 21; *Federal Land Bank* v. *Bismarck Co.,* 314 U. S. 95) has long been recognized as applying to those with whom it has made authorized contracts. See *Thomson* v. *Pacific R. Co.,* 9 Wall. 579, 588–589; *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 160–161. Certainly the policy behind the power of Congress to create tax immunities does not turn on the nature of the agency doing the work of the Government. The power stems from the power to preserve and protect functions validly authorized (*Pittman* v. *Home Owners' Corp., supra,* p. 33)—the power to make all laws necessary and proper for carrying into execution the powers vested in the Congress. U. S. Const., Art. I, § 8, cl. 18. Hence if the present contracts which the respondent contractors have with the United States, and the performance thereunder, are "activities" within the meaning of § 9 (b) of the Act, the immunity is clear. Our view is that they are and that the judgments below must be affirmed.

Respondent Roane-Anderson manages the government-owned town of Oak Ridge, Tennessee; Carbide and Carbon Chemicals operates the Oak Ridge plants for the production of fissionable materials. Their contracts antedate the Atomic Energy Act of 1946, having been originally entered into with the Manhattan District of the Corps of Engineers. Pursuant to § 9 (a) of the Act these contracts were transferred by Executive Order [1] to the Commission. The question whether the Commission should be empowered to employ private contractors in performance of its functions or whether the Commission should itself be the entrepreneur was an issue of national policy much discussed and debated at the time the legislation was before the Congress. One

[1] Executive Order No. 9816, Dec. 31, 1946, 12 Fed. Reg. 37.

measure, which had the backing of the War Department, would have authorized the Commission to lean heavily on private enterprise for performance of its functions.[2] Another measure, originating in the Senate and after extensive revisions becoming the Atomic Energy Act of 1946, contained no provision authorizing the use of contractors to the extent here involved, required the Commission to produce its own fissionable materials in its own plants by its own employees, and directed the Commission to terminate contracts previously made for the production of fissionable materials.[3] But that bill was materially altered so as to adopt as the national policy the use of "management contracts for the operation of Government-owned plants so as to gain the full advantage of the skill and experience of American industry." [4] Accordingly § 4 (c) (2) of the Act authorizes the Commission "to make, or to continue in effect, contracts with persons obligating them to produce fissionable material in facilities owned by the Commission." And § 9 (a) authorizes the transfer to the Commission of all contracts concerning the production of fissionable material. The use of private contractors is therefore one of the ways in which the Commission is authorized to manage its affairs. Its activities may, in other words, be performed by it directly or through the agencies of private enterprise.

Congress uses the word "activities" in various sections of the Act, and seems each time to give it a broad sweep. The Congressional or Joint Committee constituted under § 15 is directed to study "the activities" of the Commission. The reports which the Commission is directed to submit to Congress pursuant to § 17 concern its "activi-

[2] See H. R. Rep. No. 1186, 79th Cong., 1st Sess.

[3] See S. 1717 reprinted in Hearings before the Senate Special Committee on Atomic Energy, 79th Cong., 2d Sess., pp. 1–9.

[4] S. Rep. No. 1211, 79th Cong., 2d Sess., p. 15.

ties." Section 9 (b) authorizes the Commission to make payments to state and local governments in lieu of property taxes in those areas "in which the activities of the Commission are carried on and in which the Commission has acquired property" previously subject to local taxation. In none of these sections do we find any suggestion that "activities" is used in a narrow sense to describe less than all of the functions of the Commission. The meaning of "activities" as applied either to an individual or to a government agency may be broad enough to include what is done through independent contractors as well as through agents. Certainly where the pattern of conduct visualized by the Act is the use of independent contractors or agents from the field of private enterprise, the inference is strong that "activities" means all authorized methods of performing the governmental function. We find no contrary evidence from the legislative history.

In view of this conclusion we find it unnecessary to reach the problems of implied constitutional immunity involved in *James* v. *Dravo Contracting Co., supra,* and *Alabama* v. *King & Boozer,* 314 U. S. 1.

Affirmed.

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

Syllabus.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION ET AL. *v.* JUNEAU SPRUCE CORP.

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

No. 280. Argued December 6, 1951.—Decided January 7, 1952.

1. The District Court for the Territory of Alaska is a "district court of the United States" within the meaning of § 303 (b) of the Labor Management Relations Act, 1947, which authorizes any person injured in his business or property by reason of any violation of § 303 (a) (relating to secondary boycotts, jurisdictional strikes, etc.) to sue therefor in any "district court of the United States." Pp. 240–243.
2. The right of action under § 303 (b) of the Labor Management Relations Act, 1947, for damages caused by jurisdictional strikes prohibited by § 303 (a) (4) is not dependent upon any prior determination by the National Labor Relations Board under §§ 8 (b) (4) (D) and 10 (k) of the National Labor Relations Act, as amended. Pp. 243–245.

189 F. 2d 177, affirmed.

The District Court for the Territory of Alaska awarded respondent a judgment for $750,000 plus costs against petitioners for injuries sustained as a result of a violation of § 303 (a) of the Labor Management Relations Act, 1947, 61 Stat. 136, 158, 29 U. S. C. § 187 (a). The Court of Appeals affirmed. 189 F. 2d 177. This Court granted certiorari. 342 U. S. 857. *Affirmed*, p. 245.

Richard Gladstein and *Allan Brotsky* argued the cause and filed a brief for petitioners.

Manley B. Strayer argued the cause for respondent. With him on the brief was *Charles A. Hart*.

Solicitor General Perlman, David P. Findling, Mozart G. Ratner and *Dominick L. Manoli* filed a memorandum for the National Labor Relations Board, as *amicus curiae*.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In the spring of 1947, respondent purchased certain properties for the manufacture of lumber, including a sawmill at Juneau, Alaska, and commenced operations. Shortly thereafter, the International Woodworkers of America requested negotiation of a contract with respondent, claiming representation of a majority of respondent's employees. A bargaining agreement was signed with that union on November 3, 1947.

Respondent decided to ship its lumber to ports in Canada and the United States and acquired barges for that purpose. Respondent's policy was to utilize its own employees to load its barges. In October, 1947, petitioner, Local 16 of the International Longshoremen's and Warehousemen's Union, asked that its men be allowed to load respondent's barges. This request was denied. The request was repeated the following spring and was again denied. Petitioner Local established a picket line at respondent's plant on April 10, 1948. Most of respondent's employees refused to cross the picket line and the mill shut down. The mill reopened on July 19, 1948, but picketing continued. Petitioner International notified its Canadian locals that respondent's products were unfair. Respondent was unable to unload its barges in Canada or Puget Sound due to the refusal of longshoremen to work respondent's vessels. On October 11, 1948, the mill again closed down due to lack of storage facilities to hold the accumulating lumber. Picketing was not discontinued until May 9, 1949.

On August 3, 1948, respondent filed a charge against Local 16 alleging violations of § 8 (b) (4) (D) of the

National Labor Relations Act, as amended by the Labor Management Relations Act, 1947,[1] 61 Stat. 136, 141, 29 U. S. C. (Supp. II) §§ 151, 158, on the ground that the Local attempted to induce assignment of particular work to its members. Following a hearing pursuant to § 10 (k) of the Act, the National Labor Relations Board determined on April 1, 1949, that longshoremen represented by Local 16 were not entitled to the barge-loading work. 82 N. L. R. B. 650. In the meantime, respondent had filed suit for damages against both the Local and the International under § 303 (a) (4) of the Labor Management Relations Act.[2] Respondent asked, pursuant to an

[1] Section 8 (b) (4) (D) provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: . . . (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act; . . . ."

[2] Section 303 (a) (4) provides:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or other-

amended complaint, for damages from April 10, 1948, to April 27, 1949. After trial before a jury, respondent was awarded a judgment of $750,000 plus costs. The Court of Appeals for the Ninth Circuit affirmed. 189 F. 2d 177. The case is here on certiorari. 342 U. S. 857.

First. This suit was brought in the District Court for the Territory of Alaska. And the question which lies at the threshold of the case is whether that court is a "district court of the United States" within the meaning of § 303 (b) of the Act.[3] That court has the jurisdiction of district courts of the United States by the law which created it. 48 U. S. C. § 101. Yet vesting it with that jurisdiction does not necessarily make it a district court for all the varied functions of the Judicial Code. See *Reynolds* v. *United States,* 98 U. S. 145, 154; *McAllister* v. *United States,* 141 U. S. 174; *United States* v. *Bur-*

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wise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

. . . . . .

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act."

[3] Section 303 (b) provides:

"Whoever shall be injured in his business or property by reason [of] any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

roughs, 289 U. S. 159, 163; *Mookini* v. *United States,* 303 U. S. 201, 205. The words "district court of the United States" commonly describe constitutional courts created under Article III of the Constitution, not the legislative courts which have long been the courts of the Territories.[4] See *Mookini* v. *United States, supra,* p. 205. But we think that in the context of this legislation they are used to describe courts which exercise the jurisdiction of district courts. The jurisdiction conferred by § 303 (b) [5] is made "subject to the limitations and provisions of section 301." Section 301 lifts the limitations governing district courts as respects the amount in controversy and the citizenship of the parties; it defines the capacity of labor unions to sue or be sued; it restricts the enforceability of a money judgment against a labor union to its assets; and it specifies the jurisdiction of a district court over a union and defines the service of process.[6] Congress was here concerned with reshaping labor-management legal relations;

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[4] The new Judicial Code creates judicial districts for the District of Columbia, 28 U. S. C. § 88; for Hawaii, 28 U. S. C. § 91; and for Puerto Rico, 28 U. S. C. § 119; but none for the Canal Zone, the Virgin Islands, or for Alaska.

[5] See note 3, *supra.*

[6] Section 301 provides:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and

and it was taking precise steps to declared and announced objectives. One of those was the elimination of obstacles to suits in the federal courts. It revised the jurisdictional requirements for suits in the district courts, requirements as applicable to the trial court as to any court which in the technical sense is a district court of the United States. The Act extends in its full sweep to Alaska as well as to the states and the other territories.[7] The trial court is indeed the only court in Alaska to which recourse could be had. Even if it were not a "district court" within the meaning of § 303 (b), it plainly would be "any other court" for purposes of that section. As such other court it might or might not have jurisdiction over this dispute depending on aspects of territorial law which we have not examined. But since Congress lifted the restrictive requirements which might preclude suit in courts having the district courts' jurisdiction, we think it is more consonant with the uniform, national policy of the Act to hold that those restrictions were lifted as respects all courts

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against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

[7] Section 2 (6) defines commerce to include trade, etc., between a state and a territory or within any territory.

upon which the jurisdiction of a district court has been conferred. That reading of the Act does not, to be sure, take the words "district court of the United States" in their historic, technical sense. But literalness is no sure touchstone of legislative purpose. The purpose here is more closely approximated, we believe, by giving the historic phrase a looser, more liberal meaning in the special context of this legislation.

Second. The main contention of petitioners in the case is that § 303 (a) (4) read in light of § 8 (b) (4) (D) [8] renders illegal only such picketing as takes place after and in the face of a determination by the Board that the acts complained of were unfair labor practices. If that conclusion is warranted, there must be a reversal here since the damages reflected in the present judgment for the most part accrued prior to the decision of the Board, under § 10 (k) of the Act,[9] that petitioners had committed an unfair labor practice within the meaning of § 8 (b) (4) (D).

Section 8 (b) (4) (D) and § 303 (a) (4) are substantially identical in the conduct condemned. Section 8 (b) (4) (D) gives rise to an administrative finding; [10] § 303

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[8] See notes 1 and 2, *supra.*

[9] Section 10 (k) provides:

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

[10] The administrative finding under § 10 (k) can be the basis for a cease and desist order under § 10 (b) and (c). A cease and desist order was issued in the present dispute. 90 N. L. R. B. 1753.

(a) (4), to a judgment for damages. The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of each other. Certainly there is nothing in the language of § 303 (a) (4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather, the opposite seems to be true. For the jurisdictional disputes proscribed by § 303 (a) (4) are rendered unlawful "for the purposes of this section only," thus setting apart for private redress, acts which might also be subjected to the administrative process. The fact that the Board must first attempt to resolve the dispute by means of a § 10 (k) determination before it can move under § 10 (b) and (c) for a cease and desist order [11] is only a limitation on administrative power, as is the provision in § 10 (k) that upon compliance "with the decision of the Board or upon such voluntary adjustment of the dispute," the charge shall be dismissed. These provisions, limiting and curtailing the administrative power, find no counterpart in the provision for private redress contained in § 303 (a) (4). Section 303 (a) (4) as explained by Senator Taft, its author, "retains simply a right of suit for damages against any labor organization which undertakes a secondary boycott or a jurisdictional strike." [12]

The right to sue in the courts is clear, provided the pressure on the employer falls in the prescribed category which, so far as material here, is forcing or requiring him to assign particular work "to employees in a particular labor organization" rather than to employees "in another labor organization" or in another "class." Here the juris-

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[11] *Juneau Spruce Corp.*, 82 N. L. R. B. 650, 655.

[12] 93 Cong. Rec. 4858; 2 Legislative History of the Labor Management Relations Act, 1947, p. 1371.

dictional row was between the outside union and the inside union. The fact that the union of mill employees temporarily acceded to the claim of the outside group did not withdraw the dispute from the category of jurisdictional disputes condemned by § 303 (a)(4). Petitioners, representing one union and employing outside labor, were trying to get the work which another union, employing mill labor, had. That competition for work at the expense of employers has been condemned by the Act. Whether that condemnation was wise or unwise is not our concern. It represents national policy which has both administrative and conventional legal sanctions.

Affirmed.

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MORISSETTE *v.* UNITED STATES.

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

No. 12. Argued October 9–10, 1951.—Decided January 7, 1952.

1. A criminal intent is an essential element of an offense under 18 U. S. C. § 641, which provides that "whoever embezzles, steals, purloins, or knowingly converts" property of the United States is punishable by fine and imprisonment. Pp. 247–273.

   (a) Mere omission from § 641 of any mention of intent is not to be construed as eliminating that element from the crimes defined. *United States* v. *Behrman*, 258 U. S. 280, and *United States* v. *Balint*, 258 U. S. 250, distinguished. Pp. 250–263.

   (b) The history and purposes of § 641 afford no ground for inferring any affirmative instruction from Congress to eliminate intent from the offense of "knowingly converting" or stealing government property. Pp. 263–273.

2. Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury for determination in the light of all relevant evidence; and the trial court may not withdraw or prejudge the issue by instructing the jury that the law raises a presumption of intent from a single act. Pp. 273–276.

187 F. 2d 427, reversed.

Petitioner was convicted of a violation of 18 U. S. C. § 641. The Court of Appeals affirmed. 187 F. 2d 427. This Court granted certiorari. 341 U. S. 925. *Reversed*, p. 276.

Andrew J. Transue argued the cause and filed a brief for petitioner.

Robert W. Ginnane argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney* and *J. F. Bishop.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

This would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to the jury as to raise questions both fundamental and far-reaching in federal criminal law, for which reason we granted certiorari.[1]

On a large tract of uninhabited and untilled land in a wooded and sparsely populated area of Michigan, the Government established a practice bombing range over which the Air Force dropped simulated bombs at ground targets. These bombs consisted of a metal cylinder about forty inches long and eight inches across, filled with sand and enough black powder to cause a smoke puff by which the strike could be located. At various places about the range signs read "Danger—Keep Out—Bombing Range." Nevertheless, the range was known as good deer country and was extensively hunted.

Spent bomb casings were cleared from the targets and thrown into piles "so that they will be out of the way." They were not stacked or piled in any order but were dumped in heaps, some of which had been accumulating for four years or upwards, were exposed to the weather and rusting away.

Morissette, in December of 1948, went hunting in this area but did not get a deer. He thought to meet expenses of the trip by salvaging some of these casings. He loaded three tons of them on his truck and took them to a nearby farm, where they were flattened by driving a tractor over them. After expending this labor and trucking them to market in Flint, he realized $84.

Morissette, by occupation, is a fruit stand operator in summer and a trucker and scrap iron collector in winter. An honorably discharged veteran of World War II,

[1] 341 U. S. 925.

he enjoys a good name among his neighbors and has had no blemish on his record more disreputable than a conviction for reckless driving.

The loading, crushing and transporting of these casings were all in broad daylight, in full view of passers-by, without the slightest effort at concealment. When an investigation was started, Morissette voluntarily, promptly and candidly told the whole story to the authorities, saying that he had no intention of stealing but thought the property was abandoned, unwanted and considered of no value to the Government. He was indicted, however, on the charge that he "did unlawfully, wilfully and knowingly steal and convert" property of the United States of the value of $84, in violation of 18 U. S. C. § 641, which provides that "whoever embezzles, steals, purloins, or knowingly converts" government property is punishable by fine and imprisonment.[2] Morissette was convicted and sentenced to imprisonment for two months or to pay a fine of $200. The Court of Appeals affirmed, one judge dissenting.[3]

On his trial, Morissette, as he had at all times told investigating officers, testified that from appearances he believed the casings were cast-off and abandoned, that he did not intend to steal the property, and took it with no

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[2] 18 U. S. C. § 641, so far as pertinent, reads:

"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof;

. . . . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

[3] *Morissette* v. *United States*, 187 F. 2d 427.

wrongful or criminal intent. The trial court, however, was unimpressed, and ruled: "[H]e took it because he thought it was abandoned and he knew he was on government property. . . . That is no defense. . . . I don't think anybody can have the defense they thought the property was abandoned on another man's piece of property." The court stated: "I will not permit you to show this man thought it was abandoned. . . . I hold in this case that there is no question of abandoned property." The court refused to submit or to allow counsel to argue to the jury whether Morissette acted with innocent intention. It charged: "And I instruct you that if you believe the testimony of the government in this case, he intended to take it. . . . He had no right to take this property. . . . [A]nd it is no defense to claim that it was abandoned, because it was on private property. . . . And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty. . . . The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty." Petitioner's counsel contended, "But the taking must have been with a felonious intent." The court ruled, however: "That is presumed by his own act."

The Court of Appeals suggested that "greater restraint in expression should have been exercised," but affirmed the conviction because, "As we have interpreted the statute, appellant was guilty of its violation beyond a shadow of doubt, as evidenced even by his own admissions." Its construction of the statute is that it creates several separate and distinct offenses, one being knowing

conversion of government property. The court ruled that this particular offense requires no element of criminal intent. This conclusion was thought to be required by the failure of Congress to express such a requisite and this Court's decisions in *United States* v. *Behrman*, 258 U. S. 280, and *United States* v. *Balint*, 258 U. S. 250.

I.

In those cases this Court did construe mere omission from a criminal enactment of any mention of criminal intent as dispensing with it. If they be deemed precedents for principles of construction generally applicable to federal penal statutes, they authorize this conviction. Indeed, such adoption of the literal reasoning announced in those cases would do this and more—it would sweep out of all federal crimes, except when expressly preserved, the ancient requirement of a culpable state of mind. We think a résumé of their historical background is convincing that an effect has been ascribed to them more comprehensive than was contemplated and one inconsistent with our philosophy of criminal law.

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[4] A relation between some mental element and punishment for a

[4] For a brief history and philosophy of this concept in Biblical, Greek, Roman, Continental and Anglo-American law, see Radin, Intent, Criminal, 8 Encyc. Soc. Sci. 126. For more extensive treatment of the development in English Law, see 2 Pollock and Maitland, History of English Law, 448–511. "Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." Pound, Introduction to Sayre, Cases on Criminal Law (1927).

harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.[5] Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will." [6] Common-law commentators of the Nineteenth Century early pronounced the same principle,[7] although a few exceptions not relevant to our present problem came to be recognized.[8]

Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individu-

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[5] In *Williams* v. *New York*, 337 U. S. 241, 248, we observed that "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." We also there referred to ". . . a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." *Id.*, at 247. Such ends would seem illusory if there were no mental element in crime.

[6] 4 Bl. Comm. 21.

[7] Examples of these texts and their alterations in successive editions in consequence of evolution in the law of "public welfare offenses," as hereinafter recited, are traced in Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55, 66.

[8] Exceptions came to include sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent. Absence of intent also involves such considerations as lack of understanding because of insanity, subnormal mentality, or infancy, lack of volition due to some actual compulsion, or that inferred from doctrines of coverture. Most extensive inroads upon the requirement of intention, however, are offenses of negligence, such as involuntary manslaughter or criminal negligence and the whole range of crimes arising from omission of duty. Cf. *Commonwealth* v. *Welansky*, 316 Mass. 383, 55 N. E. 2d 902 (1944).

alism and took deep and early root in American soil.[9] As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law.[10] The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "wilfulness," "*scienter*," to denote guilty knowledge, or "*mens rea*," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.

However, the *Balint* and *Behrman* offenses belong to a category of another character, with very different antecedents and origins. The crimes there involved depend

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[9] Holmes, The Common Law, considers intent in the chapter on The Criminal Law, and earlier makes the pithy observation: "Even a dog distinguishes between being stumbled over and being kicked." P. 3. Radin, Intent, Criminal, 8 Encyc. Soc. Sci. 126, 127, points out that in American law "*mens rea* is not so readily constituted from any wrongful act" as elsewhere.

[10] In the *Balint* case, Chief Justice Taft recognized this but rather overstated it by making no allowance for exceptions such as those mentioned in n. 8.

on no mental element but consist only of forbidden acts or omissions. This, while not expressed by the Court, is made clear from examination of a century-old but accelerating tendency, discernible both here [11] and in England,[12] to call into existence new duties and crimes which disregard any ingredient of intent. The industrial revolution

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[11] This trend and its causes, advantages and dangers have been considered by Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55; Hall, Prolegomena to a Science of Criminal Law, 89 U. of Pa. L. Rev. 549; Hall, Interrelations of Criminal Law and Torts, 43 Col. L. Rev. 753, 967.

[12] The changes in English law are illustrated by Nineteenth Century English cases. In 1814, it was held that one could not be convicted of selling impure foods unless he was aware of the impurities. *Rex* v. *Dixon,* 3 M. & S. 11 (K. B. 1814). However, thirty-two years later, in an action to enforce a statutory forfeiture for possession of adulterated tobacco, the respondent was held liable even though he had no knowledge of, or cause to suspect, the adulteration. Countering respondent's arguments, Baron Parke said, "It is very true that in particular instances it may produce mischief, because an innocent man may suffer from his want of care in not examining the tobacco he has received, and not taking a warranty; but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so." *Regina* v. *Woodrow,* 15 M. & W. 404, 417 (Exch. 1846). Convenience of the prosecution thus emerged as a rationale. In 1866, a quarry owner was held liable for the nuisance caused by his workmen dumping refuse into a river, in spite of his plea that he played no active part in the management of the business and knew nothing about the dumping involved. His knowledge or lack of it was deemed irrelevant. *Regina* v. *Stephens,* L. R. 1 Q. B. 702 (1866). Bishop, referring to this decision, says, "The doctrine of this English case may almost be deemed new in the criminal law . . . . And, properly limited, the doctrine is eminently worthy to be followed hereafter." 1 Bishop, New Criminal Law (8th ed. 1892), § 1076. After these decisions, statutes prohibiting the sale of impure or adulterated food were enacted. Adulteration of Food Act (35 & 36 Vict., c. 74, § 2 (1872)); Sale of Food and Drugs Act of 1875 (38 & 39 Vict., c. 63). A conviction under the former was sustained in a holding that no guilty knowledge or intent need be

multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.

While many of these duties are sanctioned by a more strict civil liability,[13] lawmakers, whether wisely or not,[14]

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proved in a prosecution for the sale of adulterated butter, *Fitzpatrick* v. *Kelly*, L. R. 8 Q. B. 337 (1873), and in *Betts* v. *Armstead*, L. R. 20 Q. B. D. 771 (1888), involving the latter statute, it was held that there was no need for a showing that the accused had knowledge that his product did not measure up to the statutory specifications.

[13] The development of strict criminal liability regardless of intent has been roughly paralleled by an evolution of a strict civil liability for consequences regardless of fault in certain relationships, as shown by Workmen's Compensation Acts, and by vicarious liability for fault of others as evidenced by various Motor Vehicle Acts.

[14] Consequences of a general abolition of intent as an ingredient of serious crimes have aroused the concern of responsible and disinterested students of penology. Of course, they would not justify judicial disregard of a clear command to that effect from Congress, but they do admonish us to caution in assuming that Congress, without clear expression, intends in any instance to do so.

Radin, Intent, Criminal, 8 Encyc. Soc. Sci. 126, 130, says, ". . . as long as in popular belief intention and the freedom of the will are

have sought to make such regulations more effective by invoking criminal sanctions to be applied by the familiar technique of criminal prosecutions and convictions. This has confronted the courts with a multitude of prosecutions, based on statutes or administrative regulations, for what have been aptly called "public welfare offenses." These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many

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taken as axiomatic, no penal system that negates the mental element can find general acceptance. It is vital to retain public support of methods of dealing with crime." Again, "The question of criminal intent will probably always have something of an academic taint. Nevertheless, the fact remains that the determination of the boundary between intent and negligence spells freedom or condemnation for thousands of individuals. The watchfulness of the jurist justifies itself at present in its insistence upon the examination of the mind of each individual offender."

Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55, 56, says: "To inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the community as to nullify its own enforcement."

Hall, Prolegomena to a Science of Criminal Law, 89 U. of Pa. L. Rev. 549, 569, appears somewhat less disturbed by the trend, if properly limited, but, as to so-called public welfare crimes, suggests that "There is no reason to continue to believe that the present mode of dealing with these offenses is the best solution obtainable, or that we must be content with this sacrifice of established principles. *The raising of a presumption of knowledge might be an improvement.*" (Italics added.)

In *Felton* v. *United States*, 96 U. S. 699, 703, the Court said, "But the law at the same time is not so unreasonable as to attach culpability, and consequently to impose punishment, where there is no intention to evade its provisions . . . ."

violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime. This has not, however, been without expressions of misgiving.

The pilot of the movement in this country appears to be a holding that a tavernkeeper could be convicted for selling liquor to an habitual drunkard even if he did not know the buyer to be such. *Barnes* v. *State,* 19 Conn. 398 (1849). Later came Massachusetts holdings that convictions for selling adulterated milk in violation of statutes forbidding such sales require no allegation or proof that defendant knew of the adulteration. *Commonwealth* v. *Farren,* 9 Allen 489 (1864); *Commonwealth* v. *Nichols,* 10 Allen 199 (1865); *Commonwealth* v. *Waite,* 11 Allen 264 (1865). Departures from the common-law tradition,

mainly of these general classes, were reviewed and their rationale appraised by Chief Justice Cooley, as follows:

> "I agree that as a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. . . . Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." *People* v. *Roby,* 52 Mich. 577, 579, 18 N. W. 365, 366 (1884).

After the turn of the Century, a new use for crimes without intent appeared when New York enacted numerous and novel regulations of tenement houses, sanctioned by money penalties. Landlords contended that a guilty intent was essential to establish a violation. Judge Cardozo wrote the answer:

> "The defendant asks us to test the meaning of this statute by standards applicable to statutes that govern infamous crimes. The analogy, however, is deceptive. The element of conscious wrongdoing, the guilty mind accompanying the guilty act, is associated with the concept of crimes that are punished as infamous. . . . Even there it is not an invariable element. . . . But in the prosecution of minor offenses, there is a wider range of practice and of power. Prosecutions for petty penalties have always constituted in our law a class by themselves. . . . That is true though the prosecution is criminal in form." *Tenement House Department* v. *McDevitt,* 215 N. Y. 160, 168, 109 N. E. 88, 90 (1915).

Soon, employers advanced the same contention as to violations of regulations prescribed by a new labor law. Judge Cardozo, again for the court, pointed out, as a basis

for penalizing violations whether intentional or not, that they were punishable only by fine "moderate in amount," but cautiously added that in sustaining the power so to fine unintended violations "we are not to be understood as sustaining to a like length the power to imprison. We leave that question open." *People ex rel. Price* v. *Sheffield Farms Co.*, 225 N. Y. 25, 32–33, 121 N. E. 474, 477 (1918).

Thus, for diverse but reconcilable reasons, state courts converged on the same result, discontinuing inquiry into intent in a limited class of offenses against such statutory regulations.

Before long, similar questions growing out of federal legislation reached this Court. Its judgments were in harmony with this consensus of state judicial opinion, the existence of which may have led the Court to overlook the need for full exposition of their rationale in the context of federal law. In overruling a contention that there can be no conviction on an indictment which makes no charge of criminal intent but alleges only making of a sale of a narcotic forbidden by law, Chief Justice Taft, wrote:

> "While the general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it . . . , there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court. . . ." *United States* v. *Balint, supra,* 251–252.

He referred, however, to "regulatory measures in the exercise of what is called the police power where the em-

phasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*," and drew his citation of supporting authority chiefly from state court cases dealing with regulatory offenses. *Id.*, at 252.

On the same day, the Court determined that an offense under the Narcotic Drug Act does not require intent, saying, "If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent." *United States* v. *Behrman, supra,* at 288.

Of course, the purpose of every statute would be "obstructed" by requiring a finding of intent, if we assume that it had a purpose to convict without it. Therefore, the obstruction rationale does not help us to learn the purpose of the omission by Congress. And since no federal crime can exist except by force of statute, the reasoning of the *Behrman* opinion, if read literally, would work far-reaching changes in the composition of all federal crimes. Had such a result been contemplated, it could hardly have escaped mention by a Court which numbered among its members one especially interested and informed concerning the importance of intent in common-law crimes.[15] This might be the more expected since the *Behrman* holding did call forth his dissent, in which Mr. Justice McReynolds and Mr. Justice Brandeis joined, omitting any such mention.

It was not until recently that the Court took occasion more explicitly to relate abandonment of the ingredient of intent, not merely with considerations of expediency in obtaining convictions, nor with the *malum prohibitum* classification of the crime, but with the peculiar nature and quality of the offense. We referred to ". . . a now familiar type of legislation whereby penalties serve as

[15] Holmes, The Common Law.

effective means of regulation," and continued, "such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." But we warned: "Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting." *United States* v. *Dotterweich,* 320 U. S. 277, 280–281, 284.[16]

Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static. The conclusion reached in the *Balint* and *Behrman* cases has our approval and adherence for the circumstances to which it was there applied. A quite different question here is whether we will expand the doctrine of crimes without intent to include those charged here.

Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation; [17] they are invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the infamy is that of a felony, which, says Maitland, is ". . . as bad a word as you can give to man or thing." [18] State courts of last resort, on whom fall the heaviest bur-

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[16] For the place of the mental element in offenses against the revenues, see *Spies* v. *United States,* 317 U. S. 492; *United States* v. *Scharton,* 285 U. S. 518.

[17] 2 Russell on Crime (10th ed., Turner, 1950) 1037.

[18] 2 Pollock and Maitland, History of English Law, 465.

den of interpreting criminal law in this country, have consistently retained the requirement of intent in larceny-type offenses.[19] If any state has deviated, the exception has neither been called to our attention nor disclosed by our research.

Congress, therefore, omitted any express prescription of criminal intent from the enactment before us in the light of an unbroken course of judicial decision in all

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[19] Examples of decision in diverse jurisdictions may be culled from any digest. Most nearly in point are *Johnson* v. *State,* 36 Tex. 375, holding that to take a horse running at large on the range is not larceny in the absence of an intent to deprive an owner of his property; *Jordan* v. *State,* 107 Tex. Cr. R. 414, 296 S. W. 585, that, if at the time of taking parts from an automobile the accused believed that the car had been abandoned by its owner, he should be acquitted; *Fetkenhauer* v. *State,* 112 Wis. 491, 88 N. W. 294, that an honest, although mistaken, belief by defendant that he had permission to take property should be considered by the jury; and *Devine* v. *People,* 20 Hun (N. Y.) 98, holding that a claim that an act was only a practical joke must be weighed against an admitted taking of property.

Others of like purport are *Farzley* v. *State,* 231 Ala. 60, 163 So. 394; *Nickerson* v. *State,* 22 Ala. App. 640, 119 So. 243; *People* v. *Williams,* 73 Cal. App. 2d 154, 166 P. 2d 63; *Schiff* v. *People,* 111 Colo. 333, 141 P. 2d 892; *Kemp* v. *State,* 146 Fla. 101, 200 So. 368; *Perdew* v. *Commonwealth,* 260 Ky. 638, 86 S. W. 2d 534, holding that appropriation by a finder of lost property cannot constitute larceny in the absence of intent; *People* v. *Shaunding,* 268 Mich. 218, 255 N. W. 770; *People* v. *Will,* 289 N. Y. 413, 46 N. E. 2d 498; *Van Vechten* v. *American Eagle Fire Ins. Co.,* 239 N. Y. 303, 146 N. E. 432; *Thomas* v. *Kessler,* 334 Pa. 7, 5 A. 2d 187; *Barnes* v. *State,* 145 Tex. Cr. R. 131, 166 S. W. 2d 708; *Sandel* v. *State,* 131 Tex. Cr. R. 132, 97 S. W. 2d 225; *Weeks* v. *State,* 114 Tex. Cr. R. 406, 25 S. W. 2d 855; *Heskew* v. *State,* 18 Tex. Ct. App. 275; *Page* v. *Commonwealth,* 148 Va. 733, 138 S. E. 510, holding reversible error to exclude evidence having a tendency to throw light on the question of the bona fides of one accused of larceny; *Butts* v. *Commonwealth,* 145 Va. 800, 133 S. E. 764; *State* v. *Levy,* 113 Vt. 459, 35 A. 2d 853, holding that the taking of another's property in good faith by inadvertence or mistake does not constitute larceny.

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constituent states of the Union holding intent inherent in this class of offense, even when not expressed in a statute. Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act. Because the offenses before this Court in the *Balint* and *Behrman* cases were of this latter class, we cannot accept them as authority for eliminating intent from offenses incorporated from the common law. Nor do exhaustive studies of state court cases disclose any well-considered decisions applying the doctrine of crime without intent to such enacted common-law offenses,[20] although a few deviations are notable as illustrative of the danger inherent in the Government's contentions here.[21]

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[20] Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55, 73, 84, cites and classifies a large number of cases and concludes that they fall roughly into subdivisions of (1) illegal sales of intoxicating liquor, (2) sales of impure or adulterated food or drugs, (3) sales of misbranded articles, (4) violations of antinarcotic Acts, (5) criminal nuisances, (6) violations of traffic regulations, (7) violations of motor-vehicle laws, and (8) violations of general police regulations, passed for the safety, health or well-being of the community.

[21] Sayre points out that in criminal syndicalism or sedition cases, where the pressure to convict is strong, it has been accomplished by dispensing with the element of intent, in some instances by analogy with the public welfare offense. Examples are *State* v. *Hennessy,* 114 Wash. 351, 195 P. 211; *People* v. *Ruthenberg,* 229 Mich. 315, 201 N. W. 358; *State* v. *Kahn,* 56 Mont. 108, 182 P. 107; *State* v. *Smith,* 57 Mont. 563, 190 P. 107. Compare *People* v. *McClennegen,* 195 Cal. 445, 234 P. 91. This although intent is of the very essence of offenses based on disloyalty. Cf. *Cramer* v. *United States,* 325 U. S. 1; *Haupt* v. *United States,* 330 U. S. 631, where innocence of intention will defeat a charge even of treason.

The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.

The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly [22] admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

We hold that mere omission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced.

II.

It is suggested, however, that the history and purposes of § 641 imply something more affirmative as to elimination of intent from at least one of the offenses charged under it in this case. The argument does not contest

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[22] *United States* v. *Hudson and Goodwin,* 7 Cranch 32; *United States* v. *Gooding,* 12 Wheat. 460.

that criminal intent is retained in the offenses of embezzlement, stealing and purloining, as incorporated into this section. But it is urged that Congress joined with those, as a new, separate and distinct offense, knowingly to convert government property, under circumstances which imply that it is an offense in which the mental element of intent is not necessary.

Congress has been alert to what often is a decisive function of some mental element in crime. It has seen fit to prescribe that an evil state of mind, described variously in one or more such terms as "intentional," "wilful," "knowing," "fraudulent" or "malicious," will make criminal an otherwise indifferent act,[23] or increase the degree of the offense or its punishment.[24] Also, it has

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[23] 18 U. S. C. § 81, *Arson:* ". . . willfully and maliciously . . ."; 18 U. S. C. § 113, *Assault:* "(a) . . . with intent to commit murder or rape . . . . (b) . . . with intent to commit any felony, except murder or rape . . ."; 18 U. S. C. § 152, *Bankruptcy—concealment of assets, false oaths and claims, bribery:* ". . . knowingly and fraudulently . . ."; 18 U. S. C. § 201, *Bribery and Graft:* ". . . with intent to influence . . ."; 18 U. S. C. § 471, *Counterfeiting and Forgery:* ". . . with intent to defraud . . ."; 18 U. S. C. § 594, *Intimidation of voters:* ". . . for the purpose of . . ."; 18 U. S. C. § 1072, *Concealing escaped prisoner:* ". . . willfully . . ."; 61 Stat. 151, 29 U. S. C. § 162, *Interference with a member of the National Labor Relations Board or an agent of the Board in his performance of his duties:* ". . . willfully . . ."; 52 Stat. 1069, 29 U. S. C. § 216 (a), *Violations of provisions of Fair Labor Standards Act:* ". . . willfully . . ."; 37 Stat. 251, 21 U. S. C. § 23, *Packing or selling misbranded barrels of apples:* ". . . knowingly . . . ."

[24] 18 U. S. C. § 1112, Manslaughter, ". . . the unlawful killing of a human being without malice," if voluntary, carries a maximum penalty of imprisonment not to exceed ten years. If the killing is "with malice aforethought," the crime is murder, 18 U. S. C. § 1111, and, if of the first degree, punishable by death or life imprisonment, or, if of the second degree, punishable by imprisonment for any term of years or life.

at times required a specific intent or purpose which will require some specialized knowledge or design for some evil beyond the common-law intent to do injury.[25] The law under some circumstances recognizes good faith or blameless intent as a defense, partial defense, or as an element to be considered in mitigation of punishment.[26] And treason—the one crime deemed grave enough for definition in our Constitution itself—requires not only the duly witnessed overt act of aid and comfort to the enemy but also the mental element of disloyalty or adherence to the enemy.[27] In view of the care that has been bestowed upon the subject, it is significant that we have not found, nor has our attention been directed to, any instance in which Congress has expressly eliminated the mental element from a crime taken over from the common law.

The section with which we are here concerned was enacted in 1948, as a consolidation of four former sections of Title 18, as adopted in 1940, which in turn were derived from two sections of the Revised Statutes. The pertinent legislative and judicial history of these anteced-

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[25] 18 U. S. C. § 242; *Screws* v. *United States*, 325 U. S. 91.

[26] I. R. C. §§ 145 (a), 145 (b), 53 Stat. 62, as amended, 26 U. S. C. §§ 145 (a), 145 (b), as construed in *Spies* v. *United States*, 317 U. S. 492; 52 Stat. 1069, 29 U. S. C. § 216 (a), stating the criminal sanctions for violations of the Fair Labor Standards Act, provides that: "No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection." N. Y. Penal Law, § 1306, provides that, "Upon an indictment for larceny it is a sufficient defense that the property was appropriated openly and avowedly, under a claim of title preferred in good faith, even though such claim is untenable."

[27] U. S. Const., Art. III, § 3, cl. 1.

This provision was to prevent incrimination of mere mental operations such as "compassing" the death of the King. See *Cramer* v. *United States*, 325 U. S. 1. To hold that a mental element is necessary to a crime is, of course, not to say that it is all that is necessary.

ents, as well as of § 641, is footnoted.[28] We find no other purpose in the 1948 re-enactment than to collect from scattered sources crimes so kindred as to belong in

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[28] The Reviser's Note to 18 U. S. C. § 641 states that it is derived from 18 U. S. C. (1940 ed.) §§ 82, 87, 100, and 101 which, in turn, are from Rev. Stat. §§ 5438 and 5439. We shall consider only the 1940 code sections and their interpretations.

18 U. S. C. (1940 ed.) § 82 reads:

"Whoever shall take and carry away or take for his use, or for the use of another, with intent to steal or purloin . . . any property of the United States . . . shall be punished as follows . . . ."

In *United States* v. *Anderson,* 45 F. Supp. 943, a prosecution for conspiracy to violate that section, District Judge Yankwich said:

"It has been before the courts in very few cases. But such courts as have had cases under it, including our own Ninth Circuit Court of Appeals, have held that the object of the section is to introduce the crime of larceny into the Federal Criminal Code.

"In Frach v. Mass, 9 Cir., 1939, 106 F. 2d 820, 821, we find these words: 'Larceny of property of the United States is made a crime by 18 U. S. C. A. § 82.'

"This means of course, that in interpreting the statute, we may apply the principles governing the common law crime of larceny, as interpreted by the courts of various states." 45 F. Supp. at 945.

United States v. *Trinder,* 1 F. Supp. 659, was a prosecution of a group of boys, under § 82, for "stealing" a government automobile. They had taken it for a joy ride without permission, fully intending to return it when they were through. Their plans went awry when the auto came to grief against a telephone pole. In dismissing the complaint, the District Judge said:

"Upon principle and authority there was no stealing but merely trespass; secret borrowing. At common law and likewise by the federal statute (18 USCA § 82) adopting common-law terms, stealing in general imports larceny; that is, felonious taking and intent to permanently deprive the owner of his property." 1 F. Supp. at 660.

18 U. S. C. (1940 ed.) § 87, entitled "Embezzling arms and stores," provides:

"Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of, any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval

one category. Not one of these had been interpreted to be a crime without intention and no purpose to differentiate between them in the matter of intent is disclosed.

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service, shall be punished as prescribed in sections 80 and 82–86 of this title."

No cases appear to have been decided relating to the element of intent in the acts proscribed in that section.

18 U. S. C. (1940 ed.) § 100, "Embezzling public moneys or other property," states that:

"Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than $5,000, or imprisoned not more than five years, or both."

The only noted case of consequence is *Crabb* v. *Zerbst,* 99 F. 2d 562 (C. A. 5th Cir.), to which the dissent below referred at some length. The appellant there was convicted of feloniously taking and carrying away certain personal property of the United States in violation of § 46 of the Criminal Code, 18 U. S. C. (1940 ed.) § 99, and had been sentenced to seven years' imprisonment. He argued that the five-year limitation of sentence in 18 U. S. C. (1940 ed.) § 100 for stealing property of the United States reduced the ten-year limitation in § 99 for feloniously taking and carrying away property of the United States to five years also.

The Court of Appeals rejected his argument, holding that the crime of "stealing" in § 100 was separate and distinct from the offense specified in § 99, on the ground that § 100 was a broadening of the common-law crime of larceny to foreclose any avenue by which one might, in the process of pleading, escape conviction for one offense by proving that he had committed another only a hair's breadth different.

In the course of its opinion, it advanced the following pertinent observations:

"That felonious taking and carrying away of property which may be the subject of the offense constitutes the common law offense of larceny cannot be disputed. . . . However, it is doubtful if at common law any fixed definition or formula [as to the meaning of 'larceny'] was not strained in its application to some of the cases clearly constituting the offense. Modern criminal codes treat the offense in various ways. Some define the offense by following the old cases and are merely declaratory of the common law, while others

No inference that some were and some were not crimes of intention can be drawn from any difference in classification or punishment. Not one fits the congressional classification of the petty offense; each is, at its least, a misdemeanor, and if the amount involved is one hundred

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have broadened the offense to include offenses previously known as embezzlement, false pretenses, and even felonious breaches of trust.

. . . . . .

"As pointed out above, the modern tendency is to broaden the offense of larceny, by whatever name it may be called, to include such related offenses as would tend to complicate prosecutions under strict pleading and practice. In some of these statutes the offense is denominated 'theft' or 'stealing.' No statute offers a clearer example of compromise between the common law and the modern code than the two sections here involved. Section 46 [18 U. S. C. (1940 ed.) § 99] deals with robbery and larceny, the description of the latter being taken from the common law. Section 47 [18 U. S. C. (1940 ed.) § 100] denounces the related offenses which might be included with those described in section 46 under a code practice seeking to avoid the pitfalls of technical pleading. In it the offense of embezzlement is included by name, without definition. Then to cover such cases as may shade into larceny, as well as any new situation which may arise under changing modern conditions and not envisioned under the common law, it adds the words *steal or purloin* . . . . Stealing, having no common law definition to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership, but may or may not involve the element of stealth usually attributed to the word *purloin*. . . . Thus, in any case involving larceny as defined by the common law, section 46 [18 U. S. C. (1940 ed.) § 99] would apply. Where the offense is embezzlement, or its nature so doubtful as to fall between larceny and embezzlement, it may be prosecuted under section 47 [18 U. S. C. (1940 ed.) § 100]." 99 F. 2d at 564–565.

The reference in *Crabb* v. *Zerbst* to 18 U. S. C. (1940 ed.) § 99, the robbery and larceny statute then operative, suggests examination of its successor in today's code. For purpose of clarification, that section states that:

"Whoever shall rob another of any kind or description of personal

or more dollars each is a felony.[29] If one crime without intent has been smuggled into a section whose dominant offenses do require intent, it was put in ill-fitting and compromising company. The Government apparently did not believe that conversion stood so alone when it

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property belonging to the United States, or shall feloniously take and carry away the same, shall be fined not more than $5,000, or imprisoned not more than ten years, or both."

The Reviser's Note to 18 U. S. C. § 641 makes no mention of it as a successor to that section. The present robbery statute is 18 U. S. C. § 2112, "Personal property of United States," providing that:

"Whoever robs another of any kind or description of personal property belonging to the United States, shall be imprisoned not more than fifteen years."

The Reviser's Note to that section recites that it is derived from § 99 of the 1940 Code, and "That portion of said section 99 relating to felonious taking was omitted as covered by section 641 of this title," which makes it clear that, notwithstanding the absence of any reference to 18 U. S. C. (1940 ed.) § 99 in the Note to 18 U. S. C. § 641, the crime of larceny by a felonious taking and carrying away has been transported directly from the former into the latter.

18 U. S. C. (1940 ed.) § 101 is the forerunner of that part of present § 641 dealing with receiving stolen property, and has no application to the problem at hand.

The history of § 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions. It is also pertinent to note that it renders one subject to its penalty who "knowingly converts to his own use" property of the United States. The word "converts" does not appear in any of its predecessors. 18 U. S. C. (1940 ed.) § 82 is applicable to one who "take[s] for his [own] use . . . with intent to steal or purloin . . . ." 18 U. S. C. (1940 ed.) § 87 uses the words "knowingly apply to his own use." Neither 18 U. S. C. (1940 ed.) §§ 99, 100, nor 101 has any words resembling "knowingly converts to his own use." The 1948 Revision was not intended to create new crimes but to recodify those then in existence. We find no suggestion that a guilty intent was not a part of each crime now embodied in § 641.

[29] 18 U. S. C. §§ 1, 641.

drew this one-count indictment to charge that Morissette "did unlawfully, wilfully and knowingly steal and convert to his own use." [30]

Congress, by the language of this section, has been at pains to incriminate only "knowing" conversions. But, at common law, there are unwitting acts which constitute conversions. In the civil tort, except for recovery of exemplary damages, the defendant's knowledge, intent, motive, mistake, and good faith are generally irrelevant.[31] If one takes property which turns out to belong to another, his innocent intent will not shield him from making restitution or indemnity, for his well-meaning may not be allowed to deprive another of his own.

Had the statute applied to conversions without qualification, it would have made crimes of all unwitting, inadvertent and unintended conversions. Knowledge, of course, is not identical with intent and may not have been the most apt words of limitation. But knowing conver-

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[30] Had the indictment been limited to a charge in the words of the statute, it would have been defective if, in the light of the common law, the statute itself failed to set forth expressly, fully, and clearly all elements necessary to constitute the offense. *United States* v. *Carll*, 105 U. S. 611.

[31] *Harker* v. *Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670 (1850); *Railroad Co.* v. *O'Donnell*, 49 Ohio St. 489, 32 N. E. 476 (1892). The rationale underlying such cases is that when one clearly assumes the rights of ownership over property of another no proof of intent to convert is necessary. It has even been held that one may be held liable in conversion even though he reasonably supposed that he had a legal right to the property in question. *Row* v. *Home Sav. Bank*, 306 Mass. 522, 29 N. E. 2d 552 (1940). For other cases in the same vein, see those collected in 53 Am. Jur. 852–854. These authorities leave no doubt that Morissette could be held liable for a civil conversion for his taking of the property here involved, and the instructions to the jury might have been appropriate in such a civil action. This assumes of course that actual abandonment was not proven, a matter which petitioner should be allowed to prove if he can.

sion requires more than knowledge that defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion. In the case before us, whether the mental element that Congress required be spoken of as knowledge or as intent, would not seem to alter its bearing on guilt. For it is not apparent how Morissette could have knowingly or intentionally converted property that he did not know could be converted, as would be the case if it was in fact abandoned or if he truly believed it to be abandoned and unwanted property.

It is said, and at first blush the claim has plausibility, that, if we construe the statute to require a mental element as part of criminal conversion, it becomes a meaningless duplication of the offense of stealing, and that conversion can be given meaning only by interpreting it to disregard intention. But here again a broader view of the evolution of these crimes throws a different light on the legislation.

It is not surprising if there is considerable overlapping in the embezzlement, stealing, purloining and knowing conversion grouped in this statute. What has concerned codifiers of the larceny-type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches. The books contain a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain wrongful advantages from another's property. The codifiers wanted to reach all such instances. Probably every stealing is a conversion, but certainly not every knowing conversion is a stealing. "To steal means to *take away from one* in lawful possession without right with the *intention to keep wrongfully.*" (Italics added.) *Irving Trust Co.* v. *Leff*, 253 N. Y. 359, 364, 171 N. E. 569, 571. Conversion, however, may be consummated without

any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact. It is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining. Knowing conversion adds significantly to the range of protection of government property without interpreting it to punish unwitting conversions.

The purpose which we here attribute to Congress parallels that of codifiers of common law in England [32] and in the States [33] and demonstrates that the serious prob-

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[32] The Larceny Act of 1916, 6 & 7 Geo. V, c. 50, an Act "to consolidate and simplify the Law relating to Larceny triable on Indictment and Kindred Offences," provides:

"1. For the purposes of this Act—

"(1) A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof:

"Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner . . . ."

For the growth and development of the crime of larceny in England, see 2 Russell on Crime (10th ed., Turner, 1950), 1037–1222, from which the material above was taken.

[33] N. Y. Penal Law, § 1290, defines larceny as follows:

"A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use

lem in drafting such a statute is to avoid gaps and loopholes between offenses. It is significant that the English and State codifiers have tried to cover the same type of conduct that we are suggesting as the purpose of Congress here, without, however, departing from the common-law tradition that these are crimes of intendment.

We find no grounds for inferring any affirmative instruction from Congress to eliminate intent from any offense with which this defendant was charged.

III.

As we read the record, this case was tried on the theory that even if criminal intent were essential its presence (a) should be decided by the court (b) as a presumption

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of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind, steals such property and is guilty of larceny."

The same section provides further that it shall be no defense to a prosecution that:

"2. The accused in the first instance obtained possession of, or title to, such property lawfully, provided he subsequently wrongfully withheld or appropriated such property to his own use or the use of any person not entitled to the use and benefit of such property . . . ."

The Historical Note to that section discloses that it represents an attempt to abolish the distinctions between kinds of larcenies. Laws 1942, c. 732, § 1, provided:

"It is hereby declared as the public policy of the state that the best interests of the people of the state will be served, and confusion and injustice avoided, by eliminating and abolishing the distinctions which have hitherto differentiated one sort of theft from another, each of which, under section twelve hundred and ninety of the penal law, was denominated a larceny, to wit: common law larceny by asportation, common law larceny by trick and device, obtaining property by false pretenses, and embezzlement."

of law, apparently conclusive, (c) predicated upon the isolated act of taking rather than upon all of the circumstances. In each of these respects we believe the trial court was in error.

Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury. State court authorities cited to the effect that intent is relevant in larcenous crimes are equally emphatic and uniform that it is a jury issue. The settled practice and its reason are well stated by Judge Andrews in *People* v. *Flack,* 125 N. Y. 324, 334, 26 N. E. 267, 270:

> "It is alike the general rule of law and the dictate of natural justice that to constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system (unless in exceptional cases), both must be found by the jury to justify a conviction for crime. However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. Jurors may be perverse; the ends of justice may be defeated by unrighteous verdicts, but so long as the functions of the judge and jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury. . . ."

It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act. It often is tempting to cast in terms of a "presumption" a conclusion which a court thinks probable from given facts. The Supreme Court of Florida, for example, in a larceny case, from selected circumstances which are present in this case, has

declared a presumption of exactly opposite effect from the one announced by the trial court here:

> ". . . But where the taking is open and there is no subsequent attempt to conceal the property, and no denial, but an avowal, of the taking a strong presumption arises that there was no felonious intent, which must be repelled by clear and convincing evidence before a conviction is authorized. . . ." *Kemp* v. *State,* 146 Fla. 101, 104, 200 So. 368, 369.

We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect.[34] In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit. *Tot* v. *United States,* 319 U. S. 463.

Moreover, the conclusion supplied by presumption in this instance was one of intent to steal the casings, and it was based on the mere fact that defendant took them. The court thought the only question was, "Did he intend

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[34] Cf. Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59; Morgan, Some Observations Concerning Presumption, 44 Harv. L. Rev. 906.

to take the property?" That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property. Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances.

Of course, the jury, considering Morissette's awareness that these casings were on government property, his failure to seek any permission for their removal and his self-interest as a witness, might have disbelieved his profession of innocent intent and concluded that his assertion of a belief that the casings were abandoned was an afterthought. Had the jury convicted on proper instructions it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges. They might have concluded that the heaps of spent casings left in the hinterland to rust away presented an appearance of unwanted and abandoned junk, and that lack of any conscious deprivation of property or intentional injury was indicated by Morissette's good character, the openness of the taking, crushing and transporting of the casings, and the candor with which it was all admitted. They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter.

Reversed.

MR. JUSTICE DOUGLAS concurs in the result.

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

UNITED STATES *v.* HALSETH.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 91. Argued November 28, 1951.—Decided January 7, 1952.

In § 213 of the Criminal Code of 1909, 18 U. S. C. (1946 ed.) § 336, which forbids the mailing of any letter, package, postal card, or circular "concerning any lottery" or similar scheme, the words "concerning any lottery" mean an existing, going lottery or gambling scheme; and the section is not applicable to the mailing of a punchboard with a letter suggesting how it might be used and an order blank for ordering merchandise to be used for prizes, when neither the sender nor the addressee was engaged in the operation of a lottery or similar scheme. Pp. 277–281.

Affirmed.

The District Court dismissed an indictment of respondent for violation of § 213 of the Criminal Code of 1909, 18 U. S. C. (1946 ed.) § 336. On direct appeal to this Court under 18 U. S. C. § 3731, *affirmed,* p. 281.

John R. Benney argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *J. F. Bishop.*

Horace J. Donnelly, Jr. argued the cause for appellee. With him on the brief was *Bruno V. Bitker.*

MR. JUSTICE MINTON delivered the opinion of the Court.

Appellee was indicted on eight counts in the District Court for the Eastern District of Wisconsin for violation of § 213 of the Criminal Code of 1909, 35 Stat. 1129–1130, 18 U. S. C. § 336. The District Court granted appellee's motion to dismiss the indictment, and the United States

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appealed directly to this Court, pursuant to 18 U. S. C. (Supp. IV) § 3731. The pertinent provisions of the statute upon which the indictment was based were as follows:

> "No letter, package, postal card, or circular concerning any lottery . . . or similar scheme offering prizes dependent in whole or in part upon lot or chance . . . shall be deposited in or carried by the mails . . . . Whoever shall knowingly deposit . . . anything to be . . . delivered by mail in violation of . . . this section . . . shall be fined . . . or imprisoned . . . ."

The first count of the indictment charged that:

> "Perry Halseth, knowingly, wilfully and unlawfully did cause to be delivered by mail to Miss Lucia Brown a circular letter concerning a lottery or scheme offering a prize dependent upon lot or chance . . . ."

The other counts were identical except as to the name of the addressee and the point of delivery.

For the purpose of the motion to dismiss, the parties stipulated as to particularity that a letter, a circular, an order blank, and a punchboard were sent to the addressee by mail. The letter subtly indicated how the addressee might obtain a radio free by selling the chances on the punchboard and how certain lucky numbers would reward the purchaser with prizes of a radio and three Rolpoint ball pens.[1] The punchboard contained an illustration of merchandise to be won. No merchandise was sent with the mailing. If the addressee desired to put the scheme into operation, the merchandise could be obtained by sending the full amount in cash, or by a down payment of

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[1] Actually, four counts were based on material relating to radios and pens and four to cameras and a telescope; but since the nature of the mailings was the same, we consider only the material relating to radios and pens.

$2.00 with the order and the balance payable on delivery, or by a C. O. D. shipment. The punchboard also informed the addressee that merchandise could be "purchased" from appellee at any time.

The District Court held that even if these stipulated facts had been alleged in the indictment and accepted as true for the purpose of the motion to dismiss, still the indictment did not state an offense because the mailing did not concern an *existing* lottery or scheme to obtain prizes by lot or chance. The question therefore is whether the mailing of gambling paraphernalia that may be used to set up a lottery or similar scheme is a violation of the statute.

The statute on which the indictment is based was passed in 1909, and since that time no reported case has been found construing it. However, in cases construing analogous lottery statutes, old in our law, the courts have held that they apply only to existing lotteries or schemes.[2]

In *France* v. *United States,* 164 U. S. 676, a lottery had been conducted in Kentucky. After the drawing was over, persons who were interested in the outcome and who had taken money to the operators of the lottery for chances purchased were returning across the state line to Ohio; they had in their possession the official print of the lucky number that had been drawn, slips that corresponded with the lucky number, known as "hit slips," and money which was to be given to winners. They were arrested and charged with a conspiracy to violate a statute which prohibited the carrying across state lines of "any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery . . . ." (28 Stat. 963). In

[2] *France* v. *United States,* 164 U. S. 676; *Francis* v. *United States,* 188 U. S. 375; *United States* v. *Irvine,* 156 F. 376.

holding that the defendants had not violated the statute this Court said:

> "The lottery had already been drawn; the papers carried by the messengers were not then dependent upon the event of any lottery. . . .
>
> "There is no contradiction in the testimony, and the government admits and assumes that the drawing in regard to which these papers contained any information had already taken place in Kentucky, and it was the result of that drawing only that was on its way in the hands of messengers to the agents of the lottery in Cincinnati.
>
> "The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly. Full effect is given to the statute by holding that the language applies only to that kind of a paper which depends upon a lottery the drawing of which has not yet taken place, and which paper purports to be a certificate, etc., as described in the act. If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation." 164 U. S. at 682–683.

In the instant case, too, the statute is penal and must be strictly construed. We hold that the words "concerning any lottery" mean an existing, going lottery or gambling scheme. The mailing does not purport to concern any existing lottery, and neither the addressee nor the appellee was engaged in the operation of a lottery or

similar scheme. The lottery or scheme would come into existence only if the addressee put the paraphernalia into operation. The mere mailing of information concerning such schemes and how they may be set up or the mailing of paraphernalia for such schemes does not violate the statute in question. In fact, the Post Office Department itself did not regard the statute as covering the activity complained of here. Beginning in 1915, the Department has sought to amend the statute without success.[3]

Congress has had before it many times the question of what gambling devices and paraphernalia it would exclude from the mails and interstate commerce,[4] and only recently has it passed an act concerning the subject. Act of January 2, 1951, P. L. No. 906, 64 Stat. 1134, 15 U. S. C. § 1171. If punchboards are to be added to the category of devices to be excluded, it is for Congress to make the addition.

The judgment is

Affirmed.

MR. JUSTICE DOUGLAS and MR. JUSTICE BURTON dissent.

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[3] Report of the Postmaster General 72 (1915).

[4] Hearings of April, May and June 1950, House Committee on Interstate and Foreign Commerce on S. 3357 and H. R. 6736, 81st Cong., 2d Sess. 259–260.

HALCYON LINES ET AL. *v.* HAENN SHIP CEILING & REFITTING CORP.

NO. 62. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

Argued November 27, 1951.—Decided January 14, 1952.

An employee of a shoreside contractor engaged by a shipowner to repair a ship moored in navigable waters was injured aboard the ship while engaged in making repairs. His injuries did not result from a collision. Alleging that they were caused by the shipowner's negligence and the unseaworthiness of the ship, he sued the shipowner for damages. Claiming that the contractor's negligence had contributed to the injuries, the shipowner brought in the contractor as a third-party defendant and urged that it be required to make contribution. *Held:* The contribution proceedings against the contractor should be dismissed. Pp. 283–287.

(a) There is no established right to contribution between joint tortfeasors in such non-collision, maritime, injury cases. P. 284.

(b) Since Congress has enacted much legislation in the field of maritime injuries and has not approved such a rule of contribution between joint tortfeasors, it would be inappropriate for this Court to do so. Pp. 285–287.

187 F. 2d 403, reversed and remanded.

The case is stated in the opinion. *Reversed and remanded,* p. 287.

Joseph W. Henderson argued the cause for the Halcyon Lines et al. With him on the briefs were *Thomas F. Mount* and *George M. Brodhead.*

Thomas E. Byrne, Jr. argued the cause for the Haenn Ship Ceiling & Refitting Corporation. With him on the briefs was *John B. Shaw.*

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*Together with No. 197, *Haenn Ship Ceiling & Refitting Corp.* v. *Halcyon Lines et al.,* also on certiorari to the same court.

MR. JUSTICE BLACK delivered the opinion of the Court.

Halcyon Lines[1] hired the Haenn Ship Ceiling and Refitting Corporation[2] to make repairs on Halcyon's ship which was moored in navigable waters. Salvador Baccile, an employee of Haenn, was injured aboard ship while engaged in making these repairs. Alleging that his injuries were caused by Halcyon's negligence and the unseaworthiness of its vessel, he brought this action for damages against Halcyon in the United States District Court. On the ground that Haenn's negligence had contributed to the injuries, Halcyon brought Haenn in as a third-party defendant. By agreement of all parties, a $65,000 judgment was rendered for Baccile and paid by Halcyon. Despite Haenn's protest, the district judge allowed the introduction of evidence tending to show the relative degree of fault of the two parties. On this evidence the jury returned a special verdict finding Haenn 75% and Halcyon 25% responsible. The district judge refused to follow this jury determination and entered judgment in accordance with his conclusion that there was a general rule governing maritime torts such as this under which each joint tortfeasor must pay half the damages. 89 F. Supp. 765. The Court of Appeals agreed that a right of contribution existed in this case but held that it could not exceed the amount Haenn would have been compelled to pay Baccile had he elected to claim compensation under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.* 187 F. 2d 403. We granted certiorari because of the conflicting views taken by the circuits as to

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[1] Halcyon Lines refers to Halcyon Lines and Vinke & Co., two corporate joint owners and operators of the ship here involved. Halcyon is petitioner in No. 62 and the respondent in No. 197.

[2] Haenn is the petitioner in No. 197 and the respondent in No. 62.

the existence of and the extent to which contribution can be obtained in cases such as this.[3] 342 U. S. 809.

Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties. This maritime rule is of ancient origin and has been applied in many cases,[4] but this Court has never expressly applied it to non-collision cases.[5] Halcyon now urges us to extend it to non-collision cases and to allow a contribution here based upon the relative degree of fault of Halcyon and Haenn as found by the jury. Haenn urges us to hold that there is no right of contribution, or in the alternative, that the right be based upon an equal division of all damages. Both parties claim that the decision below limiting an employer's liability for contribution to those uncertain amounts recoverable under the Harbor Workers' Act is impractical and undesirable.

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[3] *American Mutual Insurance Co.* v. *Matthews,* 182 F. 2d 322; *United States* v. *Rothschild International Stevedoring Co.,* 183 F. 2d 181. See also *Slattery* v. *Marra Bros., Inc.,* 186 F. 2d 134; *Spaulding* v. *Parry Navigation Co.,* 187 F. 2d 257; *Hitaffer* v. *Argonne Co.,* 87 U. S. App. D. C. 57, 183 F. 2d 811.

[4] *The North Star,* 106 U. S. 17, 21, traces the doctrine back to the Rules of Oleron and the laws of Wisbuy. See also, *The Washington,* 9 Wall. 513; *The Alabama,* 92 U. S. 695; *The Atlas,* 93 U. S. 302; *The Chattahoochee,* 173 U. S. 540, 551–555.

[5] *American Stevedores, Inc.* v. *Porello,* 330 U. S. 446, recognized that some lower federal courts had applied the equal-division rule of contribution in non-collision cases. The opinion in that case implied that on remand and under certain contingencies the district court would "be free to adjudge the responsibility of the parties" in accordance with the contribution rule announced by the lower federal courts. That statement was only incidental as compared to the important questions there decided and cannot be taken as foreclosing a full consideration and determination of the issue which is now directly presented and crucial to our decision.

In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors.[6] This judicial attitude has provoked protest on the ground that it is inequitable to compel one tortfeasor to bear the entire burden of a loss which has been caused in part by the negligence of someone else.[7] Others have defended the policy of common-law courts in refusing to fashion rules of contribution.[8] To some extent courts exercising jurisdiction in maritime affairs have felt freer than common-law courts in fashioning rules,[9] and we would feel free to do so here if wholly convinced that it would best serve the ends of justice.

We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries.[10] For example, under the Harbor Workers' Act Congress has made fault unimportant in determining the employer's responsibility to his employee; Congress has made further inroads on

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[6] *Union Stock Yards Co.* v. *Chicago, B. & Q. R. Co.*, 196 U. S. 217, 224. And see cases collected in 3 A. L. R. Digest, pp. 864–866, and in Prosser on Torts (1941), p. 1113.

[7] See *e. g.*, Gregory, Contribution Among Joint Tortfeasors: A Defense, 54 Harv. L. Rev. 1170.

[8] *George's Radio, Inc.* v. *Capital Transit Co.*, 75 U. S. App. D. C. 187, 191, 126 F. 2d 219, 223, dissenting opinion. See also James, Contribution Among Joint Tortfeasors: A Pragmatic Criticism, 54 Harv. L. Rev. 1156.

[9] *Swift & Co.* v. *Compania Colombiana del Caribe*, 339 U. S. 684, 690, 691. Compare *The Lottawanna*, 21 Wall. 558.

[10] See *e. g.*, The Jones Act (41 Stat. 1007, 46 U. S. C. § 688), the Public Vessels Act (43 Stat. 1112, 46 U. S. C. §§ 781–790), and the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 33 U. S. C. § 901 *et seq.*).

traditional court law by abolition of the defenses of contributory negligence and assumption of risk and by the creation of a statutory schedule of compensation. The Harbor Workers' Act in turn must be integrated with other acts such as the Jones Act (41 Stat. 1007, 46 U. S. C. § 688), the Public Vessels Act (43 Stat. 1112, 46 U. S. C. §§ 781–790), the Limited Liability Act (R. S. § 4281, as amended, 46 U. S. C. § 181 *et seq.*) and the Harter Act (27 Stat. 445, 46 U. S. C. §§ 190–195). Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made. The record before us is silent as to the wishes of employees, carriers, and shippers; it only shows that the Halcyon Line is in favor of such a change in order to relieve itself of a part of its burden in this particular lawsuit. Apparently insurance companies are opposed to such a change.[11] Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act,[12] or should be based on an equal divi-

[11] Gregory, *supra*, n. 7, p. 1177. James, *supra*, n. 8, pp. 1179–1180.

[12] Section 5 of the Act provides that "The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in

sion of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.

In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so. The judgments of the Court of Appeals are reversed and the cause is remanded to the District Court with instructions to dismiss the contribution proceedings against Haenn.

It is so ordered.

MR. JUSTICE REED and MR. JUSTICE BURTON would reverse with directions to the District Court to allow contributions equal to fifty per cent of the judgment recovered by Baccile against Halcyon.

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admiralty on account of such injury or death, ..." Haenn argues that this section provides the employer's exclusive liability thereby preventing a third party from having any right of contribution against an employer under the Act in cases where the joint negligence of a third party and the employer injure an employee covered by the Act. We find it unnecessary to decide this question which is treated by the cases cited in n. 3, *supra*.

UNITED STATES *v.* SHANNON ET AL.

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

No. 47. Argued November 27, 1951.—Decided January 14, 1952.

Respondents purchased from the owners a tract of land on which stood buildings that had been damaged by members of the Armed Forces. By the sale agreement the vendors assigned any claim which they had against the United States for damage to the property. Respondents brought an action under the Tort Claims Act to recover on the damage claim, and joined their assignors as well as the United States as parties defendant. The District Court entered judgment for respondents against the United States alone, on the ground that all possible claimants were before the Court and the Anti-Assignment Act was therefore inapplicable. The Court of Appeals affirmed. *Held:* The assignment of the claim against the United States was void under the Anti-Assignment Act, and the judgment is reversed. Pp. 289–294.

1. The judgment below is based on a voluntary assignment. The considerations justifying exceptions to the Anti-Assignment Act for certain types of voluntary assignments are not present here, so the assignment falls within the prohibition of that Act. Pp. 292–293.

2. The Anti-Assignment Act is not rendered inapplicable to this case by the fact that all possible claimants were before the court; nor by the fact that the assignment was executed under a "mutual mistake of law"; nor by the fact that "hardship" might otherwise result. Pp. 293–294.

3. There was in this case no "unconscionable" conduct on the part of the government agents, who had no part in the making of the assignment. P. 294.

186 F. 2d 430, reversed.

In an action brought under the Tort Claims Act against the United States and others, the District Court entered judgment for the respondents against the United States alone. The Court of Appeals affirmed. 186 F. 2d 430. This Court granted certiorari. 342 U. S. 808. *Reversed,* p. 294.

Roger P. Marquis argued the cause for the United States. With him on the brief were *Assistant Attorney General Underhill* and *Harold S. Harrison.*

John Grimball argued the cause for respondents. With him on the brief was *C. T. Graydon.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This case brought here on writ of certiorari [1] tests the validity under the Anti-Assignment Act, R. S. § 3477,[2] of an assignment of a claim against the United States for property damage. In an effort to escape the prohibition of that Act, respondents joined their assignors, Mrs. Kathleen Boshamer et al.,[3] as well as the United States as parties defendant. The District Court, holding the assignment to be "of full force and effect," entered judgment for respondents against the United States alone. The Court of Appeals affirmed, 186 F. 2d 430.

The Boshamers owned, in addition to adjoining land which they leased to the United States, two one-acre tracts of land not under lease on which were located two houses and a barn. During January and February, 1945, these buildings were damaged by soldiers of the United States. On April 30, 1946, the Boshamers agreed to sell the entire tract—including both the leased and unleased

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[1] 342 U. S. 808.

[2] 10 Stat. 170, as amended, 31 U. S. C. § 203:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. . . ."

[3] Hereafter referred to as "the Boshamers."

portions—to respondents Samuel and W. L. Shannon, and in that instrument agreed that "after completion of the sale and after delivery of the deed, the sellers hereby release to the purchasers any claim, reparation, or other cause of action against the United States Government for any damage caused the property . . . ." [4]

Respondents brought the present action under the Federal Tort Claims Act, 28 U. S. C. (Supp. IV) § 1346 (b).[5] In their complaint respondents alleged that the Boshamers "have a cause of action against the United States of America and since they have assigned this cause of action to [respondents] for a valuable consideration and since they must prosecute this action in their own names they are equitably liable to [respondents] for the amount of any judgment that they may recover against the United States of America," and further alleged that the Boshamers had "refus[ed] to aid [respondents] in recovering the damages to which [respondents] are entitled." [6] The Boshamers filed an answer stating that they had made the assignment but "are without knowledge or information as to any damages done . . . and . . . have been unwilling to institute or prosecute a damage suit against their Government for something they have no knowledge of." [7] At the trial respondents admitted that all of the damage had occurred before the claim had been assigned to them, and that they had known of the damage at the

[4] R. 33.

[5] Originally there were two cases, one under the Tucker Act, 28 U. S. C. (Supp. IV) § 1346 (a)(2), for damages to property under lease to the United States, and the second under the Tort Claims Act for damages to buildings on property not under lease. The District Court awarded respondents judgment for $2,050 in the first action and $975 in the second, and both judgments were affirmed by the Court of Appeals. The Tort Claims action alone is involved here.

[6] R. 20.

[7] R. 23.

time of the assignment. The District Court, however, held the Anti-Assignment Act inapplicable on the ground that the joinder of the assignors prevented any possible prejudice to the Government, since "[t]he rights of all of the possible claimants and of the United States will be finally adjudicated in this one suit." [8]

The Court of Appeals affirmed, believing that the assignment had resulted from a "mutual mistake as to the law," and holding that:

> "Relief is granted, not merely because [respondents] are assignees, nor even because the vendors have been made parties to the suit, but because of the mistake that led to the making of the assignment, which was a part of the consideration for the purchase price paid by [respondents] for the land conveyed to them. The relief is given to the assignees, not as a matter of law, but as a matter of equity because of the mistake involved and the hardship which would otherwise result." 186 F. 2d 430, 434.

We cannot agree. In our view the judgment is based entirely on the assignment, which falls clearly within the ban of the Anti-Assignment Act. We have recently had occasion to review the Act's purposes. In *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 373 (1949), we stated that "[i]ts primary purpose was undoubtedly to prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government," and that a second purpose was "to prevent possible multiple payment of claims, to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant." Other courts have found yet another purpose of the statute, namely, to save to the United States "defenses which it has to claims by an as-

[8] R. 18.

signor by way of set-off, counter claim, etc., which might not be applicable to an assignee." [9]

In the *Aetna* case, *supra,* this Court reaffirmed the principle that the statute does not apply to assignments by operation of law, as distinguished from voluntary assignments. There can be no doubt that in the present case the assignment was voluntary. The Boshamers were free to sell their land as well as their damage claim to whomever they pleased, or, had they chosen, they could have sold the land and the claim separately. The voluntary nature of the assignment is reflected in the fact that one of the respondents testified on cross-examination that he understood that he was "buying a claim against the Government." [10]

That an assignment is voluntary is not an end to the matter, however. In the ninety-nine-year history of the Anti-Assignment Act, this Court has recognized as exceptions to the broad sweep of the statute two types of voluntary assignments (aside from voluntary assignments made after a claim has been allowed): transfers by will, *Erwin* v. *United States,* 97 U. S. 392, 397 (1878), and general assignments for the benefit of creditors, *Goodman* v. *Niblack,* 102 U. S. 556, 560–561 (1881). The first of these exceptions is justified by analogy to transfers by intestacy, which are exempt from the statute as being transfers by operation of law. It would be unwise to make a distinction for purposes of the Act between transfers which serve so much the same purposes as transfers by will and by intestacy. In similar fashion, the exception for voluntary assignments for the benefit of creditors has been justified by analogy to assignments in bankruptcy. See *Goodman* v. *Niblack, supra.* We find no such compelling analogies in the case at bar. On the contrary, this case

[9] *Grace* v. *United States,* 76 F. Supp. 174, 175 (1948).

[10] R. 13.

presents a situation productive of the very evils which Congress intended to prevent. For example, the assignors knew of no damage and refused to bring suit, yet by their assignment the Government is forced to defend this suit through the courts and deal with persons who were strangers to the damage and are seeking to enforce a claim which their assignors have forsworn. One of Congress' basic purposes in passing the Act was "that the government might not be harassed by multiplying the number of persons with whom it had to deal." *Hobbs* v. *McLean,* 117 U. S. 567, 576 (1886). See also *United States* v. *Aetna Surety Co., supra.*

Nor are we persuaded by the special considerations which the Court of Appeals thought were controlling here. To hold the Anti-Assignment Act inapplicable because an assignment has been executed under a "mutual mistake of law" would require an inquiry into the state of mind of all parties to a challenged assignment, and would reward those who are ignorant of a statute which has been on the books for nearly a century. The all-inclusive language of the Act permits no such easy escape from its prohibition. In like manner, to hold the Act inapplicable because all possible claimants are before the court would be to draw a distinction on the basis of a purely fortuitous factor—whether an assignee, in his suit against the Government, can get personal service on his assignor. Even more important, this theory that an assignee can avoid the Act by joining his assignor as a party defendant or an unwilling party plaintiff, would not only subvert the purposes of the Act but flood the courts with litigation by permitting them to recognize assigned claims which the accounting officers of the Government would be obligated to reject. Since only a court can give the binding adjudication of the rights of all parties to the transaction—United States, assignor, and assignee—which it is claimed prevents any possible prejudice to

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the Government, the courts would be applying a laxer rule under the statute than would the accounting officers. Such was not the intention of Congress. See *United States* v. *Gillis,* 95 U. S. 407 (1877). We do not believe the Act can be by-passed by the use of any such procedural contrivance.

The Court of Appeals also felt that respondents' claim should be upheld because "hardship" would otherwise result. If it were necessary only to balance equities in order to decide whether the Anti-Assignment Act applies—a view which this Court has many times repudiated—respondents would have little weight on their side of the scales. They paid the Boshamers $30 per acre for the land and buildings plus the claim; yet they admitted at the trial that land adjoining the Boshamer farm was worth $100 an acre or more, and that the Boshamer farm was one of the best in the county. Furthermore, we find here no "unconscionable" conduct on the part of the government agents. They had no part in the making of the assignment upon which respondents rely, and in fact the first dealing between respondents and the government agents occurred at least six weeks after that assignment had been executed.

The judgment is

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE JACKSON dissent.

MR. JUSTICE FRANKFURTER.*

I would dismiss these writs of certiorari.

After the argument of these cases it became manifest that they were legal sports. Each presents a unique set of circumstances. Neither is likely to recur; both are individualized instances outside the scope of those con-

*[This opinion applies also to No. 46, *United States* v. *Jordan, post,* p. 911.]

siderations of importance which alone, as a matter of sound judicial discretion, justify disposition of a writ of certiorari on the merits.

The controlling purpose of the radical reforms introduced by the Judiciary Act of 1925, reinforced by an exercise of the Court's rule-making power in regard to the residual jurisdiction on appeal (see Rule 12 and 275 U. S. 603–604, 43 Harv. L. Rev. 33, 42 *et seq.*), was to put the right to come here, for all practical purposes, in the Court's judicial discretion. Needless to say, the reason for this is to enable the Court to adjudicate wisely, and therefore after adequate deliberation, the controversies that make the Court's existence indispensable under our Federal system.

From time to time some cases which ought never to have been here in the first instance are bound to reach the stage of argument, despite the process by which the wheat of worthy petitions for certiorari is sifted from the vast chaff of cases for which review is sought here, too often because of the blind litigiousness of parties or of the irresponsibility and excessive zeal of their counsel. Since the Judiciary Act of 1925, successive Chief Justices have repeatedly brought this abuse of the certiorari privilege to the attention of the Bar, but thus far without avail. When it is considered that at the last Term the Court passed on 987 such petitions, it is surprising, not that petitions are granted that escaped appropriate weeding-out—and, parenthetically, that a few are inappropriately denied—but that the process of rejection works as well as it does.[1] And of course disposition of this volume of pe-

[1] Compare the 154 petitions for certiorari presented to the Court during the October Term, 1915. Even one-sixth of our current volume of petitions impelled the Court to emphasize the administrative importance of freeing this Court from the imposition of improperly granted petitions for certiorari. *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn., Ltd.*, 242 U. S. 430, 434.

titions for certiorari is the smaller part of the Court's work.[2]

The fact that a case inappropriate for review escaped denial through a weeding-out process that is bound to be circumscribed, is no reason for compounding the oversight by disposing of such a case on the merits, after argument has made more luminously clear than did the preliminary examination of the papers that the litigation ought to be allowed to rest where it is by dismissing the writ. The reason for this was set forth on behalf of the Court by Mr. Chief Justice Taft:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except 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. The present case certainly comes under neither head." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393.

In fairness to the effective adjudication of those cases for which the Court sits, the Court has again and again acted on these considerations and dismissed the writ as "improvidently granted" after the preliminary and neces-

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[2] In addition to passing upon the 987 petitions for certiorari, the Court during the last Term considered and disposed of 77 cases by the "per curiam decisions," 121 "other applications" on the Miscellaneous Docket, and 5 cases on the Original Docket, and after argument decided with full opinion 114 cases. Journal Sup. Court U. S., October Term, 1950, 1.

sarily tentative consideration of the petition.[3] These reasons are especially compelling when the Court's mistake in assuming that an important issue of general law was involved does not survive argument as to cases like the present, which were part of the vast summer accumulation of petitions to come before the Court at the opening of the Term.[4]

MR. JUSTICE DOUGLAS, dissenting.

First. If the Shannons were the only plaintiffs in the action, I assume that the Anti-Assignment Act, R. S. § 3477, would bar a recovery. But the Shannons—the assignees—have joined the Boshamers—the assignors—as defendants. Hence all the parties who can possibly be affected by the assignment are before the Court. Certainly the Boshamers could recover from the United States and, if the assignment were treated as void (as against the United States), any recovery by the Bosham-

[3] *United States* v. *Rimer,* 220 U. S. 547; *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn., Ltd., supra; Tyrrell* v. *District of Columbia,* 243 U. S. 1; *Layne & Bowler Corp.* v. *Western Well Works, Inc., supra; Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U. S. 508; *Keller* v. *Adams-Campbell Co.,* 264 U. S. 314; *Wisconsin Elec. Co.* v. *Dumore Co.,* 282 U. S. 813; *Sanchez* v. *Borras,* 283 U. S. 798; *Franklin-American Trust Co.* v. *St. Louis Union Trust Co.,* 286 U. S. 533; *Moor* v. *Texas & New Orleans R. Co.,* 297 U. S. 101; *Texas & New Orleans R. Co.* v. *Neill,* 302 U. S. 645; *Goodman* v. *United States,* 305 U. S. 578; *Goins* v. *United States,* 306 U. S. 622; *McCullough* v. *Kammerer Corp.,* 323 U. S. 327; *McCarthy* v. *Bruner,* 323 U. S. 673. See also *Washington Fidelity Nat. Ins. Co.* v. *Burton,* 287 U. S. 97, 100; *Wilkerson* v. *McCarthy,* 336 U. S. 53, 64.

[4] Both of the petitions in these cases were filed on May 3, 1951, and granted on October 8, 1951. 342 U. S. 808, 809. At this Term's opening the Court passed on 224 petitions for certiorari accumulated during the summer. In addition, at the beginning of this Term 4 cases were dismissed on motion, 6 other cases were disposed of by "per curiam decisions," and 14 Miscellaneous Docket "applications" were disposed of.

ers would in equity belong to the Shannons. See *Martin* v. *National Surety Co.*, 300 U. S. 588, 597. If they can recover, I see no reason, except a narrow conceptual one, why in this proceeding the entire controversy cannot be settled. The judgment obtained by the Boshamers against the United States would in good conscience have to be held in trust for the Shannons.

Second. The suggestion that the writ be dismissed as improvidently granted raises a recurring problem in the administration of the business of the Court. A Justice who has voted to deny the writ of certiorari is in no position after argument to vote to dismiss the writ as improvidently granted. Only those who have voted to grant the writ have that privilege. The reason strikes deep. If after the writ is granted or after argument, those who voted to deny certiorari vote to dismiss the writ as improvidently granted, the integrity of our certiorari jurisdiction is impaired. By long practice—announced to the Congress and well-known to this Bar—it takes four votes out of a Court of nine to grant a petition for certiorari. If four can grant and the opposing five dismiss, then the four cannot get a decision of the case on the merits. The integrity of the four-vote rule on certiorari would then be impaired.

Syllabus.

GEORGIA RAILROAD & BANKING CO. *v.* REDWINE, STATE REVENUE COMMISSIONER.

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

No. 1. Argued February 13, 1950.—Continued February 20, 1950.—Reargued November 26, 1951.—Decided January 28, 1952.

1. Under 28 U. S. C. § 1341, it cannot be said, in the circumstances of this case, that any of the remedies suggested by the Attorney General of Georgia affords appellant the "plain, speedy and efficient remedy" in the state courts necessary to deprive the United States District Court of jurisdiction to enjoin the State Revenue Commissioner from assessing or collecting ad valorem taxes from appellant corporation contrary to an exemption in its special state charter and in violation of the prohibition of the Federal Constitution against a state passing any law impairing the obligation of contracts. Pp. 300–303.

   (a) A suit for injunction in a state court cannot be said to be such a remedy, since it was tried by appellant without success in *Musgrove* v. *Georgia R. Co.*, 204 Ga. 139, 49 S. E. 2d 26, appeal dismissed, 335 U. S. 900. Pp. 301, 303.

   (b) Nor can arresting tax executions by affidavits of illegality be said to be such a remedy when it would require the filing of over 300 separate claims in 14 different counties to protect the single federal claim asserted by appellant. P. 303.

   (c) Nor can a suit against the State for refund after payment of taxes be said to be such a remedy when it is applicable only to taxes amounting to less than 15% of the total taxes in controversy. P. 303.

   (d) Raising appellant's federal claim in defense of a suit by the State Revenue Commissioner to recover taxes is not a remedy that could have been invoked by appellant. P. 303, n. 11.

2. This suit in a federal district court by a corporation to enjoin a State Revenue Commissioner from assessing or collecting ad valorem taxes from the corporation, contrary to an exemption in its special state charter and in violation of the prohibition of the Federal Constitution against a state passing any law impairing the obligation of contracts, is not a suit against the State which cannot be brought without the State's consent. *In re Ayers*, 123 U. S. 443, distinguished. Pp. 303–306.

85 F. Supp. 749, reversed and remanded.

A three-judge federal district court dismissed appellant's suit to enjoin a State Revenue Commissioner from assessing or collecting ad valorem taxes contrary to an exemption in appellant's special state charter and the prohibition of the Federal Constitution against any state law impairing the obligation of contracts. 85 F. Supp. 749. On appeal to this Court, *reversed and remanded,* p. 306.

Furman Smith argued the cause for appellant. With him on the briefs was *Robert B. Troutman.*

M. H. Blackshear, Jr., Assistant Attorney General of Georgia, argued the cause for appellee. With him on the brief were *Eugene Cook,* Attorney General, and *Edward E. Dorsey.*

Victor Davidson filed briefs on behalf of various Georgia counties and municipalities, as *amici curiae,* urging affirmance. With him on the briefs was *Standish Thompson,* and on a supplementary brief was *Harold Sheats,* for Fulton County, Georgia.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

Appellant was incorporated in 1833 by a Special Act of the Georgia General Assembly that included a provision for exemption from taxation.[1] In 1945, the Georgia Constitution was amended to provide that "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void." [2] According to appellant's complaint, appellee, who is State Revenue Commissioner, is threatening to act pursuant to this amendment by proceeding against appellant for the

[1] Ga. Laws 1833, pp. 256, 264.

[2] Ga. Const., Art. I, § III, par. III. See Ga. Laws 1945, No. 34, pp. 8, 14.

collection of ad valorem taxes for the year 1939, and all subsequent years, on behalf of the State and every county, school district and municipality through which appellant's lines run.[3] Appellant claims that this threatened taxation would be contrary to its legislative charter and would impair the obligation of contract between appellant and the State of Georgia, contrary to Article I, Section 10 of the Federal Constitution.[4]

This latest phase[5] of appellant's frequent litigation over the tax exemption provision of its 1833 charter began when appellant filed suit against appellee's predecessor in a Georgia state court seeking injunctive and declaratory relief. Relief was denied without reaching the merits of appellant's claim when the Georgia Supreme Court held that the action was, in effect, an unconsented suit against the State which could not be maintained in the state courts. *Musgrove* v. *Georgia Railroad & Banking Co.*, 204 Ga. 139, 49 S. E. 2d 26 (1948). We dismissed an appeal from that judgment because it was based upon a nonfederal ground adequate to support it. 335 U. S. 900 (1949).

Thereafter, appellant filed this action in the District Court to enjoin appellee from assessing or collecting ad valorem taxes contrary to its legislative charter. Appellant also asked that appellee's threatened acts be adjudged in violation of a prior decree also entered by the court below and affirmed by this Court. *Wright* v.

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[3] Ga. Code Ann., 1937, cc. 92–26, 92–27, 92–28, as amended, contains the taxation provisions which appellee is allegedly threatening to invoke against appellant.

[4] "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, ..." U. S. Const., Art. I, § 10, cl. 1.

[5] The cases concerning this exemption that have reached this Court are collected in *Atlantic Coast Line R. Co.* v. *Phillips*, 332 U. S. 168, 173 (1947).

Georgia Railroad & Banking Co., 216 U. S. 420 (1910). A court of three judges [6] dismissed appellant's complaint for want of jurisdiction, holding that the State of Georgia had not submitted itself to the jurisdiction of the court so as to be barred by the *Wright* decree and that this action against appellee is in effect an unconsented suit against the State prohibited by the Eleventh Amendment.[7] 85 F. Supp. 749 (1949).

The Attorney General of Georgia stated at the bar of this Court that "plain, speedy and efficient" state remedies were available to appellant, particularly by appeal from an assessment by appellee. We ordered the cause continued to enable appellant to assert such remedies. 339 U. S. 901 (1950). After the District Court modified the restraining order which it had entered pending appeal to permit assessment, appellee held appellant liable for the full ad valorem tax and appellant appealed to the state courts. The Georgia Supreme Court dismissed the appeal for want of jurisdiction, holding that such remedy was not available to appellant. *Georgia Railroad & Banking Co.* v. *Redwine*, 208 Ga. 261, 66 S. E. 2d 234 (1951). Following this decision, appellant moved for termination of the continuance of its appeal in this Court and we ordered reargument.

First. On reargument, the Attorney General of Georgia again maintained that "plain, speedy and efficient" remedies were available to appellant in the state courts. If so, the District Court is without jurisdiction under 28

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[6] Required under 28 U. S. C. (Supp. IV) §§ 2281, 2284. *Query* v. *United States*, 316 U. S. 486 (1942).

[7] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U. S. Const., Amend. XI.

U. S. C. (Supp. IV) § 1341.[8] The remedies now suggested are: (1) suit for injunction in the Superior Court of Fulton County, Georgia; (2) arresting tax execution by affidavits of illegality; and (3) suing the State for refund after payment of taxes. The first route was tried by appellant without success in the *Musgrove* litigation, *supra*. The second remedy, the present availability of which was doubted by the three Justices of the Georgia Supreme Court that considered the matter in the appeal case,[9] would require the filing of over three hundred separate claims in fourteen different counties to protect the single federal claim asserted by appellant.[10] The third remedy, suit for refund after payment, is applicable only to taxes payable directly to the State and amounting to less than 15% of the total taxes in controversy.[11] We cannot say that the remedies suggested by the Attorney General afford appellant the "plain, speedy and efficient remedy" necessary to deprive the District Court of jurisdiction under 28 U. S. C. (Supp. IV) § 1341.

Second. Passing to the jurisdictional ground upon which the District Court rested its decision, we note that

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[8] "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[9] 208 Ga. at 272, 66 S. E. 2d at 241.

[10] Compare *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 520 (1917), with *Matthews* v. *Rodgers*, 284 U. S. 521, 529–530 (1932). See also *Graves* v. *Texas Co.*, 298 U. S. 393, 403 (1936).

[11] An adequate remedy as to only a portion of the taxes in controversy does not deprive the federal court of jurisdiction over the entire controversy. *Greene* v. *Louisville & Interurban R. Co.*, note 10, *supra*. See *Hillsborough* v. *Cromwell*, 326 U. S. 620, 629 (1946).

It was also suggested that appellant's federal claim could be raised in defense to a suit brought by appellee to recover taxes, but this is hardly a remedy that could have been invoked by appellant.

the State of Georgia was not named as a party in the District Court. But, since appellee is a state officer, the court below properly considered whether the relief sought against the officer is not, in substance, sought against the sovereign.[12] If this action is, in effect, an unconsented suit against the State, the action is barred.[13]

The District Court characterized appellant's action as one to enforce an alleged contract with the State of Georgia, and, as such, a suit against the State. But appellant's complaint is not framed as a suit for specific performance. It seeks to enjoin appellee from collecting taxes in violation of appellant's rights under the Federal Constitution. This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State.[14] These decisions were reexamined and reaffirmed in *Ex parte Young,* 209 U. S. 123 (1908), and have been consistently followed to the present day.[15] This general rule has been applied in suits against individuals threatening

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[12] *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U. S. 682, 687–688 (1949); *In re Ayers,* 123 U. S. 443 (1887).

[13] Appellant is incorporated in Georgia and a suit by it against the State of Georgia is not expressly barred by the language of the Eleventh Amendment. Nevertheless, a federal court may not entertain the action if it is a suit against the State. *Hans* v. *Louisiana,* 134 U. S. 1 (1890).

[14] *Gunter* v. *Atlantic Coast Line R. Co.,* 200 U. S. 273 (1906); *Prout* v. *Starr,* 188 U. S. 537 (1903); *Smyth* v. *Ames,* 169 U. S. 466, 518–519 (1898); *Tindal* v. *Wesley,* 167 U. S. 204 (1897); *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362 (1894); *Pennoyer* v. *McConnaughy,* 140 U. S. 1 (1891), and numerous cases cited therein.

[15] *Alabama Comm'n* v. *Southern R. Co.,* 341 U. S. 341, 344 (1951); *Sterling* v. *Constantin,* 287 U. S. 378, 393 (1932), and cases cited therein; *Greene* v. *Louisville & Interurban R. Co.,* note 10, *supra,* at 507, and cases cited therein. See *Larson* v. *Domestic & Foreign Commerce Corp.,* note 12, *supra,* at 690–691, 704.

Appellant in this case merely seeks the cessation of appellee's allegedly unconstitutional conduct and does not request affirmative

to enforce allegedly unconstitutional taxation, including cases where, as here, it is alleged that taxation would impair the obligation of contract. *Gunter* v. *Atlantic Coast Line R. Co.,* 200 U. S. 273 (1906); *Pennoyer* v. *McConnaughy,* 140 U. S. 1 (1891); *Allen* v. *Baltimore & O. R. Co.,* 114 U. S. 311 (1885).

In re Ayers, 123 U. S. 443 (1887), relied upon below, is not a contrary holding. In that case, complainant had not alleged that officers threatened to tax its property in violation of its constitutional rights. As a result, the Court held the action barred as one in substance directed at the State merely to obtain specific performance of a contract with the State.[16] Since appellant seeks to enjoin appellee from a threatened and allegedly unconstitutional invasion of its property, we hold that this action against appellee as an individual is not barred as an unconsented suit against the State.[17] The State is free to carry out its functions without judicial interference directed at the

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action by the State. Compare *Ford Motor Co.* v. *Department of Treasury,* 323 U. S. 459, 462–463 (1945); *Great Northern Ins. Co.* v. *Read,* 322 U. S. 47, 50–51 (1944); *North Carolina* v. *Temple,* 134 U. S. 22 (1890); *Hagood* v. *Southern,* 117 U. S. 52 (1886).

[16] That there is no inconsistency between the decision in *Ayers* and the cases above cited is shown by the careful differentiation of *Allen* v. *Baltimore & O. R. Co., supra,* an opinion also written by Mr. Justice Matthews. See also *Pennoyer* v. *McConnaughy,* note 14, *supra.*

[17] The fact that the Georgia Supreme Court has considered that appellee acts with official immunity does not, of course, impart immunity from responsibility to the supreme federal authority. *Ex parte Young, supra,* at 167. See also *Graves* v. *Texas Co.,* note 10, *supra,* at 403–404.

We do not find it necessary to consider whether the State of Georgia had submitted itself to the jurisdiction of the District Court in the *Wright* litigation. Unlike *Gunter* v. *Atlantic Coast Line R. Co., supra,* where additional parties were brought into the second action, appellant has limited its complaint to a request for relief against appellee alone.

sovereign or its agents, but this immunity from federal jurisdiction does not extend to individuals who act as officers without constitutional authority.

Accordingly, we find that the District Court was not deprived of jurisdiction in this case on either the ground that it is a suit against the State or that "plain, speedy and efficient" remedies are available to appellant in the state courts. Since the District Court did not determine whether appellee was bound by the *Wright* decree and did not address itself to the merits of appellant's claim, we do not pass upon these questions but remand the case to the District Court for further proceedings.

Reversed and remanded.

MR. JUSTICE DOUGLAS, concurring.

It is my view that appellant's suit is in reality against the State of Georgia to enjoin a breach of contract. It is the same contract that was involved in *Wright* v. *Georgia R. & Banking Co.*, 216 U. S. 420. In that case the Court held that the Contract Clause of the Constitution barred Georgia from breaching her agreement granting appellant tax immunity by legislative act.

The suit in the *Wright* case was against a state officer. But the Attorney General appeared and defended the case on the merits. It is clear to me that the Attorney General represented and spoke for the interests of Georgia in the lower court and in this Court. The Georgia Constitution and statutes authorized the Governor to allow the Attorney General to defend suits involving the State's interests. See Ga. Code of 1895, §§ 23, 220; Ga. Const. of 1877, Art. VI, § X, par. II. The decree that was entered adjudicated the rights of Georgia, declaring her bound by the contract, stating that the Acts of the Georgia Legislature involved in the litigation were "a valid and binding contract between the State of Georgia"

and the present appellant. There were no special circumstances, as in *Land* v. *Dollar,* 330 U. S. 731, that would keep the suit from being *res judicata* against the State.

I would conclude that Georgia is bound by the decree in the *Wright* case. Therefore, relief is now available in the form of an ancillary exercise of the District Court's equity jurisdiction to protect appellant's rights secured under the prior decree. *Gunter* v. *Atlantic Coast Line,* 200 U. S. 273.

GUESSEFELDT *v.* McGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL.

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

No. 204. Argued November 29, 1951.—Decided January 28, 1952.

Petitioner sued under § 9 (a) of the Trading with the Enemy Act, as amended, to recover property vested by the Alien Property Custodian. He alleged that: He is a German citizen who had lived continuously in Hawaii from 1896 to 1938. In April, 1938, he took his family to Germany for a vacation. After the outbreak of war, he was unable to secure passage home before March, 1940, when his re-entry permit expired. When the United States entered the war, he was detained involuntarily in Germany, first by the Germans and later by the Russians, until July, 1949, when he returned to this country. He had done nothing directly or indirectly to aid the war effort of the enemy. *Held:*

1. Petitioner was not "resident within" Germany within the meaning of the definition of "enemy" in § 2 and, therefore, was "not an enemy" within the meaning of § 9 (a), authorizing a suit by any person "not an enemy" to recover property vested by the Alien Property Custodian. Pp. 311–312.

2. Properly construed in the light of its purposes, its legislative history, and the constitutional issues which otherwise would be raised, § 39, forbidding the return of property of any "national" of Germany or Japan vested in the Government at any time after December 17, 1941, applies only to those German and Japanese nationals otherwise ineligible to bring suit under § 9 (a). Pp. 312–320.

88 U. S. App. D. C. 383, 191 F. 2d 639, reversed.

The District Court dismissed petitioner's suit under § 9 (a) of the Trading with the Enemy Act, as amended, 50 U. S. C. App. § 1 *et seq.*, to recover property vested by the Alien Property Custodian. 89 F. Supp. 344. The Court of Appeals affirmed. 88 U. S. App. D. C. 383, 191 F. 2d 639. This Court granted certiorari. 342 U. S. 810. *Reversed,* p. 320.

William W. Barron argued the cause for petitioner. With him on the brief was *Robert F. Klepinger.*

James D. Hill argued the cause for respondents. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Baynton, George B. Searls* and *Irwin A. Seibel.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a case brought under § 9 (a) of the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. § 1 *et seq.*,[1] to recover property vested by the Alien Property Custodian. The District Court granted the Government's motion to dismiss, holding that plaintiff,

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[1] SEC. 2. "The word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory."

SEC. 9. "(a) Any person not an enemy . . . claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, . . . may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; . . . [S]aid claimant may institute a suit in equity 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 claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the

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while not "resident within" Germany within the meaning of § 2 of the Act, and thus "not an enemy" for the purposes of § 9 (a), was precluded from recovering by § 39 which provides that "No property . . . of Germany, Japan, or any national of either such country vested in . . . the Government . . . pursuant to the provisions of this Act, shall be returned to former owners thereof . . . ." 62 Stat. 1240, 1246, 50 U. S. C. App. (Supp. IV, 1946) § 39.[2] 89 F. Supp. 344. The Court of Appeals for the District of Columbia Circuit affirmed. 88 U. S. App. D. C. 383, 191 F. 2d 639. We brought the case here for clarification of the restrictions imposed by and the remedies open under the Trading with the Enemy Act. 342 U. S. 810.

Accepting the allegations as true for the purpose of dealing with the legal issues raised by the motions to dismiss, the situation before us may be briefly stated. Guessefeldt, a German citizen, lived continuously in

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United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held . . . or the interest therein to which the court shall determine said claimant is entitled." 50 U. S. C. App. §§ 2, 2 (a), 9 (a).

[2] "SEC. 39. No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property Act of 1946."

Hawaii from 1896 to 1938. In April of that year he took his family to Germany for a vacation. After the outbreak of war, he was unable to secure passage home before March, 1940, when his re-entry permit expired. When the United States entered the war, he was involuntarily detained in Germany, first by the Germans and after 1945 by the Russians, until July, 1949, when he returned to this country. During that time he did nothing directly or indirectly to aid the war effort of the enemy.

The first question to be decided is whether the claimant was "resident within" the territory of a nation with which this country was at war within the meaning of §§ 2 and 9 (a) of the Trading with the Enemy Act. He was physically within the enemy's territory. He contends, however, that the meaning conveyed by "resident within" is something more than mere presence; at the least a domiciliary connotation, if not domicile, is implied.

Legislative history leaves the meaning shrouded. Some use of the term "domicile" as the touchstone of enemy status is to be found in the Congressional hearings and reports.[3] But on the floor, Representative Montague, one of the managers of the bill, unequivocally stated under close questioning that the statutory language was intended to cover much more than those domiciled in enemy nations. Yet prisoners of war, expeditionary forces and

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[3] See Statement of Hon. Robert Lansing, Secretary of State, Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 4704, 65th Cong., 1st Sess. 3, 4. But see *id.*, at 9. Assistant Attorney General Charles Warren, principal draftsman of the bill, testified that it had no application to Germans "domiciled" in this country. *Id.*, at 34. And the House Report speaks of enemy status as being determined "not so much . . . by the nationality or allegiance of the individual, . . . as by his . . . commercial domicile or residence in enemy territory. The enemy domiciled or residing in the United States is not included . . . ." H. R. Rep. No. 85, 65th Cong., 1st Sess. 2.

"sojourners" were not, he said, intended to be included. 55 Cong. Rec. 4922.[4]

Guessefeldt retained his American domicile. Moreover, if anything more than mere physical presence in enemy territory is required, it would seem clear that he was not an "enemy" within the meaning of § 2. His stay before the war, as a matter of choice, was short. The circumstances negative any desire for a permanent or long-term connection with Germany. He intended, and indeed attempted, to leave there before this country entered the war. Being there under physical constraint, he is almost literally within the excepted class as authoritatively indicated by Mr. Montague. To hold that "resident within" enemy territory implies something more than mere physical presence and something less than domicile is consistent with the emanations of Congressional purpose manifested in the entire Act, and the relevant extrinsic light, including the decisions of lower courts on this issue, which we note without specifically approving any of them. See *McGrath* v. *Zander,* 85 U. S. App. D. C. 334, 177 F. 2d 649; *Josephberg* v. *Markham,* 152 F. 2d 644; *Stadtmuller* v. *Miller,* 11 F. 2d 732; *Vowinckel* v. *First Federal Trust Co.,* 10 F. 2d 19; *Sarthou* v. *Clark,* 78 F. Supp. 139.

Guessefeldt has the further obstacle of § 39 to clear before he can succeed. Congress in 1948, so the Govern-

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[4] The validity of this construction is additionally suggested by the explanation in the Senate report of the parallel term of § 2, "doing business within such territory." According to the report that meant "having a branch or agency actively conducting business within that country." S. Rep. No. 111, 65th Cong., 1st Sess. 4. That is to say, not "domiciled" in enemy territory by American corporation law standards, but having a substantial, not casual or transitory connection with it. See also Hearings before a Subcommittee of the Senate Committee on Commerce on H. R. 4960, 65th Cong., 1st Sess. 136–137.

ment's argument runs, adopted a "policy of nonreturn," [5] and prohibited the restoration of vested property to a "national" of Germany. A citizen is a national, and Guessefeldt is a German citizen. Thus, even though he may, before the enactment of § 39, have been entitled to bring suit as a nonenemy under § 9 (a), that privilege has since been cut off. To which Guessefeldt counters that § 39 must be construed harmoniously with § 9 (a); the term "national" in the new section must accordingly be taken to mean only those German and Japanese citizens who could not theretofore have enforced the return of their property as of right. Section 39, in the context of its legislative history and in the light of the scheme and background of the statute, makes the Government's contention unpersuasive.

It is clear that the Custodian can lawfully vest under § 5 a good deal more than he can hold against a § 9 (a) action. *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554; *Clark* v. *Uebersee Finanz-Korp.,* 332 U. S. 480. Thus Congress had to make provision for the disposal of two classes of vested property. Nonenemy property, lawfully vested under § 5, was recoverable in a suit against the Custodian. § 9 (a); see *Becker Steel Co.* v. *Cummings,* 296 U. S. 74. The second class, property owned by "enemies" and therefore not subject to recovery under § 9 (a), was reserved for disposition "[a]fter the end of the war . . . as Congress shall direct." 40 Stat. 411, 423, 50 U. S. C. App. § 12.

After both wars, Congress did adopt measures to dispose of this property. The Treaty of Berlin, 42 Stat. 1939, 1940, at the end of World War I, confirmed the possession of vested enemy property by the United States. *Junkers* v. *Chemical Foundation, Inc.,* 287 F. 597; *Lange* v. *Wingrave,* 295 F. 565; *Klein* v. *Palmer,* 18 F. 2d 932. For

[5] H. R. Rep. No. 976, 80th Cong., 1st Sess. 2.

present purposes it does not matter whether this action was taken simply to secure claims of American citizens against Germany or was regarded as the rightful withholding of spoils of war. In the Settlement of War Claims Act of 1928, 45 Stat. 254, 270, 50 U. S. C. App. §§ 9 (b)(12), (13), (14), (16), 9 (m), Congress provided for the return to admittedly enemy owners of 80% of their vested property. See *Cummings* v. *Deutsche Bank*, 300 U. S. 115.[6] Section 32 of the Trading with the Enemy Act, 60 Stat. 50, as amended, 50 U. S. C. App. (Supp. IV, 1946) § 32,

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[6] The Resolution of July 2, 1921, terminating the state of war with Germany, provided that "All property of the Imperial German Government . . . and of all German nationals which . . . has . . . come into the possession or under control of . . . the United States . . . shall be retained . . . and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law." 42 Stat. 105, 106. By the Treaty of Versailles, art. 297 (d), "all the exceptional war measures, or measures of transfer . . . shall be considered as final and binding upon all persons." In art. 297 (i), Germany undertook "to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States." The Treaty of Berlin, 42 Stat. 1939, 1940, incorporated these provisions of the Versailles Treaty, together with appendices defining "exceptional war measures" and cutting off the right of suit by German nationals against American officials on account of wartime action. An agreement of August 10, 1922, 42 Stat. 2200, established a Mixed Claims Commission to adjudicate claims of American nationals against Germany. Provisions for the return of vested property were made by successive amendments to § 9. Finally, in the Settlement of War Claims Act, 45 Stat. 254, 270, Congress provided for the return of 80% of their vested property to German enemies who would waive their claims to the remaining 20%. Germany in a debt funding agreement of June 23, 1930, deposited bonds with the United States, payments on which were to be applied to the settlement of awards of the Mixed Claims Commission. When Germany defaulted on these payments, Congress, by Public Resolution No. 53 of June 27, 1934, 48 Stat. 1267, suspended all deliveries of property under the Settlement of War Claims Act to German nationals until Germany should clear up the arrears.

enacted after World War II, provided for administrative returns of property to certain classes of "technical" enemies who were ineligible to bring suit under § 9 (a). Thus, if § 39 is treated as dealing only with property not otherwise subject to recovery, the consistency of the pattern of enactment is preserved. On the other hand, if the significant language of the section is regarded as requiring the retention of property which would otherwise be recoverable in a suit under § 9 (a), it would mark the first departure from what appears to be a heretofore consistent Congressional policy.

Section 39 was passed as part of a measure establishing a commission on the problem of compensating American prisoners of war, internees and others who suffered personal injury or property damage at the hands of World War II enemies. Congressional attention was focused on the nature and extent of these claims and methods of adjudicating them. The issues involved in § 39 were of peripheral concern. Reading the legislative history in this light, it lends support to the view that § 39 was conceived as dealing with property not otherwise subject to return. Senate hearings opened with detailed testimony analyzing the value of assets which would be left after payments for administration and liquidation, returns under § 32, and disbursements in satisfaction of judgments in suits brought under § 9 (a). Hearings before a Subcommittee of the Senate Committee on the Judiciary on H. R. 4044, 80th Cong., 2d Sess. 12–21. See also *id.*, at 44, and Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 873, 80th Cong., 1st Sess. 264. It seems clear that the legislation looks to the disposition of this fund, and the conclusion is reinforced by the provision of the section that "The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest

therein shall be covered into the Treasury at the earliest practicable date."

The tenor of the hearings demonstrates no purpose to change the existing scope of § 9 (a). The only reason a proviso to that effect was not included in § 39 as passed seems to be an assumption—unwarranted in the light of other evidence before the committees discussed below—that a national of any enemy nation had no rights under § 9 (a) in any case.[7] Indeed, the terms "enemy," "enemy alien," "enemy national," and "German or Japanese national" are used interchangeably in the hearings, not only by committee members but by witnesses from the Office of Alien Property, without regard to precise shades of meaning in the context of the Trading with the Enemy Act.

By § 39 Congress was manifesting its "firm resolve not to permit the recurrence of events which after the close of World War I led to the return of enemy property to their former owners." H. R. Rep. No. 976, 80th Cong., 1st Sess. 2. Those events, as we have seen, culminated in the Settlement of War Claims Act of 1928 permitting enemies as defined in § 2 of the Trading with the Enemy

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[7] As it passed the House, the bill contained a provision suspending the payment out of vested assets of debts owed by enemies to citizens. In the Senate hearings, Representative Beckworth, who had sponsored that provision, urged the Senate to go further and suspend the payment of so-called "title claims" as well. He presented a draft amendment for the Senate committee's consideration which provided that "no property . . . shall be returned to former owners . . . except as directed by a court under § 9 (a) of the act." This was to be an addition to the provision which became § 39. Hearings before a Subcommittee of the Senate Committee on the Judiciary on H. R. 4044, 80th Cong., 2d Sess. 124. Both of these provisions were omitted from the bill reported by the Senate. Although this bit of legislative history reveals a certain amount of confusion about the operation of the Act, it is tolerably clear from it that the operation of § 9 (a) was not intended to be affected by the legislation.

Act to recover 80% of their vested assets. The major controversy on § 39 was whether this reversal of post-World War I policy was justifiable as a matter of international law or appropriate as a course of action for the United States. Opponents of the section considered the "policy of nonreturn" as applied to admitted enemies illegal, or at least unjust, confiscation of private property. To this point—and not to the issue before the Court in this case—were directed the references in the reports, H. R. Rep. No. 976, 80th Cong., 1st Sess. 2, and debate, 94 Cong. Rec. 550–551, on which the Government relies.

On the other hand, both Senate and House committees had before them testimony calling attention to the very problem now in issue. Hearings before the House Committee on Interstate and Foreign Commerce, *supra,* at 265; Hearings before a Subcommittee of the Senate Committee on the Judiciary, *supra,* at 197, 254. And one witness presented a draft substitute for the section, complex to be sure, which would expressly have saved cases like Guessefeldt's from the operation of the bill. *Id.,* at 233–236. This suggestion was not acted upon by the committee. Yet taken as a whole, the testimony on this issue was meagre and unimpressive. It was largely in written form, and therefore less likely to have been seen by or to have had impact on the committee members or to reflect their views. These considerations, taken together with the peripheral character of the problem from the committees' point of view, the consistent failure to appreciate the technical significance of the term "enemy national" in the framework of the Act, and the fact that the matters raised by this testimony were not touched upon in floor debate—all go far to overcome any presumption that the claimant's situation was considered by Congress and rejected.

Moreover, a decision for the Government would require us to decide debatable constitutional questions. In

suits by United States citizens, § 9 (a) has been construed, over the Government's objection, to require repayment of just compensation when the Custodian has liquidated the vested assets. *Becker Steel Co.* v. *Cummings, supra; Henkels* v. *Sutherland,* 271 U. S. 298; see *Central Union Trust Co.* v. *Garvan,* 254 U. S. at 566; *Stoehr* v. *Wallace,* 255 U. S. 239, 245. Such a construction, it is said, is necessary to preserve the Act from constitutional doubt. It is clear too that friendly aliens are protected by the Fifth Amendment requirement of just compensation. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481. The question which remains is whether a citizen in Guessefeldt's position of a nation with which this country is at war is deemed a friendly alien. More broadly, is any national of an enemy country within the reach of constitutional protection? The thrust of the Government's argument is that § 39 bars any such claimant on the mere showing of his citizenship. *Ex parte Kawato,* 317 U. S. 69, holds that as a matter of common law as well as interpretation of the Trading with the Enemy Act, a resident enemy national, even though interned, must be permitted access to American courts. And *The Venus,* 8 Cranch 253, seems to say that at common and international law, in the absence of hostile acts, enemy status, at least for the purpose of trade, follows location and not nationality. Cf. *Miller* v. *United States,* 11 Wall. 268, 310–311.

On the other side is Mr. Justice (then Judge) Cardozo's careful opinion in *Techt* v. *Hughes,* 229 N. Y. 222, 128 N. E. 185, holding that a national of an enemy country, wherever resident, is an enemy alien and that any mitigation of the rigors of that status, as in the right to sue, is a matter of grace. He suggests, however, that "enemy alien" for the purpose of trade with the enemy may be something different than for other purposes, but he had, of course, no occasion to consider whether this difference attained constitutional dimensions. In *Klein* v. *Palmer,*

supra, a suit by two resident German citizens, one proclaimed a dangerous enemy alien during World War I, against the Alien Property Custodian for damages and equitable relief, Judges Hough, L. Hand and Mack held that "the government was under no constitutional prohibition from confiscating the property of the enemy's nationals, whether resident or nonresident." *Id.,* at 934. It was the court's view that the class of nonenemies for the purpose of § 2 of the Trading with the Enemy Act was broader than the class entitled to just compensation under the Fifth Amendment.

Certainly, the constitutional problem is not imaginary, and the claim not frivolous which would have to be rejected to decide in the Government's favor. Considering that confiscation is not easily to be assumed, a construction that avoids it and is not barred by a fair reading of the legislation is invited.

The concern of the Trading with the Enemy Act is with problems at once complicated and far-reaching in their repercussions. Instead of a carefully matured enactment, the legislation was a makeshift patchwork. Such legislation strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes. Cf. *Clark* v. *Uebersee Finanz-Korp.,* 332 U. S. 480; *Markham* v. *Cabell,* 326 U. S. 404; *Silesian-American Corp.* v. *Clark,* 332 U. S. 469.[8]

[8] Other than those here for review, six district court cases have involved construction of § 39. The Government contends that five of these have accepted the position it urges in this case. *Schill* v. *McGrath,* 89 F. Supp. 339; *Lippmann* v. *McGrath,* 94 F. Supp. 1016; *Bellman* v. *Clark,* Civ. No. 47–229 (S. D. N. Y. Nov. 8, 1948); *Mittler* v. *McGrath,* Civ. No. 3276–48 (D. D. C. Mar. 31, 1950); *Janner* v. *McGrath,* Civ. No. 3685–49 (D. D. C. Mar. 31, 1950). Even if this were true, it would present no such settled line of adjudication as to give pause to this Court in upsetting it. But at least three of these cases present no conflict with a decision in favor of the claimant here. In *Mittler, Janner* and *Lippman,* plaintiffs are enemies within § 2,

None of the considerations we have canvassed standing alone is conclusive in favor of the claimant. Perhaps none, by itself, would justify a decision in his favor. The cumulative effect, however, places such a decision well within the bounds of reasonable construction. We have said enough to show that the question is not free from doubt. On the balance, however, we think § 39 is properly construed as applying only to those German and Japanese nationals otherwise ineligible to bring suit under § 9 (a).

The judgment below is

Reversed.

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

MR. CHIEF JUSTICE VINSON, with whom MR. JUSTICE REED and MR. JUSTICE MINTON join, dissenting.

I dissent because I would read Section 39 as it is written. That Section plainly forbids return of vested property to "*any* national" of Germany or Japan.[1] Petitioner is a German citizen and the Court itself concedes

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thus ineligible under § 9 (a), and because they are also citizens of Germany must be barred by § 39 whatever the meaning ascribed to the term "national" in that section. The same is possibly true of *Schill,* since the plaintiff there was interned as a dangerous enemy alien during the war. It might also be added that in *McGrath* v. *Zander, supra,* decided after the enactment of § 39, the Government apparently made no contention that the section would bar the suit, although on the Government's theory that result would clearly follow. Thus, analysis of the cases shows no such near unanimity in its favor as the Government contends.

[1] "No property or interest therein of Germany, Japan, or *any national* of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States

that a German citizen is a German national. (Op. p. 320.) Yet the Court permits return of property to petitioner, limiting the application of Section 39 to *some* nationals, namely those nationals who are also "enemies" as the term is defined in Section 2 (a) of the Trading with the Enemy Act.

The term "national" has also been given legislative definition. "National" is defined as including "a subject, citizen or resident of a foreign country" in Executive Order No. 8389,[2] a regulation "approved, ratified, and confirmed" by Congress in 1941.[3] The Court applies Section 39 by reading out the term "national" and inserting the term "enemy" as defined in Section 2 (a). Since it is apparent on the face of the statute that Congress in no wise chose to assimilate these two clearly defined terms, the Court should not.

Just the other day, we held that "[w]e are not free, under the guise of construction, to amend [a] statute" by reading "carefully distinguished and separately defined terms to mean the same thing." *Pillsbury* v. *United Engineering Co.*, 342 U. S. 197, 199–200 (1952). In departing from that standard in this case, the Court rewrites Section 39 so that the Trading with the Enemy Act of 1917, as amended, will conform more closely to its own notions of statutory symmetry. Condemning that Act as

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shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property Act of 1946." (Emphasis supplied.) 62 Stat. 1240, 1246 (1948), 50 U. S. C. App. (Supp. IV) § 39.

[2] § 5 (E) (i), 6 Fed. Reg. 2897, 2898 (1941).

[3] 55 Stat. 838, 840 (1941).

a "makeshift patchwork" does not justify a failure to read the 1948 addition of Section 39 as it was written by Congress. Statutory revision by this Court is not consistent with our judicial function of enforcing statutory law as written by the legislature.

In my view, this case should be decided on the basis of the legislatively defined language of Section 39. But the Court has broadened the inquiry. Even on the Court's own basis, the result in this case cannot be squared with the history of the Trading with the Enemy Act, the legislative background of Section 39 or the scope of Congress' war power over enemy property.

At the outset, it should be clearly understood that when petitioner's property was vested, he was an alien enemy in every ordinary sense of that term. So long as his citizenship was German, he became an enemy upon the declaration of war with Germany, wherever his residence and whatever his personal sentiments. This Court has so held throughout its history.[4] The Court today acknowledges that *Techt* v. *Hughes,* 229 N. Y. 222, 128 N. E. 185 (1920), so held after an exhaustive review of the authorities. It should be added that this Court recently adopted the rationale of *Techt* v. *Hughes, supra,* in *Johnson* v. *Eisentrager,* 339 U. S. 763, 771–773 (1950). Nor need we look only to judicial definition of petitioner's status. Congress has defined "alien enemies" as including "all natives, citizens, denizens, or subjects of the hostile nation or government." [5] As we so recently said, the classification between friend and enemy based upon citi-

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[4] *The Rapid,* 8 Cranch 155, 161 (1814); *White* v. *Burnley,* 20 How. 235, 249 (1858); *The Venice,* 2 Wall. 258, 274 (1865); *The Benito Estenger,* 176 U. S. 568, 571 (1900); *Herrera* v. *United States,* 222 U. S. 558, 569 (1912).

[5] Alien Enemy Act of 1798, 1 Stat. 577, now 50 U. S. C. § 21. A similar definition of "alien enemies" had also been used in the naturalization laws. 2 Stat. 153, 154 (1802); R. S. § 2171. In World War I,

zenship, if ever "doctrinaire," has now been "validated by the actualities of modern total warfare." *Johnson* v. *Eisentrager, supra,* at 772.

When, in 1917, Congress defined the term "enemy" solely "for the purposes of" the Trading with the Enemy Act, it was aware that such status was ordinarily determined by "nationality or allegiance of the individual" rather than by "domicile or residence." [6] However, at that time, Congress chose to limit the definition of "enemy" to include only those persons "resident within" enemy territory—a definition which does not include petitioner on the pleadings in this case. Section 2 (a) of the Trading with the Enemy Act. This represented a deliberate "relaxation" and "modification" of Congress' power over enemy property.[7] This policy of modification was followed throughout the World War I alien property program, culminating in the Settlement of War Claims Act of 1928 which authorized return of 80% of seized property to its former owners.[8]

World War II legislation over alien property represented a complete reversal of the soft policy of World War I. In 1941, Congress extended the power of seizure and vesting to all property of "any foreign country or national thereof" in exercising its war power "to affirmatively compel the use and application of foreign property

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Congress specifically exempted "alien enemies" from the draft, a context in which the term "alien enemy" would be meaningless if it did not include nationals of enemy nations residing in this country. 40 Stat. 76–78, 885, 955 (1917–1918).

[6] H. R. Rep. No. 85, 65th Cong., 1st Sess. 2 (1917).

[7] *Ibid.;* S. Rep. No. 111, 65th Cong., 1st Sess. 2 (1917); 55 Cong. Rec. 4842 (1917). See *Ex parte Kawato,* 317 U. S. 69, 76–77 (1942).

[8] 45 Stat. 254, 270–274 (1928), 50 U. S. C. App. §§ 9 (b)(12)–(14) and (16), 9 (m). Returns of German property were postponed in 1934 when it appeared that Germany was in default in the payment of war claims. 48 Stat. 1267 (1934).

in a manner consistent with the interests of the United States." [9] In 1946, Congress added Section 32 to the Trading with the Enemy Act, authorizing administrative return of vested property subject to certain conditions, one of which prevented administrative return to a "citizen or subject of [an enemy] nation" who was "present . . . in the territory of such nation." [10] Finally, in the War Claims Act of 1948, Congress added Section 39 to the Trading with the Enemy Act, thereby expressing its "firm resolve not to permit the recurrence" of the World War I policy of returning enemy property.[11] The House Committee on Interstate and Foreign Commerce, in reporting favorably upon the bill, stated:

> "The policy of nonreturn and noncompensation is a sound public policy which should be enacted into law. It does not violate any concepts of international law or international morality. No essential difference exists between private property and public property in the case of Germany and Japan. For several years before World War II while Germany and Japan were preparing to make war upon the United States, property owned in the United States by the citizens of both of these countries was subject to rigid control of their respective governments. While the fiction of private ownership was retained, actually property of German and Japanese nationals in the United States was widely used to accomplish the national objectives of those countries.
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> "The position of Germany and Japan (with respect to war claims against these countries) is somewhat

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[9] 55 Stat. 838, 839 (1941), 50 U. S. C. App. § 5 (b); S. Rep. No. 911, 77th Cong., 1st Sess. 2 (1941). See *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480 (1947).

[10] 60 Stat. 50 (1946), 50 U. S. C. App. § 32 (a) (2) (D).

[11] H. R. Rep. No. 976, 80th Cong., 1st Sess. 2 (1947).

> analogous to that of a bankrupt against whom claims are apt to be filed in an amount greatly in excess of the bankrupt's assets. The legitimate claims of the United States alone, on account of the expense incurred in fighting World War II, will most likely exceed many times the assets available for payment even over a considerable period of years. Under these circumstances it is therefore not only expedient but just and fair for the United States to marshal all Japanese and German assets which are available in this country." [12]

Under this reversal of World War I policy, the property of German nationals, including petitioner's, was to be retained to satisfy war claims arising out of German aggression. The policy of non-return of vested property to German nationals restricts the scope of Section 9 (a) as to returns to German nationals such as petitioner who are not "enemies" as defined in Section 2 (a). The primary purpose of Section 9 (a)—to provide for judicial return of property mistakenly seized from American citizens or nationals of friendly countries—is preserved.[13] Such an interpretation of Section 39, reading the word "national" as meaning "national" and not "enemy," is far more harmonious with the entire Act and particularly the World War II legislation on alien property [14] than the Court's reading of the statute.

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[12] *Id.*, at 2–3.

[13] Section 9 (a) was originally designed to protect American citizens, S. Rep. No. 111, 65th Cong., 1st Sess. 8 (1917), and apparently the bulk of the claims filed under § 9 (a) are those of American citizens. Hearings before Senate Committee on the Judiciary on H. R. 4044, 80th Cong., 2d Sess. 44 (1948).

[14] 1946 patent legislation likewise conforms to this pattern. In 1921, Congress barred claims based upon World War I use of patent rights of an "alien enemy." 41 Stat. 1313, 1314, 35 U. S. C. § 86. In 1946, Congress barred claims for patent infringement during World

Looking to the legislative history of Section 39 itself, the Court notes that congressional attention was focused on the problem of compensating prisoners of war, internees and others injured by our World War II enemies. With the claims of the victims of aggression pressed upon it, it is not surprising that, when Congress balanced those claims against the rights of enemy nationals to property lawfully vested by the Alien Property Custodian, it prohibited return of property to enemy "nationals" and not merely to "enemies" as restrictively defined in Section 2 (a) of the Trading with the Enemy Act of 1917. It cannot be fairly suggested that congressional use of the term "national" was inadvertent. Objections to the restriction on recovery of property under Section 9 (a) resulting from the use of the term "national" instead of "enemy" in Section 39 were pressed upon Congress in a written statement and in oral testimony before a congressional committee.[15] A witness offered a proposed amendment to Section 39 that would have limited its application to certain described enemy nationals.[16] Even

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War II brought by a "national" of an enemy country. 60 Stat. 940, 944, 35 U. S. C. § 111. The failure to use the term "enemy" was deliberate. The next section of the 1946 Act refers to "rights of any enemy . . . as defined by the Trading With the Enemy Act . . . ." 60 Stat. 940, 944, 35 U. S. C. § 112. And the bill as drafted in the House Committee on Patents, H. R. Rep. No. 1498, 79th Cong., 2d Sess. (1946), used the term "national" as used in proposed bill H. R. 2111 (§ 9), rejecting the term "alien enemy" as used in the 1921 legislation and in proposed bill H. R. 4079 (§ 10). This was done after the difference in meaning of the term was called to the attention of the Committee by the Office of Alien Property Custodian. Hearings before the House Committee on Patents on H. R. 2111 and H. R. 4079, 79th Cong., 1st Sess. 105 (1945).

[15] Hearings before the Senate Committee on the Judiciary on H. R. 4044, 80th Cong., 2d Sess. 197–198, 233–234 (1948). See also *id.*, at 254–255, and 94 Cong. Rec. 551 (1948).

[16] *Id.*, at 235.

this amendment would not have saved petitioner's claim. It would not have substituted the term "enemy" as narrowly defined in Section 2 (a) of the Act and hence would not have limited the operation of Section 39 as drastically as the Court does today.

The Court closes with the statement that its construction of Section 39 avoids a constitutional problem which, it says, "is not imaginary." As discussed above, it is settled that petitioner is an alien enemy in every sense of the word but the purposely restrictive definition of Section 2 (a) of the Trading with the Enemy Act. "There is no constitutional prohibition against confiscation of enemy properties." *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 11 (1926), and cases cited therein. The suggestion that the relaxed legislative definition of "enemy" in 1917 could limit the constitutional war power of Congress over enemy property finds no support in decisions of this Court.[17]

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[17] *Ex parte Kawato*, 317 U. S. 69 (1942), in holding that an enemy alien's right of access to federal courts was not barred by common law or statute, did not touch upon the constitutional power of Congress over enemy property. The extension of that power to include property of an American citizen resident in an enemy country, *The Venus*, 8 Cranch 253 (1814), hardly supports a restriction of that power in case of petitioner, an enemy citizen present in an enemy country.

In *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 475 (1947), the Court stated:

"There is no doubt but that under the war power [Art. I, § 8, cl. 11], as heretofore interpreted by this Court, the United States, acting under a statute, may vest in itself the property of a *national* of an enemy nation. Unquestionably to wage war successfully, the United States may confiscate enemy property. *United States* v. *Chemical Foundation*, 272 U. S. 1, 11." (Emphasis added.)

In discussing the requirement that just compensation be paid for seizure of property of "friendly aliens," the Court had obvious reference to the nationals of friendly nations. 332 U. S. at 475–476, 479–480.

Petitioner, a German citizen present in Germany during the war, is certainly as much an enemy alien as was Ludecke, a German citizen lawfully resident in this country during the war. We found no constitutional barrier to Ludecke's summary removal without judicial scrutiny under the Alien Enemy Act of 1798. *Ludecke* v. *Watkins,* 335 U. S. 160 (1948). That opinion relied upon an excerpt from a paragraph by Chief Justice Marshall in *Brown* v. *United States,* 8 Cranch 110, 126 (1814), a case dealing with confiscation of property. 335 U. S. at 164. The full paragraph reads as follows:

> "War gives an equal right over persons and property: and if its declaration is not considered as prescribing a law respecting the person of an enemy found in our country, neither does it prescribe a law for his property. The act concerning alien enemies, which confers on the president very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war."

Any doubts as to Congress' "equal right over persons and property" of enemy aliens should have vanished with the *Ludecke* decision. The Just Compensation Clause, like the Due Process Clause, is found in the Bill of Rights. As we said in our *Ludecke* decision, "it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights." 335 U. S. at 171. In addition to what was said in *Ludecke,* the admonition of Chief Justice Marshall in *Brown* v. *United States, supra,* is appropriate in this case:

> "Respecting the power of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and

> wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall chuse to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the Court." 8 Cranch at 122–123.

The will of Congress having been expressed in unmistakable terms in Section 39, I would enforce, not frustrate, the legislative command.

CITIES SERVICE CO. ET AL. *v.* McGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN.

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

No. 305. Argued January 2–3, 1952.—Decided January 28, 1952.

1. The Trading with the Enemy Act authorizes the vesting of obligations evidenced by negotiable debentures payable to bearer, the obligors of which are within the United States, even though the debentures themselves are not in the possession of the Custodian and are outside the United States. Pp. 331–334.
   (a) Such obligations are "within the United States" within the meaning of the Executive Order authorizing, pursuant to the Act, the vesting of property "within the United States." P. 332, n. 6; pp. 333–334.
2. It is within the constitutional power of Congress to authorize the Custodian to seize an interest represented by a bond or debenture without seizing the instrument itself, where the obligor of the bond or debenture is within the United States. P. 334.
3. American obligors who are compelled, under the Trading with the Enemy Act, to make payment to the Custodian on negotiable debentures, payable to bearer, located outside the United States will be entitled under the Fifth Amendment to "just compensation" to the extent of any double liability to which they may be subjected in the event a foreign court holds them liable to a holder in due course; and such cause of action will accrue when, as, and if a foreign court compels them to make payment to a holder in due course. Pp. 334–336.

189 F. 2d 744, affirmed.

In an action by the Attorney General, as successor to the Alien Property Custodian, to enforce payment of certain negotiable debentures payable to bearer previously vested under the Trading with the Enemy Act, the District Court entered judgment for the defendants. 93 F. Supp. 408. The Court of Appeals reversed. 189 F. 2d 744. This Court granted certiorari. 342 U. S. 865. *Affirmed,* p. 336.

Timothy N. Pfeiffer argued the cause for petitioners and was on the brief for the Chase National Bank. With him also on the brief were *Theodore N. Johnsen,* for the Cities Service Company, and *Rebecca M. Cutler,* of counsel.

George B. Searls argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Baynton, James D. Hill* and *Irwin A. Seibel.*

MR. JUSTICE CLARK delivered the opinion of the Court.

In this suit the Attorney General of the United States as successor to the Alien Property Custodian [1] seeks payment by petitioners of two 5% gold debentures of the face value of $1,000 each and payable to bearer. Petitioner Cities Service Company is obligor on the debentures and petitioner Chase National Bank of New York is the indenture trustee. The obligations represented by these debentures had previously been vested, under provisions of the Trading with the Enemy Act,[2] upon a finding that the obligations were owned by a resident and national of Germany.[3] Neither of the debentures is or ever has been in the possession of respondent. One of the debentures, although not maturing until 1969, was presented for redemption at Chase's offices in New York City on January 5, 1950, subsequent to the date of the vesting order. A

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[1] The powers and functions of the Alien Property Custodian were transferred to the Attorney General by Exec. Order No. 9788 (Oct. 14, 1946), 11 Fed. Reg. 11981. The terms "Custodian" and "Attorney General" are used interchangeably in this opinion.

[2] 40 Stat. 411, as amended, 50 U. S. C. App. § 1 *et seq.*

[3] Vesting Order No. 12960 (March 11, 1949), 14 Fed. Reg. 1405. The vesting order recited that the obligations were "owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or [were] evidence of ownership or control by," the specified resident and national of Germany.

legend was then typed on the debenture reciting the issuance of the vesting order and the claims of respondent thereunder. This debenture is at present in the possession of a brokerage house in New York City.[4] The other debenture matured in 1950 but has never been presented for payment. Its whereabouts are unknown but it was last reported to be in Berlin in the hands of the Russians.[5]

The District Court granted summary judgment for petitioners on the ground that the Attorney General, in issuing the vesting order in question, had exceeded his authority to vest property "within the United States." [6] 93 F. Supp. 408. The Court felt that the obligations represented by the debentures were inseparable from the certificates themselves, which, insofar as is known, were outside this country at the time of vesting. The Court of Appeals reversed and directed summary judgment for respondent, holding that the Act authorized the seizure and enforcement of obligations evidenced by debentures

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[4] With respect to this debenture, the Attorney General seeks payment by petitioners of the proceeds of redemption plus accrued interest; or, in the alternative, the issuance to him of a new debenture of the same series and for the same face value, and with the same number of unpaid interest coupons attached.

[5] With respect to this debenture, the Attorney General seeks payment of the redemption proceeds plus accrued interest.

[6] By § 2 (c) of Exec. Order No. 9095 (March 11, 1942), 7 Fed. Reg. 1971, as amended by Exec. Order No. 9193 (July 6, 1942), 7 Fed. Reg. 5205, and Exec. Order No. 9567 (June 8, 1945), 10 Fed. Reg. 6917, the President, acting pursuant to the Trading with the Enemy Act, as amended, delegated to the Attorney General authority to vest property "within the United States" owned by a designated enemy country or national thereof, with specified exceptions not relevant here. Assuming, without deciding, that this language is narrower than the language of §§ 5 (b) and 7 (c) of the Act, as amended, we need not decide which language is controlling. For, as indicated below, we believe that in any event the obligations vested here were "within the United States" and thus come within the presumably narrower terms of the Executive Order.

outside the country so long as the obligor is within the United States. 189 F. 2d 744. In reaching this result, the Court of Appeals indicated that petitioners would have a "claim against the Treasury for recoupment" in the event of a subsequent recovery against them in a foreign court by a bona fide holder of the debentures. Otherwise, the Court felt, the vesting order would take petitioners' property in violation of the Fifth Amendment. *Id.*, at 747–749. We granted certiorari, 342 U. S. 865.

We believe that the Trading with the Enemy Act grants the authority necessary to vest obligations evidenced by domestic negotiable bearer debentures even though the debentures themselves are outside the United States. By § 7 (c) of the Act, enacted during World War I, the President is given the authority to seize all enemy property, "including . . . choses in action, and rights and claims of every character and description owing or belonging to . . . an enemy . . . ." At the beginning of World War II, Congress made an even broader grant of authority to the Executive through an amendment to § 5 (b), providing that "any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President . . . ." See *Markham* v. *Cabell,* 326 U. S. 404, 411 (1945); *Silesian-American Corp.* v. *Clark,* 332 U. S. 469, 479 (1947); *Clark* v. *Uebersee Finanz-Korp.,* 332 U. S. 480, 485–486 (1947). That the obligations represented by negotiable bearer debentures come within these broad terms is beyond question.

Petitioners urge, however, that the debentures themselves constitute the debt, and since the debentures were located outside of the United States at the time of vesting, the debts did not have a situs within the United States and therefore were not proper subjects of seizure. To apply this fiction here would not only provide a sanctuary for enemy investments and defeat the recovery of American securities looted by conquering forces; it would also

restrict the exercise of the war powers of the United States. Congress did not so intend. The Custodian's authority to reach a debenture or bonded indebtedness without seizure of the instrument itself is explicitly recognized by § 9 (n) of the Act, which provides that "[i]n the case of property consisting . . . of bonded or other indebtedness . . ., evidenced . . . by bonds or by other certificates of interest . . . or indebtedness . . ., where the right, title, and interest in the property (but not the actual . . . bond or other certificate of interest or indebtedness) was conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him . . .," then the President may, in proper cases, order return of 80% of the property.[7] Moreover, in giving the Custodian this power to seize an interest represented by a bond or debenture without seizure of the actual instrument, Congress transgressed no constitutional limitations on its jurisdiction. As the Court of Appeals pointed out, the obligor, Cities Service Company, is within the United States and the obligation of which the debenture is evidence can be effectively dealt with through the exercise of jurisdiction over that petitioner. See *Standard Oil Co.* v. *New Jersey,* 341 U. S. 428, 438–439 (1951).

A more serious question is whether application of the seizure provisions of the Act to petitioners will take their property in violation of the Fifth Amendment, unless they have a remedy against the United States in the event a foreign court holds them liable to a holder in due course

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[7] Section 9 (n) was added in 1928 by the Settlement of War Claims Act, 45 Stat. 254, which provided in general for the return of 80% of all seized property. The purpose of § 9 (n) was to authorize the President, where he had seized a stock or bond interest without seizing the instrument itself, to make such 80% return to the current holder of the instrument. See H. R. Rep. No. 17, 70th Cong., 1st Sess. 21; S. Rep. No. 273, 70th Cong., 1st Sess. 30.

of the debentures. While petitioners concede that the Act discharges them from liability in any court in the United States,[8] they contend that they have extensive properties over the world which subject them to foreign suits from which the Act affords no certain protection. Petitioners readily admit that the court of the country in which suit is brought may apply the laws of the United States and recognize their prior payment to the Attorney General as a complete defense; and that the holder, if qualified, might file a claim under the Act. Nevertheless, they insist, there remains at least the possibility that they will be exposed to liability in a foreign court. While their defense to such litigation seems adequate and final payment by them improbable, we agree that petitioners might suffer judgment the payment of which would effect a double recovery against them. In that event, petitioners will have the right to recoup from the United States, for a "taking" of their property within the meaning of the Fifth Amendment, "just compensation" to the extent of their double liability.[9] Such cause of action will accrue when, as, and if a foreign court forces petitioners to pay a holder in due course of the debentures. We agree with

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[8] See §§ 5 (b) (2) and 7 (e).

[9] Such recovery will not be prevented by § 7 (c) of the Act. That subsection provides in part:

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act . . . ."

Petitioners, however, will not be claiming "any money or other property . . . conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him . . . ." Rather they will be claiming just compensation under the Fifth Amendment for a taking of their property. Therefore the provision quoted above will not apply to them.

the Court of Appeals that only with this assurance against double liability can it fairly be said that the present seizure is not itself an unconstitutional taking of petitioners' property.

Affirmed.

MR. JUSTICE REED, with whom MR. JUSTICE MINTON joins, concurring.

We concur in the result and in the opinion except as to its declaration that petitioners will be able to recoup just compensation from the United States should they suffer a judgment effecting a second recovery against them.

In our view there is no present taking of the property of Cities Service, but only of the money due from Cities Service to the foreign bondholder on maturity of the obligation. *Standard Oil Co.* v. *New Jersey,* 341 U. S. 428. It may be that if Cities Service is later required to pay a claimant other than the Alien Property Custodian, it will have a claim against the United States for satisfaction of its expenditure. Determination that the United States owes such an obligation should await development of the circumstances of a second judgment. *Direction Der Disconto-Gesellschaft* v. *U. S. Steel Corp.,* 300 F. 741, 743; 267 U. S. 22, 29.

BOYCE MOTOR LINES, INC. *v.* UNITED STATES.

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

No. 167. Argued December 4, 1951.—Decided January 28, 1952.

A regulation promulgated by the Interstate Commerce Commission under 18 U. S. C. § 835 provides that drivers of motor vehicles transporting inflammables or explosives "shall avoid, so far as practicable, . . . driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." Under the statute, "whoever knowingly violates" any such regulation is subject to fine and imprisonment. Petitioner was indicted for having on three separate occasions operated through the Holland Tunnel a truck carrying inflammable carbon bisulphide. The indictment alleged that "there were other available and more practicable routes" for the shipments, and that petitioner "well knew" that the shipments were in violation of the regulation. *Held:* The regulation was not void for vagueness, and the District Court should not have dismissed the counts of the indictment based thereon. Pp. 338–343.

1. No more than a reasonable degree of certainty can be demanded in the language of the prohibition contained in a criminal statute, and it is not unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line. P. 340.

2. In order to convict, the Government must prove not only that petitioner could have taken another route which was both commercially practicable and appreciably safer, but also that petitioner knew there was such a practicable, safer route and deliberately took the more dangerous route through the tunnel, or that petitioner willfully neglected to inquire into the availability of such an alternative route. Pp. 342–343.

188 F. 2d 889, affirmed.

In a criminal prosecution of petitioner, the District Court, on the ground of the invalidity of the regulation, dismissed the counts of the indictment which were based upon alleged violations of a regulation of the Interstate Commerce Commission. 90 F. Supp. 996. The Court

of Appeals reversed. 188 F. 2d 889. This Court granted certiorari. 342 U. S. 846. *Affirmed,* p. 343.

Archie O. Dawson argued the cause for petitioner. With him on the brief were *Joseph C. Glavin* and *A. Harry Moore.*

Robert W. Ginnane argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg.*

Leander I. Shelley and *Russell F. Watson* filed a brief for the Port of New York Authority, as *amicus curiae,* supporting the United States.

MR. JUSTICE CLARK delivered the opinion of the Court.

The petitioner is charged with the violation of a regulation promulgated by the Interstate Commerce Commission under 18 U. S. C. § 835.[1] The Regulation provides:

> "Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed

[1] 18 U. S. C. § 835:

"The Interstate Commerce Commission shall formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles, including flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, and poisonous substances, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land, and upon all shippers making shipments of explosives or other dangerous articles via any common carrier engaged in interstate or foreign commerce by land or water.

. . . . . .

"Such regulations shall be in accord with the best-known practicable means for securing safety in transit, covering the packing, marking, loading, handling while in transit, and the precautions necessary to determine whether the material when offered is in proper condition to transport."

> gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." [2]

The statute directs that "[w]hoever knowingly violates" the Regulation shall be subject to fine or imprisonment or both.[3]

The indictment, in counts 1, 3, and 5, charges that petitioner on three separate occasions sent one of its trucks carrying carbon bisulphide, a dangerous and inflammable liquid, through the Holland Tunnel, a congested thoroughfare. In each instance, the truck was en route from Cascade Mills, New York, to Brooklyn, New York. On the third of these trips the load of carbon bisulphide exploded in the tunnel and about sixty persons were injured. The indictment further states that "there were other available and more practicable routes for the transportation of said shipment, and . . . the [petitioner] well knew that the transportation of the shipment of carbon bisulphide . . . into the . . . Holland Tunnel was in violation of the regulations promulgated . . . by the Interstate Commerce Commission . . . ." [4] There is no allegation as to the feasibility of prearrangement of routes, and petitioner is not charged with any omission in that respect.

The District Court dismissed those counts of the indictment which were based upon the Regulation in ques-

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[2] 49 CFR § 197.1 (b).

[3] "Whoever knowingly violates any such regulation shall be fined not more than $1,000 or imprisoned not more than one year, or both; and, if the death or bodily injury of any person results from such violation, shall be fined not more than $10,000 or imprisoned not more than ten years, or both." 18 U. S. C. § 835 (sixth paragraph).

[4] R. 2.

tion, holding it to be invalid on the ground that the words "so far as practicable, and, where feasible" are "so vague and indefinite as to make the standard of guilt conjectural." 90 F. Supp. 996, 998. The Court of Appeals for the Third Circuit reversed, holding that the Regulation, interpreted in conjunction with the statute, establishes a reasonably certain standard of conduct. 188 F. 2d 889. We granted certiorari. 342 U. S. 846.

A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation.[5] But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.[6]

In *Sproles* v. *Binford,* 286 U. S. 374 (1932), these principles were applied in upholding words in a criminal statute similar to those now before us. Chief Justice Hughes, speaking for a unanimous court, there said:

> " 'Shortest practicable route' is not an expression too vague to be understood. The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understand-

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[5] *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939).

[6] *Nash* v. *United States,* 229 U. S. 373, 377 (1913); *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 502–503 (1925); *United States* v. *Petrillo,* 332 U. S. 1, 7–8 (1947).

ing. . . . The use of common experience as a glossary is necessary to meet the practical demands of legislation." [7]

The Regulation challenged here is the product of a long history of regulation of the transportation of explosives and inflammables. Congress recognized the need for protecting the public against the hazards involved in transporting explosives as early as 1866.[8] The inadequacy of the legislation then enacted led to the passage, in 1908, of the Transportation of Explosives Act,[9] which was later extended to cover inflammables.[10] In accordance with that Act, the Commission in the same year issued regulations applicable to railroads. In 1934 the Commission exercised its authority under the Act to promulgate regulations governing motor trucks, including the Regulation here in question.[11] In 1940 this Regulation was amended to substantially its present terminology.[12] That terminology was adopted only after more than three years of study and a number of drafts. The trucking industry

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[7] *Sproles* v. *Binford,* 286 U. S. 374, 393 (1932). The provision which was there challenged and upheld was concerned basically with a requirement as to distance, a requirement applying within necessary limits of practicability, just as the Regulation here challenged is concerned basically with avoidance of designated points of danger, within like limits of practicability.

[8] 14 Stat. 81.

[9] 35 Stat. 554, as amended, 35 Stat. 1134.

[10] 41 Stat. 1444.

[11] 49 CFR, 1938, § 85.34 (b); see *Regulations for Transportation of Explosives,* 211 I. C. C. 351, 354 (1935).

[12] 49 CFR, 1940 Supp., § 197–7.3082: "Drivers of motor vehicles transporting inflammable liquids shall avoid, so far as practicable, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings. So far as practicable, this shall be accomplished by prearrangement of routes." The section was amended to its present form in 1942. 7 Fed. Reg. 2869.

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participated extensively in this process, making suggestions relating to drafts submitted to carriers and their organizations, and taking part in several hearings. The Regulation's history indicates the careful consideration which was given to the difficulties involved in framing a regulation which would deal practically with this aspect of the problem presented by the necessary transportation of dangerous explosives on the highways.[13]

The statute punishes only those who knowingly violate the Regulation. This requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid.[14] That is evident from a consideration of the effect of the requirement in this case. To sustain a conviction, the Government not only must prove that petitioner could have taken another route which was both commercially practicable and appreciably safer (in its avoidance of crowded thoroughfares, etc.) than the one it did follow. It must also be shown that petitioner knew that there was such a practicable, safer route and yet deliberately took the more dangerous route through the tunnel, or that petitioner willfully neglected to exercise its duty under the Regulation to inquire into the availability of such an alternative route.[15]

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[13] Compare *United States* v. *Petrillo*, 332 U. S. 1, 7 (1947); *Miller* v. *Strahl*, 239 U. S. 426, 434 (1915); *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n*, 221 U. S. 612, 620 (1911).

[14] *Screws* v. *United States*, 325 U. S. 91, 101–103 (1945); *United States* v. *Ragen*, 314 U. S. 513, 524 (1942); *Gorin* v. *United States*, 312 U. S. 19, 27–28 (1941); *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348 (1918).

[15] The officers, agents, and employees of every motor carrier concerned with the transportation of explosives and other dangerous articles are required to "become conversant" with this and other regulations applying to such transportation. 49 CFR § 197.02.

In an effort to give point to its argument, petitioner asserts that there was no practicable route its trucks might have followed which did not pass through places they were required to avoid. If it is true that in the congestion surrounding the lower Hudson there was no practicable way of crossing the River which would have avoided such points of danger to a substantially greater extent than the route taken, then petitioner has not violated the Regulation. But that is plainly a matter for proof at the trial. We are not so conversant with all the routes in that area that we may, with no facts in the record before us, assume the allegations of the indictment to be false.[16] We will not thus distort the judicial notice concept to strike down a regulation adopted only after much consultation with those affected and penalizing only those who knowingly violate its prohibition.

We therefore affirm the judgment of the Court of Appeals remanding the cause to the District Court with directions to reinstate counts 1, 3, and 5 of the indictment.

Affirmed.

MR. JUSTICE JACKSON, with whom MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER join, dissenting.

Congress apparently found the comprehensive regulation needed for the transportation of explosives and inflammables too intricate and detailed for its own processes. It delegated the task of framing regulations to the Interstate Commerce Commission and made a knowing violation of them criminal. Where the federal crime-making power is delegated to such a body, we are

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[16] This case is here to review the granting of a motion to dismiss the indictment. It should not be necessary to mention the familiar rule that, at this stage of the case, the allegations of the indictment must be taken as true.

justified in requiring considerable precision in its exercise. *Kraus & Bros.* v. *United States,* 327 U. S. 614, 621–622.

This regulation does not prohibit carriage of explosives. It presupposes that they must be transported, and, therefore, attempts to lay down a rule for choice of routings. Petitioner was admonished to avoid congested thoroughfares, places where crowds are assembled, streetcar tracks, tunnels, viaducts and dangerous crossings. Nobody suggests that it was possible to avoid all of these in carrying this shipment from its origin to its destination. Nor does the regulation require that all or any one of them be avoided except "so far as practicable." I do not disagree with the opinion of Chief Justice Hughes and the Court in *Sproles* v. *Binford,* 286 U. S. 374, that, in the context in which it was used, " 'shortest practicable route' is not an expression too vague to be understood." A basic standard was prescribed with definiteness—distance. That ordinarily was to prevail, and, if departed from, the trucker was to be prepared to offer practical justifications.

But the regulation before us contains no such definite standard from which one can start in the calculation of his duty. It leaves all routes equally open and all equally closed. The carrier must choose what is "practicable," not, as in the *Sproles* case, by weighing distance against obstacles to passage. We may, of course, take judicial notice of geography. Delivery of these goods was impossible except by passing through many congested thoroughfares and either tunnels, viaducts or bridges. An explosion would have been equally dangerous and equally incriminating in any of them. What guidance can be gleaned from this regulation as to how one could with reasonable certainty make a choice of routes that would comply with its requirements?

It is said, however, that definiteness may be achieved on the trial because expert testimony will advise the jury as to what routes are preferable. Defects in that solution

are twofold: first, there is no standard by which to direct, confine and test the expert opinion testimony and, second, none to guide a jury in choosing between conflicting expert opinions.

It is further suggested that a defendant is protected against indefiniteness because conviction is authorized only for knowing violations. The argument seems to be that the jury can find that defendant knowingly violated the regulation only if it finds that it knew the meaning of the regulation he was accused of violating. With the exception of *Screws* v. *United States,* 325 U. S. 91, which rests on a very particularized basis, the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law. I do not suppose the Court intends to suggest that if petitioner knew nothing of the existence of such a regulation its ignorance would constitute a defense.

This regulation prescribes no duty in terms of a degree of care that must be exercised in moving the shipment. The utmost care would not protect defendant from prosecution under it. One can learn his duty from such terms as "reasonable care" or "high degree of care." Of course, one may not be sure whether a trier of fact will find particular conduct to measure up to the requirements of the law, but he may learn at least what he must strive for, and that is more than he can learn from this regulation.

This question is before this Court on the indictment only. In some circumstances we might feel it better that a case should proceed to trial and our decision be reserved until a review of the conviction, if one results. But a trial can give us no better information than we have now as to whether this regulation contains sufficiently definite standards and definition of the crime. An acquittal or disagreement would leave this unworkable, indefinite regulation standing as the only guide in a matter that badly needs intelligible and rather tight regulation. It

would remain, at least to some extent, as an incoherent barrier against state enactment or enforcement of local regulations of the same subject. Would it not be in the public interest as well as in the interest of justice to this petitioner to pronounce this vague regulation invalid, so that those who are responsible for the supervision of this dangerous traffic can go about the business of framing a regulation that will specify intelligible standards of conduct?

UNITED STATES EX REL. JAEGELER *v.* CARUSI, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL.

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

No. 275. Argued January 7, 1952.—Decided January 28, 1952.

1. Under the Alien Enemy Act, the power of the Attorney General to remove to Germany a German citizen residing in this country ended when Congress, by the Joint Resolution of October 19, 1951, terminated the state of war which had existed between the United States and Germany. P. 348.
2. Petitioner, a German citizen residing in this country, who had been interned in 1942 and ordered removed to Germany in 1946 and who had applied for a writ of habeas corpus before the passage of the Joint Resolution of October 19, 1951, terminating the state of war between the United States and Germany, is no longer removable under the Alien Enemy Act and is entitled to his release. Pp. 347–349.

187 F. 2d 912, vacated and cause remanded.

Gordon Butterworth argued the cause for petitioner. With him on the brief was *George C. Dix.*

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

PER CURIAM.

On February 1, 1942, pursuant to the Alien Enemy Act of 1798, as amended,[1] the Attorney General of the United States interned petitioner, a German citizen residing in this country. On May 3, 1946, acting under the same

[1] "Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives,

statute, the Attorney General directed petitioner's removal to Germany. Thereafter, petitioner applied for a writ of habeas corpus in the District Court for the Eastern District of Pennsylvania, and on October 9, 1950, after hearings, the District Court denied relief. The Court of Appeals for the Third Circuit affirmed, 187 F. 2d 912, and petitioner applied to this Court for a writ of certiorari on August 24, 1951.

While that petition was under consideration by the Court, a joint resolution of Congress, approved on October 19, 1951, terminated the state of war which had existed between the United States and Germany. 65 Stat. 451. We granted certiorari. 342 U. S. 864 (1951).

The statutory power of the Attorney General to remove petitioner as an enemy alien ended when Congress terminated the war with Germany.[2] Thus petitioner is no longer removable under the Alien Enemy Act.

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citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety." 1 Stat. 577, as amended, 50 U. S. C. § 21.

The Attorney General acted under Presidential Proclamation No. 2526, 6 Fed. Reg. 6323, and Presidential Proclamation No. 2655, 10 Fed. Reg. 8947.

[2] "*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December

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 direct petitioner's release from custody.

It is so ordered.

MR. JUSTICE CLARK took no part in the consideration or disposition of this case.

11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: *Provided, however,* That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest." H. J. Res. 289, 82d Cong., 1st Sess., 65 Stat. 451.

BRIGGS ET AL. *v.* ELLIOTT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

No. 273. Decided January 28, 1952.

The District Court in this case decided that constitutional and statutory provisions of South Carolina requiring separate schools for the white and colored races did not of themselves violate the Fourteenth Amendment, but ordered the school officials to proceed at once to furnish equal educational facilities and to report to the court within six months what action had been taken. After an appeal to this Court had been docketed, the required report was filed in the District Court. *Held:* In order that this Court may have the benefit of the views of the District Court upon the additional facts brought out in the report, and that the District Court may have the opportunity to take whatever action it may deem appropriate in light of that report, the judgment is vacated and the case is remanded for further proceedings. Pp. 350–352.

98 F. Supp. 529, judgment vacated and case remanded.

Spottswood W. Robinson, III, Robert L. Carter, Thurgood Marshall and *Arthur D. Shores* for appellants.

Robert McC. Figg, Jr. for appellees.

PER CURIAM.

Appellant Negro school children brought this action in the Federal District Court to enjoin appellee school officials from making any distinctions based upon race or color in providing educational facilities for School District No. 22, Clarendon County, South Carolina. As the basis for their complaint, appellants alleged that equal facilities are not provided for Negro pupils and that those constitutional and statutory provisions of South Carolina requiring separate schools "for children of the white and colored races"* are invalid under the Fourteenth Amend-

*S. C. Const., Art. XI, § 7; S. C. Code, 1942, § 5377.

ment. At the trial before a court of three judges, appellees conceded that the school facilities provided for Negro students "are not substantially equal to those afforded in the District for white pupils."

The District Court held, one judge dissenting, that the challenged constitutional and statutory provisions were not of themselves violative of the Fourteenth Amendment. The court below also found that the educational facilities afforded by appellees for Negro pupils are not equal to those provided for white children. The District Court did not issue an injunction abolishing racial distinctions as prayed by appellants, but did order appellees to proceed at once to furnish educational facilities for Negroes equal to those furnished white pupils. In its decree, entered June 21, 1951, the District Court ordered that appellees report to that court within six months as to action taken by them to carry out the court's order. 98 F. Supp. 529.

Dissatisfied with the relief granted by the District Court, appellants brought a timely appeal directly to this Court under 28 U. S. C. (Supp. IV) § 1253. After the appeal was docketed but before its consideration by this Court, appellees filed in the court below their report as ordered.

The District Court has not given its views on this report, having entered an order stating that it will withhold further action thereon while the cause is pending in this Court on appeal. Prior to our consideration of the questions raised on this appeal, we should have the benefit of the views of the District Court upon the additional facts brought to the attention of that court in the report which it ordered. The District Court should also be afforded the opportunity to take whatever action it may deem appropriate in light of that report. In order that this may be done, we vacate the judgment of the District Court and remand the case to that court for further pro-

ceedings. Another judgment, entered at the conclusion of those proceedings, may provide the basis for any further appeals to this Court.

It is so ordered.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent to vacation of the judgment of the District Court on the grounds stated. They believe that the additional facts contained in the report to the District Court are wholly irrelevant to the constitutional questions presented by the appeal to this Court, and that we should note jurisdiction and set the case down for argument.

HUGHES *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 86. Argued January 7, 1952.—Decided February 4, 1952.

A Sherman Act consent decree provided for divorcement of a motion picture company's production-distribution assets from its theater assets. Two new companies were to be formed; their stock was to be distributed to stockholders of the old company; and the latter was to be dissolved. Relative to appellant, who owned 24% of the stock of the old company, the decree provided that he might "either" sell his stock in one or the other of the new companies "or" deposit such stock with a court-designated trustee under a voting trust agreement to remain in force until appellant "shall have sold" his stock in one of the companies. Appellant chose not to sell any stock, and the District Court appointed a trustee and approved the agreed terms of a voting trust. Without evidence or findings of fact, and over appellant's protests, the District Court later amended its order appointing the trustee and ordered that the trusteed stock be sold. *Held:*

1. The provision of the decree did not require that appellant sell his stock within a reasonable time. Pp. 356–357.

2. Under the powers reserved in the consent decree, the District Court can require the sale of appellant's stock; but that would be a substantial modification of the consent decree, which cannot be made without a hearing that includes evidence and a judicial determination based upon it. Pp. 357–358.

Reversed.

From an order of a three-judge District Court in a Sherman Act proceeding, compelling appellant to sell certain shares of stock, he appealed directly to this Court under 15 U. S. C. § 29. *Reversed,* p. 358.

T. A. Slack argued the cause and filed a brief for appellant. *Leonard P. Moore, John H. Dorsey* and *Francis J. O'Hara, Jr.* were of counsel.

Philip Marcus argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Ralph S. Spritzer* and *Robert L. Stern.*

Opinion of the Court by MR. JUSTICE BLACK, announced by MR. JUSTICE DOUGLAS.

A three-judge District Court has construed certain provisions of a Sherman Act consent decree as compelling the sale of certain moving picture stocks owned by the appellant Hughes. This case is properly here on appeal from an order entered to compel the sale. 15 U. S. C. (Supp. IV) § 29.

These anti-trust proceedings were originally brought by the United States against Radio-Keith-Orpheum Corporation and other moving picture producers, distributors, and exhibitors. From the District Court's judgment in the case both the Government and defendants appealed. We affirmed in part and reversed in part. *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131. We remanded the case to the District Court leaving it free to consider whether it was necessary to require the production and distribution companies to divest themselves of all ownership and interest in the business of exhibiting pictures. Thereafter a consent decree was entered containing detailed provisions for complete divorcement of R. K. O.'s production-distribution assets from its theater assets. To accomplish this, R. K. O. was to form two new holding companies: one, the "New Picture Company," was to take over all R. K. O. subsidiaries engaged in production and distribution; the other, the "New Theater Company," was to own and control R. K. O. subsidiaries which operated theaters. Upon formation of the new companies, R. K. O. was to be dissolved. Former stockholders were to become the owners of all the capital stock of the two new companies.

A factor considered in connection with this divorcement was that Howard R. Hughes, appellant here, owned 24% of the common stock of R. K. O. No other person or corporation owned as much as 1%. He and government representatives agreed on terms to meet this situation. Their agreement was embodied in the consent decree, becoming section V. This section of the decree, set out below,* is the center of the present controversy. It provides that Hughes may "either" (A) sell his stock in one or the other of the two newly formed companies, "or" (B) deposit such stock with a court-designated trustee

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*"V. Howard R. Hughes represents that he now owns approximately 24 percent of the common stock of Radio-Keith-Orpheum Corporation. Within a period of one year from the date hereof, Howard R. Hughes shall either:

"A. Dispose of his holdings of the stock of (1) the New Picture Company, or (2) the New Theater Company, as he may elect, to a purchaser or purchasers who is or are not a defendant herein or owned or controlled by or affiliated with a defendant in this cause; or

"B. Deposit with a trustee designated by the court all of his shares of the New Picture Company or the New Theater Company, as he may elect, under a voting trust agreement whereby the trustee shall possess and be entitled to exercise all the voting rights of such shares, including the right to execute proxies and consents with respect thereto. Such voting trust agreement shall thereafter remain in force until Howard R. Hughes shall have sold his holdings of stock of the New Picture Company or the New Theater Company to a purchaser or purchasers who is or are not a defendant herein or owned or controlled by or affiliated with a defendant herein, and upon such sale and transfer such voting trust agreement shall automatically terminate. Such trust shall be upon such other terms or conditions, including compensation to the trustee, as shall be prescribed by the Court. During the period of such voting trust, Howard R. Hughes shall be entitled to receive all dividends and other distributions made on account of the trusteed shares, and proceeds from the sale thereof.

"For the purpose of evidencing his consent to be bound by the terms of section V of this decree, Howard R. Hughes individually has consented to its entry and it shall be binding upon his agents and employees."

under a voting trust agreement to remain in force until Hughes shall have sold his stock in one of the companies. Hughes chose not to sell any stock, and he and the United States agreed on a trustee and the terms of a voting trust, which agreement was approved by a court order. Later, by motion the United States sought a court order forcing the trustee to sell Hughes' stock. Without evidence or findings of fact, and over Hughes' protests, the District Court amended its order appointing a trustee by providing that "if the stock trusteed shall not have been disposed of by Howard R. Hughes by February 20th, 1953, the trustee shall dispose of such stock within two years thereafter." Appellant Hughes urges that it was error to order his stock sold in so summary a manner.

First. The Government argues that section V should be read as compelling Hughes to sell his stock within a reasonable time. We hold that the language of the section imposes no such requirement. A reading of the either/or wording would make most persons believe that Hughes was to have a choice of two different alternatives. Hughes would have no choice if the first "alternative" was to sell the stock and the second "alternative" was also to sell the stock. Moreover, section V provided that, if Hughes did not sell his stock but chose to place it in a voting trust, this trust should remain in force "until Howard R. Hughes shall have sold" his stock. This would ordinarily mean that Hughes, not the Court, could decide whether his stock should be sold. Nor can a different inference be drawn from the language authorizing the court to provide the trust's general "terms or conditions, including compensation to the trustee." This language cannot support an inference that the court was empowered to deprive Hughes of either of his expressly granted alternatives.

Arguing on a broader front than the mere language of section V, the Government urges: that section V must

be interpreted so as to achieve the purposes of the entire R. K. O. consent decree; that the basic purpose of that decree was divorcement of production-distribution companies from theater exhibition companies; and that Hughes cannot consistently with this purpose be left with a 24% interest in both types of companies. It may be true as the Government now contends that Hughes' large block of ownership in both types of companies endangers the independence of each. Evidence might show that a sale by Hughes is indispensable if competition is to be preserved. However, in section V the parties and the District Court provided their own detailed plan to neutralize the evils from such ownership. Whatever justification there may be now or hereafter for new terms that require a sale of Hughes' stock, we think there is no fair support for reading that requirement into the language of section V. The District Court's order cannot be supported by reliance on such an interpretation. Consequently the court's command to sell the stock effected a substantial modification of the original decree.

Second. The Government finds support for the substantial change in the decree by reference to (1) provisions in the decree reserving jurisdiction to amend, and (2) the inherent equity powers of the court. We entertain no doubt concerning the District Court's power to require sale of Hughes' stock after a proper hearing. When this case was formerly here on other phases, 334 U. S. 131, we had occasion to point out the District Court's power to require some companies to divest themselves of ownership of other companies where necessary to preserve competition and to prevent monopoly. The guiding principles there set out would also justify compulsory divestment of stocks by an individual. But there has been no adequate hearing of this issue as to Hughes. Neither when the present order was considered nor when the original decree was entered were any findings of fact

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made to support an order of compulsory sale of Hughes' stock. As previously pointed out the consent of Hughes did not include consent to make him sell. At every stage Hughes objected to the order forcing sale of his stock without a hearing that included evidence and a judicial determination based on it.

In these circumstances we hold that it was error to enter an order forcing Hughes to sell his stock.

Reversed.

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

DICE *v.* AKRON, CANTON & YOUNGSTOWN RAILROAD CO.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 374. Argued December 3–4, 1951.—Decided February 4, 1952.

1. In an action in a state court under the Federal Employers' Liability Act, the question of the validity of a release granted to the carrier by the injured employee is a federal question and is to be determined by federal rather than state law. Pp. 361–362.
2. A release of rights under the Federal Employers' Liability Act is void when the employee is induced to sign it by deliberately false and material statements of the carrier's authorized representatives, made to deceive the employee as to the contents of the release. P. 362.
3. In an action brought under the Federal Employers' Liability Act in an Ohio state court, which provides jury trials for cases arising under the Act, it was error for the judge to take from the jury the determination of the factual questions as to whether a release had been fraudulently obtained. Pp. 362–364.

155 Ohio St. 185, 98 N. E. 2d 301, reversed.

In a state court action under the Federal Employers' Liability Act, the State Supreme Court sustained a judgment for the defendant notwithstanding a verdict of the jury in favor of the plaintiff. 155 Ohio St. 185, 98 N. E. 2d 301. This Court granted certiorari. 342 U. S. 811. *Reversed and remanded,* p. 364.

Rice A. Hershey argued the cause for petitioner. With him on the brief was *Frederic O. Hatch.*

William A. Kelly argued the cause for respondent. With him on the brief were *Cletus G. Roetzel* and *Andrew P. Martin.*

Opinion of the Court by MR. JUSTICE BLACK, announced by MR. JUSTICE DOUGLAS.

Petitioner, a railroad fireman, was seriously injured when an engine in which he was riding jumped the track. Alleging that his injuries were due to respondent's negligence, he brought this action for damages under the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. § 51 *et seq.*, in an Ohio court of common pleas. Respondent's defenses were (1) a denial of negligence and (2) a written document signed by petitioner purporting to release respondent in full for $924.63. Petitioner admitted that he had signed several receipts for payments made him in connection with his injuries but denied that he had made a full and complete settlement of all his claims. He alleged that the purported release was void because he had signed it relying on respondent's deliberately false statement that the document was nothing more than a mere receipt for back wages.

After both parties had introduced considerable evidence the jury found in favor of petitioner and awarded him a $25,000 verdict. The trial judge later entered judgment notwithstanding the verdict. In doing so he reappraised the evidence as to fraud, found that petitioner had been "guilty of supine negligence" in failing to read the release, and accordingly held that the facts did not "sustain either in law or equity the allegations of fraud by clear, unequivocal and convincing evidence."* This judgment notwithstanding the verdict was reversed by the Court of Appeals of Summit County, Ohio, on the ground that under federal law, which controlled, the jury's verdict must stand because there was ample evi-

*The trial judge had charged the jury that petitioner's claim of fraud must be sustained "by clear and convincing evidence," but since the verdict was for petitioner, he does not here challenge this charge as imposing too heavy a burden under controlling federal law.

dence to support its finding of fraud. The Ohio Supreme Court, one judge dissenting, reversed the Court of Appeals' judgment and sustained the trial court's action, holding that: (1) Ohio, not federal, law governed; (2) under that law petitioner, a man of ordinary intelligence who could read, was bound by the release even though he had been induced to sign it by the deliberately false statement that it was only a receipt for back wages; and (3) under controlling Ohio law factual issues as to fraud in the execution of this release were properly decided by the judge rather than by the jury. 155 Ohio St. 185, 98 N. E. 2d 301. We granted certiorari because the decision of the Supreme Court of Ohio appeared to deviate from previous decisions of this Court that federal law governs cases arising under the Federal Employers' Liability Act. 342 U. S. 811.

First. We agree with the Court of Appeals of Summit County, Ohio, and the dissenting judge in the Ohio Supreme Court and hold that validity of releases under the Federal Employers' Liability Act raises a federal question to be determined by federal rather than state law. Congress in § 1 of the Act granted petitioner a right to recover against his employer for damages negligently inflicted. State laws are not controlling in determining what the incidents of this federal right shall be. *Chesapeake & Ohio R. Co.* v. *Kuhn,* 284 U. S. 44; *Ricketts* v. *Pennsylvania R. Co.,* 153 F. 2d 757, 759. Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act. Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes. See *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, 244, and cases there cited. Releases and other

devices designed to liquidate or defeat injured employees' claims play an important part in the federal Act's administration. Compare *Duncan* v. *Thompson,* 315 U. S. 1. Their validity is but one of the many interrelated questions that must constantly be determined in these cases according to a uniform federal law.

Second. In effect the Supreme Court of Ohio held that an employee trusts his employer at his peril, and that the negligence of an innocent worker is sufficient to enable his employer to benefit by its deliberate fraud. Application of so harsh a rule to defeat a railroad employee's claim is wholly incongruous with the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers. And this Ohio rule is out of harmony with modern judicial and legislative practice to relieve injured persons from the effect of releases fraudulently obtained. See cases collected in note, 164 A. L. R. 402–415. See also *Union Pacific R. Co.* v. *Harris,* 158 U. S. 326; *Callen* v. *Pennsylvania R. Co.,* 332 U. S. 625; *Chesapeake & O. R. Co.* v. *Howard,* 14 App. D. C. 262, aff'd, 178 U. S. 153; *Graham* v. *Atchison T. & S. F. R. Co.,* 176 F. 2d 819. We hold that the correct federal rule is that announced by the Court of Appeals of Summit County, Ohio, and the dissenting judge in the Ohio Supreme Court—a release of rights under the Act is void when the employee is induced to sign it by the deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release. The trial court's charge to the jury correctly stated this rule of law.

Third. Ohio provides and has here accorded petitioner the usual jury trial of factual issues relating to negligence. But Ohio treats factual questions of fraudulent releases differently. It permits the judge trying a negligence case to resolve all factual questions of fraud "other than fraud

in the factum." The factual issue of fraud is thus split into fragments, some to be determined by the judge, others by the jury.

It is contended that since a state may consistently with the Federal Constitution provide for trial of cases under the Act by a nonunanimous verdict, *Minneapolis & St. Louis R. Co.* v. *Bombolis,* 241 U. S. 211, Ohio may lawfully eliminate trial by jury as to one phase of fraud while allowing jury trial as to all other issues raised. The *Bombolis* case might be more in point had Ohio abolished trial by jury in all negligence cases including those arising under the federal Act. But Ohio has not done this. It has provided jury trials for cases arising under the federal Act but seeks to single out one phase of the question of fraudulent releases for determination by a judge rather than by a jury. Compare *Testa* v. *Katt,* 330 U. S. 386.

We have previously held that "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence' " and that it is "part and parcel of the remedy afforded railroad workers under the Employers Liability Act." *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350, 354. We also recognized in that case that to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence "is to take away a goodly portion of the relief which Congress has afforded them." It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere "local rule of procedure" for denial in the manner that Ohio has here used. *Brown* v. *Western R. Co.,* 338 U. S. 294.

The trial judge and the Ohio Supreme Court erred in holding that petitioner's rights were to be determined by Ohio law and in taking away petitioner's verdict when the issues of fraud had been submitted to the jury on conflicting evidence and determined in petitioner's favor.

The judgment of the Court of Appeals of Summit County, Ohio, was correct and should not have been reversed by the Supreme Court of Ohio. The cause is reversed and remanded to the Supreme Court of Ohio for further action not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE REED, MR. JUSTICE JACKSON and MR. JUSTICE BURTON join, concurring for reversal but dissenting from the Court's opinion.

Ohio, as do many other States,[1] maintains the old division between law and equity as to the mode of trying issues, even though the same judge administers both. The Ohio Supreme Court has told us what, on one issue, is the division of functions in all negligence actions brought in the Ohio courts: "Where it is claimed that a release was induced by fraud (other than fraud in the factum) or by mistake, it is necessary, before seeking to enforce a cause of action which such release purports to bar, that equitable relief from the release be secured." 155 Ohio St. 185, 186, 98 N. E. 2d 301, 302. Thus, in all cases in Ohio, the judge is the trier of fact on this issue of fraud, rather than the jury. It is contended that the Federal Employers' Liability Act requires that Ohio courts send the fraud issue to a jury in the cases founded on that Act. To require Ohio to try a particular issue before a different fact-finder in negligence actions brought under the Employers' Liability Act from the fact-finder on the identical issue in every other negligence case disregards the settled distribution of judicial power between Federal and State courts where Congress authorizes concurrent enforcement of federally-created rights.

It has been settled ever since the *Second Employers' Liability Cases*, 223 U. S. 1, that no State which gives its

[1] Chafee, Simpson, and Maloney, Cases on Equity (1951 ed.) 12.

courts jurisdiction over common law actions for negligence may deny access to its courts for a negligence action founded on the Federal Employers' Liability Act. Nor may a State discriminate disadvantageously against actions for negligence under the Federal Act as compared with local causes of action in negligence. *McKnett* v. *St. Louis & S. F. R. Co.,* 292 U. S. 230, 234; *Missouri ex rel. Southern R. Co.* v. *Mayfield,* 340 U. S. 1, 4. Conversely, however, simply because there is concurrent jurisdiction in Federal and State courts over actions under the Employers' Liability Act, a State is under no duty to treat actions arising under that Act differently from the way it adjudicates local actions for negligence, so far as the mechanics of litigation, the forms in which law is administered, are concerned. This surely covers the distribution of functions as between judge and jury in the determination of the issues in a negligence case.

In 1916 the Court decided without dissent that States in entertaining actions under the Federal Employers' Liability Act need not provide a jury system other than that established for local negligence actions. States are not compelled to provide the jury required of Federal courts by the Seventh Amendment. *Minneapolis & St. L. R. Co.* v. *Bombolis,* 241 U. S. 211. In the thirty-six years since this early decision after the enactment of the Federal Employers' Liability Act, 35 Stat. 65 (1908), the *Bombolis* case has often been cited by this Court but never questioned. Until today its significance has been to leave to States the choice of the fact-finding tribunal in all negligence actions, including those arising under the Federal Act. Mr. Chief Justice White's opinion cannot bear any other meaning:

> "Two propositions as to the operation and effect of the Seventh Amendment are as conclusively determined as is that concerning the nature and character

of the jury required by that Amendment where applicable. (a) That the first ten Amendments, including of course the Seventh, are not concerned with state action and deal only with Federal action. We select from a multitude of cases those which we deem to be leading. *Barron* v. *Baltimore,* 7 Pet. 243; *Fox* v. *Ohio,* 5 How. 410, 434; *Twitchell* v. *Commonwealth,* 7 Wall. 321; *Brown* v. *New Jersey,* 175 U. S. 172, 174; *Twining* v. *New Jersey,* 211 U. S. 78, 93. And, as a necessary corollary, (b) that the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same. *Livingston* v. *Moore,* 7 Pet. 469, 552; *The Justices* v. *Murray,* 9 Wall. 274; *Edwards* v. *Elliott,* 21 Wall. 532; *Walker* v. *Sauvinet,* 92 U. S. 90; *Pearson* v. *Yewdall,* 95 U. S. 294." *Id.,* at 217.

"And it was of course presumably an appreciation of the principles so thoroughly settled which caused Congress in the enactment of the Employers' Liability Act to clearly contemplate the existence of a concurrent power and duty of both Federal and state courts to administer the rights conferred by the statute in accordance with the modes of procedure prevailing in such courts." *Id.,* at 218.

"The proposition that as the Seventh Amendment is controlling upon Congress, its provisions must therefore be applicable to every right of a Federal character created by Congress and regulate the enforcement of such right, but in substance creates a confusion by which the true significance of the Amendment is obscured. That is, it shuts out of view the fact that the limitations of the Amendment are applicable only to the mode in which power or jurisdiction shall be exercised in tribunals of the

> United States, and therefore that its terms have no relation whatever to the enforcement of rights in other forums merely because the right enforced is one conferred by the law of the United States." *Id.*, at 219–220.

Although a State must entertain negligence suits brought under the Federal Employers' Liability Act if it entertains ordinary actions for negligence, it need conduct them only in the way in which it conducts the run of negligence litigation. The *Bombolis* case directly establishes that the Employers' Liability Act does not impose the jury requirements of the Seventh Amendment on the States *pro tanto* for Employers' Liability litigation. If its reasoning means anything, the *Bombolis* decision means that, if a State chooses not to have a jury at all, but to leave questions of fact in all negligence actions to a court, certainly the Employers' Liability Act does not require a State to have juries for negligence actions brought under the Federal Act in its courts. Or, if a State chooses to retain the old double system of courts, common law and equity—as did a good many States until the other day, and as four States still do [2]—surely there is nothing in the Employers' Liability Act that requires traditional distribution of authority for disposing of legal issues as between common law and chancery courts to go by the board. And, if States are free to make a distribution of functions between equity and common law courts, it surely makes no rational difference whether a State chooses to provide that the same judge preside on both the common law and the chancery sides in a single litigation, instead of in separate rooms in the same building. So long as all negligence suits in a State are treated in the same way, by the same mode of disposing equitable, non-jury, and common law, jury issues, the State does

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[2] *Ibid.*

not discriminate against Employers' Liability suits nor does it make any inroad upon substance.

Ohio and her sister States with a similar division of functions between law and equity are not trying to evade their duty under the Federal Employers' Liability Act; nor are they trying to make it more difficult for railroad workers to recover, than for those suing under local law. The States merely exercise a preference in adhering to historic ways of dealing with a claim of fraud; they prefer the traditional way of making unavailable through equity an otherwise valid defense. The State judges and local lawyers who must administer the Federal Employers' Liability Act in State courts are trained in the ways of local practice; it multiplies the difficulties and confuses the administration of justice to require, on purely theoretical grounds, a hybrid of State and Federal practice in the State courts as to a single class of cases. Nothing in the Employers' Liability Act or in the judicial enforcement of the Act for over forty years forces such judicial hybridization upon the States. The fact that Congress authorized actions under the Federal Employers' Liability Act to be brought in State as well as in Federal courts seems a strange basis for the inference that Congress overrode State procedural arrangements controlling all other negligence suits in a State, by imposing upon State courts to which plaintiffs choose to go the rules prevailing in the Federal courts regarding juries. Such an inference is admissible, so it seems to me, only on the theory that Congress included as part of the right created by the Employers' Liability Act an assumed likelihood that trying all issues to juries is more favorable to plaintiffs. At least, if a plaintiff's right to have all issues decided by a jury rather than the court is "part and parcel of the remedy afforded railroad workers under the Employers Liability Act," the *Bombolis* case should be overruled explicitly instead of left as a derelict bound to occa-

sion collisions on the waters of the law. We have put the questions squarely because they seem to be precisely what will be roused in the minds of lawyers properly pressing their clients' interests and in the minds of trial and appellate judges called upon to apply this Court's opinion. It is one thing not to borrow trouble from the morrow. It is another thing to create trouble for the morrow.

Even though the method of trying the equitable issue of fraud which the State applies in all other negligence cases governs Employers' Liability cases, two questions remain for decision: Should the validity of the release be tested by a Federal or a State standard? And if by a Federal one, did the Ohio courts in the present case correctly administer the standard? If the States afford courts for enforcing the Federal Act, they must enforce the substance of the right given by Congress. They cannot depreciate the legislative currency issued by Congress—either expressly or by local methods of enforcement that accomplish the same result. *Davis* v. *Wechsler,* 263 U. S. 22, 24. In order to prevent diminution of railroad workers' nationally-uniform right to recover, the standard for the validity of a release of contested liability must be Federal. We have recently said: "One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted." *Callen* v. *Pennsylvania R. Co.,* 332 U. S. 625, 630. Such proof of fraud need be only by a preponderance of relevant evidence. See *Union Pacific R. Co.* v. *Harris,* 158 U. S. 326. The admitted fact that the injured worker signed the release is material in tending to show the release to be valid, but presumptions must not be drawn from that fact so as to hobble the plaintiff's showing that it would be unjust to allow a formally good defense to prevail. See § 5, Fed-

eral Employers' Liability Act, 35 Stat. 65, 66, 45 U. S. C. § 55.

The judgment of the Ohio Supreme Court must be reversed for it applied the State rule as to validity of releases, 155 Ohio St. 185, 98 N. E. 2d 301, and it is not for us to interpret Ohio decisions in order to be assured that on a matter of substance the State and Federal criteria coincide. Moreover, we cannot say with confidence that the Ohio trial judge applied the Federal standard correctly. He duly recognized that "the Federal law controls as to the validity of a release pleaded and proved in bar of the action, and the burden of showing that the alleged fraud vitiates the contract or compromise or release rests upon the party attacking the release." And he made an extended analysis of the relevant circumstances of the release, concluding, however, that there was no "clear, unequivocal and convincing evidence" of fraud. Since these elusive words fail to assure us that the trial judge followed the Federal test and did not require some larger quantum of proof, we would return the case for further proceedings on the sole question of fraud in the release.

UNITED STATES *v.* NEW WRINKLE, INC. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

No. 250. Argued January 10–11, 1952.—Decided February 4, 1952.

A complaint in a civil suit by the United States under § 4 of the Sherman Act charging that the two defendants successfully conspired to fix uniform minimum prices and to eliminate competition throughout substantially all of the wrinkle finish industry of the United States by means of patent-license agreements, *held* to have charged a violation of § 1 of the Sherman Act by both defendants. Pp. 372–380.

1. That one of the defendants, a patent-holding company, abstained from manufacturing activities and concentrated on patent licensing did not insulate its activity from the prohibitions of § 1 of the Sherman Act. Pp. 376–378.

2. The making of these license contracts for the purpose of regulating distribution and fixing prices of commodities in interstate commerce is subject to the Sherman Act, even though the isolated act of contracting for the licenses is wholly within a single state. P. 377.

3. Patents give no protection from the prohibitions of the Sherman Act when licensing agreements are used as a means of restraining interstate commerce and fixing prices throughout substantially all of an entire industry involving many different manufacturers. *United States* v. *Line Material Co.*, 333 U. S. 287; *United States* v. *United States Gypsum Co.*, 333 U. S. 364. Pp. 378–380.

Reversed.

The District Court dismissed a complaint by the United States under § 4 of the Sherman Act to restrain violations of § 1 by appellees. On direct appeal to this Court under 15 U. S. C. § 29, *reversed*, p. 380.

Charles H. Weston argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Robert L. Stern* and *Daniel M. Friedman.*

H. A. Toulmin, Jr. argued the cause and filed a brief for New Wrinkle, Inc., appellee.

Samuel L. Finn filed a motion to dismiss for the Kay & Ess Company, appellee.

MR. JUSTICE REED delivered the opinion of the Court.

This suit against New Wrinkle, Inc., and The Kay & Ess Co. was instituted in the United States District Court for the Southern District of Ohio by the United States as a civil proceeding under § 4 of the Sherman Act.[1] Defendants are charged with having violated § 1 of that law[2] by conspiring to fix uniform minimum prices and to eliminate competition throughout substantially all of the wrinkle finish industry[3] of the United States by means of patent license agreements. Motions to dismiss the suit were filed by defendants. The defendant Kay & Ess urged that the complaint failed to state a cause of

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[1] 15 U. S. C. § 4:

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1–7 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

[2] *Id.*, §1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . . ."

[3] "8. 'Wrinkle' finishes, also known as 'Crinkle,' 'Shrivel,' 'Sag,' 'Morocco,' and by other designations, are defined as enamels, varnishes and paints which have been compounded from such materials and

action. Defendant New Wrinkle pressed a sole contention: that it was not then and never had been engaged in interstate commerce and could, therefore, not be guilty of violating the Sherman Act.

The District Court, without opinion, thereafter entered separate judgments as to each defendant dismissing the complaint and reciting in each judgment that the motion to dismiss was "well taken." A petition for appeal was filed and allowed, and on October 8, 1951, probable jurisdiction was noted on direct appeal pursuant to a jurisdiction conferred on this Court by § 2 of the Expediting Act of February 11, 1903. 15 U. S. C. § 29.

I.

In granting the motions of defendants, the District Court, of course, treated the allegations of the complaint as true. In substance the complaint charges that prior to and during 1937, defendant Kay & Ess was engaged in litigation with a named coconspirator, the Chadeloid Chemical Co., in regard to certain patents covering manufacture of wrinkle finish enamels, varnishes and paints. Each company claimed it controlled the basic patents on wrinkle finish, contending that the patents of the other

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by such methods as to produce when applied and dried, a hard wrinkled surface on metal or other material.

"9. Wrinkle finishes are widely used as coverings for the surfaces of typewriters, cash registers, motors, adding machines, and many other articles of manufacture. They have the following advantages over smooth finishes such as ordinary enamels and varnishes:

"a. One coat of wrinkle finish is sufficient for many purposes for which two or more coats of smooth finish would be required;

"b. Surfaces to which wrinkle finishes are to be applied need not be prepared as carefully as those which are to receive smooth finishes, since the wrinkle finishes cover small imperfections; and

"c. The original appearance of wrinkle-finished articles can be maintained with less cleaning and polishing than that of smooth-finished articles."

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were subservient to its own. Negotiations throughout 1937 resulted in a contract entered into by Kay & Ess and Chadeloid on November 2, 1937. This contract made provision for the organization of a new corporation, the defendant New Wrinkle. Both Kay & Ess and Chadeloid agreed to accept stock in the new company in exchange for assignments of their wrinkle finish patents. New Wrinkle was to grant patent licenses, incorporating agreements which fixed the minimum prices at which all licensed manufacturers might sell, to the manufacturers in the wrinkle finish industry, including Kay & Ess and Chadeloid. The price-fixing schedules were not to become operative until twelve of the principal producers of wrinkle finishes had subscribed to the minimum prices prescribed in the license agreements.

Pursuant to this arrangement, the complaint charges New Wrinkle was incorporated, and the patent rights of Kay & Ess and Chadeloid were transferred to it. In conjunction with other named companies and persons, the defendants and Chadeloid thereafter worked together to induce makers of wrinkle finishes to accept the price-fixing patent licenses which New Wrinkle had to offer. These prospective licensees were advised of the agreed-upon prices, terms and conditions of sale in the New Wrinkle licenses, and they were assured that like advice was being given to other manufacturers "in order to establish minimum prices throughout the industry." After May 7, 1938, when the requisite twelve leading manufacturing companies had accepted New Wrinkle licenses, the price schedules became operative. By September 1948, when the complaint was filed in this action, more than two hundred, or substantially all, manufacturers of wrinkle finishes in the United States held nearly identical ten-year extendable license agreements from New Wrinkle. These agreements required, among other things, that a licensee observe in all sales of products cov-

ered by the licensed patents a schedule of minimum prices, discounts and selling terms established by the licensor New Wrinkle. Upon thirty days' notice in writing, New Wrinkle might alter any or all of the terms of the price schedule, but such prices, terms and discounts as New Wrinkle might establish were to bind the licensee only if imposed at the same time and in the same terms upon the licensor and all other licensees.[4] Termination provisions in the agreements required a licensee to give three months' written notice and allowed the licensor to terminate the license if a licensee failed to remedy a violation of the agreement within thirty days after written notice thereof by the licensor. A 5-cent per gallon royalty was made payable on all wrinkle finish sold or used by a licensee, said royalty to be reduced to the same figure as that contained in any subsequent license granted at a lower royalty charge.

New Wrinkle, acting with the consent of its licensees, issued at intervals "License Rulings" giving minimum

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[4] A copy of the license was filed with the complaint. An important section, § 7, reads, so far as material in this proceeding, as follows:

"7. The Licensor hereby reserves and shall have the right at any time to establish a Schedule of Minimum Prices, Discounts, and Selling Terms only in accordance with which Licensee, Licensor, and all other Licensees shall thereafter sell or otherwise dispose of products covered by patents included herein, and thereafter to modify, amend and suspend any such Schedule and/or establish a New Schedule. . . . The Licensor announces as a matter of policy that it will fix said price based upon the cost of raw materials and labor as reported by the United States Department of Commerce and the United States Department of Labor, plus the royalty charged hereunder, it being the intent and purpose of the Licensor to open to the entire trade the use of these patents so licensed at the lowest price consistent with a reasonable profit to the manufacturer, Licensee, the trade, and to this Licensor. No Schedule of Minimum Prices, Discounts and Selling Terms nor any modification or amendment or suspension thereof shall be binding upon Licensee unless at the same time and in the same terms imposed upon Licensor and all other Licensees."

prices, detailed terms and conditions such as allowable discounts and permissible practices. The requirements of these "Rulings" were adhered to by the licensees. Since an entire copy of "License Rulings," as filed with the complaint as an exhibit, is too bulky for reprinting, the schedule of prices operative at the time of the filing of the complaint in this action, as illustrative, is set out in an Appendix to this opinion, *post*, p. 381. It precisely details and makes rigid the selling procedure for a variety of minutely prescribed products deemed to be covered by the patents and the license agreements.

II.

Since the motions to dismiss must be deemed to admit all of the above as true, we need only consider whether or not these facts would establish a violation of § 1 of the Sherman Act by appellees, New Wrinkle and Kay & Ess.

Appellee, New Wrinkle, differs from Kay & Ess. New Wrinkle is not a manufacturer of the commodities covered by its patents. It is solely a holder or owner of the patents, granting the right of making and vending to others. Kay & Ess does manufacture under the New Wrinkle license. New Wrinkle urges that its abstention from manufacturing activities and concentration on patent licensing insulates its activity from the prohibitions of § 1 of the Sherman Act. Persons engaged exclusively in licensing patents are said by appellee to be exempt from the Sherman Act because such contracts are not commerce and are functions solely controlled by the patent laws. For the contention that its licensing is not commerce, reliance is placed on *New York Life Ins. Co.* v. *Deer Lodge County,* 231 U. S. 495, and cases involving such local incidents of interstate commerce as were treated in *United Shoe Machinery Co.* v. *United*

States.[5] For the latter contention, if we understand the argument correctly, New Wrinkle asserts that since patents give their owners a right to sell, they may do so on such terms as they please because they are merely selling personal services, and such services are not commerce, citing *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 502, a case holding that a strike to unionize a factory did not violate the Sherman Act.

These contentions leave out of consideration the allegations of the complaint concerning the alleged combination in restraint of trade. The United States charges the use of patent licenses as an essential part of the plan to restrain trade, a trade in enamels, varnishes and paints that is alleged to be and obviously is interstate in character. It charges that the price control is an essential part of that restraint.

We think it beyond question that this making of license contracts for the purpose of regulating distribution and fixing prices of commodities in interstate commerce is subject to the Sherman Act, even though the isolated act of contracting for the licenses is wholly within a single state. Certainly since *United States* v. *Trenton Potteries*, 273 U. S. 392, 397 (decided in 1927), price fixing in commerce, reasonable or unreasonable, has been considered a *per se* violation of the Sherman Act.[6] Likewise it is clear that, although the execution of a contract of insurance may not be interstate commerce,

> "If contracts of insurance are in fact made the instruments of restraint in the marketing of goods and services in or affecting interstate commerce, they are not beyond the reach of the Sherman Act more than

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[5] 258 U. S. 451, 465. There it is said:

"It is true that the mere making of the lease of the machines is not of itself interstate commerce."

[6] *United States* v. *Line Material Co.*, 333 U. S. 287, 307.

> contracts for the sale of commodities,—contracts which, not in themselves interstate commerce, may nevertheless be used as the means of its restraint." [7]

And so it is with patent license contracts which are a part of a plan to restrain commerce. Patents give no protection from the prohibitions of the Sherman Act to such activities, when the licenses are used, as here, in the scheme to restrain. The allegations of the complaint cover such a situation and New Wrinkle and its manufacturing licensee, Kay & Ess, are alike covered by the prohibitions of § 1.

III.

Appellees argue further, however, that the principles of *United States* v. *General Electric Co.*, 272 U. S. 476, and *Bement* v. *National Harrow Co.*, 186 U. S. 70, control here. Since we examined these principles in detail as recently as 1948, we draw upon that discussion for our conclusions here.[8] The *Bement* and *General Electric* cases allowed a patentee to license a competitor in commerce to make and vend with a price limitation controlled by the patentee. When we examined the rule in 1948, the holding of the *General Electric* case was left as stated above. 333 U. S. at 310. But it was pointed out that

> "the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly." P. 308.

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[7] *United States* v. *Underwriters Assn.*, 322 U. S. 533, dissent 570, see majority 546. And see *Polish Alliance* v. *Labor Board*, 322 U. S. 643, 647, and *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 149.

[8] *United States* v. *Line Material Co.*, 333 U. S. 287; *United States* v. *United States Gypsum Co.*, 333 U. S. 364.

We said that

> "two or more patentees in the same patent field may [not] legally combine their valid patent monopolies to secure mutual benefits for themselves through contractual agreements, between themselves and other licensees, for control of the sale price of the patented devices." P. 305.

Price control through cross-licensing was barred as beyond the patent monopoly.

On the day of the *Line Material* decision, this Court handed down *United States* v. *United States Gypsum Co.*, 333 U. S. 364. The *Gypsum* case was based on facts similar to those here alleged except that the patent owner was also a manufacturer. We have pointed out above in section II of this opinion that we consider the fact that New Wrinkle is exclusively a patent-holding company of no significance as a defense to the alleged violation of the Sherman Act. We said in *Gypsum* that

> "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." P. 389.

On remand, the prima facie case resulted in a final judgment, affirmed by this Court.[9] In discussing the *General Electric* case, the Court was unanimous in saying that it

> "gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under

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[9] *United States* v. *United States Gypsum Co.*, 340 U. S. 76. Compare as to copyrights *United States* v. *Paramount Pictures*, 334 U. S. 131, 143.

> the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized. . . . 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." Pp. 400–401.

We see no material difference between the situation in *Line Material* and *Gypsum* and the case presented by the allegations of this complaint. An arrangement was made between patent holders to pool their patents and fix prices on the products for themselves and their licensees. The purpose and result plainly violate the Sherman Act. The judgment below must be

Reversed.

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

APPENDIX TO OPINION OF THE COURT.

NEW WRINKLE, INC.

Licensors of Processes and Finishes

Minimum Price Schedule No. 5

(Announced June 1, 1947)
EFFECTIVE JULY 1, 1947

(Superseding Minimum Price Schedule No. 4 as revised December 12, 1946)

Part of New Wrinkle, Inc., License Agreement

Dated April 1, 1938

The following are the minimum prices at which patented Wrinkle Finish may be sold under License Agreement, to take effect on July 1, 1947 and to remain in force until further notice.

WRINKLE FINISH CLEAR

	1 Gal.	*5 Gal.*	*½ Drum*	*Drum*
−100	$2.85	$2.70	$2.65	$2.60
+100	2.70	2.55	2.50	2.45

WRINKLE FINISH BLACK

−100	3.40	3.25	3.20	3.10
+100	3.25	3.10	3.05	2.95

WRINKLE FINISH ORDINARY COLORS

−100	3.65	3.50	3.40	3.35
+100	3.50	3.35	3.25	3.20

WRINKLE FINISH ORGANICS (see page 3)

−100	4.00	3.85	3.75	3.70
+100	3.85	3.70	3.60	3.55

WRINKLE FINISH METALLICS (see page 3)
(Addition of metallic to clear Wrinkle)

−100	3.50	3.35	3.25	3.20
+100	3.35	3.20	3.10	3.05

In the event that a metallic is added to a pigmented Wrinkle Finish, the established minimum for that pigmented finish, plus $.25, will be the minimum price.

Reductions in price for quantity as shown on above schedule are permissable on and shall apply only to quantities of wrinkle finish contained in a single shipment.

Wrinkle Finish in concentrated form or ingredients from which customer may produce wrinkle finish may be sold by Licensee only at minimum price per gallon on the number of gallons of the kind or color of wrinkle finish for final use by the customer that can normally be produced by adding to such concentrate or ingredients supplied by Licensee.

Clear Wrinkle Finish sold by Licensee under circumstances charging seller with knowledge that customer intends converting same into colored wrinkle finish may be sold only in accordance with the minimum price per gallon hereby established for wrinkle finish of the color and quantity in question.

Prices are f. o. b. destination or freight allowed.

In the event of cancellation of orders or return of goods prices shall be readjusted and settlement made according to the actual quantities purchased and retained.

Terms: 30 days net, 1% for cash within ten days after shipment.

In making bids, it is not permissable to deduct the cash discount. The cash discount of 1% can only be given or allowed if the "Wrinkle Finish" is actually paid for within ten days after shipment.

See minimum Price Schedule (No. 2-A) on Page 7 for Canadian Prices.

STANDARD OIL CO. *v.* PECK, TAX COMMISSIONER, ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 184. Argued January 3–4, 1952.—Decided February 4, 1952.

Ohio levied an ad valorem personal property tax on all the boats and barges owned by appellant, an Ohio corporation, and employed in transporting oil along the Mississippi and Ohio Rivers. The main terminals are in Tennessee, Indiana, Kentucky and Louisiana. The vessels are registered in Cincinnati; but they neither pick up nor discharge oil in Ohio, they stop in Ohio only for occasional fuel or repairs, they traverse a maximum of only 17½ miles of waters bordering Ohio, and they were almost continuously outside Ohio during the taxable year. *Held:* Since the vessels would be subject to taxation on an apportionment basis in several other states, the Ohio tax on their full value violates the Due Process Clause of the Fourteenth Amendment. Pp. 382–385.

155 Ohio St. 61, 98 N. E. 2d 8, reversed.

The Supreme Court of Ohio sustained an ad valorem tax on the entire value of appellant's boats and barges employed in interstate commerce. 155 Ohio St. 61, 98 N. E. 2d 8. On appeal to this Court, *reversed,* p. 385.

Isador Grossman and *Rufus S. Day, Jr.* argued the cause and filed a brief for appellant.

Isadore Topper argued the cause for appellees. With him on the brief were *C. William O'Neill,* Attorney General of Ohio, *Robert E. Leach,* Assistant Attorney General, *Frank T. Cullitan* and *Saul Danaceau.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant, an Ohio corporation, owns boats and barges which it employs for the transportation of oil along the

Mississippi and Ohio Rivers. The vessels neither pick up oil nor discharge it in Ohio. The main terminals are in Tennessee, Indiana, Kentucky, and Louisiana. The maximum river mileage traversed by the boats and barges on any trip through waters bordering Ohio was 17½ miles. These 17½ miles were in the section of the Ohio River which had to be traversed to reach Bromley, Kentucky. While this stretch of water bordered Ohio, it was not necessarily within Ohio. The vessels were registered in Cincinnati, Ohio, but only stopped in Ohio for occasional fuel or repairs. These stops were made at Cincinnati; but none of them involved loading or unloading cargo.

The Tax Commissioner of Ohio, acting under §§ 5325 and 5328 of the Ohio General Code, levied an ad valorem personal property tax on all of these vessels. The Board of Tax Appeals affirmed (with an exception not material here), and the Supreme Court of Ohio sustained the Board, 155 Ohio St. 61, 98 N. E. 2d 8, over the objection that the tax violated the Due Process Clause of the Fourteenth Amendment. The case is here on appeal. 28 U. S. C. § 1257 (2).

Under the earlier view governing the taxability of vessels moving in the inland waters (*St. Louis* v. *Ferry Co.*, 11 Wall. 423; *Ayer & Lord Tie Co.* v. *Kentucky,* 202 U. S. 409; cf. *Old Dominion S. S. Co.* v. *Virginia,* 198 U. S. 299), Ohio, the state of the domicile, would have a strong claim to the whole of the tax that has been levied. But the rationale of those cases was rejected in *Ott* v. *Mississippi Barge Line Co.,* 336 U. S. 169, where we held that vessels moving in interstate operations along the inland waters were taxable by the same standards as those which *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18, first applied to railroad cars in interstate commerce. The formula approved was one which fairly apportioned the tax to the commerce carried on within the state. In that way we

placed inland water transportation on the same constitutional footing as other interstate enterprises.

The *Ott* case involved a tax by Louisiana on vessels of a foreign corporation operating in Louisiana waters. Louisiana sought to tax only that portion of the value of the vessels represented by the ratio between the total number of miles in Louisiana and the total number of miles in the entire operation. The present case is sought to be distinguished on the ground that Ohio is the domiciliary state and therefore may tax the whole value even though the boats and barges operate outside Ohio. *New York Central R. Co.* v. *Miller,* 202 U. S. 584, sustained a tax by the domiciliary state on all the rolling stock of a railroad. But in that case it did not appear that "any specific cars or any average of cars" was so continuously in another state as to be taxable there. P. 597. *Northwest Airlines, Inc.* v. *Minnesota,* 322 U. S. 292, allowed the domiciliary state to tax the entire fleet of airplanes operating interstate; but in that case, as in the *Miller* case, it was not shown that "a defined part of the domiciliary corpus" had acquired a taxable situs elsewhere. P. 295. Those cases, though exceptional on their facts, illustrate the reach of the taxing power of the state of the domicile as contrasted to that of the other states. But they have no application here since most, if not all, of the barges and boats which Ohio has taxed were almost continuously outside Ohio during the taxable year. No one vessel may have been continuously in another state during the taxable year. But we do know that most, if not all, of them were operating in other waters and therefore under *Ott* v. *Mississippi Barge Line Co., supra,* could be taxed by the several states on an apportionment basis. The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. See *Union Transit*

Co. v. *Kentucky,* 199 U. S. 194. Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations.

Reversed.

MR. JUSTICE BLACK dissents.

MR. JUSTICE MINTON, dissenting.

I assume for the purposes of this dissent that none of the vessels in question were within Ohio during the tax year, and that they were taxed to their full value by Ohio. The record shows that the vessels were all registered in Cincinnati, Ohio, as the home port, and that Ohio is the domicile of the owner. Ohio claims the right to tax these vessels because they have not acquired a tax situs elsewhere than their home port and domicile.

Seagoing vessels have always been taxable at the domicile of the owner. *Southern Pacific Co.* v. *Kentucky,* 222 U. S. 63; *Morgan* v. *Parham,* 16 Wall. 471; *Hays* v. *Pacific Mail S. S. Co.,* 17 How. 596. This same rule has been applied to vessels engaged in commerce between the different states. *Transportation Co.* v. *Wheeling,* 99 U. S. 273; *St. Louis* v. *Ferry Co.,* 11 Wall. 423. The only exception to the rule until today was that where vessels *had acquired* a situs for taxation in some other state, that other state might tax them. *Old Dominion S. S. Co.* v. *Virginia,* 198 U. S. 299. In *Ayer & Lord Tie Co.* v. *Kentucky,* 202 U. S. 409, 421, this Court said:

> "The general rule has long been settled as to vessels plying between the ports of different States, engaged in the coastwise trade, that the domicil of the owner is the situs of a vessel for the purpose of taxation, wholly irrespective of the place of enrollment, subject, however, to the exception that where a vessel

> engaged in interstate commerce has acquired an actual situs in a State other than the place of the domicil of the owner, it may there be taxed because within the jurisdiction of the taxing authority."

In the case at hand, the vessels *had not acquired* a situs for taxation in any other state. They were at large in the Ohio and Mississippi Rivers, touching ports therein from time to time. There was no showing as to how much time any of the vessels spent in any state. Indeed, the time spent in any state by the vessels plying the Mississippi River could not be shown with any accuracy, as the states on each side own to the middle of the stream.* The navigation channel might be on either side of the center line or right on the center line. Who is to say what state the vessels were in?

The doctrine of apportionment applied in *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, is not in point. In that case the domiciliary state had not sought to tax the vessels. The tax was approved in the *Ott* case only on the assurance of the Louisiana Attorney General that the taxing statute "was intended to cover and actually covers here, an average portion of property permanently within the State—and by permanently is meant throughout the taxing year." *Ibid.*, at 175. Without such assurance there would have been no basis for applying the apportionment rule. *New York Central R. Co.* v. *Miller,* 202 U. S. 584; *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, 26; *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 206.

The record in this case is silent as to whether any proportion of the vessels were in any one state for the whole

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*Douglas, Boundaries, Areas, Geographic Centers, and Altitudes of the United States and the Several States, 2d Ed. (U. S. Dept. of Interior, Geological Survey Bull. 817).

of a taxable year. The record does show that no other state collected taxes on the vessels for the years in question or any other year. Until this case, it has not been the law that the state of the owner's domicile is prohibited from taxing under such circumstances.

Southern Pacific Co. v. *Kentucky, supra,* is a case in point. There the owner of the vessels was a Kentucky corporation which operated between various coastal ports. None of the vessels were ever near Kentucky, but Kentucky was allowed to tax them because it was the state of the owner's domicile. The vessels were in and out of other states' ports, just as the instant vessels were in and out of other states' ports; but the mere possibility that some other state might attempt to levy an apportioned tax on the vessels was not permitted to destroy Kentucky's power to tax. The crucial fact was that the vessels were not shown to have acquired a tax situs elsewhere.

As recently as 1944 this Court would seem to have added vitality to the doctrine which should govern this case. Minnesota had taxed an airline on the full value of its airplanes, including those used in interstate commerce. MR. JUSTICE FRANKFURTER, announcing the judgment of the Court upholding the tax, stated:

> "The fact that Northwest paid personal property taxes for the year 1939 upon 'some proportion of its full value' of its airplane fleet in some other States does not abridge the power of taxation of Minnesota as the home State of the fleet in the circumstances of the present case. The taxability of any part of this fleet by any other State than Minnesota, in view of the taxability of the entire fleet by that State, is not now before us. It . . . is not shown here that a defined part of the domiciliary corpus has acquired a permanent location, *i. e.,* a taxing situs, elsewhere." *Northwest Airlines* v. *Minnesota,* 322 U. S. 292, 295.

The fear of "double taxation" was much more real in that case than in the instant case; yet the Minnesota tax was sustained because there was no showing that a taxing situs *had* been acquired elsewhere. The question of what some other state might do is no more before the Court in this case than it was in the *Northwest* case.

The majority today seeks to distinguish the earlier cases by magnifying the relevance of the continuous absence of the vessels from the domiciliary state. But the operative fact of the earlier cases was the absence or presence of another taxing situs. Where no other taxing situs was shown to exist, the state of the domicile was permitted to tax, irrespective of the amount of time the vessels were present in that state. *Southern Pacific Co.* v. *Kentucky, supra.*

As it is admittedly not shown on this record that these vessels have acquired a tax situs elsewhere, Ohio should be permitted to tax them as the state of the owner's domicile. I would affirm.

MEMPHIS STEAM LAUNDRY CLEANER, INC. *v.* STONE, CHAIRMAN, STATE TAX COMMISSION.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 253. Argued December 3, 1951.—Decided March 3, 1952.

A Mississippi "privilege tax," laid upon each person "soliciting business" for a laundry not licensed in the State, *held* invalid under the Commerce Clause, as applied to appellant, a foreign corporation operating a laundry and cleaning establishment in Tennessee and doing no business in Mississippi other than sending its trucks there to solicit business, pick up, deliver, and collect for, laundry and cleaning. Pp. 389–395.

1. If the tax be imposed upon the privilege of soliciting interstate business, it stands on no better footing than a tax on the privilege of doing interstate business, and it is invalid under the Commerce Clause. Pp. 392–393.

2. If the tax be imposed on the privilege of conducting intrastate activities in Mississippi, it is invalid as one discriminating against interstate commerce—because laundries not licensed in the State are taxed $50 per truck for such activities, whereas laundries licensed in the State are taxed only $8 per truck. Pp. 394–395.

53 So. 2d 89, reversed.

The Supreme Court of Mississippi sustained a "privilege tax" levied on appellant under Miss. Laws 1944, c. 138, §§ 3, 45, against a claim that it violated the Commerce Clause. 53 So. 2d 89. On appeal to this Court, *reversed,* p. 395.

C. E. Clifton argued the cause for appellant. With him on the brief were *W. H. Watkins, Sr., P. H. Eager, Jr.* and *Thomas H. Watkins.*

J. H. Sumrall submitted on brief for appellee.

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

The question before us is whether a Mississippi tax laid upon the privilege of soliciting business for a laun-

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dry not licensed in that State infringes the Commerce Clause.[1]

Appellant operates a laundry and cleaning establishment in Memphis, Tennessee. In serving the area surrounding Memphis, appellant sends ten of its trucks into eight Mississippi counties where its drivers pick up, deliver and collect for laundry and cleaning and seek to acquire new customers. Appellee, who is Chairman of the State Tax Commission of the State of Mississippi, demanded that appellant pay $500 under the following provisions of the Mississippi "state-wide privilege tax law of 1944": [2]

> "Sec. 3. Every person desiring to engage in any business, or exercise any privilege hereafter specified shall first, before commencing same, apply for, pay for, and procure from the state tax commissioner or commissioner of insurance, a privilege license authorizing him to engage in the business or exercise the privilege specified therein, and the amount of tax shown in the following sections is hereby imposed for the privilege of engaging or continuing in the business set out therein."
>
> "Sec. 45. Upon each person doing business as a transient vendor, or dealer, as defined in this section, and upon which a privilege tax is not specifically imposed by another section of this act, a tax for each county according to the following schedules:
>
> . . . . .
>
> "(t) Upon each person soliciting business for a laundry not licensed in this state as such, in each county.....$50.00
>
> . . . . .

[1] U. S. Const., Art. I, § 8.

[2] Laws of Mississippi, 1944, c. 138, §§ 3, 45.

> "(y) Provided however, that where any person subject to the payment of the tax imposed in this section, makes use of more than one vehicle in carrying on such business, the tax herein imposed shall be paid on each vehicle used in carrying on such business."

After paying the $500 tax as demanded to prevent arrest of its drivers and seizure of its ten trucks, appellant sued for refund in a state court, claiming that the Mississippi tax act was not applicable to its operations and that, if so applied, the tax would violate the Commerce Clause. Judgment was entered for appellant in the trial court but the Mississippi Supreme Court reversed, holding that appellant's drivers were "transient vendors or dealers" within the meaning of the statute and that application of the tax to appellant did not conflict with the Commerce Clause.[3] The case is here on appeal. 28 U. S. C. (Supp. IV) § 1257 (2).

In passing upon the validity of a state tax challenged under the Commerce Clause, we first look to the "operating incidence" of the tax.[4] The Mississippi Act requires a "privilege license" and imposes a "privilege tax" upon appellant's employees "soliciting business." The Mississippi Supreme Court described the tax as follows:

> ". . . The tax involved here is not a tax on interstate commerce, but a tax on a person soliciting business for a laundry not licensed in this state, a local activity which applies to residents and non-residents alike." [5]

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[3] 53 So. 2d 89 (1951). The Mississippi Supreme Court also rejected appellant's claims under the Fourteenth Amendment. We do not reach these issues under our disposition of the case.

[4] *Spector Motor Service* v. *O'Connor,* 340 U. S. 602 (1951).

[5] 53 So. 2d at 90.

The State may determine for itself the operating incidence of its tax. But it is for this Court to determine whether the tax, as construed by the highest court of the State, is or is not "a tax on interstate commerce." [6]

It would appear from portions of the opinion of the court below that the tax is laid upon the privilege of soliciting interstate business on the theory that solicitation of customers for interstate commerce is a local activity subject to state taxation. However, the opinion below may also be read as construing the statutory term "soliciting" more broadly, thereby resting the tax upon appellant's activities apart from soliciting new customers in Mississippi, namely the pick up and delivery of laundry and cleaning on regular routes within the State. Each construction of the statute raises different considerations. But clarification of the operating incidence of the tax is not required for disposition of this case since we find that the tax violates the Commerce Clause under either reading of the statute.

I.

In the long line of "drummer" cases, beginning with *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489 (1887),[7] this Court has held that a tax imposed upon the solicitation of interstate business is a tax upon interstate

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[6] *McLeod* v. *Dilworth Co.,* 322 U. S. 327 (1944); *Crenshaw* v. *Arkansas,* 227 U. S. 389, 400–401 (1913).

[7] Cases in this Court following the *Robbins* decision include: *Corson* v. *Maryland,* 120 U. S. 502 (1887); *Asher* v. *Texas,* 128 U. S. 129 (1888); *Stoutenburgh* v. *Hennick,* 129 U. S. 141 (1889); *Brennan* v. *Titusville,* 153 U. S. 289 (1894); *Stockard* v. *Morgan,* 185 U. S. 27 (1902); *Caldwell* v. *North Carolina,* 187 U. S. 622 (1903); *Rearick* v. *Pennsylvania,* 203 U. S. 507 (1906); *International Textbook Co.* v. *Pigg,* 217 U. S. 91 (1910); *Dozier* v. *Alabama,* 218 U. S. 124 (1910); *Crenshaw* v. *Arkansas,* note 6, *supra; Rogers* v. *Arkansas,* 227 U. S. 401 (1913); *Stewart* v. *Michigan,* 232 U. S. 665 (1914);

commerce itself.[8] Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted state taxation to carve out this incident from the integral economic process of interstate commerce.[9] As the Court noted last term in a case involving door-to-door solicitation of interstate business, "Interstate commerce itself knocks on the local door." [10]

If the Mississippi tax is imposed upon the privilege of soliciting interstate business, the tax stands on no better footing than a tax upon the privilege of doing interstate business. A tax so imposed cannot stand under the Commerce Clause.[11] *Spector Motor Service* v. *O'Connor,* 340 U. S. 602, 608–609 (1951), and cases cited therein.

Davis v. *Virginia,* 236 U. S. 697 (1915); *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147 (1918); *Real Silk Hosiery Mills* v. *Portland,* 268 U. S. 325 (1925); *Best & Co.* v. *Maxwell,* 311 U. S. 454 (1940); *Nippert* v. *Richmond,* 327 U. S. 416 (1946).

[8] "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce." 120 U. S. at 497; *Real Silk Hosiery Mills* v. *Portland,* note 7, *supra,* at 335.

[9] *Nippert* v. *Richmond,* note 7, *supra,* at 422–423.

[10] *Breard* v. *Alexandria,* 341 U. S. 622, 636 (1951). In sustaining the ordinance before it as one that was neither an added financial burden on sales in commerce nor an exaction for the privilege of doing interstate commerce, the Court made the following statement pertinent to the instant case:

"While taxation and licensing of hawking or peddling, defined as selling and delivering in the state, has long been thought to show no violation of the Commerce Clause, solicitation of orders with subsequent interstate shipment has been immune from such an exaction." 341 U. S. at 638.

[11] In *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 58 (1940), the Court sustained a tax "conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption." It was in that context that *Robbins* v. *Shelby County Taxing District,*

II.

On the assumption that the tax is imposed upon appellant's Mississippi activities of picking up and delivering laundry and cleaning, the "peddler" cases are invoked in support of the tax. Under that line of decisions,[12] this Court has sustained state taxation upon itinerant hawkers and peddlers on the ground that the local sale and delivery of goods is an essentially intrastate process whether a retailer operates from a fixed location or from a wagon. However, assuming for the purposes of this case that Mississippi imposes its $50 per truck tax only upon the privilege of conducting intrastate activities, the tax must be held invalid as one discriminating against interstate commerce.[13]

The $50 per truck tax is applicable only to vehicles used by a person "soliciting business for a laundry *not licensed in this state as such.*" (Emphasis supplied.) Laundries licensed in Mississippi pay a fixed fee to the municipality in which located, plus a tax of $8 per truck

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supra, was referred to as resting upon discrimination inherent in fixed-sum license taxes. 309 U. S. at 56–57; *Best & Co.* v. *Maxwell,* note 7, *supra,* at 455–456; *Nippert* v. *Richmond,* note 7, *supra,* at 424–425. Compare *Freeman* v. *Hewit,* 329 U. S. 249, 257–258 (1946).

[12] In the leading opinion, *Emert* v. *Missouri,* 156 U. S. 296 (1895), the Court reaffirmed *Machine Co.* v. *Gage,* 100 U. S. 676 (1880), and other earlier cases. Subsequent additions to the line of "peddler cases" include: *Baccus* v. *Louisiana,* 232 U. S. 334 (1914); *Wagner* v. *Covington,* 251 U. S. 95 (1919); *Caskey Baking Co.* v. *Virginia,* 313 U. S. 117 (1941).

[13] *Nippert* v. *Richmond,* note 7, *supra; Best & Co.* v. *Maxwell,* note 7, *supra; Hale* v. *Bimco Trading, Inc.,* 306 U. S. 375 (1939); *Walling* v. *Michigan,* 116 U. S. 446, 460–461 (1886); *Webber* v. *Virginia,* 103 U. S. 344 (1881); *Guy* v. *Baltimore,* 100 U. S. 434 (1880); *Welton* v. *Missouri,* 91 U. S. 275 (1876).

upon each truck used in other municipalities.[14] As a result, if appellant "solicits" business in a Mississippi municipality, it must pay a tax of $50 per truck while a competitor located in another Mississippi locality must pay a tax of only $8 per truck. The "peddler" cases are inapposite under such a showing of discrimination since they support state taxation only where no discrimination against interstate commerce appears either upon the face of the tax laws or in their practical operation.[15]

To sum up, we hold that the tax before us infringes the Commerce Clause under either interpretation of the operating incidence of the tax. The Commerce Clause created the nation-wide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states.[16] The tax imposed in this case made the Mississippi state line into a local obstruction to the flow of interstate commerce that cannot stand under the Commerce Clause.

Reversed.

MR. JUSTICE BLACK dissents.

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[14] Laws of Mississippi, 1944, c. 137, § 110, imposes the following tax:

"Upon each person operating a laundry other than a hand laundry, as follows:

In municipalities of class 1	$120.00
In municipalities of class 2	80.00
In municipalities of classes 3 and 4	60.00
In municipalities of classes 5, 6, 7 and elsewhere in the county	32.00
Upon each truck or other vehicle for such laundry in a municipality other than where the laundry is located	8.00"

[15] *Caskey Baking Co.* v. *Virginia,* note 12, *supra,* at 119–120; *Wagner* v. *Covington,* note 12, *supra,* at 102; *Emert* v. *Missouri,* note 12, *supra,* at 311; *Machine Co.* v. *Gage,* note 12, *supra,* at 679.

[16] *Gibbons* v. *Ogden,* 9 Wheat. 1, 189 (1824); *Hood & Sons* v. *DuMond,* 336 U. S. 525, 533–535, 538–539 (1949).

FIRST NATIONAL BANK OF CHICAGO, EXECUTOR, *v.* UNITED AIR LINES, INC.

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

No. 349. Argued January 8, 1952.—Decided March 3, 1952.

In a suit brought in a federal district court in Illinois, on grounds of diversity of citizenship, to recover under the Utah wrongful death statute for a death which occurred in Utah, an Illinois statute providing that "no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place" *held* invalid under the Full Faith and Credit Clause of the Federal Constitution and no bar to the suit. *Hughes* v. *Fetter*, 341 U. S. 609. Pp. 396–398. 190 F. 2d 493, reversed.

Because of Ill. Rev. Stat., c. 70, § 2, a federal district court in Illinois gave judgment for defendant in a suit to recover under the Utah wrongful death statute for a death which occurred in Utah. The Court of Appeals affirmed. 190 F. 2d 493. This Court denied certiorari, 341 U. S. 903, but later granted certiorari. 342 U. S. 875. *Reversed,* p. 398.

Robert J. Burdett argued the cause for petitioner. With him on the brief were *John H. Bishop* and *John M. Falasz.*

David Jacker argued the cause for respondent. With him on the brief were *Howard Ellis* and *John M. O'Connor, Jr.*

MR. JUSTICE BLACK delivered the opinion of the Court.

John Louis Nelson was killed when one of respondent's airliners crashed in Utah. Claiming $200,000 under the Utah wrongful death statute, petitioner brought this action in a United States district court in Illinois. Decedent prior to his death was a resident and citizen of

Illinois; petitioner, his executor, is an Illinois bank; and respondent, United Air Lines, Inc., is a Delaware corporation doing business in Illinois. Since the jurisdictional amount and diversity of citizenship requirements have been met, the case is properly triable under 28 U. S. C. § 1332 unless ch. 70, § 2 of the Illinois Revised Statutes bars the action. This Illinois law provides:

> "no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

The District Court and Court of Appeals, relying on the doctrine declared in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, as discussed and applied in later cases,[1] held that in a diversity case such as this the state statute was binding on the federal as well as state courts in Illinois and constituted a bar to maintenance of this action.[2] In so doing, they rejected two constitutional contentions made by petitioner: (1) Congress having granted diversity jurisdiction to federal district courts pursuant to power granted by Article III of the Constitution, that jurisdiction cannot be abridged or destroyed by the Illinois statute; (2) the Illinois statute violates the Full Faith and Credit Clause of the United States Constitution (Art. IV, § 1) in providing that claims for Utah deaths shall not be enforced in Illinois state courts where service on defendants could be had in Utah. We need not discuss this first constitutional contention or the *Erie R. Co.* v. *Tompkins* problems presented by it, for we recently held in

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[1] *E. g., Angel* v. *Bullington,* 330 U. S. 183; *Woods* v. *Interstate Realty Co.,* 337 U. S. 535.

[2] 190 F. 2d 493. The Court of Appeals cited and relied on two of its former holdings, *Trust Co. of Chicago* v. *Pennsylvania R. Co.,* 183 F. 2d 640, and *Munch* v. *United Air Lines,* 184 F. 2d 630.

Hughes v. *Fetter,* 341 U. S. 609, that a Wisconsin statute, much like that of Illinois, did violate the Full Faith and Credit Clause. It was to consider this full faith and credit question with reference to the Illinois statute that we granted certiorari. 342 U. S. 875.

The Wisconsin statute invalidated in *Hughes* v. *Fetter, supra,* barred suit in the Wisconsin courts for any wrongful death caused outside the state. The Illinois statute before us today is the exact duplicate of the Wisconsin statute with the single exception that suit is permitted in Illinois under another state's wrongful death statute if service of process cannot be had on the defendant in the state where the death was brought about. That Illinois is willing for its courts to try some out-of-state death actions is no reason for its refusal to grant full faith and credit as to others. The reasons supporting our invalidation of Wisconsin's statute apply with equal force to that of Illinois. This is true although Illinois agrees to try cases where service cannot be obtained in another state. While we said in *Hughes* v. *Fetter* that it was relevant that Wisconsin might be the only state in which service could be had on one of the defendants, we were careful to point out that this fact was not crucial. Nor is it crucial here that Illinois only excludes cases that can be tried in other states. We hold again that the Full Faith and Credit Clause forbids such exclusion. The District Court should not have dismissed this case.

Reversed.

MR. JUSTICE JACKSON, whom MR. JUSTICE MINTON joins, concurring in the result.

I part company with the Court as to the road we will travel to reach a destination where all agree we will stop, at least for the night. But sometimes the path that we are beating out by our travel is more important to the future wayfarer than the place in which we choose to lodge.

There are two possible routes to the agreed destination. One requires that a state statute prescribing jurisdictional limitations on its own courts be declared unconstitutional—a path which a century and a half of precedent constrains us to avoid if another way is available. This, together with adherence to the views expressed in dissent in *Hughes* v. *Fetter,* 341 U. S. 609, persuades me to resolve the issue of jurisdiction of federal courts by reference to the Act of Congress which confers that jurisdiction.

Whether or not Illinois may validly close her own courts to litigation of this kind, Illinois most assuredly cannot prescribe the subject matter jurisdiction of federal courts even when they sit in that State. Congress already has done this, 28 U. S. C. § 1332 (a) (1), and state law is powerless to enlarge, vary, or limit this requirement. The parties to this case have showed the diversity of citizenship and amount in controversy required by Congress, and therefore the federal court, by virtue of the law of its own being, has jurisdiction of their action.

The suggestion that *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, and its progeny diminish the jurisdiction of a federal court sitting in a diversity case by assimilating any limitation that the state may impose on her own courts seems to confuse the law of jurisdiction with substantive law. In *Erie* and the cases which have followed, this Court has gone far in requiring that a federal court exercising diversity jurisdiction apply the same law as would be applied if the action were brought in the state courts. But in so doing the Court has been interpreting the Rules of Decision Act, 28 U. S. C. § 1652, which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

It is indeed fanciful to suggest that a state statute relating to the power of its own courts is an applicable "rule of decision" under this statute, when Congress in passing the federal jurisdictional grant has specifically "otherwise required and provided." 28 U. S. C. § 1332 (a) (1). The petitioner enters the federal court not by the grace of the laws of Illinois but by the grace of the laws of the United States.

The establishment of jurisdiction is, however, the beginning and not the end of the decision of the case in the trial court. What law must be applied in adjudicating the substantive rights of these parties? The opinion of the Court is silent on this point, but its line of reasoning seems to imply that the federal trial court must look to Illinois law for a conflicts rule which would govern this kind of case if brought in Illinois courts. Since Illinois has, pursuant to statute, refused to entertain such actions as this, it might be supposed that such law would be hard to find.

In my view, the federal court no more derives substantive law for this case from Illinois than it does its jurisdiction. For regardless of what Illinois might say on this subject, the Constitution has "otherwise provided." I believe, as expressed in *Hughes* v. *Fetter,* that the State was free to refuse this case a forum, but, if it undertook to adjudicate the rights of the parties, the Constitution would require it to apply the law of Utah, because all elements of the wrong alleged here occurred in Utah. For the essence of the Full Faith and Credit Clause is that certain transactions, wherever in the United States they may be litigated, shall have the same legal consequences as they would have in the place where they occurred. *Order of United Commercial Travelers* v. *Wolfe,* 331 U. S. 586; *Hancock Mutual Life Ins. Co.* v. *Yates,* 299 U. S. 178.

There is undoubtedly some area of freedom for state conflicts law outside the requirements of the Full Faith

and Credit Clause. In such matters, unreached by constitutional law, the state rule would prevail in a diversity court. *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487. But if a transaction is so associated with one jurisdiction that the Constitution compels any forum in which the transaction is litigated to apply the law of that jurisdiction, is it not the Constitution instead of state conflicts law which determines what law the federal court shall apply?

The Court's detour follows this itinerary: the federal court is bound by the law of Illinois; Illinois law is wrong; we will remake the law of Illinois to provide the exact opposite to that which the state has provided; then the federal court can apply the law we have remade and pretend it is applying Illinois law. This is too tortuous an excursion for me. Since as a matter of constitutional provision liability for this alleged tort must be adjudged under Utah law and, the case being within the statutory jurisdiction of the District Court, it may ascertain and apply the law of Utah without straining it through the Illinois sieve.

MR. JUSTICE REED, dissenting.

I dissent on the ground that *Hughes* v. *Fetter*, 341 U. S. 609, should not be extended to compel a state to entertain an action for wrongful death if the claim could be effectively litigated in the courts of the state where the cause of action arose.

The reasoning for this conclusion is stated in the dissent in *Hughes* v. *Fetter, supra.*

MR. JUSTICE FRANKFURTER, dissenting.

As to any question based on diversity jurisdiction, the series of cases culminating in *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, disposes of it. As to the constitutional claim under the Full Faith and Credit Clause, I adhere to the views expressed in *Hughes* v. *Fetter*, 341 U. S. 609, 614.

SUTTON *v.* LEIB.

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

No. 143. Submitted December 3, 1951.—Decided March 3, 1952.

Asserting diversity jurisdiction, petitioner brought suit in a federal district court in Illinois to recover alimony under an Illinois divorce decree which awarded her alimony until remarriage. Subsequent to the Illinois divorce, petitioner remarried in Nevada, but the marriage was later annulled in New York on the ground that the man she married in Nevada was already married in New York and his Nevada divorce from his first wife was invalid. *Held:*

1. The liability of the defendant in this case is governed by the state law of Illinois, although the decision of federal constitutional issues involved rests finally on this Court. P. 406.

2. Upon the facts of this case, the New York annulment of the Nevada marriage must be accorded full faith and credit in Illinois. Pp. 406–409.

(a) The Nevada decree divorcing petitioner's second husband from his first wife, who was not personally served in Nevada and entered no appearance there, was subject to attack and nullification in New York for lack of jurisdiction over the parties in a contested action. Pp. 408–409.

3. The question of the effect of the Nevada marriage and the New York annulment on the obligation of the defendant in the alimony suit must be determined under Illinois law. Pp. 409–412.

(a) As a matter of constitutional law, Illinois is free to decide for itself the effect of New York's declaration of annulment on the obligations of petitioner's first husband, a stranger to the New York decree. P. 410.

(b) The jurisdiction of the federal court in this case rests on diversity of citizenship; the case does not present any non-federal issue suitable for separation and determination in the state courts; and the remaining questions of state law should be decided by the federal courts. P. 410.

4. The Court of Appeals' ruling that, in the circumstances of this case, there was no compromise of a disputed claim, is accepted here. P. 411.

188 F. 2d 766, reversed.

In a diversity suit to recover unpaid installments of alimony, the District Court rendered summary judgment for the defendant. The Court of Appeals affirmed. 188 F. 2d 766. This Court granted certiorari. 342 U. S. 846. *Reversed and remanded,* p. 412.

John Alan Appleman and *Edward D. Bolton* submitted on brief for petitioner.

A. M. Fitzgerald submitted on brief for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

By reason of a divorce in an Illinois state court, with a judgment for monthly installments of alimony until remarriage, petitioner asserts that her divorced husband, the respondent Leib, is liable for unpaid installments of alimony. Asserting diversity jurisdiction, petitioner, a divorcee, filed suit in the United States District Court for the Southern District of Illinois. Claim for recovery is made, notwithstanding a later marriage by petitioner to another in Nevada, subsequently annulled in New York, for the period from the Nevada remarriage to her third presumably valid marriage in New York to a third man. To respondent's plea that the Illinois alimony obligation was finally ended by the Nevada remarriage of petitioner, Mrs. Sutton relied upon the New York annulment decree as determining that her Nevada marriage was void. She contends that the Full Faith and Credit Clause of the Federal Constitution requires that Illinois hold her Nevada marriage void *ab initio* by virtue of the New York annulment; [1] that as the annulment decree obliterates the existence of her Nevada marriage respondent is liable for unpaid alimony until her New York marriage to Sutton.

[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

The trial court rendered summary judgment for respondent and the Court of Appeals for the Seventh Circuit affirmed. 188 F. 2d 766. The affirmance was bottomed on the conclusion that, as the Nevada marriage of petitioner was valid in Nevada, it terminated the liability for alimony under the Illinois judgment of divorce. The court thus gave full faith and credit to the Nevada marriage rather than the New York annulment.[2] Because

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such Acts, Records and Proceedings shall be proved, and the Effect thereof." U. S. Constitution, Art. IV, § 1.

Pursuant to the section, Congress early prescribed the effect substantially in the words now used:

"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." 28 U. S. C. § 1738.

[2] "We have searched the numerous cases decided by the Supreme Court of the United States on the subject of migratory divorce for a definitive holding as to the judicial status of such divorce in the state that decreed it. It appears to be assumed that the decree is valid and binding in the state where it is rendered. Thus Mr. Justice Frankfurter remarks in his concurring opinion, Williams v. North Carolina, 317 U. S. 287, 307, . . . 'It is indisputable that the Nevada decrees here, like the Connecticut decree in the Haddock . . . case, . . . were valid and binding in the state where they were rendered.' And Mr. Justice Murphy, concurring in Williams v. State of North Carolina, 325 U. S. 226, 239, . . . states that 'The State of Nevada has unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements. It is entitled, moreover, to give to its divorce decrees absolute and binding finality within the confines of its borders.' And Mr. Justice Rutledge, dissenting in the same case, 325 U. S. at page 244, . . . comments on the fact that the Nevada judgment was not voided by the decision. 'It could not be, if the same test applies to sustain it as upholds the North Carolina convictions. It stands, with the marriages founded upon it, unimpeached.' He and Mr. Justice Black, also dissenting, both call attention to the fact that the Court, in its decision, does not hold that the Nevada judgment is invalid in Nevada. Hence, in spite of the absence of a clear-cut

disposition of this case required treatment of an important question of federal law, review was granted on a writ of certiorari. 342 U. S. 846.

Facts. Petitioner, Verna Sutton, divorced respondent, Leib, in Illinois in 1939, and under the terms of the decree of divorce was awarded $125 "on or before the first day of each calendar month . . . for so long as the plaintiff shall remain unmarried, or for so long as this decree remains in full force and effect." On July 3, 1944, in Reno, Nevada, petitioner married Walter Henzel who had that day obtained a Nevada divorce from Dorothy Henzel, a resident of New York who had not been served in Nevada and who made no appearance there. One month later, August 3, 1944, Dorothy Henzel brought a separate maintenance proceeding in the courts of New York. Walter Henzel defended this suit. The proceeding resulted in a decree in Dorothy Henzel's favor, declaring Walter Henzel's Nevada divorce from her "null and void." With the service of Dorothy's process on Walter, petitioner ceased living with him, and in January 1945 filed suit in New York for annulment of her marriage to him. In

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statement in any of the main opinions of the Court as to the status of the Nevada decree in Nevada after a successful extraterritorial challenge of it, we think we may spell out authority for our assumption that it survives such challenge and remains in full force and effect within the confines of the state of Nevada until and unless it is set aside upon review in that state.

"Assuming the validity of the divorce in Nevada, then the party or parties thereto resumed full marital capacity in that state. It follows that, so far as the state of Nevada is concerned, there was no inhibition against the remarriage of Walter Henzel in that state, and no reason appears for challenging his marriage there to plaintiff immediately after the decree of divorce was rendered. Under the terms of the Illinois decree of divorce of plaintiff and defendant, such marriage immediately terminated the obligation of the latter to continue the alimony payments required thereby. We think that obligation was not reinstated and revived by the subsequent annulment of the Nevada marriage in New York." 188 F. 2d at 768.

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this proceeding Walter Henzel also appeared. On June 6, 1947, the New York court entered an interlocutory decree after trial which became final three months thereafter. This judgment declared that petitioner's marriage to Henzel was "null and void" for the reason that he "had another wife living at the time of said marriage."

There was no appeal in Nevada from the Nevada divorce of the Henzels. No further action was taken in Nevada concerning the marriage of Henzel and petitioner, and no appeal taken in New York from the judgment holding the Henzels' Nevada divorce null and void or from the judgment annulling the Nevada marriage of Henzel and petitioner. The jurisdiction of the New York courts to enter the judgments is unquestioned.

Analysis of Issues. Collection of alimony is sought against respondent who was not a party to any of the judicial proceedings in Nevada or New York and appears in none of the records from either state. Illinois law as to respondent's liability governs the federal court's decision of this case.[3] But the responsibility for the decision of federal constitutional issues involved rests finally on this Court.[4] This controversy presents, fundamentally, a problem of Illinois law, to wit, the Illinois rule as to the effect of a subsequently annulled second marriage on the alimony provisions of an Illinois divorce awarding support until remarriage.

As the Full Faith and Credit Clause requires Illinois to recognize the validity of records and judicial proceedings of sister states, the conclusion will not vary because the post-divorce recorded events underlying this litigation took place in other states than Illinois. This is not an alleged conflict of decisions between states such as existed

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[3] *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Angel* v. *Bullington,* 330 U. S. 183.

[4] *Barber* v. *Barber,* 323 U. S. 77, 81.

in certain tax and estate cases.[5] Rather the situation more nearly approaches *Barber* v. *Barber,* 323 U. S. 77. There Tennessee refused full faith and credit to a North Carolina judgment for arrears of alimony on the ground of its lack of finality in North Carolina. We reversed Tennessee's decision, not on the ground of error in Tennessee rules of law but on our determination that the North Carolina judgment was final and therefore enforceable as a matter of federal law in Tennessee under the Full Faith and Credit Clause. So in this case, Illinois' conclusion as to this claim for alimony must be reached under Illinois law on the basis of giving the various proceedings the effect to which the Constitution entitles them. In this way the Full Faith and Credit Clause performs its intended function of avoiding relitigation in other states of adjudicated issues, while leaving to the law of the forum state the application of the predetermined facts to the new problem. *Riley* v. *New York Trust Co.,* 315 U. S. 343, 348–349.

Legal Effect of Nevada and New York Events. Petitioner and Henzel were married in Nevada. Thereafter petitioner brought her putative husband before the New

[5] *Worcester County Co.* v. *Riley,* 302 U. S. 292, and cases cited. In this case this Court held, p. 299, as a basis that the action was against a state without its consent, that the Full Faith and Credit Clause does not require uniformity of decision as to domicile between the courts of different states. Cf. *Texas* v. *Florida,* 306 U. S. 398, 410.

Riley v. *New York Trust Co.,* 315 U. S. 343. In this case Georgia had determined that decedent's domicile was Georgia. New York had determined the domicile was New York. In an interpleader suit in Delaware, involving the transfer of stock of a Delaware corporation to one of the two personal representatives of decedent appointed by the respective states, this Court held, where neither personal representative had been a party to the determination of domicile in the state of the other, Delaware was free to determine the question of domicile and require delivery of the stock to that representative.

York court. Petitioner and Henzel subjected themselves to the jurisdiction of the New York court and its decree annulling their Nevada marriage was entered with jurisdiction, so far as this record shows, of the parties and the subject matter. The burden is upon one attacking the validity of a judgment to demonstrate its invalidity.[6] That judgment is *res judicata* between the parties and is unassailable collaterally.[7] As both parties were before the New York court, its decree of annulment of their Nevada marriage ceremony is effective to determine that the marriage relationship of petitioner and Henzel did not exist at the time of filing the present complaint in Illinois for unpaid alimony. The effect in Illinois of the New York declaration of nullity on the obligation for alimony is a matter of Illinois law hereinafter treated. The New York annulment determines the marriage relationship that is the marital status of petitioner and Henzel, just as any divorce judgment determines such relationship. If the Nevada court had had jurisdiction by personal service in the state or appearance in the case of Henzel and the first Mrs. Henzel, its decree of divorce would have been unassailable in other states.[8] So as to the New York decree annulling the marriage, New York had such jurisdiction of the parties and its decree is entitled to full faith throughout the Nation, in Nevada as well as in Illinois.[9]

The New York invalidation of the Nevada divorce of the Henzels stands in the same position. As Mrs. Henzel was neither personally served in Nevada nor entered her appearance, the Nevada divorce decree was subject to

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[6] *Barber* v. *Barber, supra,* 86; *Cook* v. *Cook,* 342 U. S. 126, 128.

[7] *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66, 76–78.

[8] *Sherrer* v. *Sherrer,* 334 U. S. 343.

[9] *Treinies* v. *Sunshine Mining Co., supra; Milliken* v. *Meyer,* 311 U. S. 457, 462.

attack and nullification in New York for lack of jurisdiction over the parties in a contested action.[10]

This leads us to hold that the conclusion of the Court of Appeals quoted in note 2, *supra,* is incorrect under the facts of this case. The marriage ceremony performed for petitioner and Henzel in Nevada must be held invalid because then Henzel had a living wife. The New York annulment held the Nevada marriage void. Nevada declares bigamous marriages void.[11]

Conclusion. The determination that the New York adjudications must be given full faith and credit in Illinois, however, does not decide this controversy. Although the federal courts must give the same force and effect to the New York decrees as Illinois does,[12] a question of state law remains. Does Illinois give the marriage ceremony of an annulled marriage sufficient vitality to release Leib, the respondent, from his obligation to pay alimony subsequently due?

Full faith to the New York annulment, which is conclusive everywhere as to the marriage status of petitioner and Henzel, compels Illinois to treat their Nevada marriage ceremony as void.[13] The force of that rule, however, does not require that the effect of the New York annulment on rights incident to this declaration of the invalidity of the Nevada marriage ceremony shall be the same in all states. Annulment is, in respect to its effect, analogous to divorce. A valid divorce, one spouse appearing only by constructive service, that frees the parties from the bonds of matrimony throughout the United States

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[10] *Cook* v. *Cook, supra,* citing *Williams* v. *North Carolina,* 325 U. S. 226; *Rice* v. *Rice,* 336 U. S. 674. Cf. *Sherrer* v. *Sherrer, supra.*

[11] Nev. Comp. Laws, 1929, § 4066; *Poupart* v. *District Court,* 34 Nev. 336, 123 P. 769.

[12] See note 1, and *Union & Planters' Bank* v. *Memphis,* 189 U. S. 71, 75.

[13] *Williams* v. *North Carolina,* 317 U. S. 287, 291–304.

does not require a second state to accord its terms the same result in litigation over separable legal rights as the decree would have in the courts of the state entering the decree.[14] Without reference to the effect of a divorce on incidents of the marriage relation where both spouses are actually before the court, we think it equally clear, as a matter of constitutional law, that Illinois is free to decide for itself the effect of New York's declaration of annulment on the obligations of respondent, a stranger to that decree.

Although the present proceeding necessarily presents questions of state law, resting as it does upon diversity jurisdiction, the case does not present any non-federal issue suitable for separation and determination in the state courts.[15] The remaining matters of state law are for the decision of the federal courts.[16]

It is frequently said, as a legal fiction, that annulment makes the annulled marriage ceremony as though it had never occurred. That fiction is variously treated in different jurisdictions.[17] For example in New York, the

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[14] *Estin* v. *Estin*, 334 U. S. 541. See *MacKay* v. *MacKay*, 279 App. Div. 350, 110 N. Y. S. 2d 82.

[15] *Propper* v. *Clark*, 337 U. S. 472, 489, *et seq.*, and cases cited. Furthermore the Court of Appeals has already determined that certain payments of alimony made to petitioner by respondent in settlement of installments accruing prior to the Nevada marriage do not amount to a compromise of the disputed claim. 188 F. 2d at 767–768. Cf. *Moore* v. *Shook*, 276 Ill. 47, 55, 114 N. E. 592; *Darst* v. *Lang*, 367 Ill. 119, 10 N. E. 2d 659.

[16] *Meredith* v. *Winter Haven*, 320 U. S. 228; *Propper* v. *Clark*, *supra*, 486.

[17] *In re Wombwell's Settlement*, [1922] 2 Ch. 298. Here a marriage settlement was in trust for the settlor "until the said intended marriage" and thereafter on declared trusts for the spouses. The marriage was annulled. The settlor was held entitled to the funds as a valid marriage was intended and this one was void *ab initio*. Likewise *Chapman* v. *Bradley*, 33 L. J. Ch. 139. Cf. *In re Garnett*,

petitioner apparently would recover alimony after annulment but not for the period between the remarriage ceremony and the annulment.[18]

The Court of Appeals of the Seventh Circuit has declared on an issue as to whether the petitioner's claim for alimony had been adjusted that there has been in this controversy no compromise of a disputed claim. See note 15, *supra*. We accept that ruling. That court has not had occasion to consider the effect of the annulment under the law of Illinois on the respondent's alimony obligation.

Where there had been a valid foreign marriage, followed by an annulment, based partly on issues not here involved, Illinois has held that the obligation of a former husband to pay alimony until the wife "remarry" is termi-

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74 L. J. Ch. 570; *Bishop* v. *Smith*, 1 Vict. L. R. 313; *P.* v. *P.*, [1916] 2 I. R. 400.

See Vernier, American Family Laws, § 53, Suits to Annul—Effect of Judgment, and § 48, Issue of Prohibited Marriages (this includes annulment).

New York declares some marriages void from the time their nullity is declared. McKinney's Consolidated Laws of New York, Book 14, Domestic Relations Law, § 7.

For effect on different incidents, see *Henneger* v. *Lomas*, 145 Ind. 287, 44 N. E. 462 (seduction, tort); *Burney* v. *State*, 111 Tex. Cr. R. 599, 13 S. W. 2d 375 (seduction, criminal); *Miller* v. *Wall*, 216 Ala. 448, 113 So. 501 (marriage, later annulled, held annulment did not postpone distribution of estate, distributable marriage); *Deeds* v. *Strode*, 6 Idaho 317, 55 P. 656 (civil action); *Figoni* v. *Figoni*, 211 Cal. 354, 295 P. 2d 339 (distribution of community property).

[18] This avoids double support to the wife. *Sleicher* v. *Sleicher*, 251 N. Y. 366, 167 N. E. 501. See *Frank* v. *Carter*, 219 N. Y. 35, 113 N. E. 549 (husband liable for necessaries prior to annulment); *In the Matter of Moncrief*, 235 N. Y. 390, 139 N. E. 550 (child of annulled marriage, illegitimate).

The *Sleicher* case called forth many comments when it was handed down. See 43 Harv. L. Rev. 109; 30 Col. L. Rev. 877; 25 Ill. L. Rev. 99; 14 Minn. L. Rev. 93; 39 Yale L. J. 133.

nated by the remarriage.[19] What the Illinois rule is when the foreign (Nevada) marriage is judicially declared invalid, under present circumstances, or whether respondent, if liable at all, is liable for the period during which Henzel may have owed support under a rule such as that of *Sleicher* v. *Sleicher,* 251 N. Y. 366, 167 N. E. 501, has not, so far as we know, been determined.

The judgment of the Court of Appeals should be reversed and the cause remanded to the Court of Appeals for further proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE BLACK agrees with the Court of Appeals and would affirm its judgment.

MR. JUSTICE FRANKFURTER, concurring.

This case illustrates what little excuse is left for diversity jurisdiction, certainly since *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, has curbed the unwarranted freedom of federal courts to fashion rules of local law in defiance of

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[19] *Lehmann* v. *Lehmann,* 225 Ill. App. 513, saying:

"We think that said words as so used were intended by the parties to refer to the ceremony or act of marriage as distinguished from the status or relation thereafter." P. 522.

"Even though it be considered that such marriage was not a valid one *in Illinois,* it was valid in New Jersey, where performed, and also valid in their subsequent successive domiciles, and we think that under all the facts disclosed it should be held, contrary to the finding of the chancellor in the decree appealed from, that she remarried within the meaning of the words contained in said divorce decree of April 1, 1915, and in the written agreement entered into between the parties about that time, and that she thereby elected to forfeit, and did forfeit, her right to receive alimony for her own support thereafter from respondent." P. 526.

The Illinois court was influenced by the practical construction given to the alimony decree by the parties. Pp. 516, 527. See *Wilson* v. *Cook,* 256 Ill. 460, 100 N. E. 222.

local law. For my Brother REED naturally enough concludes that the turning point of this case is a matter of Illinois law having no relation whatever to the essential functions which federal courts serve, and a matter which is peculiarly ill-suited for determination by a federal court. The issue in this case is whether the obligation imposed by an Illinois divorce decree to pay alimony "for so long as plaintiff shall remain unmarried" ceases under Illinois law when the plaintiff goes through the form of another marriage ceremony regardless of the binding validity of such a ceremony. Illinois is free to consult solely her own will whether such a provision in a decree relates merely to ceremony or requires a union with a spouse legally free to marry. On that crucial issue, we are told, there is no Illinois law. By what seems to me undesirable judicial administration, the ascertainment—for all I know the formulation—of Illinois law is committed to a federal court which in the very nature of things can render only a tentative and indecisive judgment.

Tentative and indecisive, because whatever view the Court of Appeals for the Seventh Circuit takes on this question may be authoritatively supplanted by the only court that can finally settle the issue, namely, the Supreme Court of Illinois. Such a decision from the Illinois Supreme Court can readily be solicited by the plaintiff through the Illinois declaratory judgment procedure. It is precisely the kind of controversy for which the utility of the device of a declaratory judgment has been so fulsomely acclaimed. Instead of availing itself of this modern procedure, the Court makes itself a party to a discord which passeth understanding.

No doubt the Court of Appeals may tentatively answer this question of Illinois law so far as the immediate parties are concerned. But it is not conducive to the interests of law in general that this Court should compel a

decision in a federal court which tomorrow or the day after may be definitively contradicted by the State court with the final say. I would remand the case to the Court of Appeals to be held by it until the plaintiff seeks with all deliberate speed a decision on the crucial question of the case in the Illinois courts.

Subject to this qualification, I agree with the opinion of the Court.

Syllabus.

MULLANEY, COMMISSIONER OF TAXATION OF THE TERRITORY OF ALASKA, *v.* ANDERSON ET AL.

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

No. 329. Argued January 7–8, 1952.—Decided March 3, 1952.

1. A statute of the Territorial Legislature of Alaska, Laws 1949, c. 66, providing for the licensing of commercial fishermen in territorial waters, and imposing a $5 license fee on resident fishermen and a $50 fee on nonresidents, *held* violative of the Privileges and Immunities Clause of Art. IV, § 2 of the Federal Constitution. *Toomer* v. *Witsell*, 334 U. S. 385. Pp. 417–419.
2. So far as the regulation of fisheries is concerned, Congress has granted the Territorial Legislature of Alaska no greater power over citizens of other states than a state legislature has. Pp. 419–420.
3. This suit was brought by the Alaska Fishermen's Union and its Secretary-Treasurer on behalf of some 3,200 nonresident union members. Here, for the first time, petitioner questioned their standing to maintain the suit. To remove the matter from controversy, respondents moved in this Court for leave to add as parties plaintiff two members of the union who are nonresidents of Alaska. *Held:* In the special circumstances of this case, the motion is granted. (See Rule 21 of the Federal Rules of Civil Procedure.) Pp. 416–417.

191 F. 2d 123, affirmed.

In a suit to enjoin enforcement, the District Court for the Territory of Alaska upheld a tax statute of Alaska. 91 F. Supp. 907. The Court of Appeals reversed. 191 F. 2d 123. This Court granted certiorari. 342 U. S. 865. *Affirmed*, p. 420.

J. Gerald Williams, Attorney General of Alaska, argued the cause for petitioner. With him on the brief were

John H. Dimond, Assistant Attorney General, and *Harold J. Butcher,* Special Assistant Attorney General.

Carl B. Luckerath argued the cause for respondents. With him on the brief was *Wheeler Grey.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The Territorial Legislature of Alaska provided for the licensing of commercial fishermen in territorial waters, imposing a $5 license fee on resident fishermen and a $50 fee on nonresidents. Alaska Laws, 1949, c. 66. The Alaska Fishermen's Union and its Secretary-Treasurer, on behalf of some 3,200 nonresident union members, brought this action in the District Court of the Territory to enjoin the Tax Commissioner from collecting the license fee from nonresidents. Plaintiffs contended that the Territorial Legislature was without power under the Organic Act to pass the statute, that the exaction complained of unconstitutionally burdens interstate commerce, and that it is an abridgment of the privileges and immunities of citizens of other States forbidden by Art. IV, § 2 of the Constitution and by the Fourteenth Amendment. After trial, the District Court concluded that the differential between resident and nonresident fees rests on substantial differences bearing a fair and reasonable relation to the objects of the legislation, and upheld the statute. 91 F. Supp. 907. The Court of Appeals for the Ninth Circuit reversed, one judge dissenting. 191 F. 2d 123. We brought the case here for clarification of the limits on the power of the Territorial Legislature. 342 U. S. 865.

Here, for the first time, petitioner questioned the standing of respondent union and its Secretary-Treasurer to maintain this suit. To remove the matter from controversy, respondent moved for leave to add as parties plain-

tiff two of its members, nonresidents of Alaska and subject to the statutory exaction. Rule 21 of the Federal Rules of Civil Procedure authorizes the addition of parties "by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." The original plaintiffs alleged without contradiction that they were authorized by the nonresident union members to bring this action in their behalf. This claim of authority is now confirmed in the petition supporting the motion to add the member-fishermen as plaintiffs. To grant the motion merely puts the principal, the real party in interest, in the position of his avowed agent. The addition of these two parties plaintiff can in no wise embarrass the defendant. Nor would their earlier joinder have in any way affected the course of the litigation. To dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration—the more so since, with the silent concurrence of the defendant, the original plaintiffs were deemed proper parties below. Rule 21 will rarely come into play at this stage of a litigation. We grant the motion in view of the special circumstances before us.

In *Toomer* v. *Witsell,* 334 U. S. 385, the Court held that Art. IV, § 2 of the Constitution would bar any State from imposing the license fee here attacked. In that case it was said: "The State is not without power, for example, to restrict the type of equipment used in its fisheries, to graduate license fees according to the size of the boats, or even to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay." *Id.,* at 398–399. The challenged discrimination does not come within any of these exceptions. The Tax Commissioner relied on the higher cost of enforcing the license law against non-

resident fishermen to justify the difference in fees, and the District Court found that 90% of the cost of enforcement was incurred in collecting the fees from nonresidents. But there is no warrant for the assumption that the differential in fees bears any relation to this difference in cost, nothing to indicate that it "would merely compensate" for the added enforcement burden. Indeed the Tax Commissioner and his Special Deputy Enforcement Officer specifically disclaimed any knowledge of the dollar cost of enforcement. What evidence we have negatives the idea of any such relation, for the total amount payable by nonresident fishermen in 1949–1950, in excess of what they would have been charged if they had been residents, may easily have exceeded the entire amount available for administration of the Tax Commissioner's office in that year.[1] Constitutional issues affecting taxation do not turn on even approximate mathematical determinations. But something more is required than bald assertion to establish a reasonable relation between the higher fees and the higher cost to the Territory. We do not remotely imply that the burden is on the taxing authorities to sustain the constitutionality of a tax. But where the power to tax is not unlimited, validity is not established by the mere imposition of a tax. In this case, respondents negatived other possible bases raised by the pleadings for the discrimination, and the one relied on by the Commissioner, higher enforcement costs, was one as to which all

[1] The appropriation for the office of Tax Commissioner for the biennium beginning April 1, 1949, was $500,000. Alaska Laws, 1949, c. 114. The District Court found that there were approximately 3,200 nonresident fishermen who were members of plaintiff union, and the court below added that it might be inferred from the record that an equal number of nonresident fishermen were not members of this union. 191 F. 2d at 134. The $45 differential paid by nonresidents multiplied by the 6,400 nonresident fishermen amounts to $288,000, well over half the Commissioner's biennial appropriation.

the facts were in his possession. Respondents sought to elicit these facts by interrogatories and cross-examination without avail. Under the circumstances we think they discharged their burden in attacking the statute.

But, it is urged, Alaska is not a State but a Territory to which the controlling constitutional limitations laid down in *Toomer* v. *Witsell, supra,* are not applicable. *Haavik* v. *Alaska Packers Assn.,* 263 U. S. 510, is invoked for that contention. We have no occasion here to reconsider the constitutional holding of that case, namely, that it is within the power of Congress to relieve the Territory of some of the restrictions applicable to a State. But that in fact was the real issue to which the Court's attention was directed in the *Haavik* case. It was assumed that if Congress had the power it was exercised by the Organic Act. On fuller consideration, in light of the briefs and record in that case and the implications of subsequent Congressional enactments,[2] we cannot so read the

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[2] After the decision in the *Haavik* case Congress passed the White Act, 43 Stat. 464, 48 U. S. C. §§ 221–247, comprehensively regulating "the fisheries of the United States in all waters of Alaska" and delegating authority to the Secretary of Commerce (now to the Secretary of Interior) to administer the law. That Act provided ". . . no exclusive or several right of fishery shall be granted [in reserved fishing areas established by the Secretary in Alaskan waters], nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior." 43 Stat. 464, as amended, 48 U. S. C. § 222. But see 43 Stat. 464, 467, 48 U. S. C. § 228, which provides that nothing in the Act "shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses . . . ."

In 1947, Congress amended the Organic Act of Puerto Rico to provide: "The rights, privileges, and immunities of citizens of the United States shall be respected in Puerto Rico to the same extent as though Puerto Rico were a State of the Union and subject to the provisions of paragraph 1 of section 2 of article IV of the Constitution of the United States." 61 Stat. 772, 48 U. S. C. § 737. In

Act. Section 3 provides "The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States." 37 Stat. 512, 48 U. S. C. § 23. And § 9 extends the legislative power of the Territory to "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, ..." 37 Stat. 512, 514, 48 U. S. C. § 77. In the light of these sections, we cannot presume that Congress authorized the Territorial Legislature to treat citizens of States the way States cannot treat citizens of sister States. Only the clearest expression of Congressional intent could induce such a result. It is not present. If anything, Congressional pronouncements since *Haavik* concerning the very subject matter here in issue fortify the conclusion that the Territorial Legislature, particularly in the regulation of fisheries, was granted no greater power over citizens of other States than a State legislature has. The judgment must be

Affirmed.

THE CHIEF JUSTICE, MR. JUSTICE CLARK, and MR. JUSTICE MINTON would reverse for the reasons given in points A and B of the dissenting opinion of Chief Judge Denman, 191 F. 2d 123, 134–137.

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his statement explaining the bill, Senator Butler, the manager of the bill, said, "Congress has not expressly extended the Constitution to Puerto Rico, as it did in the case of Alaska and Hawaii, and the committee considered it advisable to bring Puerto Rico expressly within the operation of the comity clause so as to leave no doubt that there may be no discrimination against citizens of the United States who are not residents of Puerto Rico." 93 Cong. Rec. 10402. The report of the Senate Committee on Public Lands expressed dissatisfaction that "Legislation in Puerto Rico has discriminated against nonresident American citizens." S. Rep. No. 422, 80th Cong., 1st Sess. 4.

DAY-BRITE LIGHTING, INC. *v.* MISSOURI.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 317. Argued January 10, 1952.—Decided March 3, 1952.

Missouri Rev. Stat., 1949, § 129.060, which provides that any employee entitled to vote may absent himself from his employment for four hours between the opening and closing of the polls on election days and that any employer who deducts wages for that absence is guilty of a misdemeanor, does not violate the Due Process or Equal Protection Clause of the Fourteenth Amendment or the Contract Clause of Art. I, § 10, of the Federal Constitution. Pp. 421–425.
362 Mo. 299, 240 S. W. 2d 886, affirmed.

Appellant was convicted in a Missouri state court of a violation of Mo. Rev. Stat., 1949, § 129.060. The Supreme Court of Missouri affirmed. 362 Mo. 299, 240 S. W. 2d 886. On appeal to this Court, *affirmed*, p. 425.

Henry C. M. Lamkin argued the cause for appellant. With him on the brief were *William H. Armstrong* and *Louis J. Portner*. *Thomas H. Cobbs* was also of counsel.

John R. Baty, Assistant Attorney General of Missouri, for appellee. With him on the brief was *J. E. Taylor*, Attorney General. *Arthur M. O'Keefe*, Assistant Attorney General, was also of counsel.

J. Albert Woll, *Herbert S. Thatcher* and *James A. Glenn* filed a brief for the American Federation of Labor, as *amicus curiae*, supporting appellee.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Missouri has a statute, Mo. Rev. Stat., 1949, § 129.060, first enacted in 1897, which was designed to end the coercion of employees by employers in the exercise of the franchise. It provides that an employee may absent him-

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self from his employment for four hours between the opening and closing of the polls without penalty, and that any employer who among other things deducts wages for that absence is guilty of a misdemeanor.[1]

Appellant is a Missouri corporation doing business in St. Louis. November 5, 1946, was a day for general elections in Missouri, the polls being open from 6 A. M. to 7 P. M. One Grotemeyer, an employee of appellant, was on a shift that worked from 8 A. M. to 4:30 P. M. each day, with thirty minutes for lunch. His rate of pay was $1.60 an hour. He requested four hours from the scheduled work day to vote on November 5, 1946. That request was refused; but Grotemeyer and all other employees on his shift were allowed to leave at 3 P. M. that day, which gave them four consecutive hours to vote before the polls closed.

Grotemeyer left his work at 3 P. M. in order to vote and did not return to work that day. He was not paid for the hour and a half between 3 P. M. and 4:30 P. M. Appellant was found guilty and fined for penalizing Grotemeyer in violation of the statute. The judgment was affirmed by the Missouri Supreme Court, 362 Mo. 299, 240

[1] "Any person entitled to vote at any election in this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so absenting himself, be liable to any penalty; provided, however, that his employer may specify the hours during which such employee may absent himself as aforesaid. Any person or corporation who shall refuse to any employee the privilege hereby conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege, or who shall, directly or indirectly, violate the provisions of this section, shall be deemed guilty of a misdemeanor, and on conviction thereof be fined in any sum not exceeding five hundred dollars."

S. W. 2d 886, over the objection that the statute violated the Due Process and the Equal Protection Clauses of the Fourteenth Amendment and the Contract Clause of Art. I, § 10.

The liberty of contract argument pressed on us is reminiscent of the philosophy of *Lochner* v. *New York,* 198 U. S. 45, which invalidated a New York law prescribing maximum hours for work in bakeries; *Coppage* v. *Kansas,* 236 U. S. 1, which struck down a Kansas statute outlawing "yellow dog" contracts; *Adkins* v. *Children's Hospital,* 261 U. S. 525, which held unconstitutional a federal statute fixing minimum wage standards for women in the District of Columbia, and others of that vintage. Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits, as *Tot* v. *United States,* 319 U. S. 463, holds. But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided. That is the essence of *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *Nebbia* v. *New York,* 291 U. S. 502; *Olsen* v. *Nebraska,* 313 U. S. 236; *Lincoln Union* v. *Northwestern Co.,* 335 U. S. 525; and *California Auto. Assn.* v. *Maloney,* 341 U. S. 105.

West Coast Hotel Co. v. *Parrish, supra,* overrruling *Adkins* v. *Children's Hospital, supra,* held constitutional a state law fixing minimum wages for women. The present statute contains in form a minimum wage requirement. There is a difference in the purpose of the legislation. Here it is not the protection of the health and morals of the citizen. Missouri by this legislation has sought

to safeguard the right of suffrage by taking from employers the incentive and power to use their leverage over employees to influence the vote. But the police power is not confined to a narrow category; it extends, as stated in *Noble State Bank* v. *Haskell,* 219 U. S. 104, 111, to all the great public needs. The protection of the right of suffrage under our scheme of things is basic and fundamental.[2]

The only semblance of substance in the constitutional objection to Missouri's law is that the employer must pay wages for a period in which the employee performs no services. Of course many forms of regulation reduce the net return of the enterprise; yet that gives rise to no constitutional infirmity. See *Queenside Hills Co.* v. *Saxl,* 328 U. S. 80; *California Auto. Assn.* v. *Maloney, supra.* Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization. Extreme cases are conjured up where an employer is required to pay wages for a period that has no relation to the legitimate end. Those cases can await decision as and when they arise. The present law has no such infirmity. It is designed to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote. The public welfare is a broad and inclusive concept. The moral, social, eco-

[2] Decisions contrary to that of the Missouri Supreme Court in this case have been rendered by the Court of Appeals of Kentucky in *Illinois Central R. Co.* v. *Commonwealth,* 305 Ky. 632, 204 S. W. 2d 973, and by the Supreme Court of Illinois in *People* v. *Chicago, M. & St. P. R. Co.,* 306 Ill. 486, 138 N. E. 155. But cf. *Zelney* v. *Murphy,* 387 Ill. 492, 56 N. E. 2d 754. The Appellate Division of the Supreme Court of New York in *People* v. *Ford Motor Co.,* 271 App. Div. 141, 63 N. Y. S. 2d 697, and the Appellate Department of the Superior Court of California in *Ballarini* v. *Schlage Lock Co.,* 100 Cal. App. 2d 859, 226 P. 2d 771, held in accord with Missouri. For a review of legislation in this field, see 47 Col. L. Rev. 135.

nomic, and physical well-being of the community is one part of it; the political well-being, another. The police power which is adequate to fix the financial burden for one is adequate for the other. The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner, Coppage,* and *Adkins* cases.

The classification of voters so as to free employees from the domination of employers is an attempt to deal with an evil to which the one group has been exposed. The need for that classification is a matter for legislative judgment (*American Federation of Labor* v. *American Sash Co.*, 335 U. S. 538), and does not amount to a denial of equal protection under the laws.

Affirmed.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE JACKSON, dissenting.

The constitutional issue in this case, if not very vital in its present application, surely is a debatable one. Two state courts of last resort, the only ones to consider similar legislation, have held it unconstitutional.[1] Only unreviewed decisions of intermediate courts[2] can be cited in support of the Court's holding.

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[1] *Illinois Central R. Co.* v. *Commonwealth,* 305 Ky. 632, 204 S. W. 2d 973; *People* v. *Chicago, M. & St. P. R. Co.*, 306 Ill. 486, 138 N. E. 155. Cf. *Zelney* v. *Murphy,* 387 Ill. 492, 56 N. E. 2d 754.

[2] *People* v. *Ford Motor Co.*, 271 App. Div. 141, 63 N. Y. S. 2d 697; *Ballarini* v. *Schlage Lock Co.*, 100 Cal. App. 2d 859, 226 P. 2d 771.

Appellant employed one Grotemeyer, under a union contract, on an hourly basis at $1.60 per hour for each hour worked. He demanded a four-hour leave of absence, with full pay, on election day to do campaigning and to get out the vote. It is stipulated that his residence was 200 feet from the polling place and that it actually took him about five minutes to vote. Appellant closed the day's work for all employees one and one-half hours earlier than usual, which gave them the statutory four hours before the polls closed. For failure to pay something less than $3 for this hour and a half which Grotemeyer did not work and for which his contract did not provide that he should be paid, the employer is convicted of crime under the statute set forth in the Court's opinion.

To sustain this statute by resort to the analogy of minimum wage laws seems so farfetched and unconvincing as to demonstrate its weakness rather than its strength. Because a State may require payment of a minimum wage for hours that are worked it does not follow that it may compel payment for time that is not worked. To overlook a distinction so fundamental is to confuse the point in issue.

The Court, by speaking of the statute as though it applies only to industry, sinister and big, further obscures the real principle involved. The statute plainly requires farmers, small service enterprises, professional offices, housewives with domestic help, and all other employers, not only to allow their employees time to vote, but to pay them for time to do so. It does not, however, require the employee to use any part of such time for that purpose. Such legislation stands in a class by itself and should not be uncritically commended as a mere regulation of "practices in the business-labor field."

Obtaining a full and free expression from all qualified voters at the polls is so fundamental to a successful representative government that a State rightly concerns it-

self with the removal of every obstruction to the right and opportunity to vote freely. Courts should go far to sustain legislation designed to relieve employees from obligations to private employers which would stand in the way of their duty as citizens.

But there must be some limit to the power to shift the whole voting burden from the voter to someone else who happens to stand in some economic relationship to him. Getting out the vote is not the business of employers; indeed, I have regarded it as a political abuse when employers concerned themselves with their employees' voting. It is either the voter's own business or the State's business. I do not question that the incentive which this statute offers will help swell the vote; to require that employees be paid time-and-a-half would swell it still more, and double-time would do even better. But does the success of an enticement to vote justify putting its cost on some other citizen?

The discriminatory character of this statute is flagrant. It is obvious that not everybody will be paid for voting and the "rational basis" on which the State has ordered that some be paid while others are not eludes me. If there is a need for a subsidy to get out the vote, no reason is apparent to me why it should go to one who lives 200 feet from his polling place but not to a self-employed farmer who may have to lay down his work and let his equipment idle for several hours while he travels several miles over bad fall roads to do his duty as a citizen. If he has a hired man, he must also lose his hand's time and his pay. Perhaps some plan will be forthcoming to pay the farmer by requiring his mortgagee to rebate some proportion of the interest on the farm mortgage if he will vote. It would not differ in principle. But no way occurs to me by which the doctor can charge some patient or the lawyer some client for the call he could not receive while he was voting.

I suppose a State itself has considerable latitude to offer inducements to voters who do not value their franchise enough to vote on their own time, even if they seem to me corrupting or discriminating ones. Perhaps my difficulty with today's decision is that I cannot rise above an old-fashioned valuation of American citizenship which makes a state-imposed pay-for-voting system appear to be a confession of failure of popular representative government.

It undoubtedly is the right of every union negotiating with an employer to bargain for voting time without loss of pay. It is equally the right of any individual employee to make that part of his hire. I have no reason to doubt that a large number of voters already have voluntary arrangements which make their absence for voting without cost. But a constitutional philosophy which sanctions intervention by the State to fix terms of pay without work may be available tomorrow to give constitutional sanction to state-imposed terms of employment less benevolent.

DOREMUS ET AL. *v.* BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 9. Argued January 31, 1952.—Decided March 3, 1952.

A statute of New Jersey provides for the reading, without comment, of five verses of the Old Testament at the opening of each public-school day. In a declaratory judgment action instituted by the two appellants, the State Supreme Court held that the statute did not violate the Federal Constitution. Appellants appealed to this Court. One of the appellants had sued as the parent of a public-school child, and each had sued as a taxpayer. *Held:* The appeal is dismissed for want of jurisdiction. Pp. 430–435.

1. The cause is moot so far as it relates to the rights of the child in question, since she graduated from the public schools before the appeal was taken to this Court. Pp. 432–433.

2. The facts stated by appellants as taxpayers were not sufficient to constitute a justiciable case or controversy within the jurisdiction of this Court, because they do not show such direct and particular financial interest as is necessary to maintain a taxpayer's case or controversy. Pp. 433–435.

5 N. J. 435, 75 A. 2d 880, appeal dismissed.

In a declaratory judgment action instituted by appellants in a New Jersey court to test the constitutionality of a statute of that State, the State Supreme Court held that the statute did not violate the Federal Constitution. 5 N. J. 435, 75 A. 2d 880. An appeal to this Court is *dismissed*, p. 435.

Heyman Zimel argued the cause and filed a brief for appellants.

Theodore D. Parsons, Attorney General, and *Henry F. Schenk,* Deputy Attorney General, argued the cause for appellees and filed a brief for the State of New Jersey. *Mr. Schenk* also filed a brief for the Board of Education of the Borough of Hawthorne, appellee.

Briefs of *amici curiae* supporting appellants were filed by *Leo Pfeffer, Will Maslow* and *Shad Polier* for the American Jewish Congress; and *Kenneth W. Greenawalt, Martin A. Schenck, Arthur Garfield Hays, Morris L. Ernst* and *Herbert Monte Levy* for the American Civil Liberties Union.

Briefs of *amici curiae* supporting appellees were filed by *Robert E. Woodside,* Attorney General, and *Harry F. Stambaugh* for the Commonwealth of Pennsylvania; *Denis M. Hurley, Michael A. Castaldi, Seymour B. Quel, Daniel T. Scannell* and *Arthur H. Kahn* for the City of New York on behalf of the Board of Education of the City of New York; and *Albert McCay* for the State Council of the Junior Order of United American Mechanics of New Jersey.

Mr. Justice Jackson delivered the opinion of the Court.

This action for a declaratory judgment on a question of federal constitutional law was prosecuted in the state courts of New Jersey. It sought to declare invalid a statute of that State which provides for the reading, without comment, of five verses of the Old Testament at the opening of each public-school day. N. J. Rev. Stat., 1937, 18:14–77. No issue was raised under the State Constitution, but the Act was claimed to violate the clause of the First Amendment to the Federal Constitution prohibiting establishment of religion.

No trial was held and we have no findings of fact, but the trial court denied relief on the merits on the basis of the pleadings and a pretrial conference, of which the record contains meager notes. The Supreme Court of New Jersey, on appeal, rendered its opinion that the Act does not violate the Federal Constitution, in spite of jurisdic-

tional doubts which it pointed out but condoned as follows:

"No one is before us asserting that his religious practices have been interfered with or that his right to worship in accordance with the dictates of his conscience has been suppressed. No religious sect is a party to the cause. No representative of, or spokesman for, a religious body has attacked the statute here or below. One of the plaintiffs is 'a citizen and taxpayer;' the only interest he asserts is just that and in those words, set forth in the complaint and not followed by specification or proof. It is conceded that he is a citizen and a taxpayer, but it is not charged and it is neither conceded nor proved that the brief interruption in the day's schooling caused by compliance with the statute adds cost to the school expenses or varies by more than an incomputable scintilla the economy of the day's work. The other plaintiff, in addition to being a citizen and a taxpayer, has a daughter, aged seventeen, who is a student of the school. Those facts are asserted, but, as in the case of the co-plaintiff, no violated rights are urged. It is not charged that the practice required by the statute conflicts with the convictions of either mother or daughter. Apparently the sole purpose and the only function of plaintiffs is that they shall assume the role of actors so that there may be a suit which will invoke a court ruling upon the constitutionality of the statute. Respondents urge that under the circumstances the question is moot as to the plaintiffs-appellants and that our declaratory judgment statute may not properly be used in justification of such a proceeding. *Cf. New Jersey Turnpike Authority v. Parsons,* 3 *N. J.* 235; *Massachusetts v. Mellon,* 262 *U. S.* 447, at 488, 43 *Sup. Ct.* 597, 67 *L. Ed.* 1078, at 1085 (1923). The point has substance but we have nevertheless concluded to dispose of the ap-

peal on its merits." 5 N. J. 435, 439, 75 A. 2d 880, 881–882 (1950).

Upon appeal to this Court, we considered appellants' jurisdictional statement but, instead of noting probable jurisdiction, ordered that "Further consideration of the question of the jurisdiction of this Court in this case and of the motion to dismiss or affirm is postponed to the hearing of the case on the merits." On further study, the doubts thus indicated ripen into a conviction that we should dismiss the appeal without reaching the constitutional question.

The view of the facts taken by the court below, though it is entitled to respect, does not bind us and we may make an independent examination of the record. Doing so, we find nothing more substantial in support of jurisdiction than did the court below. Appellants, apparently seeking to bring themselves within *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203, assert a challenge to the Act in two capacities—one as parent of a child subject to it, and both as taxpayers burdened because of its requirements.

In support of the parent-and-school-child relationship, the complaint alleged that appellant Klein was parent of a seventeen-year-old pupil in Hawthorne High School, where Bible reading was practiced pursuant to the Act. That is all. There is no assertion that she was injured or even offended thereby or that she was compelled to accept, approve or confess agreement with any dogma or creed or even to listen when the Scriptures were read. On the contrary, there was a pretrial stipulation that any student, at his own or his parents' request, could be excused during Bible reading and that in this case no such excuse was asked. However, it was agreed upon argument here that this child had graduated from the public schools before this appeal was taken to this Court. Obviously

no decision we could render now would protect any rights she may once have had, and this Court does not sit to decide arguments after events have put them to rest. *United States* v. *Alaska Steamship Co.*, 253 U. S. 113, 116.

The complaint is similarly niggardly of facts to support a taxpayer's grievance. Doremus is alleged to be a citizen and taxpayer of the State of New Jersey and of the Township of Rutherford, but any relation of that Township to the litigation is not disclosed to one not familiar with local geography. Klein is set out as a citizen and taxpayer of the Borough of Hawthorne in the State of New Jersey, and it is alleged that Hawthorne has a high school supported by public funds. In this school the Bible is read, according to statute. There is no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school. No information is given as to what kind of taxes are paid by appellants and there is no averment that the Bible reading increases any tax they do pay or that as taxpayers they are, will, or possibly can be out of pocket because of it.

The State raised the defense that appellants showed no standing to maintain the action but, on pretrial conference, perhaps with premonitions of success, waived it and acquiesced in a determination of the federal constitutional question. Whether such facts amount to a justiciable case or controversy is decisive of our jurisdiction.

This Court has held that the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure. *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 478–479; *Massachusetts* v. *Mellon,* 262 U. S. 447, 486 *et seq.* The latter case recognized, however, that "The interest of a taxpayer of a municipality in

the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate." 262 U. S. at 486. Indeed, a number of states provide for it by statute or decisional law and such causes have been entertained in federal courts. *Crampton* v. *Zabriskie,* 101 U. S. 601, 609. See *Massachusetts* v. *Mellon, supra,* at 486. Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Massachusetts* v. *Mellon, supra,* at 488.

It is true that this Court found a justiciable controversy in *Everson* v. *Board of Education,* 330 U. S. 1. But Everson showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of. This complaint does not.

We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of "case or controversy," we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

The taxpayer's action can meet this test, but only when it is a good-faith pocketbook action. It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference. If appellants established the requisite special injury necessary to a taxpayer's case or controversy, it would

not matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct. We find no such direct and particular financial interest here. If the Act may give rise to a legal case or controversy on some behalf, the appellants cannot obtain a decision from this Court by a feigned issue of taxation.

The motion to dismiss the appeal is granted.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE REED and MR. JUSTICE BURTON concur, dissenting.

I think this case deserves a decision on the merits. There is no group more interested in the operation and management of the public schools than the taxpayers who support them and the parents whose children attend them. Certainly a suit by all the taxpayers to enjoin a practice authorized by the school board would be a suit by vital parties in interest. They would not be able to show, any more than the two present taxpayers have done, that the reading of the Bible adds to the taxes they pay. But if they were right in their contentions on the merits, they would establish that their public schools were being deflected from the educational program for which the taxes were raised. That seems to me to be an adequate interest for the maintenance of this suit by all the taxpayers. If all can do it, there is no apparent reason why less than all may not, the interest being the same. In the present case the issues are not feigned; the suit is not collusive; the mismanagement of the school system that is alleged is clear and plain.

If this were a suit to enjoin a federal law, it could not be maintained by reason of *Massachusetts* v. *Mellon,* 262 U. S. 447, 486. But New Jersey can fashion her own

rules governing the institution of suits in her courts. If she wants to give these taxpayers the status to sue (by analogy to the right of shareholders to enjoin *ultra vires* acts of their corporation), I see nothing in the Constitution to prevent it. And where the clash of interests is as real and as strong as it is here, it is odd indeed to hold there is no case or controversy within the meaning of Art. III, § 2 of the Constitution.

PERKINS *v.* BENGUET CONSOLIDATED MINING CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 85. Argued November 27–28, 1951.—Decided March 3, 1952.

A foreign corporation, owning gold and silver mines in the Philippine Islands, temporarily carried on in Ohio (during the Japanese occupation of the Philippines) a continuous and systematic, but limited, part of its general business—consisting of directors' meetings, business correspondence, banking, stock transfers, payment of salaries, purchasing of machinery, etc. While engaged in doing such business in Ohio, its president was served with summons in an action *in personam* against the corporation filed in an Ohio state court by a nonresident of Ohio. The cause of action did not arise in Ohio and did not relate to the corporation's activities there. A judgment sustaining a motion to quash the service was affirmed by the State Supreme Court. *Held:*

1. The Federal Constitution does not *compel* Ohio to open its courts to such a case—even though Ohio permits a complainant to maintain a proceeding *in personam* in its courts against a properly served nonresident natural person to enforce a cause of action which does not arise out of anything done within the State. Pp. 440–441.

2. The Due Process Clause of the Fourteenth Amendment also does not *prohibit* Ohio from granting such relief against a foreign corporation. *Old Wayne Life Assn.* v. *McDonough*, 204 U. S. 8, and *Simon* v. *Southern R. Co.*, 236 U. S. 115, distinguished. Pp. 441–447.

3. As a matter of federal due process, the business done by the corporation in Ohio was sufficiently substantial and of such a nature as to *permit* Ohio to entertain the cause of action against it, though the cause of action arose from activities entirely distinct from its activities in Ohio. Pp. 447–449.

4. It not clearly appearing, under the Ohio practice as to the effect of the syllabus, whether the Supreme Court of Ohio rested its decision on Ohio law or on the Fourteenth Amendment, the cause is remanded to that court for further proceedings in the light of the opinion of this Court. Pp. 441–449.

155 Ohio St. 116, 98 N. E. 2d 33, vacated and remanded.

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In two actions in an Ohio state court, the trial court sustained a motion to quash the service on the respondent foreign corporation. The Court of Appeals of Ohio affirmed, 88 Ohio App. 118, 95 N. E. 2d 5, as did the State Supreme Court, 155 Ohio St. 116, 98 N. E. 2d 33. This Court granted certiorari. 342 U. S. 808. *Judgment vacated and cause remanded,* p. 449.

Robert N. Gorman argued the cause for petitioner. With him on the brief was *Stanley A. Silversteen.*

Lucien H. Mercier argued the cause for respondent. With him on the brief was *Charles G. White.*

Mr. Justice Burton delivered the opinion of the Court.

This case calls for an answer to the question whether the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States precludes Ohio from subjecting a foreign corporation to the jurisdiction of its courts in this action *in personam.* The corporation has been carrying on in Ohio a continuous and systematic, but limited, part of its general business. Its president, while engaged in doing such business in Ohio, has been served with summons in this proceeding. The cause of action sued upon did not arise in Ohio and does not relate to the corporation's activities there. For the reasons hereafter stated, we hold that the Fourteenth Amendment leaves Ohio free to take or decline jurisdiction over the corporation.

After extended litigation elsewhere [1] petitioner, Idonah Slade Perkins, a nonresident of Ohio, filed two actions *in personam* in the Court of Common Pleas of Clermont

[1] See *Perkins* v. *Perkins,* 57 Phil. R. 205; *Harden* v. *Benguet Consolidated Mining Co.,* 58 Phil. R. 141; *Perkins* v. *Guaranty Trust Co.,* 274 N. Y. 250, 8 N. E. 2d 849; *Perkins* v. *Benguet Consolidated Min-*

County, Ohio, against the several respondents. Among those sued is the Benguet Consolidated Mining Company, here called the mining company. It is styled a "sociedad anonima" under the laws of the Philippine Islands, where it owns and has operated profitable gold and silver mines. In one action petitioner seeks approximately $68,400 in dividends claimed to be due her as a stockholder. In the other she claims $2,500,000 damages largely because of the company's failure to issue to her certificates for 120,000 shares of its stock.

In each case the trial court sustained a motion to quash the service of summons on the mining company. 99 N. E. 2d 515. The Court of Appeals of Ohio affirmed that decision, 88 Ohio App. 118, 95 N. E. 2d 5, as did the Supreme Court of Ohio, 155 Ohio St. 116, 98 N. E. 2d 33. The cases were consolidated and we granted certiorari in order to pass upon the conclusion voiced within the court below that federal due process required the result there reached. 342 U. S. 808.

We start with the holding of the Supreme Court of Ohio, not contested here, that, under Ohio law, the mining company is to be treated as a foreign corporation.[2] Actual notice of the proceeding was given to the corpora-

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ing Co., 55 Cal. App. 2d 720, 132 P. 2d 70, rehearing denied, 55 Cal. App. 2d 774, 132 P. 2d 102, cert. denied, 319 U. S. 774; 60 Cal. App. 2d 845, 141 P. 2d 19, cert. denied, 320 U. S. 803, 815; *Perkins* v. *First National Bank of Cincinnati* (Ct. of Common Pleas, Hamilton County, Ohio), 37 Ohio Op. 162, 79 N. E. 2d 159.

[2] Ohio requires a foreign corporation to secure a license to transact "business" in that State, Throckmorton's Ohio Code, 1940, § 8625–4, and to appoint a "designated agent" upon whom process may be served, §§ 8625–2, 8625–5. The mining company has neither secured such a license nor designated such an agent. While this may make it subject to penalties and handicaps, this does not prevent it from transacting business or being sued. § 8625–25. If it has a "managing agent" in Ohio, service may be made upon him. § 11290. Such service is a permissive alternative to service on the corporation

tion in the instant case through regular service of summons upon its president while he was in Ohio acting in that capacity. Accordingly, there can be no jurisdictional objection based upon a lack of notice to a responsible representative of the corporation.

The answer to the question of whether the state courts of Ohio are open to a proceeding *in personam*, against an amply notified foreign corporation, to enforce a cause of action not arising in Ohio and not related to the business or activities of the corporation in that State rests entirely upon the law of Ohio, unless the Due Process Clause of the Fourteenth Amendment compels a decision either way.

The suggestion that federal due process *compels* the State to open its courts to such a case has no substance.

> "Provisions for making foreign corporations subject to service in the State is a matter of legislative discretion, and a failure to provide for such service is not a denial of due process. Still less is it incumbent upon a State in furnishing such process to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the State." *Missouri P. R. Co.* v. *Clarendon Co.*, 257 U. S. 533, 535.

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through its president or other chief officer. § 11288. *Lively* v. *Picton*, 218 F. 401, 406–407 (C. A. 6th Cir.). The evidence as to the business activities of the corporation in Ohio is summarized by the Ohio Court of Appeals. 88 Ohio App. 118, 119–125, 95 N. E. 2d 5, 6–9. That court held that such activities did not constitute the transaction of business referred to in the Code. In its syllabus, however, the Supreme Court of Ohio, without passing upon the sufficiency of such acts for the above statutory purpose, and without defining its use of the term, affirmed the judgment dismissing the complaint and assumed that what the corporation had done in Ohio constituted "doing business" to an extent sufficient to be recognized in reaching its decision.

Also without merit is the argument that merely because Ohio permits a complainant to maintain a proceeding *in personam* in its courts against a properly served nonresident natural person to enforce a cause of action which does not arise out of anything done in Ohio, therefore, the Constitution of the United States *compels* Ohio to provide like relief against a foreign corporation.

A more serious question is presented by the claim that the Due Process Clause of the Fourteenth Amendment *prohibits* Ohio from granting such relief against a foreign corporation. The syllabus in the report of the case below, while denying the relief sought, does not indicate whether the Supreme Court of Ohio rested its decision on Ohio law or on the Fourteenth Amendment. The first paragraph of that syllabus is as follows:

> "1. The doing of business in this state by a foreign corporation, which has not appointed a statutory agent upon whom service of process against the corporation can be made in this state or otherwise consented to service of summons upon it in actions brought in this state, will not make the corporation subject to service of summons in an action in personam brought in the courts of this state to enforce a cause of action not arising in this state and in no way related to the business or activities of the corporation in this state." 155 Ohio St. 116, 117, 98 N. E. 2d 33, 34.

If the above statement stood alone, it might mean that the decision rested solely upon the law of Ohio. In support of that possibility we are told that, under the rules and practice of the Supreme Court of Ohio, only the syllabus necessarily carries the approval of that court.[3] As

[3] In 1858 the Supreme Court of Ohio promulgated the following rule:

"A syllabus of the points decided by the Court in each case, shall be stated, in writing, by the Judge assigned to deliver the opinion of

we understand the Ohio practice, the syllabus of its Supreme Court constitutes the official opinion of that court but it must be read in the light of the facts and issues of the case.

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the Court, which shall be confined to the points of law, arising from the facts of the case, that have been determined by the Court. And the syllabus shall be submitted to the Judges concurring therein, for revisal, before publication thereof; and it shall be inserted in the book of reports without alteration, unless by the consent of the Judges concurring therein." 5 Ohio St. vii.

This policy has been recognized by statute. Bates Ohio R. S. § 427, as amended, 103 Ohio Laws 1913, § 1483, and 108 Ohio Laws 1919, § 1483. It appears now in Throckmorton's Ohio Code, 1940, § 1483, as follows:

"Whenever it has been thus decided to report a case for publication the syllabus thereof shall be prepared by the judge delivering the opinion, and approved by a majority of the members of the court; and the report may be per curiam, or if an opinion be reported, the same shall be written in as brief and concise form as may be consistent with a clear presentation of the law of the case. . . . Only such cases as are hereafter reported in accordance with the provisions of this section shall be recognized by and receive the official sanction of any court within the state."

There are many references to this practice, both in the syllabi and opinions written for the Supreme Court of Ohio. Typical of these is the following:

"It has long been the rule of this court that the syllabus contains the law of the case. It is the only part of the opinion requiring the approval of all the members concurring in the judgment. Where the judge writing an opinion discusses matters or gives expression to his views on questions not contained in the syllabus, it is merely the personal opinion of that judge." *State ex rel. Donahey* v. *Edmondson,* 89 Ohio St. 93, 107–108, 105 N. E. 269, 273.

See also, *Williamson Heater Co.* v. *Radich,* 128 Ohio St. 124, 190 N. E. 403; *Baltimore & O. R. Co.* v. *Baillie,* 112 Ohio St. 567, 148 N. E. 233. A syllabus must be read in the light of the facts in the case, even where brought out in the accompanying opinion rather than in the syllabus itself. See *Williamson Heater Co.* v. *Radich, supra; Perkins* v. *Bright,* 109 Ohio St. 14, 19–20, 141 N. E. 689, 690–691; *In re Poage,* 87 Ohio St. 72, 82–83, 100 N. E. 125, 127–128.

The only opinion accompanying the syllabus of the court below places the concurrence of its author unequivocally upon the ground that the Due Process Clause of the Fourteenth Amendment *prohibits* the Ohio courts from exercising jurisdiction over the respondent corporation in this proceeding.[4] That opinion is an official part of the report of the case. The report, however, does not disclose to what extent, if any, the other members of the court may have shared the view expressed in that opinion. Accordingly, for us to allow the judgment to stand as it is would risk an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so.

The cases primarily relied on by the author of the opinion accompanying the syllabus below are *Old Wayne Life Assn.* v. *McDonough,* 204 U. S. 8, and *Simon* v. *Southern R. Co.,* 236 U. S. 115. Unlike the case at bar, no actual notice of the proceedings was received in those cases by a

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[4] "However, the doing of business in a state by a foreign corporation, which has not appointed a statutory agent upon whom service of process against the corporation can be made in that state or otherwise consented to service of summons upon it in actions brought in that state, will not make the corporation subject to service of summons in an action in personam brought in the courts of that state to enforce a cause of action in no way related to the business or activities of the corporation in that state. *Old Wayne Mutual Life Assn. of Indianapolis* v. *McDonough,* 204 U. S., 8, 22, 23, 51 L. Ed., 345, 27 S. Ct., 236; *Simon* v. *Southern Ry. Co.,* 236 U. S., 115, 129, 130 and 132, 59 L. Ed., 492, 35 S. Ct., 255. See, also, *Pennsylvania Fire Ins. Co. of Philadelphia* v. *Gold Issue Mining & Milling Co.,* 243 U. S., 93, 95 and 96, 61 L. Ed., 610, 37 S. Ct., 344; *Robert Mitchell Furniture Co.* v. *Selden Breck Construction Co.,* 257 U. S., 213, 215 and 216, 66 L. Ed., 201, 42 S. Ct., 84; *International Shoe Co.* v. *Washington,* 326 U. S., 310, 319 and 320, 90 L. Ed., 95, 66 S. Ct., 154.

"An examination of the opinions of the Supreme Court of the United States in the foregoing cases will clearly disclose that service of summons in such an instance would be void as wanting in due process of law." 155 Ohio St. 116, 119–120, 98 N. E. 2d 33, 35.

responsible representative of the foreign corporation. In each case, the public official who was served with process in an attempt to bind the foreign corporation was held to lack the necessary authority to accept service so as to bind it in a proceeding to enforce a cause of action arising outside of the state of the forum. See 204 U. S. at 22–23, and 236 U. S. at 130. The necessary result was a finding of inadequate service in each case and a conclusion that the foreign corporation was not bound by it. The same would be true today in a like proceeding where the only service had and the only notice given was that directed to a public official who had no authority, by statute or otherwise, to accept it in that kind of a proceeding. At the time of rendering the above decisions this Court was aided, in reaching its conclusion as to the limited scope of the statutory authority of the public officials, by this Court's conception that the Due Process Clause of the Fourteenth Amendment precluded a state from giving its public officials authority to accept service in terms broad enough to bind a foreign corporation in proceedings against it to enforce an obligation arising outside of the state of the forum. That conception now has been modified by the rationale adopted in later decisions and particularly in *International Shoe Co.* v. *Washington,* 326 U. S. 310.

Today if an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service or receiving notice on its behalf, we recognize that there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state through such service of process upon that representative. This has been squarely held to be so in a proceeding *in personam* against such a corporation, at least in relation to a cause of action

arising out of the corporation's activities within the state of the forum.[5]

The essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation. Appropriate tests for that are discussed in *International Shoe Co.* v. *Washington, supra,* at 317–320. The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case. The corporate activities of a foreign corporation which, under state statute, make it necessary for it to secure a license and to designate a statutory agent upon whom process may be served provide a helpful but not a conclusive test. For example, the state of the forum may by statute require a foreign mining corporation to secure a license in order lawfully to carry on there such functional intrastate operations as those of mining or refining ore. On the other hand, if the same corporation carries on, in that state, other continuous and systematic corporate activities as it did here—consisting of directors' meetings, business correspondence, banking, stock transfers, payment of salaries, purchasing of machinery, etc.—those activities are enough to make it fair and reasonable to subject that corporation to proceedings *in personam* in that state, at least insofar as the proceedings *in personam* seek to en-

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[5] ". . . The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure." *International Shoe Co.* v. *Washington, supra,* at 320.

force causes of action relating to those very activities or to other activities of the corporation within the state.

The instant case takes us one step further to a proceeding *in personam* to enforce a cause of action not arising out of the corporation's activities in the state of the forum. Using the tests mentioned above we find no requirement of federal due process that either *prohibits* Ohio from opening its courts to the cause of action here presented or *compels* Ohio to do so. This conforms to the realistic reasoning in *International Shoe Co.* v. *Washington, supra,* at 318–319:

> ". . . there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. See *Missouri, K. & T. R. Co.* v. *Reynolds,* 255 U. S. 565; [6] *Tauza* v. *Susquehanna Coal Co.,* 220 N. Y. 259, 115 N. E. 915; cf. *St. Louis S. W. R. Co.* v. *Alexander, supra* [227 U. S. 218].
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> ". . . some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. *Lafayette Insurance Co.* v. *French,* 18 How. 404, 407; *St. Clair* v. *Cox, supra* [106 U. S. 350], 356; *Commercial Mutual Co.* v. *Davis, supra* [213 U. S.

[6] This citation does not disclose the significance of this decision but light is thrown upon it by the opinions of the state court below. *Reynolds* v. *Missouri, K. & T. R. Co.,* 224 Mass. 379, 113 N. E. 413; 228 Mass. 584, 117 N. E. 913. In addition to the cases cited in the text see *Barrow S. S. Co.* v. *Kane,* 170 U. S. 100; *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining Co.,* 243 U. S. 93 (statutory agent appointed); *Philadelphia & Reading R. Co.* v. *McKibbin,* 243 U. S. 264, 268–269 (question left open).

245], 254; *Washington* v. *Superior Court,* 289 U. S. 361, 364–365. But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction. *Smolik* v. *Philadelphia & Reading Co.,* 222 F. 148, 151. Henderson, The Position of Foreign Corporations in American Constitutional Law, 94–95.

". . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations. Cf. *Pennoyer* v. *Neff, supra* [95 U. S. 714]; *Minnesota Commercial Assn.* v. *Benn,* 261 U. S. 140."

It remains only to consider, in more detail, the issue of whether, as a matter of federal due process, the business done in Ohio by the respondent mining company was sufficiently substantial and of such a nature as to *permit* Ohio to entertain a cause of action against a foreign corporation, where the cause of action arose from activities entirely distinct from its activities in Ohio. See *International Shoe Co.* v. *Washington, supra,* at 318.

The Ohio Court of Appeals summarized the evidence on the subject. 88 Ohio App. at 119–125, 95 N. E. 2d at 6–9. From that summary the following facts are substantially beyond controversy: The company's mining properties were in the Philippine Islands. Its operations there were completely halted during the occupation of the Islands by the Japanese. During that interim the president, who was also the general manager and principal stockholder of the company, returned to his home in Clermont County, Ohio. There he maintained an office in

which he conducted his personal affairs and did many things on behalf of the company. He kept there office files of the company. He carried on there correspondence relating to the business of the company and to its employees. He drew and distributed there salary checks on behalf of the company, both in his own favor as president and in favor of two company secretaries who worked there with him. He used and maintained in Clermont County, Ohio, two active bank accounts carrying substantial balances of company funds. A bank in Hamilton County, Ohio, acted as transfer agent for the stock of the company. Several directors' meetings were held at his office or home in Clermont County. From that office he supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines and he dispatched funds to cover purchases of machinery for such rehabilitation. Thus he carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company. He there discharged his duties as president and general manager, both during the occupation of the company's properties by the Japanese and immediately thereafter. While no mining properties in Ohio were owned or operated by the company, many of its wartime activities were directed from Ohio and were being given the personal attention of its president in that State at the time he was served with summons. Consideration of the circumstances which, under the law of Ohio, ultimately will determine whether the courts of that State will choose to take jurisdiction over the corporation is reserved for the courts of that State. Without reaching that issue of state policy, we conclude that, under the circumstances above recited, it would not violate federal due process for Ohio either to take or decline jurisdiction of the corporation in this proceeding. This relieves the Ohio courts of the restriction relied upon in the opinion

accompanying the syllabus below and which may have influenced the judgment of the court below.

Accordingly, the judgment of the Supreme Court of Ohio is vacated and the cause is remanded to that court for further proceedings in the light of this opinion.[7]

It is so ordered.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE MINTON, with whom THE CHIEF JUSTICE joins, dissenting.

As I understand the practice in Ohio, the law as agreed to by the court is stated in the syllabus. If an opinion is filed, it expresses the views of the writer of the opinion and of those who may join him as to why the law was so declared in the syllabus. Judge Taft alone filed an opinion in the instant case.

The law as declared in the syllabus, which is the whole court speaking, is clearly based upon adequate state grounds. Judge Taft in his opinion expresses the view that the opinions of this Court on due process grounds require the court to declare the law as stated in the syllabus. As the majority opinion of this Court points out, this is an erroneous view of this Court's decisions. "This brings the situation clearly within the settled rule whereby this Court will not review a State court decision resting on an adequate and independent non-federal ground even though the State court may have also summoned to its support an erroneous view of federal law." *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 129.

The case of *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511, is not this case. There the case was not clearly de-

[7] For like procedure followed under somewhat comparable circumstances see *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511.

cided on an adequate state ground, but the state ground and the federal ground were so interwoven that this Court was "unable to conclude that the judgment rests upon an independent interpretation of the state law." (P. 514.) In the instant case, a clear statement of the state law is made by the court in the syllabus. Only Judge Taft has summoned the erroneous view of this Court's decisions to his support of the adequate state ground approved by the whole court.

What we are saying to Ohio is: "You have decided this case on an adequate state ground, denying service, which you had a right to do, but you don't have to do it if you don't want to, as far as the decisions of this Court are concerned." I think what we are doing is giving gratuitously an advisory opinion to the Ohio Supreme Court. I would dismiss the writ as improvidently granted.

BRANNAN, SECRETARY OF AGRICULTURE, *v.* STARK ET AL.

NO. 6. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.*

Argued October 9, 1951.—Decided March 3, 1952.

Under § 8c of the Agricultural Marketing Agreement Act of 1937, the Secretary of Agriculture promulgated an order regulating the marketing of milk in the Boston area. As amended in 1941, the order provided for fixing uniform prices to be paid to all producers and required that, in computing such uniform prices, certain amounts should be deducted for special payments to cooperative marketing associations. Claiming that this deduction and these payments to cooperatives unlawfully diverted funds which belonged to producers, certain producers who were not members of any cooperative sued to enjoin the Secretary from carrying out the provisions therefor. *Held:* The provisions for such deduction and for such payments to cooperatives are invalid, because they are not authorized by the Act. Pp. 452–466.

1. These provisions are not specifically authorized by any part of the Act. P. 458.

2. Nor are they included within the authority granted by § 8c (7)(D), which authorizes provisions "incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order." Pp. 462–464.

(a) They are not "incidental to" the terms and conditions specified in subsections (5), (6), and (7). Pp. 462–463.

(b) They are "inconsistent with" § 8c (5)(A), which provides that all handlers shall pay uniform prices for each class of milk, subject to certain adjustments not here pertinent. P. 463.

(c) They are "inconsistent with" § 8c (5)(B), which requires the payment of uniform prices to all producers for all milk delivered, subject to certain adjustments not here pertinent. Pp. 463–464.

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*Together with No. 7, *Dairymen's League Co-operative Association, Inc.* v. *Stark et al.*, also on certiorari to the same court.

3. Nor are these provisions authorized by § 10 (b) (1) directing the Secretary to accord "recognition and encouragement" to cooperative marketing associations. P. 464.

4. Nor is a different result required by the legislative history or administrative construction. Pp. 465–466.

87 U. S. App. D. C. 388, 185 F. 2d 871, affirmed.

The case is stated in the opinion. The judgment below is *affirmed*, p. 466.

Neil Brooks argued the cause for the Secretary of Agriculture. With him on the brief were *Solicitor General Perlman* and *W. Carroll Hunter*.

Seward A. Miller, Frederic P. Lee and *Maurice A. Gellis* submitted on brief for the Dairymen's League Co-operative Association, Inc.

Edward B. Hanify argued the cause for respondents. With him on the brief were *Harry Polikoff* and *Lipman Redman*.

Reuben Hall and *Waldo Noyes* filed a brief for the New England Milk Producers' Association et al., as *amici curiae*, urging reversal.

MR. JUSTICE CLARK delivered the opinion of the Court.

This action by dairy farmers, nonmembers of cooperative associations, concerns 1941 amendments to an order of the Secretary of Agriculture dealing with the marketing of milk in the Boston area. It was previously here as *Stark* v. *Wickard*, 321 U. S. 288 (1944), where it was held that the respondents had such an interest in the Order as to give them legal standing to object to those of its provisions here under attack. Upon remand the provisions were held invalid by the District Court, 82 F. Supp. 614, and that decision was affirmed in the Court of Appeals for the District of Columbia Circuit. 87 U. S. App.

D. C. 388, 185 F. 2d 871. We granted certiorari. 341 U. S. 908.

The question now presented is whether those amendments to the Order which provide for certain payments to cooperative associations are within the authority granted the Secretary by the Agricultural Marketing Agreement Act of 1937.[1] The respondents seek to enjoin the enforcement of the provisions in question.

The purpose of the Act and the nature of the Secretary's Order No. 4 thereunder [2] are set out in some detail in *Stark* v. *Wickard, supra,* at 291–302. It is here sufficient to note the following aspects of Order No. 4, as amended: In the Order, issued pursuant to the Act, the Secretary divided all milk marketed in the Greater Boston area into Class I, which is sold as fluid milk, and Class II, which is used for other purposes such as the manufacture of butter and cheese. The Order provides for the fixing of minimum prices to be paid by handlers for each of these classes of milk. Each handler pays for milk in accordance with the amount of each class he has purchased. Producers, however, are paid the same price for milk delivered no matter what use is made of the particular milk by the handler. The Market Administrator computes, on the basis of prices paid by handlers, the value of all milk sold in the area each month. After making certain adjustments, he divides that value, as adjusted, by the total quantity of milk sold in the area during the month, to determine the "blended price," which is the price actually paid the producer. One adjustment made in determining the blended price is

[1] 50 Stat. 246, as amended, 7 U. S. C. § 601 *et seq.* The Act of 1937 reenacted and amended provisions of the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended.

[2] 7 CFR §§ 904.1–904.110.

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the deduction providing for the disputed payments to cooperatives.[3] This deduction is thus "a burden on every area sale." *Stark* v. *Wickard, supra,* at 303. "Apparently, [it] is the only deduction that is an unrecoverable charge against the producers. The other items deducted under [the Order] are for a revolving fund or to meet differentials in price because of location, seasonal delivery, *et cetera.*" *Id.,* at 301. The effect of the deduction and the correlative payments to cooperatives is to reduce the amount which producers, such as respondents, who are not members of cooperatives would otherwise receive for their milk, and to increase corre-

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[3] Section 904.8 (b) of the Order requires the Market Administrator, in computing the blended price, to deduct, among other items, the total amount of cooperative payments required by § 904.10 (b), which provides:

"(b) *Cooperative payments.* On or before the 25th day after the end of each month, each qualified association shall be entitled to receive a cooperative payment from the funds provided by handlers' payments to the market administrator pursuant to § 904.9. The payment shall be made under the conditions and at the rates specified in this paragraph, and shall be subject to verification of the receipts and other items upon which such payment is based.

"(1) Each qualified association shall be entitled to payment at the rate of 1 cent per hundredweight on the milk which its producer members deliver to the plant of a handler other than a qualified association; except on milk delivered by a producer who is also a member of another qualified association, and on milk delivered to a handler who fails to make applicable payments pursuant to § 904.9 (b) (2) and § 904.11 within 10 days after the end of the month in which he is required to do so. If the handler is required by paragraph (e) of this section to make deductions from members of the association at a rate lower than 1 cent per hundredweight, the payment pursuant to this subparagraph shall be at such lower rate.

"(2) Each qualified association shall be entitled to payment at the rate of 2 cents per hundredweight on milk received from producers at a plant operated by that association." 7 CFR § 904.10 (b).

spondingly the receipts of cooperatives.[4] We must determine whether the Secretary was authorized by the statute to include the provisions requiring this deduction and these payments in the Order. No question is presented as to the adequacy of the evidence to support the findings of the Secretary, but rather, a question as to the power granted the Secretary by Congress.

The disputed provisions were introduced into the Boston Order in 1941, after hearings called by the Secretary. Affidavits, filed by representatives of the Secretary in support of his motion for summary judgment in the District Court, show the following: A major issue at the hearings was the amount of a uniform allowance, previously 26¢ per hundredweight, which was reflected in the price paid by all handlers for Class II milk.[5] This allowance resulted in a lower price to handlers for Class II milk than for Class I milk. It was intended to defray the cost of handling surplus milk. There was a considerable variance in milk plant costs which was thought to make continuance of a uniform rate undesirable. Cooperative plants showed higher costs than those of proprietary handlers. That difference was attributable not only to the cooperatives' maintenance of a reserve supply to meet irregular demands of proprietary handlers for Class I milk, but also to overcapitalization and excess capacity which had existed prior to any federal regulation. To meet these higher costs cooperatives proposed a lower uniform allowance for Class II milk, coupled with

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[4] The total amount thus paid cooperatives in the Boston area since 1941 is $1,521,028; in addition, more than $400,000 has been deposited in a special account to await the final result of this litigation. However, the payments to cooperatives have in each year constituted no more than a fraction of one percent of the total value of milk marketed in the area.

[5] See, *e. g.*, R. 60, 70–75.

a payment to cooperatives only for market services, although they had engaged in the activities claimed to constitute market services for years without any such payment. In the amendments resulting from the hearings, the uniform allowance to handlers was reduced from 26¢ to 21½¢, while at the same time the provisions here contested, requiring payments to cooperatives alone, were introduced.

Section 8c (5) of the Act provides that orders relating to milk and its products shall contain one or more of certain enumerated terms and conditions, "*and* (except as provided in subsection (7)) *no others*" (emphasis added).[6] It is paragraph (D) of subsection (7) upon which the

[6] § 8c (5), note 1, *supra:*

"(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

"(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period;

Secretary relies. That paragraph authorizes provisions "incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such

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the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

"(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

"(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

"(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sam-

order." [7] The provisions here in question are not specifically authorized by any part of the Act. Both courts below thought these provisions to be neither incidental nor necessary, and to be inconsistent with terms specified in the named subsections.[8]

The payments to the cooperative associations are said to be justified as remuneration for services performed for the market by the associations. To qualify for the pay-

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pling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

"(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the 'Capper-Volstead Act', engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

"(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

[7] § 8c (7)(D), note 1, *supra*. Subsection 7 authorizes certain general terms for all marketing orders, including both those relating to milk and its products and those relating to other commodities. The terms thus authorized, aside from paragraph (D), prohibit unfair competition, provide for filing of sales prices by handlers, and provide for selection of an agency to implement the order.

[8] 82 F. Supp. 614, 618; 87 U. S. App. D. C. 388, 397–399, 185 F. 2d 871, 880–882.

ments, an association must meet eight requirements listed in the Order.[9] But none of these shows any indication that the activity it prescribes will benefit nonmembers, with the possible exception of the seventh, which requires

[9] 7 CFR § 904.10 (a):

"(a) *Application and qualification for cooperative payments.* Any cooperative association of producers duly organized under the laws of any state may apply to the Secretary for a determination that it is qualified to receive cooperative payments in accordance with the provisions of this section. Upon notice of the filing of such an application, the market administrator shall set aside for each month, from the funds provided by handlers' payments to the market administrator pursuant to § 904.9, such amount as he estimates is ample to make payment to the applicant, and hold it in reserve until the Secretary has ruled upon the application. The applicant association shall be considered to be a qualified association entitled to receive such payments from the date fixed by the Secretary, if he determines that it meets all of the following requirements.

"(1) It conforms to the requirements relating to character of organization, voting, dividend payments, and dealing in products of nonmembers, which are set forth in the Capper-Volstead Act and in the state laws under which the association is organized.

"(2) It operates as a responsible producer-controlled marketing association exercising full authority in the sale of the milk of its members.

"(3) It systematically checks the weights and tests of milk which its members deliver to plants not operated by the association.

"(4) It guarantees payment to its members for milk delivered to plants not operated by the association.

"(5) It maintains, either individually or together with other qualified associations, a competent staff for dealing with marketing problems and for providing information to its members.

"(6) It constantly maintains close working relationships with its members.

"(7) It collaborates with similar associations in activities incident to the maintenance and strengthening of collective bargaining by producers and the operation of a plan of uniform pricing of milk to handlers.

"(8) It is in compliance with all applicable provisions of this subpart."

that the association collaborate "with similar associations in activities incident to the maintenance and strengthening of collective bargaining by producers and the operation of a plan of uniform pricing of milk to handlers." [10] Even if this requirement comprehends a service to nonmember producers substantial enough to be significant in determining the validity of a mandatory contribution from them to cooperatives, it does not support the exaction in issue, which concededly is based mainly upon other services primarily performed for members.

Indeed, those "services" which the Secretary principally urges as justifying the payments do not appear among the expressed prerequisites for the payments. Chief among the activities claimed to benefit all producers are those which tend to maintain an adequate supply of fluid milk at all times and to dispose of surplus supply. A principal source of the problems of milk marketing is the seasonal character of milk production. Herds sufficient to meet the demand for fluid milk during the winter months produce much more than enough to satisfy that demand during the summer months. It is contended that the cooperative associations handle a proportionately larger share of surplus milk than other handlers. It appears that they engage in the manufacture of milk products as a means of absorbing the surplus, and otherwise aid in obviating the "dumping" of surplus and discouraging the reduction of herds to a point below that necessary to supply the demand in the season of low production. It may be conceded that these activities are indirectly beneficial to the whole market, even though they are engaged in for the direct advantage of members only. However, proprietary handlers also carry on activities of this kind, and their plants handle two-thirds as much surplus

[10] *Ibid.*

milk as do those of the cooperatives.[11] Prior to amendment of the Order in 1941, the cost of handling surplus milk was recognized in the uniform 26¢ allowance to all handlers of Class II milk, but only cooperative associations now receive the payments in issue here. It is clear that the associations are in no way required to handle any of the surplus milk of nonmembers. More significant, there is no requirement in the Order that the associations take any action directed toward solution of the problem, even with respect to surplus milk of their members.[12]

Other "services" of the cooperatives which are claimed to be beneficial to all producers are, as they affect the issue here, relatively insignificant. These activities are, like the others, primarily designed for the advantage of mem-

[11] In 1939 (no later statistics are available in the record), there were 21 plants in the Boston area which were equipped for manufacturing milk powder, condensed milk or butter, of which 13 were cooperative and 8 proprietary. The cooperative plants handled 60.2 percent of the surplus milk that year. R. 66 and 68.

[12] Contrast the New York Order, providing for comparable payments, at various rates, to cooperatives. That Order expressly requires that an association, to qualify for any such payments, must arrange for and supply "in times of short supply, Class I milk to the marketing area," and must secure "utilization of milk, in times of long supply, in a manner to assure the greatest possible return to all producers." 7 CFR, 1950 Cum. Supp., § 927.9 (f). To receive the highest rate of payments under that Order, in certain circumstances a cooperative must "in addition to the other qualifications . . . [be] determined by the Secretary to have sufficient plant capacity to receive all the milk of producers who are members and to be willing and able to receive milk from producers not members." *Id.*, at § 927.9 (f) (3). As proposed at one point in the hearings, the Boston Order would have contained requirements like those of the New York Order. R. 233. Their omission in the Order, as finally issued, presumably was deliberate. In fact, the Secretary admits that many of the cooperatives in the Boston area were unwilling or unable to perform services such as those required by the New York Order. R. 24–25 and 70.

bers, although they may sometimes incidentally benefit the whole market. They generally amount to no more than playing the part of an alert, intelligent, organized participant in the market. They include such functions as employing economists to study the needs of the industry, participating in hearings on orders such as that involved here, being attentive to changing factors in the market, and maintaining the cooperative organizations by promotional work to show farmers the benefits of cooperation and by educational work among members. One may observe some incongruity in requiring some producers to pay others for vigorously prosecuting their own interests, especially where their interests may sometimes conflict with those of the producers burdened with the payments.

In these circumstances, we cannot say that the disputed provisions fall within the authority granted by the catch-all phrases of § 8c (7) (D) of the Act. We note at the outset that § 8c (5) states in specific and lengthy detail the provisions which may be included in milk marketing orders. That subsection lays down comprehensive directions for classification, pricing, and the operation of the equalization pool mechanism, particularly as to adjustments and deductions employed in determining the blended price. But § 8c (5) does not authorize the provisions challenged here. Section 8c (7) authorizes a congeries of general terms which may be included in all marketing orders, including those dealing with commodities other than milk and milk products. The Secretary claims authority for the provisions in question is given by the last paragraph of this omnibus subsection, a paragraph authorizing the inclusion of auxiliary provisions "incidental to . . . the terms and conditions specified in subsections (5), (6), and (7)."[13] Yet it is claimed that the

[13] § 8c (7) (D), note 1, *supra*. Subsection (6) has no application to orders dealing with milk.

contested provisions are of such basic importance that their validity may be crucial to the success of the whole milk marketing program. We do not think it likely that Congress, in fashioning this intricate marketing order machinery, would thus hang one of the main gears on the tail pipe. The conclusion that these provisions are not "incidental" to the specified terms is further supported by the presence of § 8c (5)(E), expressly authorizing deductions from payments to producers for other, specified services, and indicating the likelihood of similar specific authorization for the contested deductions if Congress intended that they should be made. Finally, the provisions cannot be incidental to the enumerated terms and conditions since they are inconsistent therewith.

The payments to cooperatives are inconsistent with § 8c (5)(A), which provides that all handlers shall pay uniform prices for each class of milk, subject to certain adjustments of no concern here. The discriminatory effect of the payments becomes the more evident when they are considered in context with the reduction in the uniform allowance to all handlers on the price of Class II milk. That reduction was simultaneous with the establishment of the system of payments to be made to cooperatives only and to be funded by deductions from prices paid all producers. The result would have been substantially similar if the allowance to proprietary handlers had been reduced while the allowance to cooperatives had been permitted to remain at its previous higher level. Such a lack of uniformity in prices paid by handlers would clearly have contravened § 8c (5)(A).

The deduction for payments to cooperatives is inconsistent with § 8c (5)(B), which requires the payment of uniform prices to all producers for all milk delivered, subject to certain adjustments not here pertinent. It has been contended that the deduction does not affect the uniform price of milk, but represents only a reimbursement for services. The argument seems to be that all

producers receive a uniform price while the deduction merely constitutes a charge to all producers for services, a charge which happens to be paid certain associations of producers because those associations perform the services. The fact remains that the receipts of nonmembers resulting from delivery of a given quantity of milk are smaller than those of the associations and their members. This is true because nonmembers are paid only the blended price while members receive, through their associations, the disputed payments in addition to the blended price. Although made to members collectively, these payments necessarily redound to members individually. Thus, if they are used to pay the costs of the associations, they reduce *pro tanto* the contributions which are required from individual members. But we need not go further than to hold that the argument cannot negate inconsistency with the uniform price requirement where, as here, the services for which the payment is made are performed for the direct benefit of the cooperatives' memberships, are but incidentally helpful to other producers, and are not a required condition to receipt of the payments.

Since the provisions for payments to cooperatives are not incidental to § 8c (5) and (7), but are inconsistent with the former subsection, we need not determine whether they are "necessary to effectuate the other provisions" [14] of the Order, the third requirement of § 8c (7)(D).

When the directly relevant provisions of the Act thus demonstrate lack of authority for the payments to cooperatives, no power to require them can be implied from the general instruction of § 10 (b)(1) to the Secretary, directing him to accord "recognition and encouragement" to cooperative associations.[15]

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[14] § 8c (7)(D), note 1, *supra*.

[15] § 10 (b) (1), note 1, *supra*.

Without support in the words of the statute the challenged provisions must fall, for neither legislative history nor administrative construction offers any cogent reasons for a contrary result. Available indicia of congressional intent at the time of enactment lend weight to the contention that specific provision would have been made for this kind of payments to cooperatives if they were meant to be made.[16] Attempted amendment later to provide authorization for the payments, and the accompanying discussion in Congress, are, as a whole, indecisive.[17] Approval of the payments by Congress cannot be inferred from its ratification, upon passage of the Agricultural Marketing Agreement Act in 1937, of marketing orders previously issued under the Agricultural Adjustment Act.[18] Even if we were to accept the proposition that

[16] The statutory provisions setting forth the terms which might be included in marketing orders were first enacted in an amendment to the Agricultural Adjustment Act in 1935. 49 Stat. 753. This enactment occurred shortly after the decisions of this Court in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935), and *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935), placing limitations on the delegation of rule-making authority to administrative agencies. With these cases specifically in mind, Congress set forth with deliberate particularity and completeness the terms which the Secretary might include in marketing orders. H. R. Rep. No. 1241, 74th Cong., 1st Sess. 8; S. Rep. No. 1011, 74th Cong., 1st Sess. 8.

[17] S. 3426, 76th Cong., 3d Sess.; S. Rep. No. 1719, 76th Cong., 3d Sess. S. 3426 would have clearly authorized payments such as those challenged here. It passed the Senate, but went no further. As to the inconclusive nature of the Bill and its history, see the opinion of the Court of Appeals, 87 U. S. App. D. C. 388, 400, 185 F. 2d 871, 883.

[18] "Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed." 50 Stat. 246, 249.

Congress there intended to confer statutory authority for all future provisions like any of those then existing in any marketing order, we would reach the same conclusion because neither the provisions for these particular payments nor any closely analogous provisions were at that time present in any marketing orders. Nor have provisions bearing substantial similarity to those before us since been included in other orders so frequently as to amount to a consistent administrative interpretation of import in construing the Act.[19] Many provisions for payments to cooperatives appearing in other orders have been of a kind specifically authorized by the statute. Thus, the provision of the first Boston Milk Order for a price differential as between cooperative milk and noncooperative milk was upheld in *Green Valley Creamery* v. *United States*,[20] as a "market differential" authorized by § 8c (5)(A)(1).

We have no occasion to judge the equity or the wisdom of the payments to cooperatives involved in this case. We hold that they are not authorized by the Act.

Affirmed.

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

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

I dissent and would sustain the provisions of the Secretary of Agriculture's Boston milk order which the majority here invalidates. Those provisions require that cooperatives be reimbursed for a part of the cost they incur in performing services which the Secretary and the

[19] Of thirty-nine currently outstanding milk marketing orders, only four contain provisions of the general nature of those in question. One of these is the Boston Order involved here; another is the New York Order, as to which see note 12, *supra*.

[20] 108 F. 2d 342, 345 (C. A. 1st Cir., 1939).

Court of Appeals have found benefit all dairy farmers in the Boston market area. Two or three sentences, or clauses in them, of today's majority opinion avow that the Court invalidates the payment provisions solely on the ground that the Secretary is without statutory authority to include them in his order. The remainder of the Court's opinion is not at all limited to an attempt to justify an exclusively statutory holding. For despite the clause at the end of the Court's opinion that it does not "judge the equity or the wisdom of the payments," nearly all of its 15 pages are devoted to a studied effort to leave the impression that the payments are unfair handouts, gratuities, or subsidies to inefficiently operated cooperatives. It seems appropriate, therefore, to explain at the very outset the true nature of these payments and the consequences of outlawing them.

In general the Secretary's order fixes prices and regulates distribution of milk in the Greater Boston area. Under this marketing system the purchase price of all milk sold by farmers in the area is paid into a collective fund or pool. After deduction of legally authorized amounts it is the duty of the Government's market administrator to distribute the fund so that all contributing farmers will receive so far as possible equal amounts for equal quantities of milk of the same quality. The difficulty of achieving this uniformity of price as between cooperative and non-cooperative farmers is complicated by many factors. Non-member farmers receive direct payment for their milk from this market pool fund. But highly material here is the fact that the pool funds are not distributed to farm cooperative association members but instead are paid directly to the associations of which they are members. These associations then deduct certain expenses before distributing the balance to their member farmers. Many of these expenses are incurred by the association in performing beneficial market-wide

services which bring about higher milk prices for all farmers. Fund payments to non-cooperative farmers, however, are subject to no such association deductions. The result is that farmer members of cooperatives may get less for their milk than non-members. See *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 579, 580. In this way non-members can get a free ride paid for by cooperating farmers; the latter have always objected to this, regarding it as a dog-in-the-manger attitude and an unfair market practice. Before the Government stepped into the milk picture, the cooperating farmers used strong coercive measures to compel non-cooperatives to help pay a fair share of cooperative costs in rendering market-wide services. And from the beginning of government regulation in the 1930's the Government has adopted measures to insure that non-member farmers pay for the benefits they receive.

The provisions here nullified prescribe a legal and peaceful method to require non-cooperative farmers to pay their fair share of market costs, thereby preventing the recurrence of the kind of violent strife with which this country became all too familiar before the present national farm policy was adopted. The provisions have been a part of the Boston order since 1941—eleven years. In accordance with them more than one and a half million dollars have been paid to cooperatives.[1] If illegally received, I suppose the money is illegally held. Whether these farmer associations can survive the Pandora's box of lawsuits this case is likely to turn loose is anybody's guess. Perhaps most dairy farmers in New England would not of their own accord file suits against the cooperatives, for the record indicates an overwhelming farmer support for the market order including these challenged

[1] In addition, about $400,000 has been paid into court under an impounding order entered by the District Court in 1949.

provisions.[2] In fact, the five farmers whose names appear as challengers of these provisions are not the persons most interested in sabotaging the Boston milk order. Expenses of this litigation, already more than $25,000 by 1949, have been borne by milk handlers. These handlers have no financial interest in the fund and did not even have standing to bring this suit in their own name. *United States* v. *Rock Royal Co-op., supra,* 561. The attitude of these private proprietors in this and past attacks on cooperatives justifies a rather strong inference that cooperatives will continue to be defendants in lawsuits pushed by well-financed adversaries.

It may be suggested that despite possible floods of litigation, the cooperatives can be saved from complete bankruptcy by statutes of limitations, judicially created defenses, finespun legal or verbal distinctions, or even by emergency congressional legislation. But if some might happen to befriend cooperatives in the future, the blow today inflicted is hardly calculated to make cooperatives very enthusiastic about performing the important functions in the market program that Congress wanted them to.[3] Moreover, these particular New England associations are not the only ones placed in imminent jeopardy

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[2] In 1941 farmers in the Boston milk area were given an opportunity to express their approval or disapproval of the order. They voted as follows:

	For	*Against*
Cooperating farmers	11,587	0
Non-member farmers	694	61
Total vote	12,281	61

[3] "The Secretary, in the administration of this title, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution." 49 Stat. 750, 767.

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by today's holding. As the majority opinion points out, cooperative associations in other areas have been receiving payments for market-wide services under similar market orders of the Secretary. Under such provisions millions of dollars have been received by these other cooperatives. They too have little if any chance to escape harassment from the swarm of lawsuits this case invites.[4]

Congress intended cooperatives to be what they actually have been—the backbone of the farm market system and the dynamo which makes the system function. Without them, many think that program would have been a flop; with their help comparative peace has now come to an industry that in the twenties and early thirties was divided into fighting factions engaging in bitter warfare and bloodshed on the nation's highways. Regardless of the consequences, however, the majority's body blow to cooperatives would be justified if required by congressional command. But Congress has expressed its desire precisely to the contrary. This is shown, I believe beyond all doubt, by the language, history, background and administration of the marketing laws.

I feel deeply that the Court's action in this case checkmates the congressional will, unjustifiably inflicts a grievous wrong on cooperatives, and plays havoc with a national farm policy that is working peacefully and well. The judiciary should not cavalierly throw a monkey wrench into its machinery.

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[4] The majority apparently desires to leave an inference that some of the other orders might survive legal challenges. I cannot believe that the majority is today sustaining these other orders not now here against attacks on grounds not yet argued. In each market area the services for which cooperatives are paid are of the same nature. Any difference in language used by the Secretary in formulating the orders is of no real significance, and I do not believe any crucial distinctions could possibly be drawn between the various orders except by arbitrary fiat.

History, Background, and Administration of the Act.— An inherent problem of the milk industry is that cows produce more milk at some seasons of the year than at others. This means a seasonal excess of supply over demand which can result in disastrous price cutting in an uncontrolled market. In an attempt to avoid the harmful consequences of price cutting farmers combined in cooperative associations which agreed to find a market for all the milk their members produced. Through the channel of collective bargaining, they were able to obtain better prices and a wider market for fluid milk. With the surplusage that still remained, they turned to the manufacture of cheese, butter, and other by-products, even though their manufacturing plants were forced to remain idle during the seasons of no surplusage. Congress itself recognized the inherent value of these cooperative organizations, and with a view to helping farmers improve their market position, it passed the Capper-Volstead Act in 1922 [5] and the Agricultural Marketing Act of 1929.[6]

These Acts treated cooperative associations as useful governmental instrumentalities to achieve congressional agricultural policies. With such help cooperatives made progress, although in every market area there were some producers who refused to join. These non-member producers, without paying anything for it, nevertheless received direct advantages from the work of the cooperatives in raising milk prices, diverting surplusage, and

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[5] 42 Stat. 388, 7 U. S. C. § 291. This Act gave special consideration and exemptions to cooperative associations of farmers.

[6] 46 Stat. 11, 12 U. S. C. § 1141. A declared policy of this Act was to encourage the organization and operation of farmer cooperative associations. The Act also provided for making loans to cooperatives, to aid them in taking care of the surplus crops, and to assist the cooperatives in educating the producers of farm products in the advantages of cooperative marketing.

improving general market conditions. This produced deep resentment on the part of cooperative-producers which resulted in bitter strife and unrest.[7]

Thus, an acute agricultural problem has long been one of devising means whereby each producer would pay his fair share of the cost of rendering needed market-wide services. Prior to passage of the Agricultural Adjustment Act of 1933, the cooperatives themselves used their bargaining power to meet the situation. A 1929 contract between the cooperative association and handlers (purchasers of milk from producers) in the Chicago marketing area illustrates the methods used.[8] All handlers were required to agree not to purchase milk from non-member producers unless the latter agreed to a certain deduction. This deduction was equal to that the handlers were required to make in the case of milk purchased from member-producers. In both instances the deduction was paid by the handlers to the cooperative to defray its expense incurred for the services. This procedure insured that no producer of milk received benefits without paying something for them.

The Agricultural Adjustment Act of 1933 empowered the Secretary of Agriculture to regulate the milk industry by a system of licensing and marketing agreements. In the licenses issued under this Act, the Secretary included various provisions relating to payments to cooperatives for the rendition of marketing services. Some licenses contained provisions similar to those of the Chicago contract of 1929.[9] Others contained provisions which required

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[7] See *Nebbia* v. *New York*, 291 U. S. 502.

[8] See H. R. Doc. No. 451, 74th Cong., 2d Sess. 47–48.

[9] See, *e. g.*, Twin City (St. Paul and Minneapolis) Area Milk License No. 5, Ex. A, Arts. II and III, issued August 29, 1933 and terminated February 16, 1934; and License No. 32, Ex. A, § II, issued February 12, 1934 and terminated April 18, 1944.

all producers who did not belong to cooperative associations to pay "service charges" to organizations created by order of the Secretary.[10] These organizations rendered the same services which cooperatives did and charged the same for them. Thus all producers were required to pay their share for market services, either directly to a producer-owned association or to an association sponsored by the Secretary to force non-members to pay their part.

In 1935 Congress amended the Agricultural Adjustment Act to provide for market regulation by means of orders. The first Boston milk order was issued under § 8 (b) of that Act as amended. That order required the payment of a higher price per hundredweight for cooperative milk than for non-cooperative milk. This was based on the Secretary's finding that "the differential in prices to associations of producers, and producers, is justified as a reasonable allowance for services actually performed by associations of producers." *Green Valley Creamery* v. *United States,* 108 F. 2d 342, 345. This differential which remained in the order from the date it was issued in 1936 until 1941 was held valid by the Court of Appeals for the First Circuit in *Green Valley Creamery* v. *United States, supra.* See also *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 562, 565. From 1941 to the present the Secretary's Boston order has contained the kind of cooperative payment provisions now in issue, and treated by the majority as a gratuity.

In summary, before 1933 cooperative associations forced payments for their services by exertion of collective

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[10] See, *e. g.,* Baltimore Production Area Milk License No. 6, Art. III, § 5, issued September 25, 1933. Detroit Milk Shed Milk License No. 4, Art. III, § 4, issued August 23, 1933. Evansville, Indiana, Milk Shed License No. 12, Art. III, § 4, issued October 19, 1933. Philadelphia Milk Shed License No. 3, Art. III, App. I, § 4, issued August 21, 1933.

strength. After passage of the Agricultural Adjustment Act of 1933 licenses issued under it up to 1935 compelled such payments. Congress amended the Act in 1935. Committee Reports show that orders of the Secretary issued under the Amendment should "follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued" between 1933 and 1935.[11] The same Committee Report in explaining why the Secretary should recognize and encourage cooperative associations "to promote efficient methods of marketing and distribution" said: "it has been found from experience that the participation by . . . associations of producers has been of material value in administering" the agricultural program.[12] The 1937 Amendment to the Act went still further and "expressly ratified, legalized, and confirmed" all "marketing agreements, licenses, orders, regulations, provisions, and acts" of the Secretary of Agriculture issued under the former Act. 50 Stat. 246, 249. Some of the orders and licenses thus expressly ratified by Congress contained the provisions requiring nonmembers to pay for collective market services. And a Committee Report on this 1937 legislation referred to the Act's marketing program as "valuable supplements to the cooperative efforts of producers, particularly in the case of fruits, vegetables, and milk." [13] Finally, in 1948 Congress again manifested its approval of the Secretary's program which at that time included the very cooperative payments now at issue.[14]

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[11] H. R. Rep. No. 1241, 74th Cong., 1st Sess. 9.

[12] *Supra,* p. 13.

[13] H. R. Rep. No. 468, 75th Cong., 1st Sess. 2.

[14] "Any program in effect under the Agricultural Adjustment Act, as reenacted and amended by this Act, on the effective date of section 302 of the Agricultural Act of 1948 shall continue in effect with-

The Court brushes aside the foregoing history and invalidates the cooperative payment provisions. Its asserted reason for doing so is that statutory authority for the payments is lacking. We are left in the dark as to whether the Secretary lacks all authority to make payments to any and all persons, or has authority to pay everybody else except cooperatives, or has authority to pay everybody else except New England cooperatives. The Court's opinion leads me to believe that its real basis for invalidation is a belief that:

(1) The payments are a mere gratuity, a subsidy to inefficiently operated cooperatives.[15]

(2) The Secretary's order properly construed does not require cooperatives to perform market-wide services; therefore they should be paid nothing, regardless of the fact that they actually performed such services for the past eleven years.

(3) It is evil and illegal to pay cooperatives for working to benefit a whole group of which they are a part.

First. If these payments were mere gratuities as the District Court held and as intimated by the majority, I too would hold them illegal. However, they cannot be considered gratuities because administrative findings of fact and the whole record show precisely the contrary. I cannot agree that it is for this Court to redetermine facts found by the Secretary after at least three exhaus-

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out the necessity for any amendatory action relative to such program, but any such program shall be continued in operation by the Secretary of Agriculture only to establish and maintain such orderly marketing conditions as will tend to effectuate the declared purpose set out in section 2 or 8c (18) of the Agricultural Adjustment Act, as reenacted and amended by this Act." Act of July 3, 1948, 62 Stat. 1247, 1258, 7 U. S. C. (Supp. IV) § 672 (b).

[15] This appears to have been the view of the District Court. 82 F. Supp. 614.

tive public hearings [16]—findings which were not even challenged by the parties. The administrative history of the Marketing Act shows conclusively that at the time of the first of these hearings in 1941 the right of cooperatives to receive payments for market-wide services was well established. From the evidence before the Secretary at this first hearing he concluded that the payments to cooperatives were justified and would tend to effectuate the purposes of the Act. 6 Fed. Reg. 3762, 7 CFR, 1941 Supp., § 904.0. In 1943 another public hearing was held at which an unsuccessful attempt was made to eliminate cooperative payment provisions from the order. One of the findings resulting from this hearing is as follows:

> "The present plan of payments to cooperatives, which became effective August 1, 1941, was based on the consideration that to achieve the benefits to all producers which the order is designed to provide two types of activity by producers' cooperative marketing organizations are desirable: (1) presentation of evidence at hearings concerning the needs of producers with respect to prices for milk and differentials to reflect handling costs to furnish an adequate basis for constructive amendments to the order, and (2) assumption of responsibility for a reserve of milk to meet the irregular needs of distributors which is essential in a market which provides market-wide equalization among all producers of the total value of the milk. . . . From these considerations it was

[16] Public hearings were held in 1940, 1941, 1942, 1943 and 1947. The 1940 and 1941 hearing records are before us as an exhibit. The other hearing records are available; all the findings resulting from all these hearings have been published in the Federal Register as the law requires. And if the evidence before the Secretary were not available, his findings would carry a presumption of a state of facts justifying his action. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 567–568.

> concluded that provision for payments to cooperative associations is considered necessary to equitably apportion the total value of milk among producers. The testimony in support of the proposal to completely eliminate this feature of the order does not show that these considerations were substantially erroneous." 9 Fed. Reg. 3057, 3059.

In 1947 still another unsuccessful attempt was made to eliminate these provisions. At this public hearing the Secretary expressly reaffirmed the prior crucial findings on which the order rests. 12 Fed. Reg. 4921, 4928. It is the provisions of this 1947 order now held invalid.

There was an abundance of evidence to support the Secretary's findings that the cooperatives in the Boston area were equipped to and did constantly provide substantial services to help sustain the market price of milk and to stabilize its distribution. Evidence showed that New England cooperatives maintained expensive manufacturing equipment to take care of surplus milk; that most of the surplus milk was concentrated in cooperative plants and that even proprietary handlers normally depended on cooperatives in time of short production. There was testimony that all these activities imposed huge financial burdens on cooperative associations and that unless non-members were made to bear part of these large costs, cooperating farmers, who saved the market from the chaos of a fluctuating milk supply, would actually get less net amounts for their milk than did the non-members who merely reaped the harvest sown by others.

The foregoing suggests but a very minor part of the evidence on which the Secretary found that the cooperative payment provisions were consistent with the Act's terms and necessary to effectuate the order's other provisions designed to maintain a smoothly functioning market. The Court of Appeals agreed with the Secretary as to the value of cooperative services. 87 U. S. App.

D. C. 388, 392, 399, 185 F. 2d 871, 875, 882. Its opinion not only conceded that "there was substantial evidence that these services were rendered" but emphatically declared "There is no doubt that these services are pronounced aids to all participants in the marketing area—producers, handlers and consumers." In fact the Court of Appeals rather impatiently rejected the "gratuity" theory of the payments by declaring that the record made the market-wide aid of cooperatives "so clear that it serves no purpose to describe the helpful effects in detail." This Court now resurrects this rejected theory by implying that the cooperative payments are mere gifts, thereby upsetting the Secretary's findings while asserting that it is indulging in pure statutory construction.[17] This, of course, is the safest way to upset findings supported as these are by substantial evidence.

Second. The majority seems to imply that even if the cooperatives do render valuable market-wide services they ought not to be paid. This is because the Court, reading the order with punctilious nicety, finds that it lacks words expressly compelling cooperatives to render the precise services for which they are paid. I fail to see why cooperatives should not be paid for work they actually do, but in any event I read the order as requiring that those services be performed.

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[17] The majority disclaims any challenge to the adequacy of the evidence to support the Secretary's findings. In the succeeding paragraph the majority resorts to affidavits filed in the trial court in an attempt to show that the purpose of these payment provisions was to subsidize inefficient and overcapitalized cooperative plants. The Secretary had found the payments were bona fide compensation for work performed. Thus the Secretary found one fact; the Court relies on a court affidavit to find a contrary fact. I think the affidavit does not support this Court's finding. Moreover, the administrative findings should be tested by evidence the administrator heard, not by *de novo* proceedings in a reviewing court.

The public hearings held in connection with this order resulted in findings that cooperatives should be paid for rendering two broad types of market services. Most importantly, they were to be paid for the "assumption of responsibility for a reserve of milk to meet the irregular needs of distributors." 9 Fed. Reg. 3059. Section 904.10 (b)(2) of the order specifies the amounts to be paid cooperatives for meeting this responsibility. This section by its very terms requires that before they get their pay cooperatives must meet their responsibility by running plants which sell or process milk. It does so in the following language: "Each qualified association shall be entitled to payment at the rate of 2 cents per hundredweight on milk received from producers at a plant operated by that association." Neither the New York order nor any other order could possibly contain a more compelling requirement for the cooperatives to perform these market services than does this order—namely, no work, no pay.[18]

Section 904.10 (b)(1) specifies the amounts to be paid cooperatives for their work in bringing about better milk prices for all farmers. This is the second broad type of service which the Secretary found cooperatives should be paid for. In order to be entitled to receive any payment whatsoever for this service, a cooperative must not only comply with the provisions of the Capper-Volstead Act, but also must "collaborate(s) with similar associations in activities incident to the maintenance and strengthening of collective bargaining by producers and the operation of a plan of uniform pricing of milk to handlers." [19] If a cooperative does the things required by the Capper-Volstead Act and the last-mentioned section of the order, it is bound to be working to bring about better milk prices for all dairy farmers in the area.

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[18] See n. 4, *supra.*

[19] 7 CFR, 1947 Supp., § 904.10 (a)(1)(7).

After public hearing, the administrator of this Act has found on three separate occasions that cooperatives expended their time and money in performing these market-wide services. I am not sure why the majority forbids the payments. I hope it is not on the theory that the Secretary's supposed lack of linguistic skill must deprive cooperatives of pay for the work they did during the past eleven years. Whether this is the theory, one cannot be sure.

Third. The majority states that there is somewhat of an "incongruity" in allowing cooperatives to be paid for "vigorously prosecuting their own interests," leaving the inference that there is something inherently evil and illegal in such payments. I do not see why. It seems more incongruous and wrong to me to let non-members get something for nothing and at the sole expense of the cooperating farmers. There is certainly no conflict of interest among farmers in connection with the obtaining of a higher price for the milk of all. The payments were made to achieve this end. Furthermore, I doubt if the majority would want to hold that Congress is barred from taking advantage of the belief of many that government regulation can be most effective where the fullest possible use is made of the aid and helpful services of those who are being regulated. I find it impossible to believe that Congress intended to compel the Secretary to hire more regular, all-time government employees to perform, and in many instances to duplicate, work that could be best and perhaps least irritatingly performed by farmer-owned and farmer-controlled associations.[20] To the contrary,

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[20] However, the contrary view of the Court of Appeals appears to have been a basis for its invalidation of the order for it said:

"It is argued that it would take a decided increase in the present staff of the administrator to provide these services and that such increase would be expensive. This is no answer. The Act makes it the duty of the administrator to do this. He cannot farm out these duties to

the controlling law expressly directs the Secretary to use cooperatives where he can.[21] That it is evil for the Secretary to pay cooperatives for market services seems an unduly fastidious concept.[22]

Finally, I do not agree with the majority that statutory authority for these payments is lacking. The Act first authorizes the Secretary to take certain specified actions designed to set up a well-functioning government-controlled milk-market system. To avoid the inevitable rigidity of its expressly defined authorizations Congress went further and authorized the Secretary to provide for additional market mechanisms "Incidental to, and not inconsistent with, the terms and conditions specified . . . and necessary to effectuate the other provisions of such order." 49 Stat. 750, 757, 7 U. S. C. § 608c (7)(D). The key words in this section, referred to by the Court of Appeals as "the measuring standard," are "incidental," "not inconsistent," and "necessary." Largely relying on

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one class of producers at the expense of another class, for this would violate the effect of uniformity of price required in subsections 608c (5) (B) (i) and (ii) and be 'inconsistent' therewith." 185 F. 2d 871, 881.

[21] See n. 3, *supra.*

[22] I have not discussed above a fourth ground upon which the Court may possibly rely for its holding. There seems to be a certain flavor in the majority opinion to the effect that cooperatives should not be paid for maintaining surplus milk reserves since corresponding payments are not made to proprietary milk handlers. However, this must be mere coloration, for the record shows, by the testimony of the proprietary interests themselves, that they will not work to dispose of surplus milk at the high price which only fluid milk brings because they are unwilling to deal with their competitors. If the proprietary interests should decide to cooperate with their competitors in the future so that all farmers can receive higher prices for their milk, the Secretary and the farmers will no doubt be glad to pay them for doing so. At any rate, I do not believe the majority is proceeding on the assumption that because one group has been wronged, the Court must insure that all other groups must be similarly wronged.

their selections of abstract word definitions, the District Court and the Court of Appeals held that the Secretary's order was forbidden by each of these key words. This Court clearly agrees that the order for payment is not "incidental" and is "inconsistent" with the Act's terms. However, it meticulously avoids any reliance on the word "necessary."

A. *Necessary.*—The Secretary concluded that cooperative payments were "necessary" to effectuate the other terms of his order. An overwhelming majority of the farmers affected by the payment provision voted in favor of them. The administrative history of the Act shows that the payments have made a substantial contribution to the smooth operation of the Government's program. Congress itself has ratified these very provisions now in issue. All of this is enough for me; I would hold that the provisions are "necessary" within the meaning of the Act.

B. *Incidental.*—The majority holds that these payments are not "incidental" to the other terms of the order. This holding seems to be based on the idea that the payment provisions are too important to be merely "incidental." [23] This idea is in marked contrast to the Court's previous statement that "the payments to cooperatives have in each year constituted no more than a fraction of one percent of the total value of milk marketed in the area." I do not doubt that these payments are of considerable importance in carrying out the basic market control system set up by the Act. But I deny that they are such independent ends in themselves that they are

[23] The majority also states that these payments cannot be "incidental" because they are "inconsistent" with other provisions of the Act. Maybe these two words are synonyms, but I had not thought so. At any rate I shall later state reasons why these payments are wholly consistent with the Act and the market program set up under it.

something more than an "incidental" part of the program they were designed to serve. Clearly the payment provisions are auxiliary to the main purpose of the Act and its market system. Consequently, the Court refuses to give that "considerable flexibility" which we have previously said the Secretary should have "to include provisions auxiliary to those definitely specified." *United States* v. *Rock Royal Co-op., supra,* at 575, 576.

C. *Inconsistent.*—The Court's holding that the cooperative payments are "inconsistent" with the Act is based on the notion that the order destroys uniformity of prices received by cooperative members and non-members to the detriment of non-members. The Court's holding in this regard rests in part on its unsupported and unsupportable findings that "receipts of nonmembers resulting from delivery of a given quantity of milk are smaller than those of the associations and their members. This is true because nonmembers are paid only the blended price while members receive, through their associations, the disputed payments in addition to the blended price." The crucial error of these assumptions or findings of fact, whichever they are, is the Court's assertion that cooperative service payments "redound to members individually." There is not only an absence of evidence to support this assertion, but it is contrary to the known facts of the way cooperatives work. The only possible support for such an extraordinary inference is by a renewed adoption of the theory that these payments are gratuities, a theory the Court of Appeals emphatically rejected. But this record actually shows that it costs the cooperatives more to perform the services than they are paid. It also shows that cooperatives are compelled to deduct the complete cost of these services long before the member farmers are paid for their milk. The result is that but for these payments the cooperative members are bound to get less than the blended price for their milk while non-members get the

blended price. The very reason the Secretary authorized these payments was to insure so far as possible that nonmembers should not get more for their milk than cooperating farmers do. It is therefore the Court's action today, not the Secretary's order, that prevents uniformity of price in the Boston area.

In striking down these provisions of the Secretary's order, the Court has departed from many principles it has previously announced in connection with its supervision over administrative agents. Under these principles, the Court would refrain from setting aside administrative findings of fact when supported by substantial evidence; [24] we would give weight to the interpretation of a statute by its administrators; [25] when administrators have interpreted broad statutory terms, such as here involved, we would recognize that it is our duty to accept this interpretation even though it was not "the only reasonable one" or the one "we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n* v. *Aragon,* 329 U. S. 143, 153. Only a short while ago in a Labor Board case this Court said: "Not only are the findings of the Board conclusive with respect to questions of fact in this field when supported by substantial evidence on the record as a whole, but the Board's interpretation of the Act and the Board's application of it in doubtful situations are entitled to weight." *Labor Board* v. *Denver Bldg. Council,* 341 U. S. 675, 691, 692. True, this was said with reference to a Labor Board case under the Taft-Hartley Act, but findings and interpretations of the Secretary of Agriculture should stand on no lower level.

I dissent.

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[24] See *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474.

[25] *Gray* v. *Powell,* 314 U. S. 402.

ADLER ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 8. Argued January 3, 1952.—Decided March 3, 1952.

The Civil Service Law of New York, § 12–a, makes ineligible for employment in any public school any member of any organization advocating the overthrow of the Government by force, violence or any unlawful means. Section 3022 of the Education Law, added by the Feinberg Law, requires the Board of Regents (1) to adopt and enforce rules for the removal of any employee who violates, or is ineligible under, § 12–a, (2) to promulgate a list of organizations described in § 12–a, and (3) to provide in its rules that membership in any organization so listed is prima facie evidence of disqualification for employment in the public schools. No organization may be so listed, and no person severed from or denied employment, except after a hearing and subject to judicial review. *Held:* This Court finds no constitutional infirmity in § 12–a of the Civil Service Law of New York or in § 3022 of the Education Law. Pp. 486–496.

1. Section 3022 and the rules promulgated thereunder do not constitute an abridgment of the freedom of speech and assembly of persons employed or seeking employment in the public schools of New York. *Garner* v. *Los Angeles Board*, 341 U. S. 716. Pp. 491–493.

2. The provision of § 3022 directing the Board of Regents to provide in rules thereunder that membership in any organization so listed by the Board shall constitute prima facie evidence of disqualification for employment in the public schools does not deny members of such organizations due process of law. Pp. 494–496.

3. The use of the word "subversive" in § 1 of the Feinberg Law, which is a preamble and not a definitive part of the Act, does not render the statute void for vagueness under the Due Process Clause, in view of the fact that in subdivision 2 of § 3022 it is given a very definite meaning—*i. e.*, an organization that advocates the overthrow of government by force or violence. P. 496.

4. The constitutionality of § 3021 of the Education Law not having been questioned in the proceedings in the lower courts and being raised here for the first time, it will not be passed upon by this Court before the state courts have had an opportunity to pass upon it. P. 496.

301 N. Y. 476, 95 N. E. 2d 806, affirmed.

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In a declaratory judgment action, the Supreme Court of New York, Kings County, held that subdivision (c) of § 12–a of the New York Civil Service Law, § 3022 of the New York Education Law, and the rules of the State Board of Regents promulgated thereunder violated the Due Process Clause of the Fourteenth Amendment, and enjoined action thereunder by the Board of Education of New York City. 196 Misc. 873, 95 N. Y. S. 2d 114. The Appellate Division reversed. 276 App. Div. 527, 96 N. Y. S. 2d 466. The Court of Appeals of New York affirmed the decision of the Appellate Division. 301 N. Y. 476, 95 N. E. 2d 806. On appeal to this Court, *affirmed*, p. 496.

Osmond K. Fraenkel argued the cause for appellants. With him on the brief was *Arthur Garfield Hays.*

Michael A. Castaldi argued the cause for appellee. With him on the brief were *Denis M. Hurley, Seymour B. Quel, Daniel T. Scannell* and *Bernard Friedlander.*

By special leave of Court, *Wendell P. Brown,* Solicitor General, argued the cause for the State of New York, as *amicus curiae,* urging affirmance. With him on the brief were *Nathaniel L. Goldstein,* Attorney General, and *Ruth Kessler Toch,* Assistant Attorney General.

Dorothy Kenyon, Raymond L. Wise and *Herbert Monte Levy* filed a brief for the American Civil Liberties Union, as *amicus curiae,* supporting appellants.

Mr. Justice Minton delivered the opinion of the Court.

Appellants brought a declaratory judgment action in the Supreme Court of New York, Kings County, praying that § 12–a of the Civil Service Law, [1] as implemented by

[1] N. Y. Laws 1939, c. 547, as amended N. Y. Laws 1940, c. 564.

the so-called Feinberg Law,[2] be declared unconstitutional, and that action by the Board of Education of the City of New York thereunder be enjoined. On motion for judgment on the pleadings, the court held that subdivision (c) of § 12–a, the Feinberg Law, and the Rules of the State Board of Regents promulgated thereunder violated the Due Process Clause of the Fourteenth Amendment, and issued an injunction. 196 Misc. 873, 95 N. Y. S. 2d 114. The Appellate Division of the Supreme Court reversed, 276 App. Div. 527, 96 N. Y. S. 2d 466, and the Court of Appeals affirmed the judgment of the Appellate Division, 301 N. Y. 476, 95 N. E. 2d 806. The appellants come here by appeal under 28 U. S. C. § 1257.

Section 12–a of the Civil Service Law, hereafter referred to as § 12–a, is set forth in the margin.[3] To implement

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[2] N. Y. Laws 1949, c. 360.

[3] "§ 12–a. *Ineligibility*

"No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college, or any other state educational institution who: (a) By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

"(b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

"(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political sub-

this law, the Feinberg Law was passed, adding a new section, § 3022, to the Education Law of the State of New York, which section so far as here pertinent is set forth in the margin.[4] The Feinberg Law was also to implement

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division thereof shall be overthrown by force or violence, or by any unlawful means;

"(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

[4] "§ 3022. *Elimination of subversive persons from the public school system*

"1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools on any of the grounds set forth in section twelve–a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

"2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve–a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal

§ 3021 of the Education Law of New York.[5] The constitutionality of this section was not attacked in the proceedings below.

The preamble of the Feinberg Law, § 1, makes elaborate findings that members of subversive groups, particularly of the Communist Party and its affiliated organizations, have been infiltrating into public employment in the public schools of the State; that this has occurred and continues notwithstanding the existence of protective statutes designed to prevent the appointment to or retention in employment in public office, and particularly in the public schools, of members of any organizations which teach or advocate that the government of the United States or of any state or political subdivision thereof shall be overthrown by force or violence or by any other unlawful means. As a result, propaganda can be disseminated among the children by those who teach them and to whom they look for guidance, authority, and leadership. The Legislature further found that the members of such groups use their positions to advocate and teach their doctrines, and are frequently bound by

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agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state."

[5] "§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances*

"A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position."

oath, agreement, pledge, or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. This propaganda, the Legislature declared, is sufficiently subtle to escape detection in the classroom; thus, the menace of such infiltration into the classroom is difficult to measure. Finally, to protect the children from such influence, it was thought essential that the laws prohibiting members of such groups, such as the Communist Party or its affiliated organizations, from obtaining or retaining employment in the public schools be rigorously enforced. It is the purpose of the Feinberg Law to provide for the disqualification and removal of superintendents of schools, teachers, and employees in the public schools in any city or school district of the State who advocate the overthrow of the Government by unlawful means or who are members of organizations which have a like purpose.

Section 3022 of the Education Law, added by the Feinberg Law, provides that the Board of Regents, which has charge of the public school system in the State of New York, shall, after full notice and hearing, make a listing of organizations which it finds advocate, advise, teach, or embrace the doctrine that the government should be overthrown by force or violence or any other unlawful means, and that such listing may be amended and revised from time to time.

It will be observed that the listings are made only after full notice and hearing. In addition, the Court of Appeals construed the statute in conjunction with Article 78 of the New York Civil Practice Act, Gilbert-Bliss' N. Y. Civ. Prac., Vol. 6B, so as to provide listed organizations a right of review.

The Board of Regents is further authorized to provide in rules and regulations, and has so provided, that membership in any listed organization, after notice and hearing, "shall constitute prima facie evidence for disquali-

fication for appointment to or retention in any office or position in the school system";[6] but before one who is an employee or seeks employment is severed from or denied employment, he likewise must be given a full hearing with the privilege of being represented by counsel and the right to judicial review.[7] It is § 12–a of the Civil Service Law, as implemented by the Feinberg Law as above indicated, that is under attack here.

It is first argued that the Feinberg Law and the rules promulgated thereunder constitute an abridgment of the

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[6] "§ 254. *Disqualification or removal of superintendents, teachers and other employes.*

. . . . . .

"2. *List of subversive organizations to be issued.* Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12–a of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith." Official Compilation of Codes, Rules and Regulations of the State of New York (Fifth Supp.), Vol. 1, pp. 205–206.

[7] The Court of Appeals construed the statute in conjunction with § 12–a subd. [d], *supra,* n. 3. The Rules of the Board of Regents provided: "In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed." Section 254, 1 (e), Official Compilation of Codes, Rules and Regulations of the State of New York (Fifth Supp.), Vol. 1, p. 206.

freedom of speech and assembly of persons employed or seeking employment in the public schools of the State of New York.

It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. *Communications Assn.* v. *Douds,* 339 U. S. 382. It is equally clear that they have no right to work for the State in the school system on their own terms. *United Public Workers* v. *Mitchell,* 330 U. S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not. Such persons are or may be denied, under the statutes in question, the privilege of working for the school system of the State of New York because, first, of their advocacy of the overthrow of the government by force or violence, or, secondly, by unexplained membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force or violence, and known by such persons to have such purpose.

The constitutionality of the first proposition is not questioned here. *Gitlow* v. *New York,* 268 U. S. 652, 667–672, construing § 161 of the New York Penal Law.

As to the second, it is rather subtly suggested that we should not follow our recent decision in *Garner* v. *Los Angeles Board,* 341 U. S. 716. We there said:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relation-

> ship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment." 341 U. S., at p. 720.

We adhere to that case. A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate.

If, under the procedure set up in the New York law, a person is found to be unfit and is disqualified from employment in the public school system because of membership in a listed organization, he is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice. Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence.

It is next argued by appellants that the provision in § 3022 directing the Board of Regents to provide in rules and regulations that membership in any organization listed by the Board after notice and hearing, with provision for review in accordance with the statute, shall constitute prima facie evidence of disqualification, denies due process, because the fact found bears no relation to the fact presumed. In other words, from the fact found that the organization was one that advocated the overthrow of government by unlawful means and that the person employed or to be employed was a member of the organization and knew of its purpose,[8] to presume that such member is disqualified for employment is so unreasonable as to be a denial of due process of law. We do not agree.

> "The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. . . .
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> "Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, National and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous." *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35, at p. 42.

Membership in a listed organization found to be within the statute and known by the member to be within the

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[8] In the proceedings below, both the Appellate Division of the Supreme Court and the Court of Appeals construed the statute to require such knowledge. 276 App. Div. 527, 530, 96 N. Y. S. 2d 466, 470–471; 301 N. Y. 476, 494, 95 N. E. 2d 806, 814–815.

statute is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say that such a finding is contrary to fact or that "generality of experience" points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. Nor is there here a problem of procedural due process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it. The holding of the Court of Appeals below is significant in this regard:

> "The statute also makes it clear that . . . proof of such membership 'shall constitute prima facie evidence of disqualification' for such employment. But, as was said in *Potts* v. *Pardee* (220 N. Y. 431, 433): 'The presumption growing out of a *prima facie* case . . . remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it.' Thus the phrase '*prima facie* evidence of disqualification,' as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* evidence for which subdivision 2 of section 3022 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. (Civil Service Law, § 12–a, subd. [d].) Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by

> the section of the statute last cited above. In that view there here arises no question of procedural due process." 301 N. Y. 476, at p. 494, 95 N. E. 2d 806, at 814–815.

Where, as here, the relation between the fact found and the presumption is clear and direct and is not conclusive, the requirements of due process are satisfied.

Without raising in the complaint or in the proceedings in the lower courts the question of the constitutionality of § 3021 of the Education Law of New York, appellants urge here for the first time that this section is unconstitutionally vague. The question is not before us. We will not pass upon the constitutionality of a state statute before the state courts have had an opportunity to do so. *Asbury Hospital* v. *Cass County,* 326 U. S. 207, 213–216; *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 460–462; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 546.

It is also suggested that the use of the word "subversive" is vague and indefinite. But the word is first used in § 1 of the Feinberg Law, which is the preamble to the Act, and not in a definitive part thereof. When used in subdivision 2 of § 3022, the word has a very definite meaning, namely, an organization that teaches and advocates the overthrow of government by force or violence.

We find no constitutional infirmity in § 12–a of the Civil Service Law of New York or in the Feinberg Law which implemented it, and the judgment is

Affirmed.

MR. JUSTICE BLACK, dissenting.

While I fully agree with the dissent of MR. JUSTICE DOUGLAS, the importance of this holding prompts me to add these thoughts.

This is another of those rapidly multiplying legislative enactments which make it dangerous—this time for school

teachers—to think or say anything except what a transient majority happen to approve at the moment. Basically these laws rest on the belief that government should supervise and limit the flow of ideas into the minds of men. The tendency of such governmental policy is to mould people into a common intellectual pattern. Quite a different governmental policy rests on the belief that government should leave the mind and spirit of man absolutely free. Such a governmental policy encourages varied intellectual outlooks in the belief that the best views will prevail. This policy of freedom is in my judgment embodied in the First Amendment and made applicable to the states by the Fourteenth. Because of this policy public officials cannot be constitutionally vested with powers to select the ideas people can think about, censor the public views they can express, or choose the persons or groups people can associate with. Public officials with such powers are not public servants; they are public masters.

I dissent from the Court's judgment sustaining this law which effectively penalizes school teachers for their thoughts and their associates.

MR. JUSTICE FRANKFURTER, dissenting.

We are asked to pass on a scheme to counteract what are currently called "subversive" influences in the public school system of New York. The scheme is formulated partly in statutes and partly in administrative regulations, but all of it is still an unfinished blueprint. We are asked to adjudicate claims against its constitutionality before the scheme has been put into operation, before the limits that it imposes upon free inquiry and association, the scope of scrutiny that it sanctions, and the procedural safeguards that will be found to be implied for its enforcement have been authoritatively defined. I think we should adhere to the teaching of this Court's history to

avoid constitutional adjudications on merely abstract or speculative issues and to base them on the concreteness afforded by an actual, present, defined controversy, appropriate for judicial judgment, between adversaries immediately affected by it. In accordance with the settled limits upon our jurisdiction I would dismiss this appeal.

An understanding of the statutory scheme and the action thus far taken under it is necessary to a proper consideration of the issues which for me control disposition of the case, namely, standing of the parties and ripeness of the constitutional question.

A New York enactment of 1949 precipitated this litigation. But that legislation is tied to prior statutes. By a law of 1917 "treasonable or seditious" utterances or acts barred employment in the public schools. New York Education Law, § 3021. In 1939 a further enactment disqualified from the civil service and the educational system anyone who advocates the overthrow of government by force, violence or any unlawful means, or publishes material advocating such overthrow or organizes or joins any society advocating such doctrine. New York Civil Service Law, § 12–a. This states with sufficient accuracy the provisions of this Law, which also included detailed provisions for the hearing and review of charges.

During the thirty-two years and ten years, respectively, that these laws have stood on the books, no proceedings, so far as appears, have been taken under them. In 1949 the Legislature passed a new act, familiarly known as the Feinberg Law, designed to reinforce the prior legislation. The Law begins with a legislative finding, based on "common report" of widespread infiltration by "members of subversive groups, and particularly of the communist party and certain of its affiliated organizations," into the educational system of the State and the evils attendant upon that infiltration. It takes note of existing laws and exhorts the authorities to greater endeavor

of enforcement. The State Board of Regents, in which are lodged extensive powers over New York's educational system, was charged by the Feinberg Law with these duties:

> (1) to promulgate rules and regulations for the more stringent enforcement of existing law;
>
> (2) to list "after inquiry, and after such notice and hearing as may be appropriate" those organizations membership in which is proscribed by subsection (c) of § 12–a of the Civil Service law;
>
> (3) to provide in its rules and regulations that membership in a listed organization shall be *prima facie* evidence of disqualification under § 12–a;
>
> (4) to report specially and in detail to the legislature each year on measures taken for the enforcement of these laws.

Accordingly, the Board of Regents adopted Rules for ferreting out violations of § 3021 or § 12–a. An elaborate machinery was designed for annual reports on each employee with a view to discovering evidence of violations of these sections and to assuring appropriate action on such discovery. The Board also announced its intention to publish the required list of proscribed organizations and defined the significance of an employee's membership therein in proceedings for his dismissal. These Rules by the Board of Regents were published with an accompanying Memorandum by the Commissioner of Education. He is the administrative head of New York's school system and his Memorandum was for the guidance of school officials throughout the State. It warned of the danger of indiscriminate or careless action under the Feinberg Law and the Regents' Rules, and laid down this duty:

> "The statutes and the Regents' Rules make it clear that it is a primary duty of the school authorities

> in each school district to take positive action to eliminate from the school system any teacher in whose case there is evidence that he is guilty of subversive activity. School authorities are under obligation to proceed immediately and conclusively in every such case."

The Rules and Memorandum appear in the record; we shall have occasion to refer later to their relevance to what was decided below. Our attention has also been called to an order of the Board of Education of the City of New York, the present appellee. This order further elaborates the part of the Regents' Rules dealing with reports on teachers. It is not clear whether this order has gone into effect. In any event it was not before the lower courts and is not in the record here.

It thus appears that we are asked to review a complicated statutory scheme prohibiting those who engage in the kind of speech or conduct that is proscribed from holding positions in the public school system. The scheme is aligned with a complex system of enforcement by administrative investigation, reporting and listing of proscribed organizations. All this must further be related to the general procedures under the New York law for hearing and reviewing charges of misconduct against educational employees, modified as those procedures may be by the Feinberg Law and the Regents' Rules.

This intricate machinery has not yet been set in motion. Enforcement has been in abeyance since the present suit, among others, was brought to enjoin the Board of Education from taking steps or spending funds under the statutes and Rules on the theory that these transgressed various limitations which the United States Constitution places on the power of the States. The case comes here on the bare bones of the Feinberg Law only partly given flesh by the Regents' Rules. It was decided wholly on pleadings: a complaint, identifying the plaintiffs and their

interests, setting out the offending statutes and Rules, and concluding in a more or less argumentative fashion that these provisions violate numerous constitutional rights of the various plaintiffs; an answer, denying that the impact of the statute is unconstitutional and that the plaintiffs have any interest to support the suit. On these pleadings summary judgment in favor of some of the plaintiffs was granted by the Supreme Court in Kings County, 196 Misc. 873, 95 N. Y. S. 2d 114; this was reversed by the Appellate Division for the Second Department with direction that the complaint be dismissed, 276 App. Div. 527, 96 N. Y. S. 2d 466, and the Court of Appeals affirmed the Appellate Division. 301 N. Y. 476, 95 N. E. 2d 806. These pleadings and the opinions below are the basis on which we are asked to decide this case.

About forty plaintiffs brought the action initially; the trial court dismissed as to all but eight. 196 Misc., at 877, 95 N. Y. S. 2d, at 117–118. The others were found without standing to sue under New York law. The eight who are here as appellants alleged that they were municipal taxpayers and were empowered, by virtue of N. Y. Gen. Municipal Law § 51, to bring suit against municipal agencies to enjoin waste of funds. New York is free to determine how the views of its courts on matters of constitutionality are to be invoked. But its action cannot of course confer jurisdiction on this Court, limited as that is by the settled construction of Article III of the Constitution. We cannot entertain, as we again recognize this very day, a constitutional claim at the instance of one whose interest has no material significance and is undifferentiated from the mass of his fellow citizens. *Doremus* v. *Board of Education,* 342 U. S. 429. This is not a "pocketbook action." As taxpayers these plaintiffs cannot possibly be affected one way or the other by any disposition of this case, and they make no such claim. It may well be that the authorities will, if left free, divert funds and effort

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from other purposes for the enforcement of the provisions under review, though how much leads to the merest conjecture. But the total expenditure, certainly the new expenditure, necessary to implement the Act and Rules may well be *de minimis*. The plaintiffs at any rate have not attempted to show that any such expenditure would come from funds to which their taxes contribute. In short, they have neither alleged nor shown that our decision on the issues they tender would have the slightest effect on their tax bills or even on the aggregate bill of all the City's taxpayers whom they claim to represent. The high improbability of being able to make such a demonstration, in the circumstances of this case, does not dispense with the requirements for our jurisdiction. If the incidence of taxation in a city like New York bears no relation to the factors here under consideration, that is precisely why these taxpayers have no claim on our jurisdiction.

This ends the matter for plaintiffs Krieger and Newman. But six of the plaintiffs advanced grounds other than that of being taxpayers in bringing this action. Two are parents of children in New York City schools. Four are teachers in these schools. On the basis of the record before us these claims, too, are insufficient, in view of our controlling adjudications, to support the jurisdiction of this Court.

The trial court found the interests of the plaintiffs as parents inconsequential. 196 Misc., at 875, 95 N. Y. S. 2d, at 816. I agree. Parents may dislike to have children educated in a school system where teachers feel restrained by unconstitutional limitations on their freedom. But it is like catching butterflies without a net to try to find a legal interest, indispensable for our jurisdiction, in a parent's desire to have his child educated in schools free from such restrictions. The hurt to parents' sensibilities is too tenuous or the inroad upon rightful claims to public edu-

cation too argumentative to serve as the earthy stuff required for a legal right judicially enforceable. The claim does not approach in immediacy or directness or solidity that which our whole process of constitutional adjudication has deemed a necessary condition to the Court's settlement of constitutional issues.

An apt contrast is provided by *McCollum* v. *Board of Education*, 333 U. S. 203, where a parent did present an individualized claim of his own that was direct and palpable. There the parent alleged that Illinois imposed restrictions on the child's free exercise of faith and thereby on the parent's. The basis of jurisdiction in the *McCollum* case was not at all a parental right to challenge in the courts—or at least in this Court—educational provisions in general. The closely defined encroachment of the particular arrangement on a constitutionally protected right of the child, and of the parent's right in the child, furnished the basis for our review. The Feinberg Law puts no limits on any definable legal interest of the child or of its parents.

This leaves only the teachers, Adler, Spencer, and George and Mark Friedlander. The question whether their interest as teachers was sufficient to give them standing to sue was thought by the trial court to be conclusively settled by our decision in *United Public Workers* v. *Mitchell,* 330 U. S. 75. I see no escape from the controlling relevance of the *Mitchell* case. There individual government employees sought to enjoin enforcement of the provisions of the Hatch Act forbidding government employees to take active part in politics. The complaint contained detailed recitals of the desire, intent and specific steps short of violation on the part of plaintiffs to engage in the prohibited activities. See *id.*, at 87–88, n. 18. There as here the law was attacked as violating constitutional guaranties of freedom of speech. We found jurisdiction wanting to decide the issue except as to one

plaintiff whose conduct had already violated the applicable standards.

The allegations in the present action fall short of those found insufficient in the *Mitchell* case. These teachers do not allege that they have engaged in proscribed conduct or that they have any intention to do so. They do not suggest that they have been, or are, deterred from supporting causes or from joining organizations for fear of the Feinberg Law's interdict, except to say generally that the system complained of will have this effect on teachers as a group. They do not assert that they are threatened with action under the law, or that steps are imminent whereby they would incur the hazard of punishment for conduct innocent at the time, or under standards too vague to satisfy due process of law. They merely allege that the statutes and Rules permit such action against some teachers. Since we rightly refused in the *Mitchell* case to hear government employees whose conduct was much more intimately affected by the law there attacked than are the claims of plaintiffs here, this suit is wanting in the necessary basis for our review.

This case proves anew the wisdom of rigorous adherence to the prerequisites for pronouncement by this Court on matters of constitutional law. The absence in these plaintiffs of the immediacy and solidity of interest necessary to support jurisdiction is reflected in the atmosphere of abstraction and ambiguity in which the constitutional issues are presented. The broad, generalized claims urged at the bar touch the deepest interests of a democratic society: its right to self-preservation and ample scope for the individual's freedom, especially the teacher's freedom of thought, inquiry and expression. No problem of a free society is probably more difficult than the reconciliation or accommodation of these too often conflicting interests. The judicial role in this

process of accommodation is necessarily very limited and must be carefully circumscribed. To that end the Court, in its long history, has developed "a series of rules" carefully formulated by Mr. Justice Brandeis, "under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 346.

We have emphasized that, as to the kind of constitutional questions raised by the Feinberg Law, "the distinction is one of degree, and it is for this reason that the effect of the statute in proscribing beliefs—like its effect in restraining speech or freedom of association—must be carefully weighed by the courts in determining whether the balance struck by [the State] comports with the dictates of the Constitution." *American Communications Assn.* v. *Douds,* 339 U. S. 382, 409. But as the case comes to us we can have no guide other than our own notions—however uncritically extra-judicial—of the real bearing of the New York arrangement on the freedom of thought and activity, and especially on the feeling of such freedom, which are, as I suppose no one would deny, part of the necessary professional equipment of teachers in a free society. The scheme for protecting the school system from being made the instrument of purposes other than a school system should serve in a free society—certainly a concern within the constitutional powers of a State—bristles with ambiguities which must enter into any constitutional decision we may make. Of these only a few have been considered by the courts below. We are told that an organization cannot be listed by the Regents except after hearing. 301 N. Y., at 488, 493, 494, 95 N. E. 2d, at 810–811, 814–815. From this it may be assumed that the hearing contemplated is that found wanting by some members of this Court in *Joint Anti-Fascist Refugee Committee* v. *McGrath,*

341 U. S. 123. The effect of the requirement that membership in a listed organization be prima facie evidence of disqualification in a dismissal proceeding is enlarged upon. 301 N. Y., at 494, 95 N. E. 2d, at 814–815. And the Court of Appeals indicates that only one who "knowingly holds membership in an organization named upon any listing" is subjected to the operation of that rebuttable presumption. *Id.*, at 494, 95 N. E. 2d, at 814.

These are the only islands of clarity. Otherwise we are at sea. We are not told the meaning to be attributed to the words "treasonable or seditious" in § 3021 of the Education Law, though that is one of the two sections of preexisting law which the elaborate apparatus of the Feinberg Law is designed to enforce. In light of the experience under the Sedition Act of 1798, 1 Stat. 596, "seditious" can hardly be deemed a self-defining term or a word of art. See Miller, Crisis in Freedom, 136–137. Nor can we turn to practical application or judicial construction for sufficient particularity of the meaning to be attributed to the range of activity proscribed by § 12–a. Concern over the latitude afforded by such phrases as "the overthrow of government by . . . any unlawful means" when positions of trust or public employment are conditioned upon disbelief in such an objective cannot be deemed without warrant. See *American Communications Assn.* v. *Douds,* 339 U. S. 382, 415, 435; *Garner* v. *Board of Public Works of Los Angeles,* 341 U. S. 716, 724. In those cases the Court had ground for limiting the reach of a dubious formula. No such alternative is available here.

These gaps in our understanding of the precise scope of the statutory provisions are deepened by equal uncertainties in the implementing Rules. Indeed, according to the Appellate Division these Rules are not in the case. 276 App. Div., at 531, 96 N. Y. S. 2d, at 471. And the Court of Appeals was silent on the point. Therefore we

are without enlightenment, for example, on the nature of the reporting system described by the Rules. This may be a vital matter, affecting not the special circumstances of a particular case but coloring the whole scheme. For it may well be of constitutional significance whether the reporting system contemplates merely the notation as to each teacher that no evidence of disqualification has turned up, if such be the case, or whether it demands systematic and continuous surveillance and investigation of evidence. The difference cannot be meaningless, it may even be decisive, if our function is to balance the restrictions on freedom of utterance and of association against the evil to be suppressed. Again, the Rules seem to indicate that past activities of the proscribed organizations or past membership in listed organizations may be enough to bar new applicants for employment. But we do not know, nor can we determine it. This, too, may make a difference. See *Garner* v. *Board of Public Works of Los Angeles, supra,* at 729 (MR. JUSTICE BURTON dissenting in part). We do not know, nor can we ascertain, the effect of the presumption of continuing membership in proscribed organizations that is drawn from evidence of past membership "in the absence of a showing that such membership has been terminated in good faith." We are uninformed of the effect in law of the Commissioner's memorandum, and there is no basis on which to appraise its effect in practice. As for the order of the Board of Education of the City of New York, it is not even formally in the case. In the face of such uncertainties this Court has in the past found jurisdiction wanting, howsoever much the litigants were eager for constitutional pronouncements. *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450; *Congress of Industrial Organizations* v. *McAdory,* 325 U. S. 472; *Rescue Army* v. *Municipal Court,* 331 U. S. 549; *Parker* v. *County of Los Angeles,* 338 U. S. 327.

This statement of reasons for declining jurisdiction sounds technical, perhaps, but the principles concerned are not so. Rare departures from them are regrettable chapters in the Court's history, and in well-known instances they caused great public misfortune.

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

I have not been able to accept the recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights.* I cannot for example find in our constitutional scheme the power of a state to place its employees in the category of second-class citizens by denying them freedom of thought and expression. The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher.

The public school is in most respects the cradle of our democracy. The increasing role of the public school is seized upon by proponents of the type of legislation represented by New York's Feinberg law as proof of the importance and need for keeping the school free of "subversive influences." But that is to misconceive the effect of this type of legislation. Indeed the impact of this kind of censorship on the public school system illustrates the high purpose of the First Amendment in freeing speech and thought from censorship.

The present law proceeds on a principle repugnant to our society—guilt by association. A teacher is disqualified because of her membership in an organization found to be "subversive." The finding as to the "subversive" character of the organization is made in a proceeding to which the teacher is not a party and in which it is not

**United Public Workers* v. *Mitchell*, 330 U. S. 75; *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716.

clear that she may even be heard. To be sure, she may have a hearing when charges of disloyalty are leveled against her. But in that hearing the finding as to the "subversive" character of the organization apparently may not be reopened in order to allow her to show the truth of the matter. The irrebuttable charge that the organization is "subversive" therefore hangs as an ominous cloud over her own hearing. The mere fact of membership in the organization raises a prima facie case of her own guilt. She may, it is said, show her innocence. But innocence in this case turns on knowledge; and when the witch hunt is on, one who must rely on ignorance leans on a feeble reed.

The very threat of such a procedure is certain to raise havoc with academic freedom. Youthful indiscretions, mistaken causes, misguided enthusiasms—all long forgotten—become the ghosts of a harrowing present. Any organization committed to a liberal cause, any group organized to revolt against an hysterical trend, any committee launched to sponsor an unpopular program becomes suspect. These are the organizations into which Communists often infiltrate. Their presence infects the whole, even though the project was not conceived in sin. A teacher caught in that mesh is almost certain to stand condemned. Fearing condemnation, she will tend to shrink from any association that stirs controversy. In that manner freedom of expression will be stifled.

But that is only part of it. Once a teacher's connection with a listed organization is shown, her views become subject to scrutiny to determine whether her membership in the organization is innocent or, if she was formerly a member, whether she has *bona fide* abandoned her membership.

The law inevitably turns the school system into a spying project. Regular loyalty reports on the teachers must be made out. The principals become detectives; the

students, the parents, the community become informers. Ears are cocked for tell-tale signs of disloyalty. The prejudices of the community come into play in searching out the disloyal. This is not the usual type of supervision which checks a teacher's competency; it is a system which searches for hidden meanings in a teacher's utterances.

What was the significance of the reference of the art teacher to socialism? Why was the history teacher so openly hostile to Franco Spain? Who heard overtones of revolution in the English teacher's discussion of the Grapes of Wrath? What was behind the praise of Soviet progress in metallurgy in the chemistry class? Was it not "subversive" for the teacher to cast doubt on the wisdom of the venture in Korea?

What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. Supineness and dogmatism take the place of inquiry. A "party line"—as dangerous as the "party line" of the Communists—lays hold. It is the "party line" of the orthodox view, of the conventional thought, of the accepted approach. A problem can no longer be pursued with impunity to its edges. Fear stalks the classroom. The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin.

This, I think, is what happens when a censor looks over a teacher's shoulder. This system of spying and

surveillance with its accompanying reports and trials cannot go hand in hand with academic freedom. It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to protect. A system which directly or inevitably has that effect is alien to our system and should be struck down. Its survival is a real threat to our way of life. We need be bold and adventuresome in our thinking to survive. A school system producing students trained as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction. The Framers knew the danger of dogmatism; they also knew the strength that comes when the mind is free, when ideas may be pursued wherever they lead. We forget these teachings of the First Amendment when we sustain this law.

Of course the school systems of the country need not become cells for Communist activities; and the classrooms need not become forums for propagandizing the Marxist creed. But the guilt of the teacher should turn on overt acts. So long as she is a law-abiding citizen, so long as her performance within the public school system meets professional standards, her private life, her political philosophy, her social creed should not be the cause of reprisals against her.

BLACKMAR *v.* GUERRE, REGIONAL MANAGER, VETERANS' ADMINISTRATION, ET AL.

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

No. 361. Argued January 30–31, 1952.—Decided March 3, 1952.

Petitioner was discharged from his position in the Regional Office of the Veterans' Administration in New Orleans and this action was sustained by the Civil Service Commission in Washington. He brought suit in a federal district court in Louisiana against the Manager of the Regional Office and the Civil Service Commission (*eo nomine*) to have these actions set aside. *Held:* The suit was properly dismissed. Pp. 513–516.

1. Defendants' challenges to the venue and jurisdiction of the district court were properly presented by motion and answer. Fed. Rules Civ. Proc., 12 (b). P. 514.

2. Congress has not constituted the Civil Service Commission a body corporate or authorized it to be sued *eo nomine*. Pp. 514–516.

(a) The present suit against the Commission *eo nomine* is not authorized by the Hatch Act, 5 U. S. C. § 118k (c). Pp. 514–515.

(b) Nor was this suit authorized by the Administrative Procedure Act, 5 U. S. C. § 1009, which provides for review of agency action only in a court of "competent jurisdiction." The courts of the District of Columbia are the only courts of "competent jurisdiction" to reach the members of the Civil Service Commission. Pp. 515–516.

3. The only defendant before the court was the Regional Director, and it is obvious that no relief could be granted against him in this suit. Pp. 515, 516.

190 F. 2d 427, affirmed.

A district court in Louisiana dismissed this suit for want of jurisdiction. The Court of Appeals affirmed. 190 F. 2d 427. This Court granted certiorari. 342 U. S. 884. *Affirmed,* p. 516.

René R. Nicaud argued the cause for petitioner. With him on the brief was *Conrad Meyer, III.*

Benjamin Forman argued the cause for respondents. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade.*

MR. JUSTICE MINTON delivered the opinion of the Court.

Petitioner, a veteran employed as authorization officer in the Regional Office of the Veterans' Administration in New Orleans, was removed from his position. He appealed under § 14 of the Veterans' Preference Act of 1944 (5 U. S. C. (Supp. IV) § 863) to the Tenth Regional Office of the United States Civil Service Commission in New Orleans. The Regional Board found that his discharge was not warranted and recommended that he be reinstated to his position. The Veterans' Administration appealed to the Board of Appeals and Review of the Civil Service Commission in Washington. The Commission reversed the Tenth Regional Board and so notified petitioner.

Petitioner then instituted this suit in the District Court for the Eastern District of Louisiana, naming as defendants Guerre, the Regional Manager of the Veterans' Administration, who had first discharged him, and the United States Civil Service Commission. Guerre was served personally. Service on the Commission was sought through personal service on Weinstein, the United States District Attorney, and on Leach, the Regional Director of the Tenth United States Civil Service Region. Both Weinstein and Leach resided within the Eastern District of Louisiana. Service by registered mail was made in the District of Columbia upon the Attorney General of the United States and the United States Civil Service Commission.

Petitioner prayed for a judgment of the District Court setting aside and annulling his discharge by Guerre and the action of the Civil Service Commission confirming

Guerre's action, and declaring that "plaintiff is entitled to an order from the United States Civil Service Commission directing . . . Guerre . . . to restore plaintiff to his aforesaid position" with back pay. Respondents appeared and filed a motion to dismiss because of improper venue and lack of jurisdiction. After this motion was overruled, respondents filed an answer raising, among other things, the same issues. On motions of both parties for summary judgment, the court sustained that of respondents, holding that it lacked jurisdiction over the persons of the Commissioners, who were not residents of the Eastern District of Louisiana and who were indispensable parties. The Court of Appeals affirmed on the ground that there was no venue in the District Court, without prejudice to further proceedings by petitioner in the proper venue. 190 F. 2d 427. We granted certiorari. 342 U. S. 884.

We do not reach the merits in this proceeding. We are met at the threshold with a challenge by motion and answer as to the venue and jurisdiction of the District Court of Louisiana to entertain this action. These defenses as to law and fact were properly presented in this manner. Fed. Rules Civ. Proc., 12 (b).

If the Commission could be sued *eo nomine,* we would be confronted with the question of whether service as here made would be sufficient to bring the Commission into court; but Congress has not constituted the Commission a body corporate or authorized it to be sued *eo nomine.*

It is suggested that such authorization is given by the Hatch Act.[1] Not so. While § 118k (c) of 5 U. S. C. does provide that a state officer or employee found to have violated § 118k (b) may obtain review in the District Court of the district in which he resides, this is not authorization for a new proceeding against the Civil Service Commis-

[1] 53 Stat. 1147, as amended, 54 Stat. 767, § 12 (c), 5 U. S. C. (Supp. IV) § 118k (c).

sion. It is authorization only for a transfer of the case from the Commission to the District Court—a continuation of the same proceeding before another tribunal. Review is instituted by petition and notice to the Commission, which is directed by the Act to file a transcript of the record in the case in the District Court. The court reviews the case on the old record, with the right to hear further evidence. Even this limited review is not afforded federal employees found to have violated § 118 (i). Thus, by no stretch of the imagination can the limited review granted state employees by the Hatch Act be deemed an authorization by Congress for the present suit against the Commission. When Congress authorizes one of its agencies to be sued *eo nomine,* it does so in explicit language, or impliedly because the agency is the offspring of such a suable entity. See *Keifer & Keifer* v. *R. F. C.,* 306 U. S. 381, 390.

Since the Civil Service Commission is not a corporate entity which Congress has authorized to be sued, a suit involving the action of the Commission generally must be brought against the individual Commissioners as members of the United States Civil Service Commission. No such suit was brought here, and no service was had upon the individuals comprising the Civil Service Commission. Therefore, neither the individuals comprising the Civil Service Commission nor the Commission as a suable entity was before the District Court.

We do not have a question of venue as to defendants until we have defendants before the court. The only defendant before the court was Guerre. The venue as to him was all right, but it is obvious no relief can be granted against him.

It is further suggested that judicial review is authorized by the Administrative Procedure Act, 5 U. S. C. § 1001 *et seq.* Certainly there is no specific authorization in that Act for suit against the Commission as an entity. Still

less is the Act to be deemed an implied waiver of all governmental immunity from suit. If the Commission's action is reviewable under § 1009,[2] it is reviewable only in a court of "competent jurisdiction." Assuming, without deciding, that Commission action is reviewable by court action under § 1009, it must follow that review must be in that district where the Commissioners can be served. Since we have held that the Civil Service Commission is not an entity that may be sued anywhere it may be functioning but only the Commissioners may be sued where they can be served, § 1009 does not aid petitioner in an action brought in Louisiana. The courts of the District of Columbia are the only courts of "competent jurisdiction" to reach the members of the Civil Service Commission.

Since the members of the Civil Service Commission were never served, and could not be served, in the District Court for the Eastern District of Louisiana, and the Civil Service Commission is not a corporate entity, it follows that the only defendant before the court was Guerre, and, as we have pointed out, no relief could possibly be granted against him in these proceedings, the judgment is

Affirmed.

MR. JUSTICE BLACK dissents.

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[2] "§ 1009. *Judicial review of agency action.*

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) *Right of review.*

"Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) *Form and venue of proceedings.*

"The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action . . . in any court of competent jurisdiction. . . ."

GRAY ET AL. *v.* BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE ET AL.

NO. 120. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE.*

Argued January 9–10, 1952.—Decided March 3, 1952.

This suit by appellants to enjoin appellees from alleged violations of the Fourteenth Amendment in refusing to admit Negroes to the University of Tennessee must be dismissed as moot, since appellants' requests for admission to the University have been granted and there is no suggestion that any person "similarly situated" will not be afforded similar treatment. Pp. 517–518.

100 F. Supp. 113; 97 F. Supp. 463, judgments vacated with directions to dismiss the action on the ground that the cause is moot.

Robert L. Carter argued the cause for appellants in No. 120 and petitioners in No. 159, Misc. With him on the briefs were *Carl A. Cowan, Thurgood Marshall* and *Z. Alexander Looby.*

John J. Hooker argued the cause for appellees in No. 120. With him on the brief was *K. Harlan Dodson, Jr. Mr. Hooker* and *Mr. Dodson* also filed a brief for the Board of Trustees of the University of Tennessee et al. in No. 159, Misc.

Shackelford Miller, Jr., U. S. Circuit Judge, and *Leslie R. Darr* and *Robert L. Taylor,* U. S. District Judges, filed a response to the rule to show cause in No. 159, Misc.

PER CURIAM.

Appellants, on behalf of themselves and other Negroes "similarly situated," sued in the District Court to enjoin appellees from alleged violations of the Fourteenth Amendment in refusing to admit Negroes to the Univer-

*Together with No. 159, Misc., *Ex parte Gray et al.,* on petition for writ of mandamus.

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sity of Tennessee. A three-judge court, convened at appellants' request, held that this case was not within the jurisdiction of a three-judge court under 28 U. S. C. (Supp. IV) § 2281 and ordered that the case proceed before a single district judge. 100 F. Supp. 113. The single judge held that appellants were entitled to relief but did not enter an order. 97 F. Supp. 463.

Appellants contend that only a court of three judges has jurisdiction over the cause. No. 120 is an appeal from the order dissolving the three-judge court brought directly to this Court under 28 U. S. C. (Supp. IV) § 1253. We set the appeal down for argument, postponing consideration of jurisdictional questions. In No. 159 Misc., appellants asked, in the alternative, that we issue a writ of mandamus to vacate the order dissolving the three-judge court. We issued a rule to show cause why the petition for mandamus should not be granted, 342 U. S. 846, and, upon the filing of a response to the rule, set the petition down for argument with the appeal.

At the argument, counsel for appellees stated that appellants would be admitted to the University of Tennessee as requested. Thereafter, appellants filed a motion stating that appellant Gray has been admitted to the University and that the other appellants were, because of changed circumstances, unable to avail themselves of the opportunity at present. Appellants moved this Court to vacate the order dissolving the three-judge court and to remand the case to that court for further proceedings. Since appellants' requests for admission to the University of Tennessee have been granted and since there is no suggestion that any person "similarly situated" will not be afforded similar treatment, appellants' motion is denied and the judgments below are vacated and the District Court is directed to dismiss the action upon the ground that the cause is moot.

It is so ordered.

FRISBIE, WARDEN, *v.* COLLINS.

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

No. 331. Argued January 28, 1952.—Decided March 10, 1952.

1. That a person was forcibly abducted and taken from one state to another to be tried for a crime does not invalidate his conviction in a court of the latter state under the Due Process Clause of the Fourteenth Amendment. *Ker* v. *Illinois,* 119 U. S. 436. P. 522.
2. A different result is not required by the Federal Kidnaping Act, even if the abduction was a violation of that Act. Pp. 522–523.
3. There being sound arguments to support the conclusion of the Court of Appeals in this case that there were "special circumstances" which required prompt federal intervention, that conclusion is accepted by this Court without deciding whether state remedies had been exhausted before relief from state imprisonment was sought in a federal court. Pp. 520–522.

189 F. 2d 464, reversed.

The district court denied respondent's petition for a writ of habeas corpus. The Court of Appeals reversed. 189 F. 2d 464. This Court granted certiorari. 342 U. S. 865. *Reversed,* p. 523.

Edmund E. Shepherd, Solicitor General of Michigan, argued the cause for petitioner. With him on the brief were *Frank G. Millard,* Attorney General, and *Daniel J. O'Hara,* Assistant Attorney General.

A. Stewart Kerr, acting under appointment by the Court, argued the cause and filed a brief for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Acting as his own lawyer,[1] the respondent Shirley Collins brought this habeas corpus case in a United States

[1] We appointed counsel to represent respondent in this Court. 342 U. S. 892.

District Court seeking release from a Michigan state prison where he is serving a life sentence for murder. His petition alleges that while he was living in Chicago, Michigan officers forcibly seized, handcuffed, blackjacked and took him to Michigan. He claims that trial and conviction under such circumstances is in violation of the Due Process Clause of the Fourteenth Amendment and the Federal Kidnaping Act,[2] and that therefore his conviction is a nullity.

The District Court denied the writ without a hearing on the ground that the state court had power to try respondent "regardless of how presence was procured." The Court of Appeals, one judge dissenting, reversed and remanded the cause for hearing. 189 F. 2d 464. It held that the Federal Kidnaping Act had changed the rule declared in prior holdings of this Court, that a state could constitutionally try and convict a defendant after acquiring jurisdiction by force.[3] To review this important question we granted certiorari. 342 U. S. 865.

We must first dispose of the state's contention that the District Court should have denied relief on the ground that respondent had an available state remedy. This argument of the state is a little cloudy, apparently because of the state attorney general's doubt that any state procedure used could possibly lead to the granting of relief. There is no doubt that as a general rule federal courts should deny the writ to state prisoners if there is "available State corrective process." 62 Stat. 967, 28 U. S. C. § 2254.[4] As explained in *Darr* v. *Burford,* 339

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[2] 47 Stat. 326, as amended, 18 U. S. C. § 1201.

[3] *Ker* v. *Illinois,* 119 U. S. 436; *Mahon* v. *Justice,* 127 U. S. 700. See also *Lascelles* v. *Georgia,* 148 U. S. 537; *In re Johnson,* 167 U. S. 120.

[4] "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the rem-

U. S. 200, 210, this general rule is not rigid and inflexible; district courts may deviate from it and grant relief in special circumstances. Whether such circumstances exist calls for a factual appraisal by the court in each special situation. Determination of this issue, like others, is largely left to the trial courts subject to appropriate review by the courts of appeals.

The trial court, pointing out that the Michigan Supreme Court had previously denied relief, apparently assumed that no further state corrective process was available [5] and decided against respondent on the merits. Failure to discuss the availability of state relief may have been due to the fact that the state did not raise the question; indeed the record shows no appearance of the state.[6] The Court of Appeals did expressly consider the question of exhaustion of state remedies. It found the existence of

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edies available in the courts of the State, or that there is either an absence of available State corrective process *or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.* [Emphasis added.]

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

[5] The Court said, "Petitioner originally filed a petition for a writ of habeas corpus in the Supreme Court of the State of Michigan which was denied on June 22, 1949. He then filed a petition for a writ in this District, on the ground that the complaint in the state court action was defective and that a faulty warrant was issued for his arrest, claiming further that he was kidnapped by Michigan Police authorities in Chicago, Illinois, and brought to Michigan for trial. This petition was also denied."

[6] So far as the record shows, the state's first objection to federal court consideration of this case was made after the Court of Appeals decided in respondent's favor. A motion for rehearing then filed alleged that respondent had made several futile efforts to have his conviction reviewed. The motion also denied that the particular ground here relied on had previously been raised.

"special circumstances" which required prompt federal intervention "in this case." It would serve no useful purpose to review those special circumstances in detail. They are peculiar to this case, may never come up again, and a discussion of them could not give precision to the "special circumstances" rule. It is sufficient to say that there are sound arguments to support the Court of Appeals' conclusion that prompt decision of the issues raised was desirable. We accept its findings in this respect.

This Court has never departed from the rule announced in *Ker* v. *Illinois,* 119 U. S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." [7] No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

Despite our prior decisions, the Court of Appeals, relying on the Federal Kidnaping Act, held that respondent was entitled to the writ if he could prove the facts he alleged. The Court thought that to hold otherwise after the passage of the Kidnaping Act "would in practical effect lend encouragement to the commission of criminal acts by those sworn to enforce the law." In considering whether the law of our prior cases has been changed by the Federal Kidnaping Act, we assume, without intimating that it is so, that the Michigan officers would have violated it if the facts are as alleged. This Act prescribes

[7] See cases cited, *supra,* n. 2.

in some detail the severe sanctions Congress wanted it to have. Persons who have violated it can be imprisoned for a term of years or for life; under some circumstances violators can be given the death sentence. We think the Act cannot fairly be construed so as to add to the list of sanctions detailed a sanction barring a state from prosecuting persons wrongfully brought to it by its officers. It may be that Congress could add such a sanction.[8] We cannot.

The judgment of the Court of Appeals is reversed and that of the District Court is affirmed.

It is so ordered.

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[8] Cf. *Mahon* v. *Justice, supra,* n. 3, 705.

CARLSON ET AL. *v.* LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE.

NO. 35. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.*

Argued November 26, 1951.—Decided March 10, 1952.

1. Under § 20 (a) of the Immigration Act, as amended by § 23 of the Internal Security Act, the Attorney General may, in his discretion, hold in custody without bail, pending determination as to their deportability, aliens who are members of the Communist Party of the United States, when there is reasonable cause to believe that their release on bail would endanger the safety and welfare of the United States. Pp. 526–547.
2. The lack of a clause in the Constitution specifically empowering such action does not render Congress impotent to require the expulsion of resident alien Communists. Pp. 533–537.

   (a) So long as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders. P. 534.

   (b) The doctrines and practices of Communism teach the use of force to achieve political control clearly enough to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien Communists. Pp. 534–536.
3. Under orders from the Acting Commissioner of Immigration, certain aliens were arrested under warrants issued after enactment of the Internal Security Act, charging them with being members of the Communist Party and directing that they be held in custody pending determination of deportability. They petitioned for habeas corpus. Respondent filed returns alleging that there was reasonable cause to believe that their release would endanger the welfare and safety of the United States. Later he filed affidavits that the Service had evidence indicating that each petitioner was

*Together with No. 136, *Butterfield, Director of Immigration and Naturalization Service,* v. *Zydok,* on certiorari to the United States Court of Appeals for the Sixth Circuit.

at the time of arrest a member of the Communist Party and had since 1930 participated, or was then actively participating, in the Party's indoctrination of others to the prejudice of the public interest. *Held:*

(a) The refusal of bail in these cases was not arbitrary or capricious or an abuse of power and did not violate the Due Process Clause of the Fifth Amendment. Pp. 537–542.

(1) The discretion as to bail vested in the Attorney General by the Internal Security Act was broad enough to justify petitioners' detention without bail as a menace to the public interest. Pp. 537–541.

(2) There is no denial of due process under the Fifth Amendment in the detention of alien Communists without bail, pending determination of deportability, where there is reasonable cause to believe that their release on bail would endanger the safety and welfare of the United States. Pp. 541–542.

(b) The delegation to the Attorney General of discretionary authority to detain such aliens without bail pending deportation hearings does not constitute an unlawful delegation of legislative power or violate the Due Process Clause of the Fifth Amendment, because the statute contains definite legislative standards for deportation and such authority is to be exercised within the framework of the Subversive Activities Control Act to guard against Communist activities pending deportation hearings. Pp. 542–544.

(c) The Eighth Amendment does not require that bail be allowed in the circumstances of these cases. Pp. 544–546.

4. Prior to enactment of the Internal Security Act, an alien Communist was arrested under a warrant charging that he was subject to deportation as an alien member of an organization advocating the violent overthrow of the Government; but he was released on bail. After the effective date of the Act, he was again taken into custody under the same warrant and held without bail under an order from the Acting Commissioner of Immigration, based on §§ 22 and 23 of the Internal Security Act. *Held:* He must be released unless, within a reasonable time in the discretion of the court, he is rearrested under a new warrant. Pp. 531, 546–547.

187 F. 2d 991, affirmed.

187 F. 2d 802, judgment vacated and cause remanded.

No. 35. In habeas corpus proceedings, a district court held that respondent had not abused his discretion in ordering petitioners held without bail pending deporta-

tion hearings. 94 F. Supp. 18. The Court of Appeals reversed. 186 F. 2d 183. On rehearing and after introduction of certain evidence, the district court again sustained petitioners' detention without bail. The Court of Appeals affirmed. 187 F. 2d 991. This Court granted certiorari. 342 U. S. 807. *Affirmed,* p. 547.

No. 136. In a habeas corpus proceeding, the district court sustained detention of respondent without bail pending determination of deportability. The Court of Appeals reversed. 187 F. 2d 802. This Court granted certiorari. 342 U. S. 810. *Judgment vacated and cause remanded,* p. 547.

John T. McTernan argued the cause and *John W. Porter, Ben Margolis, Carol King* and *A. L. Wirin* filed a brief for petitioners in No. 35.

John F. Davis argued the cause for petitioner in No. 136 and respondent in No. 35. With him on the briefs were *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg.*

Carol King argued the cause for respondent in No. 136. With her on the brief was *Alan N. Brown.*

MR. JUSTICE REED delivered the opinion of the Court.

These cases present a narrow question with several related issues. May the Attorney General, as the executive head of the Immigration and Naturalization Service,[1] after taking into custody active alien Communists on warrants,[2] charging either membership in a group that ad-

[1] Reorganization Plan No. V, 54 Stat. 1238.

[2] Sec. 19 of an Act to regulate the immigration of aliens to, and the residence of aliens in, the United States, 39 Stat. 889, February 5, 1917, as amended 8 U. S. C. § 155:

". . . any alien who shall have entered or who shall be found in the United States in violation of this chapter, or in violation of any other law of the United States; . . . shall, upon the warrant of the Attorney General, be taken into custody and deported. . . ."

vocates the overthrow by force of this Government [3] or inclusion in any prohibited classes of aliens,[4] continue them in custody without bail, at his discretion pending determination as to their deportability, under § 23 of the

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[3] Act of October 16, 1918, 40 Stat. 1012, as amended, 8 U. S. C. (1946 ed.) § 137, see note 15, *infra:*

"(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law. . . ."

[4] Internal Security Act of 1950, September 23, 1950, § 22, subsection 4 (a), amending the Act of October 16, 1918, see 8 U. S. C. § 137:

"Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1 (1) or section 1 (3) of this Act or . . . a member of any one of the classes of aliens enumerated in section 1 (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States."

Id., § 22:

"That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

"(1) Aliens who seek to enter the United States whether solely, principally, or incidentally, to engage in activities which would be prejudicial to the public interest, or would endanger the welfare or safety of the United States;

"(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

"(A) Aliens who are anarchists;

"(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

"(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical sub-

Internal Security Act?[5] Differing views of the Courts of Appeals led us to grant certiorari. 342 U. S. 807, 810.

I. *Facts.*—The four petitioners in case No. 35 were arrested under warrants, issued after the enactment of the Internal Security Act of 1950, charging each with being an alien who was a member of the Communist Party of the United States.[6] The warrants directed that they be held in custody,[7] pending determination

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division of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;

. . . . . .

"(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law; . . . .

. . . . . .

"(3) Aliens with respect to whom there is reason to believe that such aliens would, after entry, be likely to (A) engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security; (B) engage in any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unconstitutional means; or (C) organize, join, affiliate with, or participate in the activities of any organization which is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950."

[5] Internal Security Act of 1950, § 23:

". . . Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. . . ."

[6] See § 22 (1), Internal Security Act, note 4, *supra.*

[7] See note 5, *supra.*

of deportability.[8] Petitions for habeas corpus were promptly filed alleging that the detention without bond was in violation of the Due Process Clause of the Fifth Amendment [9] and the Eighth Amendment to the Constitution of the United States, and that § 20 of the Immigration Act, as amended, was also unconstitutional. See note 5, *supra*. The allegation appears below.[10]

Respondent filed returns defending his orders of detention on the ground that there was reasonable cause to believe that petitioners' release would be prejudicial to the public interest and would endanger the welfare and safety of the United States. These returns were countered by petitioners with allegations of their many years' residence spent in this country without giving basis for fear of action by them inimical to the public welfare during the pendency of their deportation proceedings,

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[8] Before the passage of the Internal Security Act the four petitioners had been arrested and admitted to bail on warrants charging membership in groups advocating the overthrow of the Government by force and violence. In our view of the issues now here, these former happenings are immaterial to our consideration of this writ of certiorari.

[9] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[10] "That section 20 of the Immigration Act of February 5, 1917, as amended by section 23 of Public Law 831, 81st Congress (commonly known as Subversive Activities Control Act of 1950) and section 1 of the Act of October 16, 1918 (8 U. S. C. 137), as amended, are, and each of them is, unconstitutional and void in that they deprive persons, including petitioner, of liberty and property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States in that they abridge the freedom of persons, including petitioner, of speech, the press and assembly and the right to petition the government for redress of grievances, in violation of the First Amendment to the Constitution of the United States, and in that they purport to authorize indefinite detention of persons, including petitioner, without bond prior to final determination of deportability."

their integration into community life through marriage and family connections, and their meticulous adherence to the terms of previous bail, allowed under a former warrant charging deportability. See note 8, *supra*. On consideration of these undenied allegations, the trial court determined that the Director had not been shown to have abused his discretion.[11] This order was reversed on the ground that the Director "must state some fact upon which a reasonable person could logically conclude that the denial of bail is required to protect the country or to secure the alleged alien's presence for deportation should an order to that effect be the result of the hearing." [12]

On rehearing, the Director made allegation, supported by affidavits, that the Service's dossier of each petitioner contained evidence indicating to him that each was at the time of arrest a member of the Communist Party of the United States and had since 1930 participated or was then actively participating in the Party's indoctrination of others to the prejudice of the public interest. There was no denial of these allegations by any of the petitioners, except Hyun, or any assertion that any of them had completely severed all Communist affiliations or connections.[13] As to Hyun the denial was formal and did not include any affidavit denying the facts stated in the Director's affidavit. As the allegations are set out by the Court of Appeals in the carefully detailed opinion of Circuit Judge Stephens, we refrain from any further re-

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[11] *Carlson* v. *Landon*, 186 F. 2d 183, 186; *Stevenson* v. *Landon*, 186 F. 2d 190.

[12] *Id.*, at 189.

[13] 28 U. S. C. § 2248:

"The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true."

statement here.[14] The Court of Appeals affirmed the District Court's determination that there was substantial evidence to support the discretion exercised in denying bail.

Respondent Zydok, in case No. 136, was arrested in August 1949 under a recent warrant charging that he was subject to deportation as an alien with membership in an organization advocating the violent overthrow of the Government. Act of October 16, 1918, as amended, 8 U. S. C. (1946 ed.) § 137. At that time he was released on $2,000 bail. Later a deportation hearing was held by the Immigration and Naturalization Service but this Court's decision in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, necessitated a second deportation hearing.

After the effective date, September 23, 1950, of the Internal Security Act of 1950, respondent was again taken into custody by petitioner on the 1949 warrant, pursuant to radiogram direction from the Acting Commissioner of Immigration and Naturalization referring to § 20 of the Immigration Act of 1917, as amended by § 23 of the Internal Security Act. The respondent was held without bail by petitioner under an order from the Acting Commissioner of Immigration. The rearrest was based on § 22 of the Internal Security Act of 1950 which provides for the deportation of aliens who are members of or affiliated with the Communist Party. 8 U. S. C. (Supp. IV) § 137.

Thereupon respondent filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Michigan, challenging the validity of his detention without bail. The District Court found that petitioner was an alien and had been and was on arrest a member of the Communist Party. The court determined

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[14] *Carlson* v. *Landon,* 187 F. 2d 991.

that there had been no abuse of administrative discretion in refusing bail and denied the petition for habeas corpus.[15]

The Court of Appeals for the Sixth Circuit reversed the District Court, holding that in determining denial of bail the Attorney General could not rest on membership alone in the Communist Party but was under the duty to consider also the likelihood that the alien would appear when ordered to do so under the circumstances as developed in the habeas corpus hearing. The court thought the failure of the Attorney General to allow bail was an abuse of discretion.

That court agreed that the District Court was correct in finding that Zydok was a member of the Communist Party and had been in 1949 the financial secretary of its Hamtramck Division. The respondent's testimony justifies the District Court's finding set out in the margin.[16] The record shows other information in the files of the Attorney General, such as attendance at closed meetings of the Party and the Michigan State Convention. The opinion succinctly sets out the facts concerning respondent's integration into American life. We adopt that statement.[17] It was said:

> "Discretion does not mean decision upon one particular fact or set of facts. It means rather a just

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[15] Quite properly, we think, no question is raised as to the applicability of the Internal Security Act amendments relating to membership in the Communist Party and allowance of bail, notes 4 and 5, *supra*, to detention under a warrant based on 8 U. S. C. (1946 ed.) § 137 (c), note 3, *supra*. Cf. Internal Security Act, 64 Stat. 987, Title I, § 2.

[16] "That the petitioner, while under cross-examination by the Chief Assistant United States Attorney, was a consistently evasive witness and his evasive demeanor in testifying in relation to his communistic activities convinces this Court that he is knowingly and wilfully participating in the Communist movement."

[17] 187 F. 2d at 803:

"Appellant was seventeen years of age when he arrived in this country from Poland in 1913. Since then he has lived continuously

and proper decision in view of all the attending circumstances. The Styria v. Morgan, 186 U. S. 1, 9, 22 S. Ct. 731, 46 L. Ed. 1027. There are many circumstances which involve decision." 187 F. 2d 802, 803.

The Court of Appeals concluded:

"We think that a fair consideration of the factors above set out in their aggregate require that appellant should have been granted bail in some reasonable amount. This view is more nearly in accordance with the spirit of our institutions as it relates even to those who seek protection from the laws which they incongruously seek to destroy. See Carlson v. Landon, Dist. Director, 9 Cir., 186 F. 2d 183; United States ex rel. Potash v. Dist. Director, 2 Cir., 169 F. 2d 747, 752." *Id.*, at 804.

II. *The Issues.*—Petitioners in No. 35, the *Carlson* case, and respondent in No. 136, the *Zydok* case, seek respectively reversal or affirmance principally on the same grounds. It is urged that the denial of bail to each was arbitrary and capricious, a violation of the Fifth Amend-

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in the State of Michigan. He has been a waiter in an English speaking restaurant in Hamtramck, Mich., for seventeen years and for a great part of that time he was head waiter. He owns his own home in Detroit and has a family consisting of his wife, two sons, a daughter, and five grandchildren. Both sons served in the armed services of the United States in World War II. His children and grandchildren were born in this country and his daughter married here. During World War II while appellant was head waiter in the restaurant he sold about $50,000.00 worth of U. S. War Bonds and during that period he donated blood on seven occasions to the Red Cross for the United States Army.

"Before his second arrest and while he was at large on bail he reported regularly to the Department of Immigration and Naturalization Service. The record fails to disclose that he has violated any law or that he is engaged or is likely to engage in, any subversive activities."

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ment; that where there is no evidence to justify a fear of unavailability for the hearings or for the carrying out of a possible judgment of deportation, denial of bail under the circumstances of these cases is an abuse of discretion and violates a claimed right to reasonable bail secured by the Eighth Amendment to the Constitution. Zydok urges, also, that there was an abuse of discretion in rearresting him, when there was no change of circumstances, after his previous release under bond on the same warrant. There are other minor contentions as to irregularities in the proceedings that appear to us immaterial to our consideration of these cases.

The basis for the deportation of presently undesirable aliens resident in the United States is not questioned and requires no reexamination. When legally admitted, they have come at the Nation's invitation, as visitors or permanent residents, to share with us the opportunities and satisfactions of our land. As such visitors and foreign nationals they are entitled in their persons and effects to the protection of our laws. So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders.[18]

Changes in world politics and in our internal economy bring legislative adjustments affecting the rights of various classes of aliens to admission and deportation.[19] The

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[18] *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707; *Bugajewitz* v. *Adams*, 228 U. S. 585; *Ng Fung Ho* v. *White*, 259 U. S. 276, 280; *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 318; *Eichenlaub* v. *Shaughnessy*, 338 U. S. 521, 528; III Hackworth's Digest of International Law 725 (1942).

[19] For example compare Act of December 17, 1943, 57 Stat. 600, with Act of May 6, 1882, 22 Stat. 58.

passage of the Internal Security Act of 1950 marked such a change of attitude toward alien members of the Communist Party of the United States. Theretofore there was a provision for the deportation of alien anarchists and other aliens, who are or were members of organizations devoted to the overthrow by force and violence of the Government of the United States, but the Internal Security Act made Communist membership alone of aliens a sufficient ground for deportation.[20] The reasons for the exercise of power are summarized in Title I of the Internal Security Act. It is sufficient here to print § 2 (15).[21] We have no doubt that the doctrines and practices of

[20] See note 4, *supra*. The extension of the proscription of residence to aliens believing in the overthrow of Government by force or violence has been progressive, as can be readily observed by following the successive enactments of laws to regulate the residence of aliens since the Act of February 5, 1917, 39 Stat. 874. See 8 U. S. C. §§ 137 and 155.

[21] "(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

Communism clearly enough teach the use of force to achieve political control to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien Communists under its power to regulate the exclusion, admission and expulsion of aliens.[22] Congress had before it evidence of resident aliens' leadership in Communist domestic activities sufficient to furnish reasonable ground for action against alien resident Communists. The bar against the admission of Communists cannot be differentiated as a matter of power from that against anarchists upheld unanimously half a century ago in the exclusion of Turner.[23] Since "[i]t is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful," [24] the fact that petitioners, and respondent Zydok, were made deportable after entry is immaterial. They are deported for what they are now, not for what they were.[25] Otherwise, when an alien once legally became a denizen of this country he could not be deported

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[22] I Trotsky, History of the Russian Revolution, 106, 120, 141, 144, 151; Lenin, Collected Works (1930), Vol. XVIII, pp. 279–280; Lenin, The State and Revolution, August, 1917, Foreign Languages Publishing House, Moscow (1949), 28, 30, 33. Translations furnished indicate the same attitude on the part of Stalin. Collected Works, Vol. I, pp. 131–137, 185–205, 241–246; Vol. III, pp. 367–370. And see Leites, The Operational Code of the Politburo (1950), c. xiii, "Violence." See also Immigration and Naturalization Systems of the United States, S. Rep. No. 1515, 81st Cong., 2d Sess., Senate Committee on the Judiciary, Part 3, Subversives, c. I, B, Alien Control; c. II, C, Deportation of Subversive Aliens.

[23] *Turner* v. *Williams,* 194 U. S. 279; *Schneiderman* v. *United States,* 320 U. S. 118, MR. JUSTICE DOUGLAS concurring at 165.

[24] *Bugajewitz* v. *Adams,* 228 U. S. 585, 591; *Ng Fung Ho* v. *White,* 259 U. S. 276, 280.

[25] *Mahler* v. *Eby,* 264 U. S. 32, 39:

"[Congress] was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that

for any reason of which he had not been forewarned at the time of entry. Mankind is not vouchsafed sufficient foresight to justify requiring a country to permit its continuous occupation in peace or war by legally admitted aliens, even though they never violate the laws in effect at their entry. The protection of citizenship is open to those who qualify for its privileges. The lack of a clause in the Constitution specifically empowering such action has never been held to render Congress impotent to deal as a sovereign with resident aliens.[26]

III. *Constitutionality.*—A. *Arbitrary, capricious, abuse of discretion.*—The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, "with such opportunity for judicial review of their action as Congress may see fit to authorize or permit." This power is, of course, subject to judicial intervention under the "paramount law of the Constitution." [27]

Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution.[28] Since deportation is a particularly drastic remedy where aliens have

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their continued presence here would not make for the safety or welfare of society." See also *Eichenlaub* v. *Shaughnessy,* 338 U. S. 521, 530. Compare *Harisiades* v. *Shaughnessy,* 342 U. S. 580, decided today.

[26] *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304, 318.

[27] *Fong Yue Ting* v. *United States,* 149 U. S. 698, 713–715, 728; *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 659; *The Japanese Immigrant Case,* 189 U. S. 86, 97; *Zakonaite* v. *Wolf,* 226 U. S. 272; *Wong Wing* v. *United States,* 163 U. S. 228, 231.

A claim of citizenship has protection. *Ng Fung Ho* v. *White,* 259 U. S. 276.

[28] *Turner* v. *Williams,* 194 U. S. 279, 290–291; *Zakonaite* v. *Wolf,* 226 U. S. 272, 275; *Bugajewitz* v. *Adams,* 228 U. S. 585, 591; *Mahler* v. *Eby,* 264 U. S. 32.

become absorbed into our community life,[29] Congress has been careful to provide for full hearing by the Immigration and Naturalization Service before deportation. Such legislative provision requires that those charged with that responsibility exercise it in a manner consistent with due process.[30] Detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings. Of course purpose to injure could not be imputed generally to all aliens subject to deportation, so discretion was placed by the 1950 Act in the Attorney General to detain aliens without bail, as set out in note 5, *supra*.[31]

The change in language seems to have originated in H. R. 10, 81st Cong., 1st Sess., introduced by Representative Sam Hobbs of Alabama on January 3, 1949. It was

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[29] *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10; *Jordan* v. *De George*, 341 U. S. 223, 231.

[30] *The Japanese Immigrant Case*, 189 U. S. 86; *Vajtauer* v. *Commissioner*, 273 U. S. 103.

[31] The former provision read as follows:

". . . Pending the final disposal of the case of any alien so taken into custody, he may be released under a bond in the penalty of not less than $500 with security approved by the Attorney General, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States." 8 U. S. C. (1946 ed.) § 156.

On December 7, 1951, at the request of this Court, the Government furnished us a list of the Bail or Detention Status, as of the period just prior to December 7, of deportation cases, involving subversive charges, pending on the date of the enactment of the Internal Security Act, September 23, 1950. The list indicates that the modest bonds or personal recognizances of the far larger part of the aliens remained unchanged after the bond amendment to the Immigration Act. Of those detained without bond on order of the Service, the courts have released all but a few. It is quite clear from the list that detention without bond has been the exception.

intended to clarify the procedure in dealing with deportees and to "expressly authorize the Attorney General, in his discretion, to hold arrested aliens in custody." [32] The need for clarification arose from varying interpretations of the authority to grant bail under the former bail provision. Note 31, *supra.* In *Prentis* v. *Manoogian,* 16 F. 2d 422, 424, the Court of Appeals for the Sixth Circuit had held that by the earlier provision "Congress intended to grant to the alien a right, and that its failure to follow with some such phrase as 'at the discretion of the commissioner' vests the discretion to avail himself of the opportunity afforded in the alien, and not the discretion to allow bail in the commissioner or director." On the other hand in *United States ex rel. Zapp* v. *District Director,* 120 F. 2d 762, the Court of Appeals for the Second Circuit construed the provision to the contrary. It said:

> "The natural interpretation of the language used, that the alien 'may be released under a bond,' would indicate that the release is discretionary with the Attorney General; and that appears to be borne out by other provisions of this section, as well as other sections of the immigration laws, where the choice of words appears to have significance." P. 765.

In the later case of *United States ex rel. Potash* v. *District Director,* 169 F. 2d 747, the same court applied its *Zapp* opinion to explain that the Service's discretion as to bail was not untrammeled but subject to judicial review.[33] It

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[32] H. R. Rep. No. 1192, 81st Cong., 1st Sess., p. 6; S. Rep. No. 2239, 81st Cong., 2d Sess., p. 5.

[33] 169 F. 2d at 751:

"The discretion of the Attorney General which we held to exist in the Zapp case is interpreted as one which is to be reasonably exercised upon a consideration of such factors, among others, as the probability of the alien being found deportable, the seriousness of the charge against him, if proved, the danger to the public safety of his presence within the community, and the alien's availability for subsequent

was in the light of these cases that Congress inserted in the bail provisions the phrase "in the discretion of the Attorney General," the lack of which very phrase the *Manoogian* case held made bail a right of the detained alien. The present statute does not grant bail as a matter of right.

The Government does not urge that the Attorney General's discretion is not subject to any judicial review, but merely that his discretion can be overturned only on a showing of clear abuse.[34] We proceed on the basis suggested by the Government. It is first to be observed that the language of the reports is emphatic in explaining Congress' intention to make the Attorney General's exercise of discretion presumptively correct and unassailable except for abuse. We think the discretion reposed in the Attorney General is at least as great as that found by the Second Circuit in the *Potash* case, *supra,* to be in him under the former bail provision. It can only be

proceedings if enlarged on bail. However, in any consideration of his denial of bail it should always be borne in mind that the court's opinion as to whether the alien should be admitted to bail can only override that of the Attorney General where the alien makes a clear and convincing showing that the decision against him was without a reasonable foundation." See *U. S. ex rel. Doyle* v. *District Director,* 169 F. 2d 753; *U. S. ex rel. Pirinsky* v. *Shaughnessy,* 177 F. 2d 708; *U. S. ex rel. De Geronimi* v. *Shaughnessy,* 187 F. 2d 896. (This is the only case from the Second Circuit Court of Appeals since the Internal Security Act. It leaves open the question of the reviewability of the Attorney General's action under that Act.)

[34] The proposed bills at one time contained a provision:

"(f) No alien detained under any provision of law relating to the exclusion or expulsion of aliens shall, prior to an unreviewable order discharging him from custody, be released by any court, on bond or otherwise, except pursuant to the order of a Federal court composed of three judges." S. Rep. No. 2239, 81st Cong., 2d Sess., p. 3. This was introduced to allow for possible release from custody pending deportation hearings. *Id.,* at p. 9. The clause did not survive.

overridden where it is clearly shown that it "was without a reasonable foundation."

The four petitioners in the *Carlson* case were active in Communist work. In the *Zydok* case the only evidence is membership in the Party, attendance at closed sessions and the holding of the office of financial secretary of its Hamtramck Division. This evidence goes beyond unexplained membership and shows a degree, minor perhaps in Zydok's case, of participation in Communist activities. As the purpose of the Internal Security Act to deport all alien Communists as a menace to the security of the United States is established by the Internal Security Act itself, Title I, § 2, we conclude that the discretion as to bail in the Attorney General was certainly broad enough to justify his detention of all these parties without bail as a menace to the public interest. As all alien Communists are deportable, like Anarchists, because of Congress' understanding of their attitude toward the use of force and violence in such a constitutional democracy as ours to accomplish their political aims, evidence of membership plus personal activity in supporting and extending the Party's philosophy concerning violence gives adequate ground for detention. It cannot be expected that the Government should be required in addition to show specific acts of sabotage or incitement to subversive action. Such an exercise of discretion is well within that heretofore approved in *Knauff* v. *Shaughnessy,* 338 U. S. 537, 541.[35] There is no

[35] Even though we also take into consideration the factor of probable availability for trial, which we do not think is of great significance in cases involving security from Communist activities of alien Communists, the past record of these aliens is far from decisive against the Attorney General's action. The Internal Security Act made membership sufficient for deportation and set up a procedure that could be carried out. § 22 (2) (C), note 4, *supra,* and § 23. Deportation became more likely for alien Communists by these amendments.

evidence or contention that all persons arrested as deportable under § 22 of the Internal Security Act, note 4, *supra,* for Communist membership are denied bail. In fact, a report filed with this Court by the Department of Justice in this case at our request shows allowance of bail in the large majority of cases. The refusal of bail in these cases is not arbitrary or capricious or an abuse of power. There is no denial of the due process of the Fifth Amendment under circumstances where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government.

B. *Delegation of Legislative Power.*—This leaves for consideration the constitutionality of this delegation of authority. We consider first the objection to the alleged unbridled delegation of legislative power in that the Attorney General is left without standards to determine when to admit to bail and when to detain. It is familiar law that in such an examination the entire Act is to be looked at and the meaning of the words determined by their surroundings and connections. Congress can only legislate so far as is reasonable and practicable, and must leave to executive officers the authority to accomplish its purpose.[36] Congress need not make specific standards for each subsidiary executive action in carrying out a policy.[37] The bail provision applies to many

[36] *Buttfield* v. *Stranahan,* 192 U. S. 470; *Union Bridge Co.* v. *United States,* 204 U. S. 364, 386; *United States* v. *Grimaud,* 220 U. S. 506; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 421:

"The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply."

[37] *Wayman* v. *Southard,* 10 Wheat. 1, 43–48; *St. Louis, I. M. & S. R. Co.* v. *Taylor,* 210 U. S. 281, 286; *Intermountain Rate Cases,* 234

classes of deportable aliens other than those named in the classes listed in § 22 of the Internal Security Act. See note 4, *supra*.[38] A wide range of discretion in the Attorney General as to bail is required to meet the varying situations arising from the many aliens in this country.[39]

The policy and standards as to what aliens are subject to deportation are, in general, clear and definite. 8 U. S. C. §§ 137 and 155. Specifically when dealing with alien Communists, as in these cases, the legislative standard for deportation is definite. See notes 3 and 4, *supra*. In carrying out that policy the Attorney General is not left with untrammeled discretion as to bail. Courts review his determination. Hearings are had, and he must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity. The legislative judgment of evils calling for the 1950

U. S. 476, 486–489; *Fahey* v. *Mallonee*, 332 U. S. 245, 249. See *Yakus* v. *United States*, 321 U. S. 414, 424–425:

"The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct . . . . These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework."

[38] Any alien becoming a public charge within five years of entry may be subject to deportation. Likewise any alien sentenced more than once for any crime involving moral turpitude, and certain illegal entrants. See 8 U. S. C. § 155.

[39] Approximately 85,000,000 people, citizens and aliens, are said to have crossed our borders in the 1949 fiscal year. Some many times. Five million aliens are reported to have registered under the Alien Registration Act of 1940. S. Rep. No. 1515, pp. 630–631, *supra*, n. 22.

amendments to deportation legislation is set out in the introductory sections of the Subversive Activities Control Act.[40] So far as pertinent to these proceedings, the new legislation was designed to eliminate the subversive activities of resident aliens who seek to inculcate the doctrine of force and violence into the political philosophy of the American people. To this end provision was made for the detention and deportation of certain noncitizens, including members of the Communist Party. When in the judgment of the Attorney General an alien Communist may so conduct himself pending deportation hearings as to aid in carrying out the objectives of the world communist movement, that alien may be detained. Compare *Yakus* v. *United States,* 321 U. S. 414, and *Bowles* v. *Willingham,* 321 U. S. 503, 515. This is a permissible delegation of legislative power because the executive judgment is limited by adequate standards. The authority to detain without bail is to be exercised within the framework of the Subversive Activities Control Act to guard against Communist activities pending deportation hearings. Cf. *Mahler* v. *Eby,* 264 U. S. 32, 40. We do not see that such discretion violates the Due Process Clause of the Fifth Amendment.

C. *Violation of Eighth Amendment.*—The contention is also advanced that the Eighth Amendment to the Constitution, note 9, *supra,* compels the allowance of bail in a reasonable amount. We have in the preceding sections of this opinion set out why this refusal of bail is not an abuse of power, arbitrary or capricious, and why the delegation of discretion to the Attorney General is not unconstitutional. Here we meet the argument that the Constitution requires by the Eighth Amendment, note 9, *supra,* the same reasonable bail for alien Communists under deportation charges as it accords citizens charged with bail-

[40] See for example § 2 (15), quoted above at note 21.

able criminal offenses. Obviously the cases cited by the applicants for habeas corpus fail flatly to support this argument.[41] We have found none that do.

The bail clause was lifted with slight changes from the English Bill of Rights Act.[42] In England that clause has never been thought to accord a right to bail in all cases,[43] but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept.[44] The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death.[45] Indeed,

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[41] Attention is called to *United States ex rel. Potash* v. *District Director,* 169 F. 2d 747, 752:

"If the Eighth Amendment to the Constitution is considered to have any bearing upon the right to bail in deportation proceedings, and this has been denied, it is our opinion that the provisions of that Amendment and any requirement of the due process provisions of the Fifth Amendment will be fully satisfied if the standards of fairness and reasonableness we have set forth regarding the exercise of discretion by the Attorney General are observed."

United States ex rel. Klig v. *Shaughnessy,* 94 F. Supp. 157, 160:

"It is not unappropriate to refer here to the Eighth Amendment to the Constitution of the United States, one of that series of amendments collectively known as the Bill of Rights, which prohibits the imposition of excessive bail. Certainly, the principle inherent in that amendment applies to deportation proceedings, whether or not such proceedings technically fall within its scope. That principle cannot be reconciled with the government's denial of bail to these relators under the circumstances here set forth."

[42] 1 Wm. & Mary, Sess. 2, c. II, § I (10).

[43] Petersdorff, on Bail, 483 *et seq.*

[44] I Annals of Congress 753.

[45] 1 Stat. 91, § 33; Federal Rules of Criminal Procedure, 46 (a).

Similarly, on appeal from a conviction by the trial court, a defendant is not entitled to bail if he does not present a substantial question. Fed. Rules Crim. Proc., 46 (a)(2); *Bridges* v. *United States,* 184

the very language of the Amendment fails to say all arrests must be bailable. We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases.

It should be noted that the problem of habeas corpus after unusual delay in deportation hearings is not involved in this case. Cf. *United States ex rel. Potash* v. *District Director*, 169 F. 2d 747, 751.

IV. *Rearrest.*—Finally, respondent Zydok argues that his rearrest on the outstanding warrant, after he had once been released on bail, was improper. The inquiry on habeas corpus is limited to the propriety of Zydok's present detention. *McNally* v. *Hill*, 293 U. S. 131, 136. While the Attorney General has made a satisfactory showing that he has good cause for detaining Zydok without bail, no order based on a new warrant has been entered.[46] Zydok did not allow the proceedings to run along but objected promptly by habeas corpus to detention under the warrant. It has been said that the rule in criminal cases is that a warrant once executed is exhausted.[47] This guards against precipitate rearrest. Where, however, the rearrest comes after the discovery of error in release, a new warrant is not necessarily required.[48] State cases have held that an escaped person or one who secured his

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F. 2d 881, 884; *Williamson* v. *United States*, 184 F. 2d 280, 281; *Baker* v. *United States*, 139 F. 2d 721.

In England, there was a series of crimes and situations where the arrested person could "have no other sureties but the four walls of the prison." Blackstone's Commentaries, Book IV, 298.

[46] See *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 158, and cases there cited; *Mahler* v. *Eby*, 264 U. S. 32, 45. These cases had valid orders entered subsequent to an invalid arrest.

[47] See *United States ex rel. Heikkinen* v. *Gordon*, 190 F. 2d 16, 19; *Doyle* v. *Russell*, 30 Barb. (N. Y.) 300.

[48] *People ex rel. Wolfe* v. *Johnson*, 230 N. Y. 256, 130 N. E. 286.

release by trick may be rearrested without a new warrant.[49] Although a warrant for rearrest is required by statute, when a convicted person is paroled his status on violation of the parole is the same as that of an escaped prisoner.[50] When a prisoner is out on bond he is still under court control, though the bounds of his confinement are enlarged. His bondsmen are his jailers.[51] While the bailsmen may arrest without warrant, the court proceeds under bench warrant to retake a prisoner. Cf. 18 U. S. C. § 3143.

Although in a civil proceeding for deportation the same branch of government issues and executes the warrant, we think the better practice is to require in those cases also a new warrant.

The judgment of the Court of Appeals in the *Zydok* case will be vacated and the cause remanded to the District Court for further proceedings in accordance with this opinion, with directions to order the release of the respondent Zydok unless within a reasonable time in the discretion of the court he is rearrested under a new warrant.[52]

No. 35 is affirmed; No. 136 is vacated.

MR. JUSTICE BLACK, dissenting.

Today the Court holds that law-abiding persons, neither charged with nor convicted of any crime, can be held in jail indefinitely, without bail, if a subordinate Washington bureau agent believes they are members of the Commu-

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[49] *Voll* v. *Steele*, 141 Ohio St. 293, 47 N. E. 2d 991. Cf. *Porter* v. *Garmony*, 148 Ga. 261, 96 S. E. 426. Bail once allowed by a magistrate, pending trial, may not in some instances be refused by a higher court. *In re Marshall*, 38 Ariz. 424, 300 P. 1011.

[50] *Anderson* v. *Corall*, 263 U. S. 193, 196.

[51] *Taylor* v. *Taintor*, 16 Wall. 366, 371.

[52] See *Dowd* v. *Cook*, 340 U. S. 206; *Mahler* v. *Eby*, 264 U. S. 32, 45.

nist Party, and therefore dangerous to the Nation because of the possibility of their "indoctrination of others." Underlying this harsh holding are past decisions of this Court declaring that Congress may constitutionally direct the summary deportation of aliens for any reason it sees fit. I agree with MR. JUSTICE DOUGLAS for the reasons he gives in his dissenting opinion in *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 598, that these prior declarations should now be reconsidered and rejected. This would dispose of these cases. But the Court today not only adheres to, but greatly expands the constitutional doctrine of the former cases. The Court also relies on the Internal Security Act of 1950, 64 Stat. 987, for its holding. MR. JUSTICE FRANKFURTER presents strong arguments for construing the Act so as to reach an opposite result. But even if authorized by that Act, as the majority holds, the denial of a right to bail under the circumstances of these cases strikes me as a shocking disregard of the following provisions of the Bill of Rights: Eighth Amendment's ban against excessive bail; [1] First Amendment's ban against abridgment of thought, speech and press; [2] Fifth Amendment's ban against depriving a person of liberty without due process of law.[3] Before a detailed discussion of my several grounds of dissent it is necessary to state the facts and the precise issues the records present.

Respondent Zydok, petitioners Carlson and others were all arrested ("detained") in connection with proceedings which might lead to their deportation. A subordinate of the Commissioner of Immigration, not the

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[1] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U. S. Const., Amend. VIII.

[2] "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . ." U. S. Const., Amend. I.

[3] "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law; . . . ." U. S. Const., Amend. V.

Attorney General, directed that they be held in prison without bail. Of necessity, consideration of these deportation proceedings by bureaus and courts may last for years. Carlson's has already dragged on for over four years. Moreover, even deportation orders at the end of such proceedings might not end their indeterminate jail sentences since the foreign countries to which they are ordered might refuse to admit them. Such refusals have prevented deportation in thousands of cases.[4] Thus denial of bail may well be the equivalent of a life sentence, at least for Zydok, 56 years old, and Carlisle whose health is bad. Such has become the fate of ordinary family people selected and classified, on secret information, as "dangerous" by Washington bureau agents.

Zydok's case illustrates what is happening. He has lived in this country 39 years, owns his home, has violated no law, is "not likely to engage in any subversive activities," has a wife, two sons, a daughter and five grandchildren, all born in the United States. Both sons served in the armed services in World War II. Zydok himself, then a waiter, sold about $50,000 worth of U. S. war bonds and "donated blood on seven occasions to the Red Cross for the United States Army." This jailing of Zydok, despite a patriotic record of which many citizens could well be proud, is typical of what actually happens when public feelings run high against an unpopular minority.

While the Court gives Zydok a momentary technical respite, its holding means that he too, pursuant to the Government's present program, can and will be held in jail without bond as a "dangerous" character. The others, with equally enviable records as law-abiding persons, are not even given a technical respite. Mrs. Stevenson is the wife of a citizen and is the mother of a young man who

[4] 96 Cong. Rec. 10449; H. R. Rep. No. 1192, 81st Cong., 1st Sess., pp. 7, 9, 10.

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is also a citizen. Her son has long been subject to attacks of undulant fever. He and his 70-year-old grandmother need Mrs. Stevenson's help as does her husband who does her housework while she is "detained" as "dangerous" to our national security. The District Judge tried to persuade the representatives of the Immigration Bureau and the Attorney General to agree for him to enter an order fixing bail for her and for Mr. Carlisle. His request was refused.

The record does not leave us in doubt as to why bail was denied Mrs. Stevenson, Mr. Carlisle, or any of these allegedly "dangerous" aliens. Denial was not on the ground that if released they might try to evade obedience to possible deportation orders. The District Judge in No. 35 conceded that "there is nothing here to indicate the Government is fearful that they are going to leave the jurisdiction"; he said, "I am not going to release men and women that the Attorney General's office says are security risks"; he also said, "I am not going to turn these people loose if they are Communists, any more than I would turn loose a deadly germ in this community. If that is my duty let the Circuit Court say so and assume that burden." [5] These remarks to counsel show that he kept these people in jail only because he thought Communists, as such, were too dangerous to the Nation to be allowed to associate with other people. The Court of Appeals' denial of bail was also based on the premise that Communists were too dangerous to the Nation to be left out of jail, not on the premise that deportation would be delayed or frustrated by granting bail. 187 F. 2d 991.

[5] And the District Judge in No. 35 said "When there is a claim, and I don't know whether it is true or not . . . that these people are security risks and that their release is dangerous to the security of the United States, until that is either disproved or proved I am not going to release them. My first vote in that respect is for the security of the country. We have had 42,000 casualties already."

And the Solicitor General has admitted here that "the only evidence advanced to support their detention without bail was that they had been active in the Communist movement." The majority here also appears to rest on the same basis. It must, unless it is now drawing inferences that some might flee and be unavailable for deportation. As the Government admits, there is not a vestige of support for such an inference.[6] Besides, an alien "who shall willfully fail or refuse to present himself for deportation . . . shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years . . . ." 64 Stat. 987, 1012.

Thus it clearly appears that these aliens are held in jail without bail for no reason except that "they had been active in the Communist movement." From this it is concluded that their association with others would so imperil the Nation's safety that they must be isolated from their families and communities. On this premise they would be just as dangerous whether aliens or citizens, deportable or not. Since it is not necessary to keep them in jail to assure their compliance with a deportation order, their imprisonment cannot possibly be intended as an aid to deportation. They are kept in jail solely because a bureau agent thinks that is where Communists should be. A power to put in jail because dangerous cannot be derived from a power to deport. Consequently prior cases holding that Congress has power to deport aliens provide no support at all for today's holding that Con-

[6] In this state of the record and particularly in view of the Solicitor General's contrary admission, I am at a loss to understand note 35 in the Court's opinion. It is there intimated that these aliens might flee and be unavailable for deportation. I cannot believe that the Court is resting, or would rest, its approval of denial of bail on a ground which even the Solicitor General had not deemed supportable by the record.

gress has power to authorize bureau agents to put "dangerous" people in jail without privilege of bail.

The stark fact is that if Congress can authorize imprisonment of "alien Communists" because dangerous, it can authorize imprisonment of citizen "Communists" on the same ground. And while this particular bureau campaign to fill the jails is said to be aimed at "dangerous" alien Communists only, peaceful citizens may be ensnared in the process. For the bureau agent is not required to prove that a person he throws in jail is an alien, or a Communist, or "dangerous." The agent need only declare he has reason to believe that such is the case. The agent may be and here apparently was acting on the rankest hearsay evidence. The secret sources of his "information" may have been spies and informers, a class not usually rated as the most reliable by people who have had experience with them.[7] In this record the nearest approach to any identifiable source of information is that some of the jailed persons had admitted past membership in organizations listed by the Attorney General as "Communist," or "Com-

[7] "Anonymous informations ought not to be received in any sort of prosecution. It is introducing a very dangerous precedent, and is quite foreign to the spirit of our age." Written near 100 A. D. by Emperor Trajan to Pliny the Younger in response to Pliny's interesting report of his prosecution of Christians. 9 Harvard Classics, 428. Pliny was "in great doubt" even then as to "whether the very profession of Christianity, unattended with any criminal act, or only the crimes themselves inherent in the profession are punishable . . . ." *Supra,* 426. "If they [informers against Christians] succeeded in their prosecution, they were exposed to the resentment of a considerable and active party, to the censure of the more liberal portion of mankind, and to the ignominy which in every age and country, has attended the character of an informer. If, on the contrary, they failed in their proofs, they incurred the severe, and perhaps capital, penalty which, according to a law published by the emperor Hadrian, was inflicted on those who falsely attributed to their fellow-citizens the crime of Christianity." 2 Gibbon, The History of the Decline and Fall of the Roman Empire (Oxford Univ. Press), 107, 108.

munist front." These listings are made by the Attorney General *ex parte* on secret dossiers containing statements from sources that the Attorney General refuses to reveal. A majority of this Court has held that such listings are illegal. *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123. This alone should be enough to reverse the judgments in No. 35. My own judgment is that Congress has not authorized the Bureau of Immigration to hold people in jail without bond solely because it believes them "dangerous." Nor do I think that Congress has power to grant any such authority even if it had attempted to do so.

First. Section 23 of the Internal Security Act, 64 Stat. 987, 1011, provides that "Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole." I read this language as attempting to authorize the Attorney General to hold aliens without bail within his discretion. I think that means the Attorney General's discretion, not that of a subordinate in the Bureau of Immigration. This record does not show that these people were jailed by virtue of an exercise of discretion by the Attorney General. Decision to put deportable aliens in jail without bond (with very minor exceptions) was made by subordinates in the Bureau of Immigration. I agree with MR. JUSTICE FRANKFURTER that this decision to jail aliens en masse was not based on the kind of "discretion" the Act intended. But I further think § 23 should not be construed as permitting the Attorney General to delegate this tremendous power to others.

The Government finds a power to so delegate in provisions of the Alien Registration Act of 1940, 8 U. S. C.

§ 458 (a) and in the President's Reorganization Plan No. 2 of 1950, 5 U. S. C. (Supp. IV) following § 133z–15. These provisions are in such broad general terms that they could be read as allowing the Attorney General to delegate all his discretionary duties. But the gravity of a discretionary power to seize people and keep them in jail without a right of bail warns against implying such an unlimited power to delegate it. It is bad enough to read an Act as vesting even the Nation's chief prosecutor with power to determine what individuals he prosecutes should be held in jail without bail. Delegating and redelegating this dangerous power to subordinates entrusted with duties like those of deputy sheriffs and policemen raises serious procedural due process questions. I am not willing to imply that Congress has granted power to make such delegations which so ominously threaten the liberty of individuals. Consequently, assuming constitutionality of § 23, I would hold that it vests power in the Attorney General alone to decide whether a person should be denied bail.

Second. The Fifth Amendment commands that no person shall be deprived of liberty without due process of law. I think this provision has been violated here.

Surely it is not consistent with procedural due process of law for prosecuting attorneys or their law enforcement subordinates to make final determinations as to whether persons they accuse of something shall remain in jail indefinitely awaiting a decision as to the truthfulness of the accusations against them. In effect that was done here. I have already referred to the trial judge's statement in No. 35 that he was not going to release people the Attorney General deemed to be bad security risks. Moreover, the immigration official's mere belief based on statements coming from unidentified persons was accepted by both trial judges as casting on each alleged "alien Communist" the burden of proving he was not a Communist by

clear and convincing evidence. And their refusal to incriminate themselves by denying the immigration officer's suspicions was accepted as sufficient proof to keep them behind the jail doors. I think that condemning people to jail is a job for the judiciary in accordance with procedural "due process of law."[8] To farm out this responsibility to the police and prosecuting attorneys is a judicial abdication in which I will have no part.

Third. As previously pointed out, the basis of holding these people in jail is a fear that they may indoctrinate people with Communist beliefs. To put people in jail for fear of their talk seems to me to be an abridgment of speech in flat violation of the First Amendment. I have to admit, however, that this is a logical application of recent cases watering down constitutional liberty of speech.[9] I also realize that many believe that Communists and "fellow travelers" should not be accorded any of the First Amendment's protections. My belief is that we must have freedom of speech, press and religion for all or we may eventually have it for none. I further believe that the First Amendment grants an absolute right to believe in any governmental system, discuss all governmental affairs, and argue for desired changes in the existing order. This freedom is too dangerous for bad, tyrannical governments to permit. But those who wrote and adopted our First Amendment weighed those dangers against the dangers of censorship and deliberately chose the First Amendment's unequivocal command that freedom of assembly, petition, speech and press shall not be abridged. I happen to believe this was a wise choice and that our free way of life enlists such respect and love that

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[8] See *Mozorosky* v. *Hurlburt,* 106 Ore. 274, 198 P. 556, 15 A. L. R. 1076 and note pp. 1079–1083.

[9] See, *e. g., American Communications Assn.* v. *Douds,* 339 U. S. 382; *Dennis* v. *United States,* 341 U. S. 494; *Feiner* v. *New York,* 340 U. S. 315.

our Nation cannot be imperiled by mere talk. This belief of mine may and I suppose does influence me to protest whenever I think I see even slight encroachments on First Amendment liberties. But the encroachment here is not small. True it is mainly those alleged to be present or past "Communists" who are now being jailed for their beliefs and expressions. But we cannot be sure more victims will not be offered up later if the First Amendment means no more than its enemies or even some of its friends believe it does.

Fourth. I think § 23 as construed and as here applied violates the command of the Eighth Amendment that "Excessive bail shall not be required . . . ." Under one of the Government's contentions, which the Court apparently adopts, the Eighth Amendment's ban on excessive bail means just about nothing. That contention is that Congress has power, despite the Amendment, to determine "whether or not bail may be granted, or must be granted, and the Constitution then forbids the exaction of excessive bail . . . ." Under this contention, the Eighth Amendment is a limitation upon judges only, for while a judge cannot constitutionally fix excessive bail, Congress can direct that people be held in jail without any right to bail at all. Stated still another way, the Amendment does no more than protect a right to bail which Congress can grant and which Congress can take away. The Amendment is thus reduced below the level of a pious admonition. Maybe the literal language of the framers lends itself to this weird, devitalizing interpretation when scrutinized with a hostile eye. But at least until recently, it has been the judicial practice to give a broad, liberal interpretation to those provisions of the Bill of Rights obviously designed to protect the individual from governmental oppression. I would follow that practice here. The Court refuses to do so because (1) the English Bill of Rights "has never been thought to accord a right to bail in

all cases . . ." and (2) "in criminal cases bail is not compulsory where the punishment may be death." As to (1): The Eighth Amendment is in the American Bill of Rights of 1789, not the English Bill of Rights of 1689. And it is well known that our Bill of Rights was written and adopted to guarantee Americans greater freedom than had been enjoyed by their ancestors who had been driven from Europe by persecution. See *Bridges* v. *California*, 314 U. S. 252, 264–265. As to (2): It is true bail has frequently been denied in this country "when the punishment may be death." I fail to see where the Court's analogy between deportation and the death penalty advances its argument unless it is also analogizing the offense of indoctrinating talk to the crime of first degree murder.

Another governmental contention is this: "The bail provisions of the Eighth Amendment and of the statutes relating thereto have always been considered as applicable only to criminal proceedings. Since deportation proceedings are not criminal in character, the Eighth Amendment has no application." I reject the contention that this constitutional right to bail can be denied a man in jail by the simple device of providing a "not criminal" label for the techniques used to incarcerate. Imprisonment awaiting determination of whether that imprisonment is justifiable has precisely the same evil consequences to an individual whatever legalistic label is used to describe his plight. Prior to this Amendment's adoption, history had been filled with instances where individuals had been imprisoned and held for want of bail on charges that could not be substantiated. Official malice had too frequently been the cause of imprisonment. The plain purpose of our bail Amendment was to make it impossible for any agency of Government, even the Congress, to authorize keeping people imprisoned a moment longer than was necessary to assure their attendance to answer whatever

legal burden or obligation might thereafter be validly imposed upon them. In earlier days of this country there were fond hopes that the bail provision was unnecessary, that no branch of our Government would ever want to deprive any person of bail. On this subject Mr. Justice Story said, "The provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct." Story on Constitutional Law, 5th ed., Vol. 2, p. 650. Perhaps the word "atrocious" is too strong. I can only say that I regret, deeply regret, that the Court now adds the right to bail to the list of other Bill of Rights guarantees that have recently been weakened to expand governmental powers at the expense of individual freedom.

I am for reversing in No. 35 and affirming in No. 136.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BURTON joins, dissenting.

If the Attorney General, after the Internal Security Act, had made a general ruling that thereafter he would not allow bail to any alien against whom deportation proceedings were started and who was then a member of the Communist Party—an undiscriminating, unindividualized class determination—it would disregard the clear direction of Congress for this Court not to hold that the Attorney General had exceeded the limits of his discretion. It would wilfully disregard the adjudications on bail in deportation cases which preceded the Act and the unambiguous legislative history of the law based upon this judicial history. Congress unequivocally chose not to give nonreviewable discretionary power to the Attorney General to deny bail. In substance though not formally he has made such a general ruling. The records before us disclose that since the Internal Security Act the Attorney

General has in fact followed the general practice of denying bail to all active Communists. Such blanket exercise of the power granted him by the Act calls for review and cannot stand.

The controlling questions in this case are: What standards of discretion does the Internal Security Act of 1950 [1] impose upon the Attorney General in granting or denying bail to persons arrested for deportation proceedings; and has the Attorney General here observed those standards? The Government concedes that Congress made reviewable the discretion of the Attorney General on the bail question. This subjection of the Attorney General's action to judicial scrutiny is not to be formally or lightly exercised. The bill which ultimately became § 23 of the Internal Security Act was initially passed by the House with a provision making absolute and unreviewable the Attorney General's action.[2] The bill as enacted, however, omitted the finality clause; the Attorney General's authority was thus defined: "Pending final determination of the deportability of any alien . . . [he] may, *in the discretion of the Attorney General* (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or

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[1] Pub. L. No. 831, 81st Cong., 2d Sess., 64 Stat. 987.

[2] H. R. 10, 81st Cong., 1st Sess. read in relevant part thus: "(g) No court shall have jurisdiction to release on bond or otherwise any alien detained under any provision of law relating to the exclusion or expulsion of aliens at any time prior to a decision of court in his favor which is not subject to further judicial reviews." See 96 Cong. Rec. 10448–10460. H. R. Rep. No. 1192, 81st Cong., 1st Sess. 10–11 had this comment: "The provision is designed to leave the question of releasing an alien from custody in an immigration case entirely in the hands of the Attorney General . . . . It in no way denies the right of any alien to test the legality of his detention through the courts; it merely states that the alien cannot be released by the court until judicial proceedings have been finally terminated in the alien's favor."

(3) be released on conditional parole." [3] Before the passage of the Act Congress had before it conflicting views of Courts of Appeals: according to *Prentis* v. *Manoogian,* 16 F. 2d 422 (C. A. 6th Cir.), bail was a matter of the alien's right; the Second Circuit ruled that it was a matter within the Attorney General's discretion subject to judicial review. *United States ex rel. Potash* v. *District Director,* 169 F. 2d 747 (C. A. 2d Cir.).[4] Congress chose the latter view. It deserves emphasis that it was discretion that was given the Attorney General, not power to decide arbitrarily.[5]

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[3] Internal Security Act of 1950, § 23, 64 Stat. 987, 1010, 8 U. S. C. (Supp. IV) § 156 (a) (emphasis added).

[4] H. R. Rep. No. 1192, 81st Cong., 1st Sess. 5–6, commenting on H. R. 10, which made the Attorney General's discretion unreviewable, yet gave "discretion" to the Attorney General, said:

"This [existing law] has often been found to be lacking in clarity and doubtful in purpose when questions have arisen concerning procedure following arrest of an alien, or during the interim between his arrest and his hearing and decision on his case . . . . The committee believes that this bill will greatly simplify such details."

A memorandum from a lawyers' group which was read into the record urged that to make the decision of the Attorney General unreviewable "flouts the recent decision of the circuit court of appeals of the second circuit," citing *United States ex rel. Potash* v. *District Director,* 169 F. 2d 747. 96 Cong. Rec. 10454.

[5] Compare the language "in the discretion of the Attorney General" with the clause "Where the Controller has reasonable grounds to believe," which the Privy Council had before it in *Nakkuda Ali* v. *Jayaratne,* [1951] A. C. 66. It was held, in the judgment of Lord Radcliffe, "that there must in fact exist such reasonable grounds, known to the Controller, before he can validly exercise the power" conferred. And for this reason: "After all, words such as these are commonly found when a legislature or law-making authority confers powers on a minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the

In granting the Attorney General discretion subject to judicial review, Congress legislated against a historical background which gives meaning to bail provisions. Only the other day this Court restated the concept of bail traditional in American thought and reflected in the Constitution:

> "This traditional right to freedom before conviction [or before order for deportation] permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. . . . To infer from the fact of indictment [or warrant for deportation] alone a need for bail in an unusually high amount is an arbitrary act." *Stack* v. *Boyle,* 342 U. S. 1, 4, 5, 6.
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> "The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. . . . Each defendant stands before the bar of justice as an individual. . . . Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them." *Id.,* at 7, 8, 9 (concurring opinion).

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condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith: but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality." *Id.,* at 77.

This historical meaning of "bail," familiar even to laymen, must infuse our interpretation of the words of a Congress of whom, in fact, a majority were lawyers. When Congress provided for bail, within the Attorney General's discretion, for persons arrested for deportation proceedings, it was extending to resident aliens still lawfully in our midst the same privileges that are granted as a matter of course to dangerous criminals. The factors relevant to the exercise of discretion are factors that pertain to each individual as an individual. "Discretion is only to be respected when it is conscious of the traditions which surround it and of the limits which an informed conscience sets to its exercise." [6]

If these aliens, instead of awaiting deportation proceedings, were held for trial under a Smith Act indictment, they could not be denied bail merely because of the indictment. *Stack* v. *Boyle, supra.* Membership in the Communist Party—the charge which is the foundation for the deportation proceedings—is surely not as great a danger as a leading share in a conspiracy to advocate the overthrow of the Government by force, which was the essence of the indictment in *Dennis* v. *United States,* 341 U. S. 494. And the opportunity for "the unhampered preparation of a defense" is quite as important to the alien arrested for deportation proceedings as it is to the Smith Act defendant. We would hesitate to impute to Congress, in the absence of some more explicit command, an intent to make bail more readily available to those held on a serious criminal charge than to those awaiting proceedings to determine the question of deportability. Congress made no such distinction. Instead, it cast the Attorney General's authority in terms descriptive of the

[6] Professor Mark De Wolfe Howe in The Nation, Jan. 12, 1952, p. 30.

customary power of commissioners or district judges in admitting to bail.

The factors stated by the Second Circuit in the *Potash* case, *supra,* at 751, which guided the enactment, are presumably the standards which Congress expected to be observed: "The discretion of the Attorney General . . . is to be reasonably exercised upon a consideration of such factors, among others, as the probability of the alien being found deportable, the seriousness of the charge against him, if proved, the danger to the public safety of his presence within the community, and the alien's availability for subsequent proceedings if enlarged on bail."

Congress thus made provision for a fair assurance of each alien's availability in the event he is eventually ordered deported. There is, however, not the slightest indication in the Government's returns or in the records before us that each petitioner's ties to family and community and each one's behavior under an earlier warrant against him do not assure his presence throughout the deportation proceedings and thereafter. The records affirmatively indicate the contrary. Moreover, in deportation cases—as compared, for example, with prosecutions under the Smith Act—the consideration that the individuals concerned may depart from the country is minimized in significance, first, because compulsory departure from the United States is just what they are contesting, and secondly, if they do depart, the purpose of the deportation proceedings is realized.

It would be unfair to Congress to deny that it followed the traditional concept of bail by making "the danger to the public safety of his presence within the community" a criterion for bailability. No less must it be presumed that Congress required that each criterion should be applied in the traditional manner, that is, by individualized application to each alien. In each case, the alien's anticipated personal conduct—and that alone—

must be considered. Also, how expeditiously each deportation proceeding can be concluded, and therefore how long the bail in each case need be in effect, are relevant considerations.

But it is argued that, since an introductory section of the Internal Security Act makes a "legislative finding" of the threat represented by the Party,[7] Congress intended membership in the Communist Party alone to serve as a reasonable basis for believing individual aliens too dangerous to leave at large. Such an interpretation renders meaningless the discretion granted the Attorney General wherever the deportation charge is membership in the Communist Party. The argument means that he may exercise discretion as to bail only to deny bail. Congress did not write such a Hobson's choice into law. True, the bail provisions apply to deportation proceedings brought on other grounds. However, the absorbing concern of Congress in the Internal Security Act was with the problem of the Communist Party; that Act for the first time explicitly made membership in the Communist Party a ground for deportation.[8] It puts Congress in a stultifying position to suggest that it gave with one hand only to take away with the other.

In these cases the Attorney General has not exercised his discretion by applying the standards required of him. He evidently thought himself under compulsion of law and made an abstract, class determination, not an individualized judgment. When the five aliens were arrested originally (one as late as June, 1950), all were released on bail, ranging from $5,000 for one to $1,000 for another; three were released on $2,000 bail. Much is made of the fact that the enactment of the Internal Security Act on

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[7] Internal Security Act of 1950, § 2, 64 Stat. 987.

[8] Internal Security Act of 1950, § 22, 64 Stat. 987, 1006, 8 U. S. C. (Supp. IV) §§ 137, 137–3.

September 22, 1950, intervened between the original grant of bail and the subsequent rearrest and detention of the aliens. The only change in that Act relevant to these deportation proceedings was the provision making membership in the Communist Party specifically a basis for deportation.[9] New warrants charging membership in the Communist Party at some time after entry were served on the rearrested aliens in Los Angeles, though not on Zydok in Detroit. The immigration authorities were by the Act relieved of proving—in order to make a prima facie case—that the Communist Party is an "organization . . . that believes in, advises, advocates, or teaches . . . the overthrow by force or violence of the Government." [10] But in the circumstances of today a legislative definition of the Communist Party as an organization advocating violent overthrow of government made little difference in the required proof.[11] At any rate, a complete answer is that nowhere—either in his returns to the writs of habeas corpus or elsewhere—has the Attorney General made any assertion that the Internal Security Act eased the proof of deportability, indicating by his silence that such a factor did not influence his judgment.[12] The returns in the Los Angeles cases supported the denial of bail solely by the statement, "said facts cause the said Acting Commis-

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[9] *Ibid.*

[10] 40 Stat. 1012, 8 U. S. C. § 137 (c).

[11] See *Dennis* v. *United States,* 341 U. S. 494, 510–511, and the concurring opinion of MR. JUSTICE JACKSON in *American Communications Assn.* v. *Douds,* 339 U. S. 382, 422.

[12] A radiogram to the District Director of Immigration and Naturalization in Los Angeles from the Acting Commissioner in Washington compendiously justified holding the four Los Angeles aliens without bail thus:

". . . the instruction . . . was issued only after the cases had been examined in the light of the Internal Security Act . . . and the spirit and intention thereof and all of the factors concerning the

sioner to believe that if the said petitioner[s] were enlarged on bail [they] would engage in activities which would be prejudicial to the public interest, and would endanger the welfare and safety of the United States." The return in Zydok's case stated no reasons for the Attorney General's decision. The only evidence at the hearings was also directed solely to the Communist activities of the aliens.

The insubstantiality of the evidence for showing any danger in freeing each individual alien on bail raises ample doubt whether the Attorney General exercised a discretion as instructed by statute. In Zydok's case the claim is that he had been a member of the Communist Party and financial secretary of a Hamtramck, Michigan, section in 1949, a year before his rearrest and denial of bail on October 23, 1950. From Zydok's failure to deny present membership during his testimony, the District Court drew the conclusion that he was "knowingly and wilfully participating in the Communist movement." This was clearly a violation of Zydok's privilege against self-incrimination, which he many times claimed.[13] But assuming that the Attorney General had evidence before him that Zydok was at present a member of the Communist Party, that alone is insufficient to show danger in freeing him on bail during the deportation proceeding. To deny bail, the Attorney General should have a reasonable basis for believing that the circumstances attending Zydok present too hazardous a risk in leaving him at large.

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likelihood of the deportability and the activities of said alien had been given careful consideration as well as the factors of undue hardship which continued detention might impose."

The radiograms, in October, 1950, to the District Director in Detroit ordering Zydok's rearrest and detention without bail gave no reasons for the action.

[13] See 20 Stat. 30, 18 U. S. C. § 3481; *Wilson* v. *United States,* 149 U. S. 60, 66. See also *Blau* v. *United States,* 340 U. S. 159.

There is also no evidence on the activities of the other four aliens that is more recent than 1949—a year before the issuance of the relevant warrants for deportation and the denials of bail here under review—with the exception of a newspaper article by Carlson published in late 1950. In fact, in the case of Carlisle and Stevenson the Government had no evidence of activity or membership in the Communist Party more recent than the 1930's. Since all these aliens when previously arrested were released on bail, we cannot escape the conclusion that the Attorney General after the enactment of the Internal Security Act did not deny bail from an individualized estimate of "the danger to the public safety of [each person's] presence within the community." [14]

[14] In a case just decided, the Court of Appeals for the Second Circuit found a not unreasonable exercise of discretion by the Attorney General in circumstances that are here wanting. An extract from the opinion of Judge A. N. Hand illumines the differences:

"In his petition for the writ, Young alleged facts indicating that if released he would be available for any further proceedings at which his presence would be required. The return to the writ, however, contained allegations which, if accepted, established a reasonable foundation for the denial of bail by the Attorney General. Thus the return, in addition to containing allegations of membership in the Communist party, alleged that Young had once before escaped from custody during earlier proceedings; that he had previously attempted to enter the United States by furnishing a false identity and with a fraudulent passport; and that during his present detention he refused to answer questions relating to prior identification, places of residence, employment and home life. Section 2248 of the Judicial Code, 28 U. S. C. § 2248, requires that the facts alleged in the return be taken as true unless impeached, and Young in his traverse to the return did not refute those statements, nor did he in his motion for reargument, make any offer to prove the contrary, nor did he assert new facts, which under 28 U. S. C. § 2246 could have been accomplished by affidavit. As the Supreme Court has recently said in *Stack* v. *Boyle,* 342 U. S. 1, 4: 'The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty.' " *United States ex rel. Young* v. *Shaughnessy,* 194 F. 2d 474 (C. A. 2d Cir., February 13, 1952).

We are confirmed in this conclusion by the Attorney General's practice. For we are advised by the Solicitor General that it has been the Government's policy since the Internal Security Act to terminate bail for all aliens awaiting deportation proceedings whom it deems to be present active Communists, barring only those for whom special circumstances of physical condition or family situation compel an exception. The ordinary considerations of availability to respond to the final judgment of the courts have apparently been ruled out by the Attorney General since the enactment of the Internal Security Act. All those whom the Government believes to be active Communists are considered unbailable without individualized consideration of risk from their continued freedom. It must therefore be inferred that the Attorney General acted on the assumption that, because he was convinced that the aliens here were present Communist Party members, they were not bailable. These persons should have the benefit of an exercise of discretion by the Attorney General, freed from any conception that Congress had made them in effect unbailable. We think that the California case should be returned to the District Court for discharge of the four persons detained unless the Attorney General within a reasonable time makes a new determination on the bail question using the standards here outlined. And if Zydok is rearrested under a new warrant, the Attorney General will have a fresh opportunity to exercise his discretion in setting bail.

MR. JUSTICE DOUGLAS, dissenting.

My reasons for dissent strike deeper than the bail provisions of the Eighth Amendment. According to the warrants of arrest issued on October 31, 1950, the petitioners in No. 35 are being detained for deportation because they were formerly members of the Communist Party of the United States. Zydok, the respondent in

No. 136, was arrested for present Communist Party membership, but no charge has been made that he has been guilty of any seditious conduct or that he has committed any overt act endangering our national security. If the Constitution does not permit expulsion of these aliens for their past actions or present expressions unaccompanied by conduct—and I do not think it does*—then they are illegally detained and should be set free, making the issue of bail meaningless.

MR. JUSTICE BURTON, dissenting.

I join the dissenting opinion of MR. JUSTICE FRANKFURTER and add the suggestion that the Eighth Amendment lends support to the statutory interpretation he advocates. That Amendment clearly prohibits federal bail that is excessive in amount when seen in the light of all traditionally relevant circumstances. Likewise, it must prohibit unreasonable denial of bail. The Amendment cannot well mean that, on the one hand, it prohibits the requirement of bail so excessive in amount as to be unattainable, yet, on the other hand, under like circumstances, it does not prohibit the denial of bail, which comes to the same thing. The same circumstances are relevant to both procedures. It is difficult to believe that Congress now has attempted to give the Attorney General authority to disregard those considerations in the denial of bail.

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*See my dissents in *Dennis* v. *United States*, 341 U. S. 494, 584–589; *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 598.

FAR EAST CONFERENCE ET AL. *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 15, Misc. Argued January 30, 1952.—Decided March 10, 1952.

The United States brought this suit in the District Court to enjoin alleged violations of the Sherman Antitrust Act. The defendants were the Far East Conference, a voluntary association, and its constituent members, steamship companies engaged in "outbound Far East trade." The agreement under which the Conference operated was approved by the predecessor of the Federal Maritime Board, exercising authority under the Shipping Act of 1916, as amended. Under this agreement the Conference established a dual system of rates, whereby shippers who agreed to use exclusively bottoms of Conference members paid one rate, while those who did not so bind themselves paid a fixed higher rate. This dual system of rates constituted the gravamen of the Government's suit. *Held:*

1. The case is initially within the exclusive jurisdiction of the Federal Maritime Board. *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474. Pp. 573–576.

(a) A different result from that reached in the *Cunard* case is not required by the fact that there a private shipper invoked the Antitrust Acts whereas here it is the Government. P. 576.

(b) The United States is a "person" who under § 22 of the Shipping Act may file a complaint with the Federal Maritime Board. P. 576.

2. Rather than order the case retained on the District Court docket pending action by the Board, this Court orders dismissal of the proceeding brought in the District Court. Pp. 576–577.

94 F. Supp. 900, reversed.

In a suit brought by the United States to enjoin alleged violations of the Sherman Act, the District Court denied the defendants' motion to dismiss. 94 F. Supp. 900. This Court granted certiorari. 342 U. S. 811. *Reversed,* p. 577.

Elkan Turk argued the cause for the Far East Conference et al., petitioners. With him on the brief were *John Milton* and *Seymour H. Kligler.*

John W. Davis argued the cause for the Isthmian Steamship Co., petitioner. With him on the brief was *Josiah Stryker.*

J. Roger Wollenberg argued the cause for the United States. With him on the brief were *Solicitor General Perlman* and *Assistant Attorney General Morison.*

Arthur M. Boal argued the cause for the Federal Maritime Board, respondent. With him on the brief were *Francis S. Walker* and *George F. Galland.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a suit in the District Court for New Jersey to enjoin violations of the Sherman Law.[1] 26 Stat. 209, 15 U. S. C. §§ 1 and 2. The defendants were the Far East Conference, a voluntary association, and its constituent members, steamship companies engaged in what is known as the "outbound Far East trade." The Conference was organized in 1922, and the Conference Agreement under which it operates was approved by the United States Shipping Board,[2] exercising authority under the Shipping

[1] The jurisdiction of the District Court was based on § 4 of the Sherman Law: "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1–7 of this title . . . ." 26 Stat. 209, 15 U. S. C. § 4.

[2] Section 3 of the Shipping Act of 1916 created the Shipping Board. 39 Stat. 728, 729. Through several steps its functions have come to its present successor, the Federal Maritime Board. By Executive Order No. 6166, June 10, 1933, § 12, its functions were transferred to the United States Shipping Board Bureau in the Department of Commerce. In 1936 Congress created the United States Maritime Commission, 49 Stat. 1985, 1987, 46 U. S. C. § 1114; and in 1950 the present Federal Maritime Board was established. Reorganization Plan No. 21 of 1950, 15 Fed. Reg. 3178–3180.

Act of 1916, as amended.[3] Under this Agreement there has been established a dual system of rates, called the contract and noncontract rate system.[4] Shippers who agreed to use exclusively bottoms of Conference members paid one rate; those who did not bind themselves by such exclusive patronage contract paid a fixed higher rate. Shippers who adhered to the exclusive patronage contract were not tied to a particular carrier; they were free to choose among Conference carriers. The Conference members, however, were obligated to supply facilities sufficient to handle freight destined for the Far East. This system of two levels of freight rates constituted the gravamen of the Government's suit.

Admitting the dual-rate system, the defendants justified on the merits but moved that the complaint be dismissed on the ground that the nature of the issues required that resort must first be had to the Federal Maritime Board before a District Court could adjudicate the Government's complaint. The Board, as intervenor, joined in this motion. It was denied by the District Court, 94 F. Supp. 900, and we brought the case here, under § 262 of the Judicial Code, 28 U. S. C. § 1651 (a), because there are in issue important questions regarding the relation between the Sherman Law and the Shipping Act. 342 U. S. 811.

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[3] 39 Stat. 728, 46 U. S. C. § 801 *et seq.*

[4] The irrelevance of the failure to file the rates themselves with the Board was laid bare in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474, 486–487:

"If there be a failure to file an agreement as required by § 15, the board, as in the case of other violations of the act, is fully authorized by § 22, *supra*, to afford relief upon complaint or upon its own motion. Its orders, in that respect, as in other respects, are then, under § 31, for the first time, open to a judicial proceeding to enforce, suspend or set them aside in accordance, generally, with the rules and limitations announced by this court in respect of like orders made by the Interstate Commerce Commission."

At the threshold we must decide whether, in a suit brought by the United States to enjoin a dual-rate system enforced in concert by steamship carriers engaged in foreign trade, a District Court can pass on the merits of the complaint before the Federal Maritime Board has passed upon the question. We see no reason to depart from *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474. That case answers our problem. There a competing carrier invoked the Antitrust Acts for an injunction against a combination of carriers in the North Atlantic trade which were alleged to operate a dual-rate system similar to that here involved. The plaintiff had not previously challenged the offending practice before the United States Shipping Board, the predecessor in authority of the present Maritime Board. This Court sustained the two lower courts, 39 F. 2d 204 (D. C. S. D. N. Y.) and 50 F. 2d 83 (C. A. 2d Cir.), dismissing the bill because initial consideration by the Shipping Board of the circumstances in controversy had not been sought. After a detailed analysis of the provisions of the Shipping Act and their relation to the construction theretofore given to the Interstate Commerce Act, this was the conclusion:

> "The [Shipping] act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well under-

stood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. Compare *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238; *United States* v. *Hamburgh-American S. S. Line,* 216 Fed. 971.

"A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the anti-trust laws. Compare *Keogh* v. *Chicago & N. W. Ry. Co., supra* [260 U. S. 156], at p. 162. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, are demonstrative of this conclusion." 284 U. S. 474, 485.

The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for as-

certaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

It is significant that this mode of accommodating the complementary roles of courts and administrative agencies in the enforcement of law was originally applied in a situation where the face of the statute gave the Interstate Commerce Commission and the courts concurrent jurisdiction. "The pioneer work of Chief Justice White" in *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, as his successor characterized it, 257 U. S. XXVI, was one of those creative judicial labors whereby modern administrative law is being developed as part of our traditional system of law. In this case we are merely applying the philosophy which was put in memorable words by Mr. Justice (as he then was) Stone:

> ". . . court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coördinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim." *United States* v. *Morgan*, 307 U. S. 183, 191.

The sole distinction between the *Cunard* case and this is that there a private shipper invoked the Antitrust Acts and here it is the Government. This difference does not touch the factors that determined the *Cunard* case. The same considerations of administrative expertise apply, whoever initiates the action. The same Antitrust Laws and the same Shipping Act apply to the same dual-rate system. To the same extent they define the appropriate orbits of action as between court and Maritime Board.

But the Government argues that it should not be forced to go first to the Board because the United States may not be deemed a "person" who under § 22 of the Shipping Act may file a complaint with the Maritime Board.[5] Surely the large question here in issue ought not to turn on such a debating point. It is almost frivolous to suggest that the Maritime Board would deny standing to the United States as a complainant. The Board has consistently treated the United States as a "person" within its rule for intervention. We ought not to dally longer with this objection, considering the fact that the United States, as a matter of common knowledge, is today one of the largest shippers in the Far East trade. The matter seems to be disposed of by *United States* v. *Interstate Commerce Commission,* 337 U. S. 426, 430 *et seq.,* involving similar provisions of the Interstate Commerce Act.

Having concluded that initial submission to the Federal Maritime Board is required, we may either order the case retained on the District Court docket pending the Board's action, *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422, 432–433; *El Dorado Oil Works* v. *United States,* 328 U. S. 12, 17; see *United States* v. *Interstate Commerce Commission, supra,* at 465, n. 12, or order dismissal of the proceeding brought in the Dis-

[5] 39 Stat. 728, 736, 46 U. S. C. § 821.

trict Court. As distinguished from the situation presented by the first *El Dorado* case, *supra,* which was a contract action raising only incidentally a question proper for initial administrative decision, the present case involves questions within the general scope of the Maritime Board's jurisdiction. Shipping Act of 1916, §§ 14, 15, 39 Stat. 728, 733, 46 U. S. C. §§ 812, 814. An order of the Board will be subject to review by a United States Court of Appeals, with opportunity for further review in this Court on writ of certiorari. Pub. L. No. 901, 81st Cong., 2d Sess., §§ 2, 10, 64 Stat. 1129, 1132. If the Board's order is favorable to the United States, it can be enforced by process of the District Court on the Attorney General's application. 39 Stat. 728, 737, 46 U. S. C. § 828. We believe that no purpose will here be served to hold the present action in abeyance in the District Court while the proceeding before the Board and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily initiated later, if appropriate. Business-like procedure counsels that the Government's complaint should now be dismissed, as was the complaint in *United States Navigation Co.* v. *Cunard Steamship Co., supra.*

The judgment of the District Court must be

Reversed.

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

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

The Shipping Act would have to be amended for me to reach the result of the majority. The Conference agreement, approved by the Board in 1922, provides for the adoption by the Conference of a tariff of rates and charges.

It states that there shall be no unjust discrimination against shippers and no rebates paid to them. There is no provision in the agreement for dual rates—no arrangement for allowing one rate to shippers who give all their business to the members and for retaliations against nonsubscribing shippers by exacting from them a higher rate. Nevertheless petitioners have prescribed this dual rate system for the purpose of barring from the outbound Far East trade steamship lines that are not members of the combination. At least these are the facts if we are to believe the allegations of the complaint, as we must on the motion to dismiss.

If the Board had expressly approved the dual rate system, and the dual rate system did not violate the Shipping Act, then there would be immunity from the Sherman Act, since § 15 of the Shipping Act, 39 Stat. 733, as amended, 46 U. S. C. § 814, gives the Board authority to approve agreements fixing or regulating rates, in effect makes "lawful" the rates so approved, and exempts from the Sherman Act every "lawful" agreement concerning them. But that exemption from the Sherman Act can be acquired only in the manner prescribed by § 15. Here no effort was made to obtain it. Hence the petitioners are at large, subject to all of the restraints of the Sherman Act.

Why should the Department of Justice be remitted to the Board for its remedy? The Board has no authority to enforce the Sherman Act.[1] If the rates were filed, of course the Board would have exclusive jurisdiction to pass on them. But even then it is restricted. Section 14, Third, for example, makes unlawful retaliation against any shipper by resort to discriminatory or unfair tactics because a shipper has patronized another carrier. And it

[1] The remedy provided by § 22 of the Shipping Act is for "any violation of this Act." The charge in the present case is a violation of the Sherman Act.

would seem plain that when a shipper is charged one rate if he gives the Conference a monopoly of his business and another and higher rate if the shipper uses a carrier not a member of the Conference, the shipper is being retaliated against for shopping around among carriers.

Petitioners, therefore, operate outside the law not only because they have failed to submit their schedule of rates to the Board but also because the rates adopted would, if approved, be illegal.[2] The steamship companies, therefore, flout the law as plainly as if they used rates that had been disapproved by the Board. In either case the public interest needs protection if the Sherman Act is to be enforced—whether it be represented in a criminal prosecution or, as here, in a civil proceeding brought by the United States.

The jurisdiction of the Department of Justice must commence at this point, unless we are to amend the Act by granting an anti-trust exemption to rate fixing not only when the rates are filed by the companies and approved by the Board but also when they are not filed at all or are rates which, if filed, could not be approved. I would read the Act as written and require the steamship companies to obtain the anti-trust exemption in the precise way Congress has provided.

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[2] There is less room for expertise where the rates used by the steamship companies are unfiled rates or unlawful rates. Cf. *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474.

HARISIADES *v.* SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION.

NO. 43. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued December 5, 1951.—Decided March 10, 1952.

1. The Alien Registration Act of 1940, so far as it authorizes the deportation of a legally resident alien because of membership in the Communist Party, even though such membership terminated before enactment of the Act, was within the power of Congress under the Federal Constitution. Pp. 581–596.

(a) The Act does not deprive the alien of liberty without due process of law in violation of the Fifth Amendment. Pp. 584–591.

(1) The power to deport aliens is inherent in every sovereign state. Pp. 587–588.

(2) The policy toward aliens is so exclusively entrusted to the political branches of the Government as to be largely immune from judicial inquiry or interference; and it cannot be said that the power has been so unreasonably or harshly exercised by Congress in this Act as to warrant judicial interference. Pp. 588–590.

(3) The fact that the Act inflicts severe hardship on the individuals affected does not render it violative of the Due Process Clause. Pp. 590–591.

(b) The Act does not abridge the aliens' freedoms of speech and assembly in contravention of the First Amendment. Pp. 591–592.

(c) The Act does not contravene the provision of Art. I, § 9 of the Constitution forbidding *ex post facto* laws. Pp. 593–596.

2. Procedural requirements of the Administrative Procedure Act are not mandatory as to proceedings which were instituted before the effective date of the Act. P. 583, n. 4.

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*Together with No. 206, *Mascitti* v. *McGrath, Attorney General,* on appeal from the United States District Court for the District of Columbia; and No. 264, *Coleman* v. *McGrath, Attorney General, et al.,* also on appeal from the United States District Court for the District of Columbia.

3. One who consented to the same individual acting both as presiding officer and examining officer in administrative proceedings is without standing, on judicial review, to raise the objection that he was thereby denied procedural due process. P. 583, n. 4.

187 F. 2d 137, affirmed.

The cases are stated in the opinion of the Court, pp. 581–584. The judgments are *affirmed,* p. 596.

Richard F. Watt argued the cause for petitioner in No. 43. With him on the brief was *Walter F. Dodd.*

Jack Wasserman argued the cause for appellant in No. 206. With him on the brief was *Filindo B. Masino.*

David Rein argued the cause for appellant in No. 264. With him on the brief was *Joseph Forer.*

Robert L. Stern argued the cause for respondent in No. 43 and appellees in Nos. 206 and 264. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg, John R. Wilkins* and *Charles Gordon.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

The ultimate question in these three cases is whether the United States constitutionally may deport a legally resident alien because of membership in the Communist Party which terminated before enactment of the Alien Registration Act, 1940.[1]

Harisiades, a Greek national, accompanied his father to the United States in 1916, when thirteen years of age, and has resided here since. He has taken a wife and sired two children, all citizens. He joined the Communist Party in 1925, when it was known as the Workers Party, and served as an organizer, Branch Executive Committee-

[1] 54 Stat. 670, 8 U. S. C. § 137.

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man, secretary of its Greek Bureau, and editor of its paper "Empros." The party discontinued his membership, along with that of other aliens, in 1939, but he has continued association with members. He was familiar with the principles and philosophy of the Communist Party and says he still believes in them. He disclaims personal belief in use of force and violence and asserts that the party favored their use only in defense. A warrant for his deportation because of his membership was issued in 1930 but was not served until 1946. The delay was due to inability to locate him because of his use of a number of aliases. After hearings, he was ordered deported on the grounds that after entry he had been a member of an organization which advocates overthrow of the Government by force and violence and distributes printed matter so advocating. He sought release by habeas corpus, which was denied by the District Court.[2] The Court of Appeals for the Second Circuit affirmed.[3]

Mascitti, a citizen of Italy, came to this country in 1920, at the age of sixteen. He married a resident alien and has one American-born child. He was a member of the Young Workers Party, the Workers Party and the Communist Party between 1923 and 1929. His testimony was that he knew the party advocated a proletarian dictatorship, to be established by force and violence if the capitalist class resisted. He heard some speakers advocate violence, in which he says he did not personally believe, and he was not clear as to the party policy. He resigned in 1929, apparently because he lost sympathy with or interest in the party. A warrant for his deportation issued and was served in 1946. After the usual administrative hearings he was ordered deported on the same grounds as Harisiades. He sought relief by declaratory

[2] 90 F. Supp. 397.

[3] 187 F. 2d 137.

judgment, which was denied without opinion by a three-judge District Court for the District of Columbia. His case comes to this Court by direct appeal.

Mrs. Coleman, a native of Russia, was admitted to the United States in 1914, when thirteen years of age. She married an American citizen and has three children, citizens by birth. She admits being a member of the Communist Party for about a year, beginning in 1919, and again from 1928 to 1930, and again from 1936 to 1937 or 1938. She held no office and her activities were not significant. She disavowed much knowledge of party principles and program, claiming she joined each time because of some injustice the party was then fighting. The reasons she gives for leaving the party are her health and the party's discontinuance of alien memberships. She has been ordered deported because after entry she became a member of an organization advocating overthrow of the Government by force and violence. She sought an injunction on constitutional grounds, among others. Relief was denied, without opinion, by a three-judge District Court for the District of Columbia and her case also comes here by direct appeal.

Validity of the hearing procedures is questioned for noncompliance with the Administrative Procedure Act, which we think is here inapplicable.[4] Admittedly, each of these deportations is authorized and required by the letter, spirit and intention of the statute. But the Act

[4] Petitioner Harisiades and appellant Coleman contend that the proceedings against them must be nullified for failure to conform to the requirements of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. § 1001 *et seq.* However, § 12 of the Act, 60 Stat. 244, 5 U. S. C. § 1011, provides that ". . . no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement." The proceedings against Harisiades and Coleman were instituted before the effective date of the Act. Harisiades also contends that, the Administrative Procedure Act

is assailed on three grounds: (1) that it deprives the aliens of liberty without due process of law in violation of the Fifth Amendment; (2) that it abridges their freedoms of speech and assembly in contravention of the First Amendment; and (3) that it is an *ex post facto* law which Congress is forbidden to pass by Art. I, § 9, cl. 3 of the Constitution.

We have in each case a finding, approved by the court below, that the Communist Party during the period of the alien's membership taught and advocated overthrow of the Government of the United States by force and violence. Those findings are not questioned here.

I.

These aliens ask us to forbid their expulsion by a departure from the long-accepted application to such cases of the Fifth Amendment provision that no person shall be deprived of life, liberty or property without due process of law. Their basic contention is that admission for permanent residence confers a "vested right" on the alien, equal to that of the citizen, to remain within the country, and that the alien is entitled to constitutional protection in that matter to the same extent as the citizen. Their second line of defense is that if any power to deport domiciled aliens exists it is so dispersed that the judiciary must concur in the grounds for its exercise to the extent of finding them reasonable. The argument goes on to the contention that the grounds prescribed by the Act of 1940 bear no reasonable relation to protection of legitimate interests of the United States and concludes that

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aside, he was denied procedural due process in that in his 1946–1947 hearings the same individual acted both as presiding officer and examining officer. However, it appears that the officer here performed both functions with Harisiades' consent. He, therefore, has no standing to raise the objection now.

the Act should be declared invalid. Admittedly these propositions are not founded in precedents of this Court.

For over thirty years each of these aliens has enjoyed such advantages as accrue from residence here without renouncing his foreign allegiance or formally acknowledging adherence to the Constitution he now invokes. Each was admitted to the United States, upon passing formidable exclusionary hurdles, in the hope that, after what may be called a probationary period, he would desire and be found desirable for citizenship. Each has been offered naturalization, with all of the rights and privileges of citizenship, conditioned only upon open and honest assumption of undivided allegiance to our Government.[5] But acceptance was and is not compulsory. Each has been permitted to prolong his original nationality indefinitely.

So long as one thus perpetuates a dual status as an American inhabitant but foreign citizen, he may derive advantages from two sources of law—American and international. He may claim protection against our Government unavailable to the citizen. As an alien he retains a claim upon the state of his citizenship to diplomatic intervention on his behalf, a patronage often of considerable value. The state of origin of each of these aliens could presently enter diplomatic remonstrance against these deportations if they were inconsistent with international law, the prevailing custom among nations or their own practices.

The alien retains immunities from burdens which the citizen must shoulder. By withholding his allegiance from the United States, he leaves outstanding a foreign

[5] 40 Stat. 548, as amended, 8 U. S. C. § 732 (a) (13), (16), (17), (18), (19); 61 Stat. 122, as amended, 8 U. S. C. § 735. But a certificate of naturalization is subject to revocation on the ground of fraud or other illegality in the procurement. 54 Stat. 1158, 8 U. S. C. § 738; *Knauer* v. *United States,* 328 U. S. 654.

call on his loyalties which international law not only permits our Government to recognize but commands it to respect. In deference to it certain dispensations from conscription for any military service have been granted foreign nationals.[6] They cannot, consistently with our international commitments, be compelled "to take part in the operations of war directed against their own country." [7] In addition to such general immunities they may enjoy particular treaty privileges.[8]

Under our law, the alien in several respects stands on an equal footing with citizens,[9] but in others has never been conceded legal parity with the citizen.[10] Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and

[6] § 2 of the Selective Draft Act of 1917, 40 Stat. 76, as amended, 50 U. S. C. App. § 202; § 3 of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 50 U. S. C. App. § 303; § 4 (a) of the Selective Service Act of 1948, 62 Stat. 604, as amended, 50 U. S. C. App. § 454 (a). Cf. *Moser* v. *United States,* 341 U. S. 41.

[7] Article 23, 1907 Hague Convention, Respecting the Laws and Customs of War on Land, 36 Stat. 2301–2302.

[8] Borchard, Diplomatic Protection of Citizens Abroad, 64.

[9] This Court has held that the Constitution assures him a large measure of equal economic opportunity, *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Truax* v. *Raich,* 239 U. S. 33; he may invoke the writ of habeas corpus to protect his personal liberty, *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 660; in criminal proceedings against him he must be accorded the protections of the Fifth and Sixth Amendments, *Wong Wing* v. *United States,* 163 U. S. 228; and, unless he is an enemy alien, his property cannot be taken without just compensation. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481.

[10] He cannot stand for election to many public offices. For instance, Art. I, § 2, cl. 2, § 3, cl. 3, of the Constitution respectively require that candidates for election to the House of Representatives and Senate be citizens. See Borchard, Diplomatic Protection of Citizens Abroad, 63. The states, to whom is entrusted the authority to set qualifications of voters, for most purposes require citizenship as a condition precedent to the voting franchise. The alien's right to

tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose.[11]

War, of course, is the most usual occasion for extensive resort to the power. Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment,[12] and his property becomes subject to seizure and perhaps confiscation.[13] But it does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use. So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.

That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign

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travel temporarily outside the United States is subject to restrictions not applicable to citizens. 43 Stat. 158, as amended, 8 U. S. C. § 210. If he is arrested on a charge of entering the country illegally, the burden is his to prove "his right to enter or remain"—no presumptions accrue in his favor by his presence here. 39 Stat. 889, as amended, 8 U. S. C. § 155 (a).

[11] *Fong Yue Ting* v. *United States,* 149 U. S. 698, 707, 711–714, 730; *Lem Moon Sing* v. *United States,* 158 U. S. 538, 545–546; *Li Sing* v. *United States,* 180 U. S. 486, 494–495; *Fok Yung Yo* v. *United States,* 185 U. S. 296, 302; *The Japanese Immigrant Case,* 189 U. S. 86, 97; *United States* v. *Ju Toy,* 198 U. S. 253, 261; *Zakonaite* v. *Wolf,* 226 U. S. 272, 275; *Tiaco* v. *Forbes,* 228 U. S. 549, 556–557; *Bugajewitz* v. *Adams,* 228 U. S. 585, 591.

[12] 40 Stat. 531, 50 U. S. C. § 21.

[13] 40 Stat. 411, 50 U. S. C. App. § 2 (c); 40 Stat. 415, 50 U. S. C. App. § 6; 62 Stat. 1246, 50 U. S. C. App. § 39; *Guessefeldt* v. *McGrath,* 342 U. S. 308.

state.[14] Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it.

This brings us to the alternative defense under the Due Process Clause—that, granting the power, it is so unreasonably and harshly exercised by this enactment that it should be held unconstitutional.

In historical context the Act before us stands out as an extreme application of the expulsion power. There is no denying that as world convulsions have driven us toward a closed society the expulsion power has been exercised with increasing severity, manifest in multiplication of grounds for deportation, in expanding the subject classes from illegal entrants to legal residents, and in greatly lengthening the period of residence after which one may be expelled.[15] This is said to have reached a point where it is the duty of this Court to call a halt upon the political branches of the Government.

It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contempora-

[14] ". . . [I]n strict law, a State can expel even domiciled aliens without so much as giving the reasons, the refusal of the expelling State to supply the reasons for expulsion to the home State of the expelled alien does not constitute an illegal, but only a very unfriendly act." 1 Oppenheim, International Law (3d ed., Roxburgh, 1920), 498–502, at 499. But cf. 1 Oppenheim, International Law (7th ed., Lauterpacht, 1948), 630–634, at 631. See also 4 Moore, International Law Digest, 67–96, citing examples; Wheaton's International Law (6th ed., Keith, 1929), 210–211; *Fong Yue Ting* v. *United States*, 149 U. S. 698.

[15] An open door to the immigrant was the early federal policy. It began to close in 1884 when Orientals were excluded. 23 Stat. 115. Thereafter, Congress has intermittently added to the excluded classes, and as rejections at the border multiplied illegal entries increased. To combat these, recourse was had to deportation in the Act of 1891, 26 Stat. 1086. However, that Act could be applied to an illegal entrant only within one year after his entry. Although that time limitation was subsequently extended, 32 Stat. 1218; 34 Stat. 904–905,

neous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.[16]

These restraints upon the judiciary, occasioned by different events, do not control today's decision but they

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until after the turn of the century expulsion was used only as an auxiliary remedy to enforce exclusion.

Congress, in 1907, provided for deportation of legally resident aliens, but the statute reached only women found engaging in prostitution, and deportation proceedings were authorized only within three years after entry.

From those early steps, the policy has been extended. In 1910, new classes of resident aliens were listed for deportation, including for the first time political offenders such as anarchists and those believing in or advocating the overthrow of the Government by force and violence. 36 Stat. 264. In 1917, aliens who were found after entry to be advocating anarchist doctrines or the overthrow of the Government by force and violence were made subject to deportation, a five-year time limit being retained. 39 Stat. 889. A year later, deportability because of membership in described subversive organizations was introduced. 40 Stat. 1012; 41 Stat. 1008. When this Court, in 1939, held that that Act reached only aliens who were members when the proceedings against them were instituted, *Kessler* v. *Strecker,* 307 U. S. 22, Congress promptly enacted the statute before us, making deportation mandatory for all aliens who at any time past have been members of the proscribed organizations. In so doing it also eliminated the time limit for institution of proceedings thereunder. Alien Registration Act, 1940, 54 Stat. 670, 673.

[16] *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 319–322; *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.,* 333 U. S. 103, 111; U. S. Const., Art. IV, § 4; *Luther* v. *Borden,* 7 How. 1, 42; *Pacific Telephone Co.* v. *Oregon,* 223 U. S. 118; *Marshall* v. *Dye,* 231 U. S. 250. In respect to the war power over even citizens, see *Hirabayashi* v. *United States,* 320 U. S. 81, 92; *Korematsu* v. *United States,* 323 U. S. 214, 217–218. That English courts also refuse to review grounds for deportation orders appears from *Rex* v. *Home Secretary; Ex parte Bressler,* 27 Cox Cr. Ca. 655.

are pertinent. It is not necessary and probably not possible to delineate a fixed and precise line of separation in these matters between political and judicial power under the Constitution. Certainly, however, nothing in the structure of our Government or the text of our Constitution would warrant judicial review by standards which would require us to equate our political judgment with that of Congress.

Under the conditions which produced this Act, can we declare that congressional alarm about a coalition of Communist power without and Communist conspiracy within the United States is either a fantasy or a pretense? This Act was approved by President Roosevelt June 28, 1940, when a world war was threatening to involve us, as soon it did. Communists in the United States were exerting every effort to defeat and delay our preparations. Certainly no responsible American would say that there were then or are now no possible grounds on which Congress might believe that Communists in our midst are inimical to our security.

Congress received evidence that the Communist movement here has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists. It would be easy for those of us who do not have security responsibility to say that those who do are taking Communism too seriously and overestimating its danger. But we have an Act of one Congress which, for a decade, subsequent Congresses have never repealed but have strengthened and extended. We, in our private opinions, need not concur in Congress' policies to hold its enactments constitutional. Judicially we must tolerate what personally we may regard as a legislative mistake.

We are urged, because the policy inflicts severe and undoubted hardship on affected individuals, to find a re-

straint in the Due Process Clause. But the Due Process Clause does not shield the citizen from conscription and the consequent calamity of being separated from family, friends, home and business while he is transported to foreign lands to stem the tide of Communism. If Communist aggression creates such hardships for loyal citizens, it is hard to find justification for holding that the Constitution requires that its hardships must be spared the Communist alien. When citizens raised the Constitution as a shield against expulsion from their homes and places of business, the Court refused to find hardship a cause for judicial intervention.[17]

We think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation. However desirable world-wide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities. Reform in this field must be entrusted to the branches of the Government in control of our international relations and treaty-making powers.

We hold that the Act is not invalid under the Due Process Clause. These aliens are not entitled to judicial relief unless some other constitutional limitation has been transgressed, to which inquiry we turn.

II.

The First Amendment is invoked as a barrier against this enactment. The claim is that in joining an organization advocating overthrow of government by force and

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[17] *Hirabayashi* v. *United States,* 320 U. S. 81; *Korematsu* v. *United States,* 323 U. S. 214.

violence the alien has merely exercised freedoms of speech, press and assembly which that Amendment guarantees to him.

The assumption is that the First Amendment allows Congress to make no distinction between advocating change in the existing order by lawful elective processes and advocating change by force and violence, that freedom for the one includes freedom for the other, and that when teaching of violence is denied so is freedom of speech.

Our Constitution sought to leave no excuse for violent attack on the status quo by providing a legal alternative—attack by ballot. To arm all men for orderly change, the Constitution put in their hands a right to influence the electorate by press, speech and assembly. This means freedom to advocate or promote Communism by means of the ballot box, but it does not include the practice or incitement of violence.[18]

True, it often is difficult to determine whether ambiguous speech is advocacy of political methods or subtly shades into a methodical but prudent incitement to violence. Communist governments avoid the inquiry by suppressing everything distasteful. Some would have us avoid the difficulty by going to the opposite extreme of permitting incitement to violent overthrow at least unless it seems certain to succeed immediately. We apprehend that the Constitution enjoins upon us the duty, however difficult, of distinguishing between the two. Different formulae have been applied in different situations and the test applicable to the Communist Party has been stated too recently to make further discussion at this time profitable.[19] We think the First Amendment does not prevent the deportation of these aliens.

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[18] *Dennis* v. *United States*, 341 U. S. 494.

[19] *Ibid.*

III.

The remaining claim is that this Act conflicts with Art. I, § 9, of the Constitution forbidding *ex post facto* enactments. An impression of retroactivity results from reading as a new and isolated enactment what is actually a continuation of prior legislation.

During all the years since 1920 Congress has maintained a standing admonition to aliens, on pain of deportation, not to become members of any organization that advocates overthrow of the United States Government by force and violence, a category repeatedly held to include the Communist Party. These aliens violated that prohibition and incurred liability to deportation. They were not caught unawares by a change of law. There can be no contention that they were not adequately forewarned both that their conduct was prohibited and of its consequences.

In 1939, this Court decided *Kessler* v. *Strecker,* 307 U. S. 22, in which it was held that Congress, in the statute as it then stood, had not clearly expressed an intent that Communist Party membership remained cause for deportation after it ceased.[20] The Court concluded that in the absence of such expression only contemporaneous membership would authorize deportation.

The reaction of the Communist Party was to drop aliens from membership, at least in form, in order to immunize them from the consequences of their party membership.

The reaction of Congress was that the Court had misunderstood its legislation. In the Act here before us it supplied unmistakable language that past violators of its prohibitions continued to be deportable in spite of resignation or expulsion from the party. It regarded the fact

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[20] 40 Stat. 1012.

that an alien defied our laws to join the Communist Party as an indication that he had developed little comprehension of the principles or practice of representative government or else was unwilling to abide by them.

However, even if the Act were found to be retroactive, to strike it down would require us to overrule the construction of the *ex post facto* provision which has been followed by this Court from earliest times. It always has been considered that that which it forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment.[21] Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.[22] Both of these doctrines as original proposals might be debatable, but both have been considered closed for many years and a body of statute and decisional law has been built upon them. In *Bugajewitz* v. *Adams,* 228 U. S. 585, 591, Mr. Justice Holmes, for the Court, said: "It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want. The coincidence of the local penal law with the policy of Congress is an accident. . . . The prohibition of *ex post facto* laws in Article I, § 9, has no application . . . and with regard to the petitioner it is not necessary to construe the statute as having any retrospective effect." Later, the Court said, "It is well settled that deportation, while it may be burdensome and severe for

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[21] *Calder* v. *Bull,* 3 Dall. 386, 390; *Johannessen* v. *United States,* 225 U. S. 227, 242.

[22] *Fong Yue Ting* v. *United States,* 149 U. S. 698, 730; *Bugajewitz* v. *Adams,* 228 U. S. 585, 591; *Bilokumsky* v. *Tod,* 263 U. S. 149, 154.

the alien, is not a punishment. . . . The inhibition against the passage of an *ex post facto* law by Congress in § 9 of Article I of the Constitution applies only to criminal laws . . . and not to a deportation act like this . . . ." *Mahler* v. *Eby*, 264 U. S. 32, 39.

It is urged against the foregoing opinions that in a few cases the *ex post facto* prohibition had been applied to what appeared to be civil disabilities. *Fletcher* v. *Peck*, 6 Cranch 87; *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333; *Pierce* v. *Carskadon*, 16 Wall. 234. The Court has since explained that those cases proceeded from the view that novel disabilities there imposed upon citizens were really criminal penalties for which civil form was a disguise. *Burgess* v. *Salmon*, 97 U. S. 381, 385. Those cases were known to the Justices who promulgated the above-quoted opinions but have never been considered to govern deportation. The facts of this case afford no basis for reconsidering or modifying the long-settled doctrine.

It is contended that this policy allows no escape by reformation. We are urged to apply some doctrine of atonement and redemption. Congress might well have done so, but it is not for the judiciary to usurp the function of granting absolution or pardon. We cannot do so for deportable ex-convicts, even though they have served a term of imprisonment calculated to bring about their reformation.

When the Communist Party as a matter of party strategy formally expelled alien members en masse, it destroyed any significance that discontinued membership might otherwise have as indication of change of heart by the individual. Congress may have believed that the party tactics threw upon the Government an almost impossible burden if it attempted to separate those who sincerely renounced Communist principles of force and violence from those who left the party the better to serve

it. Congress, exercising the wide discretion that it alone has in these matters, declined to accept that as the Government's burden.

We find none of the constitutional objections to the Act well founded. The judgments accordingly are

Affirmed.

MR. JUSTICE CLARK took no part in the consideration or decision of these cases.

MR. JUSTICE FRANKFURTER, concurring.

It is not for this Court to reshape a world order based on politically sovereign States. In such an international ordering of the world a national State implies a special relationship of one body of people, *i. e.*, citizens of that State, whereby the citizens of each State are aliens in relation to every other State. Ever since national States have come into being, the right of people to enjoy the hospitality of a State of which they are not citizens has been a matter of political determination by each State. (I put to one side the oddities of dual citizenship.) Though as a matter of political outlook and economic need this country has traditionally welcomed aliens to come to its shores, it has done so exclusively as a matter of political outlook and national self-interest. This policy has been a political policy, belonging to the political branch of the Government wholly outside the concern and the competence of the Judiciary.

Accordingly, when this policy changed and the political and law-making branch of this Government, the Congress, decided to restrict the right of immigration about seventy years ago, this Court thereupon and ever since has recognized that the determination of a selective and exclusionary immigration policy was for the Congress and not for the Judiciary. The conditions for entry of every alien,

the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.

The Court's acknowledgment of the sole responsibility of Congress for these matters has been made possible by Justices whose cultural outlook, whose breadth of view and robust tolerance were not exceeded by those of Jefferson. In their personal views, libertarians like Mr. Justice Holmes and Mr. Justice Brandeis doubtless disapproved of some of these policies, departures as they were from the best traditions of this country and based as they have been in part on discredited racial theories or manipulation of figures in formulating what is known as the quota system. But whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress. Courts do enforce the requirements imposed by Congress upon officials in administering immigration laws, *e. g.*, *Kwock Jan Fat* v. *White,* 253 U. S. 454, and the requirement of Due Process may entail certain procedural observances. *E. g., Ng Fung Ho* v. *White,* 259 U. S. 276. But the underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens shall be allowed to stay, are for Congress exclusively to determine even though such determination may be deemed to offend American traditions and may, as has been the case, jeopardize peace.

In recognizing this power and this responsibility of Congress, one does not in the remotest degree align oneself with fears unworthy of the American spirit or with

hostility to the bracing air of the free spirit. One merely recognizes that the place to resist unwise or cruel legislation touching aliens is the Congress, not this Court.

I, therefore, join in the Court's opinion in these cases.

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

There are two possible bases for sustaining this Act:

(1) A person who was once a Communist is tainted for all time and forever dangerous to our society; or

(2) Punishment through banishment from the country may be placed upon an alien not for what he did, but for what his political views once were.

Each of these is foreign to our philosophy. We repudiate our traditions of tolerance and our articles of faith based upon the Bill of Rights when we bow to them by sustaining an Act of Congress which has them as a foundation.

The view that the power of Congress to deport aliens is absolute and may be exercised for any reason which Congress deems appropriate rests on *Fong Yue Ting* v. *United States,* 149 U. S. 698, decided in 1893 by a six-to-three vote. That decision seems to me to be inconsistent with the philosophy of constitutional law which we have developed for the protection of resident aliens. We have long held that a resident alien is a "person" within the meaning of the Fifth and the Fourteenth Amendments. He therefore may not be deprived either by the National Government or by any state of life, liberty, or property without due process of law. Nor may he be denied the equal protection of the laws. A state was not allowed to exclude an alien from the laundry business because he was a Chinese,[1] nor discharge him from employment because

[1] *Yick Wo* v. *Hopkins,* 118 U. S. 356.

he was not a citizen,[2] nor deprive him of the right to fish because he was a Japanese ineligible to citizenship.[3] An alien's property (provided he is not an enemy alien), may not be taken without just compensation.[4] He is entitled to habeas corpus to test the legality of his restraint,[5] to the protection of the Fifth and Sixth Amendments in criminal trials,[6] and to the right of free speech as guaranteed by the First Amendment.[7]

An alien, who is assimilated in our society, is treated as a citizen so far as his property and his liberty are concerned. He can live and work here and raise a family, secure in the personal guarantees every resident has and safe from discriminations that might be leveled against him because he was born abroad. Those guarantees of liberty and livelihood are the essence of the freedom which this country from the beginning has offered the people of all lands. If those rights, great as they are, have constitutional protection, I think the more important one—the right to remain here—has a like dignity.

The power of Congress to exclude, admit, or deport aliens flows from sovereignty itself and from the power "To establish an uniform Rule of Naturalization." U. S. Const., Art. I, § 8, cl. 4. The power of deportation is therefore an *implied* one. The right to life and liberty is an *express* one. Why this *implied* power should be given priority over the *express* guarantee of the Fifth Amendment has never been satisfactorily answered. Mr. Justice Brewer's dissent in *Fong Yue Ting* v. *United States, supra,* pp. 737–738, grows in power with the passing years: "It is said that the power here asserted is inherent in

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[2] *Truax* v. *Raich,* 239 U. S. 33.

[3] *Takahashi* v. *Fish & Game Commission,* 334 U. S. 410.

[4] *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481.

[5] *Ekiu* v. *United States,* 142 U. S. 651, 660.

[6] *Wong Wing* v. *United States,* 163 U. S. 228.

[7] *Bridges* v. *California,* 314 U. S. 252.

sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practices of other nations to ascertain the limits? The governments of other nations have elastic powers—ours is fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this Constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, they gave to this government no general power to banish. Banishment may be resorted to as punishment for crime; but among the powers reserved to the people and not delegated to the government is that of determining whether whole classes in our midst shall, for no crime but that of their race and birthplace, be driven from our territory."

The right to be immune from arbitrary decrees of banishment certainly may be more important to "liberty" than the civil rights which all aliens enjoy when they reside here. Unless they are free from arbitrary banishment, the "liberty" they enjoy while they live here is indeed illusory. Banishment is punishment in the practical sense. It may deprive a man and his family of all that makes life worth while. Those who have their roots here have an important stake in this country. Their plans for themselves and their hopes for their children all depend on their right to stay. If they are uprooted and sent to lands no longer known to them, no longer hospitable, they become displaced, homeless people condemned to bitterness and despair.

This drastic step may at times be necessary in order to protect the national interest. There may be occasions when the continued presence of an alien, no matter how long he may have been here, would be hostile to the safety or welfare of the Nation due to the nature of his conduct. But unless such condition is shown, I would stay the hand of the Government and let those to whom we have extended our hospitality and who have become members of our communities remain here and enjoy the life and liberty which the Constitution guarantees.

Congress has not proceeded by that standard. It has ordered these aliens deported not for what they are but for what they once were. Perhaps a hearing would show that they continue to be people dangerous and hostile to us. But the principle of forgiveness and the doctrine of redemption are too deep in our philosophy to admit that there is no return for those who have once erred.

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 601 and 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, 1951, THROUGH MARCH 10, 1952.

Cases Dismissed in Vacation.

No. 37. Kloetzer *v.* Louisville & Nashville Railroad Co. On petition for writ of certiorari to the Appellate Court of Illinois, Fourth District. June 14, 1951. Dismissed per stipulation pursuant to Rule 35 of the Rules of this Court. *Roberts P. Elam* for petitioner. *William R. Gentry* and *Harold G. Baker* for respondent. Reported below: 341 Ill. App. 478, 95 N. E. 2d 502.

No. 49. United States *v.* Menominee Tribe of Indians. Appeal from the Court of Claims. July 11, 1951. Dismissed per stipulation pursuant to Rule 35 of the Rules of this Court. *Solicitor General Perlman, Assistant Attorney General Vanech* and *Roger P. Marquis* for the United States. *Glen A. Wilkinson* for appellee. Reported below: 118 Ct. Cl. 290.

No. 123. Priebe & Sons, Inc. *v.* Hunt, Administratrix, et al. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. August 9, 1951. Dismissed per stipulation pursuant to Rule 35 of the Rules of this Court. *Casper W. Ooms* for petitioner. *F. O. Richey* and *H. F. McNenny* for respondents. Reported below: 188 F. 2d 880.

No. 13. Thompson et al. *v.* Wallin et al. Appeal from the Court of Appeals of New York. September 12, 1951. Dismissed per stipulation pursuant to Rule 35 of the Rules of this Court. *John J. Abt* for appellants. *Nathaniel L. Goldstein,* Attorney General of New York,

Wendell P. Brown, Solicitor General, and *Ruth Kessler Toch,* Assistant Attorney General, for appellees. Reported below: 301 N. Y. 476, 95 N. E. 2d 806.

No. 21. Gem Manufacturing Co. *v.* Packard Motor Car Co. Certiorari, 341 U. S. 930, to the United States Court of Appeals for the Seventh Circuit. September 28, 1951. Dismissed per stipulation pursuant to Rule 35 of the Rules of this Court. *Charles B. Cannon* and *Geo. H. Wallace* for petitioner. *Harry W. Lindsey, Jr.* and *Lowell C. Noyes* for respondent. Reported below: 187 F. 2d 65.

October 8, 1951.

Per Curiam Decisions.

No. 31. Los Angeles Building & Construction Trades Council et al. *v.* LeBaron, Regional Director, National Labor Relations Board. On petition for writ of certiorari to the United States Court of Appeals for the Ninth 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 the United States District Court for the Southern District of California with directions to vacate its judgment and to dismiss the petition upon the ground that the cause is moot. *Maurice J. Nicoson* for petitioners. *Solicitor General Perlman, David P. Findling, Mozart G. Ratner* and *Winthrop A. Johns* for respondent. Reported below: 185 F. 2d 405.

Nos. 89 and 90. Alabama Public Service Commission et al. *v.* Louisville & Nashville Railroad Co. Appeals from the United States District Court for the Middle District of Alabama. *Per Curiam:* Judgments reversed. *Alabama Public Service Comm'n* v. *Southern R. Co.,* 341 U. S. 341. Mr. Justice Frankfurter and

MR. JUSTICE JACKSON adhere to the views expressed in their concurring opinion in *Alabama Public Service Comm'n* v. *Southern R. Co.*, 341 U. S. 341, 351, as to the jurisdictional issue in these cases. *Si Garrett,* Attorney General of Alabama, *M. Roland Nachman, Jr.* and *Wallace L. Johnson,* Assistant Attorneys General, for appellants. *Robert E. Steiner, Jr.* and *Sam Rice Baker* for appellee. Reported below: 94 F. Supp. 892, 893.

No. 92. THORP *v.* BOARD OF TRUSTEES, NEWARK COLLEGE OF ENGINEERING. On petition for writ of certiorari to the Supreme Court of New Jersey. *Per Curiam:* The petition for writ of certiorari is granted. It appearing that the cause has become moot, the judgment of the Supreme Court of New Jersey is vacated and the cause is remanded for such proceedings as by that Court may be deemed appropriate. *Samuel L. Rothbard* for petitioner. *Theodore D. Parsons,* Attorney General of New Jersey, and *Joseph A. Murphy,* Assistant Deputy Attorney General, for respondent. Reported below: 6 N. J. 498, 79 A. 2d 462.

No. 116. WINN ET AL. *v.* PITTSTON COMPANY. Appeal from the Supreme Court of Appeals of Virginia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *John J. Wicker* and *Harris J. Griston* for appellants. *Robert T. Barton, Jr.* and *Theodore S. Hope, Jr.* for appellee. Reported below: 191 Va. 886, 63 S. E. 2d 34.

No. 163. NORTH SIDE LAUNDRY CO. *v.* BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW, ALLEGHENY COUNTY. Appeal from the Supreme Court of Pennsylvania. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial

federal question. *Mahlon E. Lewis* for appellant. *Nathaniel K. Beck* and *Leonard Boreman* for appellee. Reported below: 366 Pa. 636, 79 A. 2d 419.

No. 155. ALLEN ET AL. *v.* CITY OF LONG BEACH ET AL. Appeal from the District Court of Appeal of California, Second Appellate District. *Per Curiam:* The motion for leave to file brief of American Federation of Labor is denied. The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Herbert S. Thatcher* for appellants. *Irving M. Smith* for appellees. Reported below: 101 Cal. App. 2d 15, 224 P. 2d 792.

No. 166. CATES, TRADING AS GLORY BEE PRODUCTS, *v.* HADERLEIN, POSTMASTER OF CHICAGO. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *Per Curiam:* The petition for writ of certiorari is granted. Upon consideration of respondent's confession of error and the record, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court with directions to vacate its order dismissing the complaint. *Joseph Rosenbaum* and *Alvin E. Stein* for petitioner. *Solicitor General Perlman* for respondent. Reported below: 189 F. 2d 369.

No. 205. WEINMANN *v.* MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, 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 the want of a substantial federal question. MR. JUSTICE BLACK dissents. *George T. Goggin* for appellant. *Solicitor General Perlman* for McGrath, Attorney General, appellee. Reported below: 102 Cal. App. 2d 260, 227 P. 2d 564.

No. 243. BIRCHAM *v.* KENTUCKY. Appeal from the Court of Appeals of Kentucky. *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. *William S. Heidenberg* for appellant. Reported below: 238 S. W. 2d 1008.

Miscellaneous Orders.

No. 79. DIXON *v.* DUFFY, WARDEN. Certiorari, 341 U. S. 938, to the Supreme Court of California. It is ordered that Franklin C. Stark, Esq., of Oakland, California, a member of the bar of this Court, be appointed to serve as counsel for the petitioner in this case.

No. 80. KEENAN *v.* BURKE, WARDEN;

No. 81. JANKOWSKI *v.* BURKE, WARDEN; and

No. 82. FOULKE *v.* BURKE, WARDEN. Certiorari, 341 U. S. 939, to the Supreme Court of Pennsylvania. It is ordered that Archibald Cox, Esq., of Cambridge, Massachusetts, a member of the bar of this Court, be appointed to serve as counsel for the petitioners in these cases.

No. 95. JENNINGS *v.* ILLINOIS; and

No. 96. LA FRANA *v.* ILLINOIS. Certiorari, 341 U. S. 947, to the Supreme Court of Illinois. It is ordered that Nathaniel L. Nathanson, Esq., of Chicago, Illinois, a member of the bar of this Court, be appointed to serve as counsel for the petitioners in these cases. It is further ordered that Calvin P. Sawyier, Esq., of Chicago, Illinois, be appointed to serve as associate counsel for the petitioner in No. 95.

No. 71, Misc. EX PARTE COGDELL ET AL. Motion for leave to file petition for writ of mandamus granted. A

rule is ordered to issue, returnable within thirty days, requiring the respondents to show cause why the petition for writ of mandamus should not be granted. *George E. C. Hayes, James M. Nabrit, Jr.* and *George M. Johnson* for petitioners. *Vernon E. West, Chester H. Gray* and *Milton D. Korman* for McGuire et al., respondents.

No. 19, Misc. SEVERA *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 33, Misc. CONNOR *v.* FLORIDA;
No. 50, Misc. LAWSON *v.* SHUTTLEWORTH, WARDEN;
No. 62, Misc. BOWE *v.* SKEEN, WARDEN; and
No. 78, Misc. KERR *v.* HEINZE, WARDEN. Motions for leave to file petitions for writs of habeas corpus in these cases severally denied.

No. 77, Misc. MULVEY *v.* SUPREME COURT OF MICHIGAN;
No. 99, Misc. VAN PELT *v.* CHICAGO POLICE DEPARTMENT; and
No. 103, Misc. JOSLIN *v.* CHIEF JUSTICE OF THE SUPREME COURT OF MICHIGAN ET AL. Motions for leave to file petitions for writs of mandamus in these cases severally denied.

No. 6, Misc. STANDARD OIL CO. OF CALIFORNIA ET AL. *v.* UNITED STATES. Leave granted petitioners to withdraw the motion for leave to file petition for writ of certiorari to the United States District Court for the Southern District of California, Central Division. *Marshall P. Madison, Francis R. Kirkham, John M. Hall* and *Murray Gartner* for the Standard Oil Company of California; *F. F. Thomas, Jr.* and *James D. Adams* for the Shell Oil Co.; *Oscar John Dorwin* and *S. A. L. Morgan*

for the Texas Company; *Jackson W. Chance* for the Richfield Oil Corp.; *Edward D. Lyman* and *Edmund D. Buckley* for the Tide Water Associated Oil Co.; and *Herman Phleger* for the Union Oil Company of California, petitioners.

No. 37, Misc. SMITH *v.* UNITED STATES ET AL. Application denied.

No. 53, Misc. SPADER *v.* BURKE, WARDEN. Motions for leave to file petitions for writs of certiorari and habeas corpus denied.

No. 60, Misc. MACARTHUR MINING CO., INC. *v.* UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ET AL. Motion for leave to file petition for writ of prohibition denied. *Inghram D. Hook* and *John W. Hoffman, Jr.* for petitioner.

No. 65, Misc. DI STEFANO ET AL. *v.* BEONDY ET AL. Application denied.

No. 66, Misc. ROBERTS *v.* MCGEE, DIRECTOR OF CORRECTIONS OF CALIFORNIA, ET AL. Motions for leave to file petitions for writs of certiorari and habeas corpus denied.

Certiorari Granted. (*See also Nos. 31, 92 and 166, supra.*)

No. 35. CARLSON ET AL. *v.* LANDON, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari granted. *John W. Porter, Carol King* and *A. L. Wirin* for petitioners. *Solicitor General Perlman* filed a memorandum suggesting that certiorari be granted. Reported below: 187 F. 2d 991.

No. 47. UNITED STATES *v.* SHANNON ET AL. C. A. 4th Cir. Certiorari granted. *Solicitor General Perlman* for the United States. Reported below: 186 F. 2d 430.

No. 85. PERKINS *v.* BENGUET CONSOLIDATED MINING CO. ET AL. Supreme Court of Ohio. Certiorari granted. *Robert N. Gorman* and *Stanley A. Silversteen* for petitioner. *Lucien H. Mercier* and *Charles G. White* for the Benguet Consolidated Mining Co., respondent. Reported below: 155 Ohio St. 116, 98 N. E. 2d 33.

No. 158. LILLY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari granted. *Randolph E. Paul* and *Louis Eisenstein* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *I. Henry Kutz* for respondent. Reported below: 188 F. 2d 269.

No. 195. RUTKIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. *Edward Halle* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Stanley M. Silverberg* and *Ellis N. Slack* for the United States. Reported below: 189 F. 2d 431.

No. 209. UNITED STATES *v.* KELLY ET AL. Court of Claims. Certiorari granted. *Solicitor General Perlman* for the United States. *Henry J. Fox* for respondents. Reported below: 119 Ct. Cl. 197, 96 F. Supp. 611.

No. 43. HARISIADES *v.* SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION. C. A. 2d Cir. Certiorari granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Carol King* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for respondent. Reported below: 187 F. 2d 137.

No. 169. McGrath, Attorney General, Successor to the Alien Property Custodian, *v.* Nagano. C. A. 7th Cir. Certiorari granted. Mr. Justice Clark took no part in the consideration or decision of this application. *Solicitor General Perlman* for petitioner. *Edward R. Johnston* for respondent. Reported below: 187 F. 2d 759.

No. 46. United States *v.* Jordan et al. C. A. 6th Cir. Certiorari granted limited to the third question presented by the petition for the writ, *i. e.*:

"Whether assignments of claims against the United States for such timber damage to the leased property are void under the Anti-Assignment Act (31 U. S. C. § 203), where the assignments were voluntarily made by the lessor-owners of the property to their successors in title after the leases had expired and after possession had been returned to them by the United States."

Solicitor General Perlman for the United States. *Sam Costen* for respondents. Reported below: 186 F. 2d 803.

No. 62. Halcyon Lines et al. *v.* Haenn Ship Ceiling & Refitting Corp.; and

No. 197. Haenn Ship Ceiling & Refitting Corp. *v.* Halcyon Lines et al. C. A. 3d Cir. Certiorari granted. *Joseph W. Henderson, Thomas F. Mount* and *George M. Brodhead* for petitioners in No. 62. *Thomas E. Byrne, Jr.* for petitioner in No. 197. *Edward J. Mingey* was on a memorandum with *Mr. Byrne* for respondent in No. 62. Reported below: 187 F. 2d 403.

No. 118. Beauharnais *v.* Illinois. Supreme Court of Illinois. Certiorari granted. *Alfred A. Albert* for petitioner. Reported below: 408 Ill. 512, 97 N. E. 2d 343.

No. 126. National Labor Relations Board *v.* American National Insurance Co. C. A. 5th Cir. Certio-

rari granted. *Solicitor General Perlman* for petitioner. *M. L. Cook* for respondent. Reported below: 187 F. 2d 307.

No. 180. KEROTEST MANUFACTURING CO. *v.* C-O-TWO FIRE EQUIPMENT CO. C. A. 3d Cir. Certiorari granted. *Walter J. Blenko, John F. C. Glenn* and *Aaron Finger* for petitioner. *R. Morton Adams, Arthur G. Connolly* and *Edward T. Connors* for respondent. Reported below: 189 F. 2d 31.

No. 78. VON MOLTKE *v.* GILLIES, SUPERINTENDENT. C. A. 6th Cir. Certiorari granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for respondent. Reported below: 189 F. 2d 56.

No. 136. BUTTERFIELD, DIRECTOR OF THE IMMIGRATION & NATURALIZATION SERVICE, *v.* ZYDOK. C. A. 6th Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. *Carol King* for respondent. Reported below: 187 F. 2d 802.

No. 173. LYKES *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *Chester H. Ferguson* and *George W. Ericksen* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for the United States. Reported below: 188 F. 2d 964.

No. 204. GUESSEFELDT *v.* MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, 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. *Robert F. Klepinger* and *William W.*

Barron for petitioner. *Solicitor General Perlman* filed a memorandum suggesting that certiorari be granted. Reported below: 88 U. S. App. D. C. 383, 191 F. 2d 639.

No. 5, Misc. STROBLE *v.* CALIFORNIA. Supreme Court of California. Certiorari granted. *A. L. Wirin* and *Fred Okrand* for petitioner. *Edmund G. Brown,* Attorney General of California, *William V. O'Connor,* Assistant Attorney General, and *Frank W. Richards,* Deputy Attorney General, for respondent. Reported below: 36 Cal. 2d 615, 226 P. 2d 330.

No. 16, Misc. DICE *v.* AKRON, CANTON & YOUNGSTOWN RAILROAD CO. Supreme Court of Ohio. Certiorari granted. *Rice A. Hershey* and *Frederic O. Hatch* for petitioner. *Cletus G. Roetzel* for respondent. Reported below: 155 Ohio St. 185, 98 N. E. 2d 301.

No. 29, Misc. SHERMAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari granted. Petitioner *pro se.* *Ivan A. Elliott,* Attorney General of Illinois, and *William C. Wines* and *Raymond S. Sarnow,* Assistant Attorneys General, for respondent.

No. 15, Misc. FAR EAST CONFERENCE ET AL. *v.* UNITED STATES ET AL. United States District Court for the District of New Jersey. Motion for leave to file petition for writ of certiorari granted. Certiorari granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *John Milton* and *Elkan Turk* for the Far East Conference et al.; and *Josiah Stryker* for the Isthmian Steamship Co., petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Charles H. Weston* and *J. Roger Wollenberg* for the United States; and *Francis S. Walker* for the Federal Maritime Board, respondents. Reported below: 94 F. Supp. 900.

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Certiorari Denied. (*See also No. 243 and Misc. Nos. 19, 53 and 66, supra.*)

No. 24. FAY, ADMINISTRATOR, ET AL. *v.* SWICKER ET AL. Supreme Court of Ohio. Certiorari denied. *Marvin C. Harrison* for petitioners. *Robert Guinther* for the Republic Mutual Insurance Co., respondents. Reported below: 154 Ohio St. 341, 96 N. E. 2d 196.

No. 27. QUEST-SHON MARK BRASSIERE CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Robert T. Murphy* for petitioner. *Solicitor General Perlman, David P. Findling* and *Mozart G. Ratner* for respondent. Reported below: 185 F. 2d 285.

No. 28. FREMONT CAKE & MEAL CO. *v.* WILSON & CO., INC. Supreme Court of Nebraska. Certiorari denied. *Maxwell V. Beghtol* and *J. Lee Rankin* for petitioner. *J. A. C. Kennedy* for respondent. Reported below: 153 Neb. 160, 43 N. W. 2d 657.

No. 29. KELLY *v.* DELAWARE RIVER JOINT COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. *Henry D. O'Connor* for petitioner. *Philip Price* for respondents. Reported below: 187 F. 2d 93.

No. 33. PENNSYLVANIA EX REL. DAVERSE *v.* HOHN, WARDEN, ET AL. Supreme Court of Pennsylvania. Certiorari denied. *John W. Cragun* for petitioner.

No. 36. JACKSON ET AL. *v.* NORTHWEST AIRLINES, INC. C. A. 8th Cir. Certiorari denied. *Elmer J. Ryan* for petitioners. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for respondent. Reported below: 185 F. 2d 74.

No. 39. SEAMPRUFE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. *Nathaniel H. Janes* and *Hyman J. Cohen* for petitioner. *Solicitor General Perlman, David P. Findling, Mozart G. Ratner* and *Irving M. Herman* for respondent. Reported below: 186 F. 2d 671.

No. 41. GREENE ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Robert M. Drysdale* for petitioners. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for the United States. Reported below: 118 Ct. Cl. 248, 94 F. Supp. 666.

No. 42. BRACK *v.* GROSS. C. A. 4th Cir. Certiorari denied. *Jo V. Morgan* and *Jo V. Morgan, Jr.* for petitioner. Reported below: 186 F. 2d 940.

No. 45. MACK *v.* MALES ET AL. C. A. 6th Cir. Certiorari denied. *Harry J. Lippman* for petitioner. Reported below: 187 F. 2d 334.

No. 48. UNITED STATES *v.* LOYAL BAND OR GROUP OF CREEK INDIANS ET AL. Court of Claims. Certiorari denied. *Solicitor General Perlman* for the United States. *Wilfred Hearn* for respondents. Reported below: 118 Ct. Cl. 373, 97 F. Supp. 426.

No. 50. CANADIAN AVIATOR, LTD. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. *Eugene Underwood* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Samuel D. Slade, Leavenworth Colby* and *Morton Hollander* for the United States. Reported below: 187 F. 2d 100.

No. 51. HAAS *v.* PALACE HOTEL CO. ET AL. District Court of Appeal of California, First Appellate District.

Certiorari denied. *Roger Kent* for petitioner. *Lyman Henry* for the Palace Hotel Co.; and *Farnham P. Griffiths* and *Morris M. Doyle* for the Bank of California et al., respondents. Reported below: 101 Cal. App. 2d 108, 224 P. 2d 783.

No. 52. MAROOSIS *v.* SMYTH, COLLECTOR OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *A. Russell Berti* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *S. Dee Hanson* for respondent. Reported below: 187 F. 2d 228.

No. 53. RUBINO ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Wareham C. Seaman* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *L. W. Post* for respondent. Reported below: 186 F. 2d 304.

No. 55. CLOUGHERTY *v.* JAMES VERNOR CO. C. A. 6th Cir. Certiorari denied. *Arthur J. Hass* for petitioner. *Wilber M. Brucker* for respondent. Reported below: 187 F. 2d 288.

No. 56. WINROD *v.* MCFADDEN PUBLICATIONS, INC. C. A. 7th Cir. Certiorari denied. *John F. Eberhardt* for petitioner. *Loy N. McIntosh* and *Frederick Secord* for respondent. Reported below: 187 F. 2d 180.

No. 57. MORENO *v.* UNITED STATES. Court of Claims. Certiorari denied. *LaVern R. Dilweg, T. Bruce Fuller* and *R. H. McNeill* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Samuel D. Slade* and *Morton Hollander* for the United States. Reported below: 118 Ct. Cl. 30, 93 F. Supp. 607.

No. 58. CARRIER CORPORATION *v.* REFRIGERATION ENGINEERING, INC. C. A. 9th Cir. Certiorari denied. *Herman Seid* for petitioner.

No. 59. HALESTON DRUG STORES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Wilber Henderson* for petitioner. *Solicitor General Perlman, David P. Findling, Mozart G. Ratner* and *Norton J. Come* for respondent. Reported below: 187 F. 2d 418.

No. 60. SEA VIEW, INC. ET AL. *v.* WEINSTEIN, GUARDIAN, ET AL. C. A. 5th Cir. Certiorari denied. *R. W. Thompson, Jr.* and *Webb M. Mize* for petitioners. *William L. Guice* for Weinstein; and *Albert Sidney Johnston, Jr.* for Coopers, Inc. et al., respondents. Reported below: 188 F. 2d 116.

No. 61. BATES ET AL. *v.* BATTE ET AL. C. A. 5th Cir. Certiorari denied. *Robert L. Carter* and *Thurgood Marshall* for petitioners. *Rufus Creekmore* for respondents. Reported below: 187 F. 2d 142.

No. 63. AUGUSTINE ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Frederick Bernays Wiener* and *Jacob Kossman* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle* and *John Lockley* for the United States. Reported below: 188 F. 2d 359.

No. 64. UNION STARCH & REFINING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Harry T. Ice* for petitioner. *Solicitor General Perlman, David P. Findling, Mozart G. Ratner* and *Norton J. Come* for respondent. Reported below: 186 F. 2d 1008.

No. 65. LATVIAN STATE CARGO & PASSENGER STEAMSHIP LINE *v.* MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Horace S. Whitman* and *Charles Recht* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baynton, George B. Searls* and *Joseph Laufer* for respondent. Reported below: 88 U. S. App. D. C. 226, 188 F. 2d 1000.

No. 66. NORTH ARLINGTON NATIONAL BANK *v.* KEARNY FEDERAL SAVINGS & LOAN ASSN. C. A. 3d Cir. Certiorari denied. *Fred Herrigel, Jr.* for petitioner. *Frank G. Masini* for respondent. Briefs of *amici curiae* supporting the petition were filed by *Theodore D. Parsons,* Attorney General, and *Oliver T. Somerville,* Deputy Attorney General, for the State of New Jersey; *Fred N. Oliver, Willard P. Scott* and *Michael F. McCarthy* for the National Association of Mutual Savings Banks; and *Charles Danzig* for the New Jersey Bankers' Association. Reported below: 187 F. 2d 564.

No. 67. OLDLAND ET AL. *v.* PHILLIPS PETROLEUM CO.; and

No. 107. PHILLIPS PETROLEUM CO. *v.* OLDLAND ET AL. C. A. 10th Cir. Certiorari denied. *Frank Delaney* and *L. H. Larwill* for Oldland et al. *Rayburn L. Foster, Harry D. Turner* and *George L. Sneed* for the Phillips Petroleum Co. Reported below: 187 F. 2d 780.

No. 68. UNITED STATES *v.* SIMS. C. A. 3d Cir. Certiorari denied. *Solicitor General Perlman* for the United States. *Abraham E. Freedman* for respondent. Reported below: 186 F. 2d 972.

No. 69. MURRAY *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. *Maurine L. Jones* for peti-

tioner. *Solicitor General Perlman* filed a memorandum for the United States, respondent, stating that the Government, in effect, occupies the role of a stakeholder and takes no position as to whether the writ of certiorari should issue. Reported below: 188 F. 2d 362.

No. 70. BOYLE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Llewellyn A. Luce* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, A. F. Prescott* and *Irving I. Axelrad* for respondent. Reported below: 187 F. 2d 557.

No. 71. JONES *v.* MOTOROLA, INC. ET AL. C. A. 2d Cir. Certiorari denied. *L. Stewart Gatter* for petitioner. *Foorman L. Mueller* for Motorola, Inc., respondent. Reported below: See 186 F. 2d 707.

No. 72. HUGO V. LOEWI, INC. *v.* GESCHWILL. C. A. 9th Cir. Certiorari denied. *Arthur B. Hyman* for petitioner. *Roy F. Shields* for respondent. Reported below: 188 F. 2d 366.

No. 73. HUGO V. LOEWI, INC. *v.* SMITH. C. A. 9th Cir. Certiorari denied. *Arthur B. Hyman* for petitioner. *Roy F. Shields* for respondent. Reported below: 188 F. 2d 160.

No. 74. COLUMBIA HOSPITAL FOR WOMEN AND LYING-IN ASYLUM *v.* UNITED STATES FIDELITY & GUARANTY CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Milton W. King, Bernard I. Nordlinger* and *Ellis B. Miller* for petitioner. *Louis M. Denit, Thomas S. Jackson* and *A. Leckie Cox* for respondent. Reported below: 88 U. S. App. D. C. 251, 188 F. 2d 654.

No. 75. MOFFETT, EXECUTRIX, *v.* COMMERCE TRUST CO. ET AL. C. A. 8th Cir. Certiorari denied. *Martin J. O'Donnell* for petitioner. *Charles M. Blackmar* and *Philip J. Close* for the Commerce Trust Co.; *Orlin A. Weede, Walter A. Raymond* and *R. Carter Tucker* for Weede et al.; and *B. C. Howard* for Kopp et al., respondents. Reported below: 187 F. 2d 242.

No. 76. TAYLOR ET AL. *v.* HUBBELL ET AL. C. A. 9th Cir. Certiorari denied. *Gerald Jones* for petitioners. *J. Nicholas Udall* for respondents. Reported below: 188 F. 2d 106.

No. 84. JACKSON *v.* AMERICAN FIRE & CASUALTY CO. C. A. 5th Cir. Certiorari denied. *J. Y. Sanders, Jr.* and *Ben R. Miller* for petitioner. Reported below: 187 F. 2d 379.

No. 87. DALTON ET AL. *v.* MARZALL, COMMISSIONER OF PATENTS. United States Court of Customs and Patent Appeals. Certiorari denied. *John J. Rogan* and *Charles A. Morton* for petitioners. *Solicitor General Perlman* and *John R. Benney* for respondent. Reported below: 38 C. C. P. A. (Pat.) 953, 188 F. 2d 170.

No. 88. DORSKY *v.* BROWN, LICENSE INSPECTOR. Supreme Court of Alabama. Certiorari denied. *John S. Tucker, Jr.* for petitioner. *Si Garrett,* Attorney General of Alabama, and *H. Grady Tiller* and *William H. Burton,* Assistant Attorneys General, for respondent. Reported below: 255 Ala. 238, 51 So. 2d 360.

No. 93. GALTER ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *Henry H. Koven* for petitioners. *Solicitor General Perlman, Assistant Attor-*

ney General Morison, Charles H. Weston, J. Roger Wollenberg and *W. T. Kelley* for respondent. Reported below: 186 F. 2d 810.

No. 97. GOODLOE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles E. Ford* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 88 U. S. App. D. C. 102, 188 F. 2d 621.

No. 98. BAIRD *v.* GUARANTY TRUST CO., TRUSTEE, ET AL. Court of Appeals of New York. Certiorari denied. *Julius Levy* for petitioner. *Theodore Kiendl* for the Guaranty Trust Co.; *Orville W. Wood* for the Chase National Bank; *Bernard D. Fischman* for Klorfein; and *John B. Marsh* and *Edward E. Watts, Jr.* for the City Bank Farmers Trust Co., respondents. Reported below: 302 N. Y. 658, 98 N. E. 2d 474.

No. 99. HUNTER ET AL. *v.* SHEPHERD ET AL. C. A. 7th Cir. Certiorari denied. *Richard E. Westbrooks* for petitioners. *Jack A. Williamson* and *Robert McCormick Adams* for Shepherd et al.; and *R. S. Outlaw* and *W. J. Milroy* for the Atchison, T. & S. F. R. Co., respondents. Reported below: 188 F. 2d 294.

No. 101. BLUM *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *George L. Weisbard* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Hilbert P. Zarky* for respondent. Reported below: 187 F. 2d 177.

No. 105. THORPE ET AL. *v.* LANDSTROM ET AL. C. A. 8th Cir. Certiorari denied. *Holton Davenport* for petitioners. *H. F. Fellows* for respondents. Reported below: 189 F. 2d 46.

No. 108. KENYON, EXECUTRIX, *v.* AUTOMATIC INSTRUMENT CO. C. A. 6th Cir. Certiorari denied. *Eugene C. Knoblock* for petitioner. *Clarence J. Loftus* and *William E. Lucas* for respondent. Reported below: 186 F. 2d 752.

No. 109. CRANE, DOING BUSINESS AS ASSOCIATED FRUIT DISTRIBUTORS, *v.* JOSEPH DENUNZIO FRUIT CO. ET AL. C. A. 9th Cir. Certiorari denied. *Benjamin W. Shipman* for petitioner. *Eli H. Brown, III* for the Joseph Denunzio Fruit Co.; and *G. L. Aynesworth* and *L. Nelson Hayhurst* for Kazanjian, respondents. Reported below: 188 F. 2d 569.

No. 110. MATTOX ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William Klein* for petitioners. *Solicitor General Perlman, Ed Dupree, Leon J. Libeu* and *Nathan Siegel* for the United States. Reported below: 187 F. 2d 406.

No. 111. JACKSONVILLE GAS CORP. *v.* FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION. Supreme Court of Florida. Certiorari denied. *Elliott Adams* for petitioner. *Lewis W. Petteway* for respondent. Reported below: 50 So. 2d 887.

No. 114. WABASH CORPORATION ET AL. *v.* ROSS ELECTRIC CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Theodore S. Kenyon* and *Arthur G. Connolly* for petitioners. *Alexander C. Neave, Charles H. Walker* and *Harry R. Pugh, Jr.* for respondents. Reported below: 187 F. 2d 577.

No. 115. WEISS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Sidney Morse* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for the United States. Reported below: 187 F. 2d 610.

No. 117. BOARD OF COMMISSIONERS FOR THE ATCHAFALAYA BASIN LEVEE DISTRICT *v.* SMYTH ET AL. C. A. 5th Cir. Certiorari denied. *John L. Madden* for petitioner. Reported below: 187 F. 2d 11.

No. 119. SCHOOL DISTRICT OF THE BOROUGH OF SHENANDOAH ET AL. *v.* CITY OF PHILADELPHIA, TRUSTEE. Supreme Court of Pennsylvania. Certiorari denied. *Thomas C. Egan* for petitioners. *David Berger* for respondent. Reported below: 367 Pa. 180, 79 A. 2d 433.

No. 124. BOEING AIRPLANE CO. *v.* AERONAUTICAL INDUSTRIAL DISTRICT LODGE NO. 751 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL. C. A. 9th Cir. Certiorari denied. *Frank E. Holman* and *Lowell P. Mickelwait* for petitioner. *Lee Olwell* and *Tracy E. Griffin* for respondents. Reported below: 188 F. 2d 356.

No. 125. DOMINION NATIONAL BANK, TRUSTEE, ET AL. *v.* HALE, FORMER COLLECTOR OF INTERNAL REVENUE, ET AL. C. A. 6th Cir. Certiorari denied. *Robert Ash* and *John W. Cragun* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Robert N. Anderson* and *Louise Foster* for respondents. Reported below: 186 F. 2d 374.

No. 127. BAGSBY ET AL. *v.* TRUSTEES OF PLEASANT GROVE INDEPENDENT SCHOOL DISTRICT. Court of Civil Appeals of Texas, Seventh Supreme Judicial District. Certiorari denied. *Austin L. Fickling* for petitioners. *Morris I. Jaffe* for respondent. Reported below: 237 S. W. 2d 750.

No. 129. MCANDREWS *v.* E. W. BLISS CO. C. A. 6th Cir. Certiorari denied. *Samuel T. Gaines* for petitioner. *James A. Butler* for respondent. Reported below: 186 F. 2d 499.

No. 130. GEORGIA *v.* WENGER. C. A. 7th Cir. Certiorari denied. *Eugene Cook,* Attorney General of Georgia, *M. H. Blackshear, Jr.,* Deputy Attorney General, and *Lamar W. Sizemore,* Assistant Attorney General, for petitioner. *Maurice J. Walsh* for respondent. A brief of *amici curiae* supporting petitioner was filed for the States of Alabama, by *Si Garrett,* Attorney General; California, by *Edmund G. Brown,* Attorney General; Connecticut, by *George C. Conway,* Attorney General, and *William L. Beers,* Deputy Attorney General; Delaware, by *H. Albert Young,* Attorney General; Florida, by *Richard W. Ervin,* Attorney General; Illinois, by *Ivan A. Elliott,* Attorney General; Iowa, by *Robert L. Larson,* Attorney General; Kansas, by *Harold R. Fatzer,* Attorney General; Kentucky, by *A. E. Funk,* Attorney General; Mississippi, by *J. P. Coleman,* Attorney General; Nebraska, by *Clarence S. Beck,* Attorney General, and *Walter E. Nolte,* Deputy Attorney General; New Hampshire, by *Gordon N. Tiffany,* Attorney General; New Jersey, by *Theodore D. Parsons,* Attorney General; North Dakota, by *E. T. Christianson,* Attorney General; Oregon, by *George Neuner,* Attorney General; Rhode Island, by *William E. Powers,* Attorney General; South Carolina, by *T. C. Callison,* Attorney General; Tennessee, by *Roy H. Beeler,* Attorney General, and *William F. Barry,* Solicitor General; Texas, by *Price Daniel,* Attorney General; Vermont, by *Clifton G. Parker,* Attorney General; Virginia, by *J. Lindsay Almond, Jr.,* Attorney General; Washington, by *Smith Troy,* Attorney General; and West Virginia, by *William C. Marland,* Attorney General, and *Easton R. Stephenson,* Assistant Attorney General. Reported below: 187 F. 2d 285.

No. 131. MARACHOWSKY STORES CO. *v.* O'CONNOR, CUSTODIAN. C. A. 7th Cir. Certiorari denied. *David A. Canel* for petitioner. Respondent *pro se.* Reported below: 188 F. 2d 686.

No. 132. BALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Byron G. Skelton* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 188 F. 2d 472.

No. 133. KIME *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Francis Heisler* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Felicia H. Dubrovsky* for the United States. Reported below: 188 F. 2d 677.

No. 140. ALABAMA MARBLE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *John J. Smith* for petitioner. *Solicitor General Perlman, David P. Findling* and *Mozart G. Ratner* for respondent. Reported below: 185 F. 2d 1022.

No. 141. MARKS ET AL., TRUSTEES, *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. Garner Anthony* for petitioners. *Solicitor General Perlman* and *Assistant Attorney General Vanech* for the United States. *Walter D. Ackerman, Jr.*, Attorney General, and *Rhoda V. Lewis*, Deputy Attorney General, filed a brief for the Territory of Hawaii, as *amicus curiae*, supporting the petition. Reported below: 187 F. 2d 724.

No. 142. SOUTHERN PACIFIC CO. ET AL. *v.* SMITH, ADMINISTRATRIX, ET AL. C. A. 9th Cir. Certiorari denied. *Clarence J. Young* for petitioners. Reported below: 187 F. 2d 397.

No. 144. KURZEN *v.* MARZALL, COMMISSIONER OF PATENTS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Hayden C. Covington* for petitioner. *Solicitor General Perlman,*

Assistant Attorney General Baldridge and *Samuel D. Slade* for respondent. Reported below: 88 U. S. App. D. C. 274, 188 F. 2d 673.

No. 145. Dalton Telephone Co. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *Marion A. Prowell* for petitioner. *Solicitor General Perlman, David P. Findling, Mozart G. Ratner* and *Marcel Mallet-Prevost* for respondent. Reported below: 187 F. 2d 811.

No. 146. Lucero, Administrator, *v.* Saindon et al. C. A. 10th Cir. Certiorari denied. *Louis C. Lujan* for petitioner. *James R. Modrall* for respondents. Reported below: 187 F. 2d 345.

No. 150. Eastern Venetian Blind Co. *v.* Acme Steel Co. C. A. 4th Cir. Certiorari denied. *John Vaughan Groner* and *William H. Webb* for petitioner. *Glen E. Smith* and *Edward R. Johnston* for respondent. Reported below: 188 F. 2d 247.

No. 152. S. Klein on the Square, Inc. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Sidney A. Diamond* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Irving I. Axelrad* for respondent. Reported below: 188 F. 2d 127.

No. 154. Pietrzak *v.* United States. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 188 F. 2d 418.

No. 156. Distillers Factors Corp. *v.* Jacobs, Receiver in Bankruptcy. C. A. 3d Cir. Certiorari de-

nied. *Archibald Palmer* and *Max L. Rosenstein* for petitioner. *Morris M. Schnitzer* for respondent. Reported below: 187 F. 2d 685.

No. 157. TERRIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Sam R. Merrill* and *Philip D. Beall* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, John F. Davis* and *Felicia H. Dubrovsky* for the United States. Reported below: 188 F. 2d 472.

No. 160. STRATEGICAL DEMOLITION TORPEDO CO., INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Frank E. Scrivener* and *Robert C. Hardwerk* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for the United States. Reported below: 119 Ct. Cl. 291, 96 F. Supp. 315.

No. 161. CLINTON FOODS, INC. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. *Mark Candee* and *Stanley C. Morris* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *John T. Grigsby* for the United States, respondent. Reported below: 188 F. 2d 289.

No. 168. FRIEDMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William G. Comb* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 190 F. 2d 364.

No. 170. ILLINOIS CENTRAL RAILROAD CO. *v.* ALFORD ET AL. C. A. 5th Cir. Certiorari denied. *Joseph H. Wright, Charles A. Helsell, A. B. Freyer* and *M. C. Thompson* for petitioner. Reported below: 187 F. 2d 144.

No. 171. ANDERSON-TULLY COMPANY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Lamar Williamson* and *R. L. Dent* for petitioner. *Solicitor General Perlman, Assistant Attorney General Vanech* and *Roger P. Marquis* for the United States. Reported below: 189 F. 2d 192.

No. 175. TRAVELERS INSURANCE CO. *v.* TONER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Arthur J. Phelan* and *Frank F. Roberson* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for the Deputy Commissioner, respondent. Reported below: 89 U. S. App. D. C. —, 190 F. 2d 30.

No. 179. OSTERMAN & HUTNER ET AL. *v.* GUARANTY TRUST CO., TRUSTEE, ET AL. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. *Percival E. Jackson* for petitioners. *Theodore Kiendl* for the Guaranty Trust Co.; *Bernard D. Fischman* for Klorfein; *John B. Marsh* and *Edward E. Watts, Jr.* for the City Bank Farmers Trust Co.; and *Arthur A. Gammell* for the Chase National Bank, respondents.

No. 181. KAM KOON WAN *v.* E. E. BLACK, LTD. C. A. 9th Cir. Certiorari denied. *Samuel Landau* and *David Previant* for petitioner. Reported below: 188 F. 2d 558.

No. 182. MILLER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Al M. Heck* for petitioners. *Solicitor General Perlman, Robert L. Stern, Ed Dupree, Leon J. Libeu* and *Nathan Siegel* for the United States. Reported below: 186 F. 2d 937.

No. 185. FARA INVESTORS, INC. *v.* LOURIE ET AL. Court of Appeals of New York. Certiorari denied. *Henry N. Rapaport* for petitioner. Reported below: 302 N. Y. 730, 98 N. E. 2d 704.

No. 188. GILLETTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Vine H. Smith, Frank E. Hook* and *Otho S. Bowling* for petitioner. *Solicitor General Perlman* and *Assistant Attorney General McInerney* for the United States. Reported below: 189 F. 2d 449.

No. 190. AMERICAN STORES CO. *v.* BETTERMAN. Supreme Court of Pennsylvania. Certiorari denied. *Joseph Gilfillan* for petitioner. *Frank A. Sinon* for respondent. Reported below: 367 Pa. 193, 80 A. 2d 66.

No. 191. WELDON *v.* INTERSTATE COMMERCE COMMISSION. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Morison, James A. Murray* and *Leo H. Pou* for respondent. Reported below: 188 F. 2d 367.

No. 192. FREIDUS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *John McKim Minton* and *Richard T. Davis* for petitioner. *Solicitor General Perlman* and *Assistant Attorney General Caudle* for the United States. Reported below: 190 F. 2d 144.

No. 196. KIMBELL-DIAMOND MILLING 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 *Lee A. Jackson* for respondent. Reported below: 187 F. 2d 718.

No. 198. LOUK ET AL. *v.* FRIEDMAN ET AL. C. A. 4th Cir. Certiorari denied.

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No. 200. ASSEFF ET AL. *v.* MARZALL, COMMISSIONER OF PATENTS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John F. Oberlin* and *Almon S. Nelson* for petitioners. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for respondent. Reported below: 88 U. S. App. D. C. 358, 189 F. 2d 660.

No. 201. SUNRAY OIL CORP. *v.* ALLBRITTON. C. A. 5th Cir. Certiorari denied. *C. E. Bryson* and *Angus G. Wynne* for petitioner. *Chris J. Dixie* for respondent. Reported below: 188 F. 2d 751.

No. 202. GOVERNMENT SERVICES, INC. *v.* DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John W. Cross* for petitioner. *Vernon E. West, Chester H. Gray* and *George C. Updegraff* for respondent. Reported below: 88 U. S. App. D. C. 360, 189 F. 2d 663.

No. 208. A. B. T. MANUFACTURING CORP. *v.* NATIONAL REJECTORS, INC. C. A. 7th Cir. Certiorari denied. *Oscar E. Bland, Charles M. Thomas* and *Clarence E. Threedy* for petitioner. *Clarence J. Loftus* and *William E. Lucas* for respondent. Reported below: 188 F. 2d 706.

No. 210. TUCKER *v.* NEW ORLEANS LAUNDRIES, INC. ET AL. C. A. 5th Cir. Certiorari denied. *William G. McRae* for petitioner. *Sidney A. Wolff* for the New Orleans Laundries, Inc.; and *Leonard B. Levy* for Lob et al., respondents. Reported below: 188 F. 2d 263.

No. 211. TUCKER *v.* NATIONAL LINEN SERVICE CORP. ET AL. C. A. 5th Cir. Certiorari denied. *William G. McRae* for petitioner. *M. F. Goldstein* for the National

Linen Service Corporation et al.; *James A. Branch* for Vicknair et al.; *Sidney A. Wolff* for the New Orleans Laundries, Inc.; and *Leonard B. Levy* for Lob et al., respondents. Reported below: 188 F. 2d 265.

No. 212. AMERICAN ELASTICS, INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leo Brady* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for the United States. Reported below: 187 F. 2d 109.

No. 213. STROUD *v.* SWOPE, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Robert G. Maysack* for respondent. Reported below: 187 F. 2d 850.

No. 215. BERNARD REALTY CO. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *A. W. Richter* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Melva M. Graney* for the United States. Reported below: 188 F. 2d 861.

No. 217. STEIN ET AL., DOING BUSINESS AS REGLOR OF CALIFORNIA, *v.* EXPERT LAMP CO. C. A. 7th Cir. Certiorari denied. *Will Freeman* and *C. A. Miketta* for petitioners. *Max Richard Kraus* for respondent. Reported below: 188 F. 2d 611.

No. 221. KING ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Homer L. Bruce* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Stanley M. Silverberg* and *Ellis N. Slack* for respondent. Reported below: 189 F. 2d 122.

No. 222. DIXON *v.* ATLANTIC COAST LINE RAILROAD CO. C. A. 5th Cir. Certiorari denied. *Harry M. Wilson* for petitioner. *Charles Cook Howell* for respondent. Reported below: 189 F. 2d 525.

No. 223. RAILWAY EXPRESS AGENCY, INC. *v.* KENNEDY ET AL. C. A. 7th Cir. Certiorari denied. *Kenneth F. Burgess* and *Douglas F. Smith* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for Kennedy et al., respondents. Reported below: 189 F. 2d 801.

No. 225. PORTO RICO TELEPHONE CO. *v.* PUERTO RICO COMMUNICATIONS AUTHORITY. C. A. 1st Cir. Certiorari denied. *John W. Davis* and *S. Hazard Gillespie, Jr.* for petitioner. *Victor Gutierrez Franqui,* Attorney General of Puerto Rico, *A. Torres Braschi* and *Edgar S. Belaval,* Assistant Attorneys General, for respondent. Reported below: 189 F. 2d 39.

No. 226. DOWDY ET AL. *v.* HAWFIELD, EXECUTOR, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Luther Robinson Maddox* for petitioners. *Albert Brick* for respondents. Reported below: 88 U. S. App. D. C. 241, 189 F. 2d 637.

No. 227. UNITED TRUCK LINES, INC. *v.* INTERSTATE COMMERCE COMMISSION. C. A. 9th Cir. Certiorari denied. *Edward J. Reilly* and *B. H. Kizer* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Robert L. Stern, J. Roger Wollenberg, Daniel W. Knowlton, James A. Murray* and *Leo H. Pou* for respondent. Reported below: 189 F. 2d 816.

No. 228. SCRIPPS-HOWARD RADIO, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari

denied. *Raymond T. Jackson, George S. Smith* and *Harry P. Warner* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Ralph S. Spritzer, Benedict P. Cottone* and *Max Goldman* for respondent. Reported below: 89 U. S. App. D. C. —, 189 F. 2d 677.

No. 235. Norfolk & Western Railway Co. *v.* Charles. C. A. 7th Cir. Certiorari denied. *Edward R. Adams* for petitioner. *James G. Lemon, Jr.* for respondent. Reported below: 188 F. 2d 691.

No. 255. Hicks *v.* North Carolina. Supreme Court of North Carolina. Certiorari denied. *Claude L. Dawson* for petitioner. *Harry McMullan,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent. Reported below: 233 N. C. 511, 64 S. E. 2d 871.

No. 102. Neapolidis et al. *v.* Theofana Maritime Co., Ltd. et al. Supreme Court of Appeals of Virginia. Certiorari denied. *Jacob L. Morewitz* for petitioners. *Leon T. Seawell* and *Harry E. McCoy, Jr.* for respondents. Reported below: 192 Va. 90, 63 S. E. 2d 795.

No. 164. Sigurjonnson et al. *v.* Trans-American Traders, Inc. C. A. 5th Cir. Certiorari denied. *T. T. Oughterson* for petitioners. Reported below: 188 F. 2d 760.

No. 194. Lynch et al. *v.* United States. C. A. 5th Cir. Certiorari denied. *Frank M. Gleason* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Sydney Brodie* for the United States. Reported below: 189 F. 2d 476.

No. 103. SWIFT & Co. *v.* RECONSTRUCTION FINANCE CORPORATION; and

No. 104. CUDAHY PACKING CO. *v.* RECONSTRUCTION FINANCE CORPORATION. United States Emergency Court of Appeals. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of these applications. *Edward R. Johnston, Albert E. Jenner, Jr.* and *William N. Strack* for petitioner in No. 103. *Vincent O'Brien* for petitioner in No. 104. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for respondent.

No. 112. ABO ET AL. *v.* MCGRATH, ATTORNEY GENERAL, ET AL.;

No. 113. AOKI ET AL. *v.* BARBER, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION SERVICE;

No. 121. MCGRATH, ATTORNEY GENERAL, ET AL. *v.* ABO ET AL.; and

No. 122. BARBER, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION SERVICE, *v.* AOKI ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Wayne M. Collins* for petitioners in Nos. 112 and 113 and respondents in Nos. 121 and 122. *Solicitor General Perlman* for petitioners in Nos. 121 and 122, and with *Mr. Perlman* for respondents in Nos. 112 and 113 were *Assistant Attorney General Baldridge, Samuel D. Slade* and *Herman Marcuse.* Reported below: 186 F. 2d 766, 775.

No. 128. RISBERG *v.* DULUTH, MISSABE & IRON RANGE RAILWAY CO. Supreme Court of Minnesota. Certiorari denied. *David W. Louisell* for petitioner. *W. O. Bissonett* and *Donald D. Harries* for respondent. Reported below: 233 Minn. 396, 47 N. W. 2d 113.

No. 148. REMINGTON RAND, INC. *v.* SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COM-

MERCIALES, S. A., ET AL. 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. *William P. MacCracken, Jr.*, *Urban A. Lavery* and *William W. Barron* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baynton, George B. Searls* and *David Schwartz* for McGrath et al.; and *John J. Wilson* and *Donald Hiss* for the Societe Internationale pour Participations Industrielles et Commerciales, S. A., respondents. Reported below: 88 U. S. App. D. C. 275, 188 F. 2d 1011.

No. 149. JOHNSON ET AL. *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. *R. Arthur Jett* for petitioners. *Horace L. Walker* and *Hewitt Biaett* for respondent. Reported below: 188 F. 2d 458.

No. 153. HOPE BASKET CO. ET AL. *v.* PRODUCT ADVANCEMENT CORP. ET AL.; and

No. 216. DELPHI FROSTED FOODS CORP. *v.* ILLINOIS CENTRAL RAILROAD CO. Petitions for writs of certiorari to the United States Court of Appeals for the Sixth Circuit denied for the reason that applications therefor were not made within the time provided by law. 28 U. S. C. § 2101 (c). *Herbert H. Porter* and *Edwin T. Bean* for petitioners in No. 153. *Charles Garfinkel* for petitioner in No. 216. *Lloyd C. Root* and *Frank E. Liverance, Jr.* for respondents in No. 153. *James G. Wheeler* for respondent in No. 216. Reported below: 187 F. 2d 1008; 188 F. 2d 343.

No. 177. HARTMAIER ET AL. *v.* LONG ET AL. Supreme Court of Missouri. Certiorari denied. *Roger C. Slaughter* for petitioners. *Herman M. Langworthy* for respondents. Reported below: 361 Mo. 1151, 238 S. W. 2d 332.

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No. 193. NEMOURS CORPORATION *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Laurence Graves* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Melva M. Graney* for the United States. Reported below: 188 F. 2d 745.

No. 266. MASKE *v.* WASHINGTON, MARLBORO & ANNAPOLIS MOTOR LINES, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *David G. Bress, Alvin L. Newmyer, Jr.* and *Sheldon E. Bernstein* for petitioner. *George D. Horning, Jr.* for respondent. Reported below: 89 U. S. App. D. C. —, 190 F. 2d 621.

No. 2, Misc. SCHOLL *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se. Price Daniel,* Attorney General of Texas, *Charles D. Mathews,* First Assistant Attorney General, and *E. Jacobson,* Assistant Attorney General, for respondent. Reported below: 155 Tex. Cr. R. —, 236 S. W. 2d 499.

No. 3, Misc. LANHAM ET AL. *v.* HOWELL ET AL. Supreme Court of Mississippi. Certiorari denied. *Charles W. Anderson* for petitioners. *Means Johnston* for respondents. Reported below: 210 Miss. 383, 49 So. 2d 701.

No. 4, Misc. JOHNSON *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *E. Guy Hammond* for petitioner. Reported below: 155 Ohio St. 97, 97 N. E. 2d 660.

No. 8, Misc. ARESEN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 10, Misc. THOMPSON *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied. *Louis C. Glasso* and *Zeno Fritz* for petitioner. *William S. Rahauser* for respondent. Reported below: 367 Pa. 102, 79 A. 2d 401.

No. 11, Misc. HEWITT *v.* CITY OF JACKSONVILLE. C. A. 5th Cir. Certiorari denied. *Will O. Murrell* for petitioner. Reported below: 188 F. 2d 423.

No. 12, Misc. ROHDE *v.* RAGEN, WARDEN, ET AL. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 13, Misc. GRENYA *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 14, Misc. COBLE *v.* PENNSYLVANIA ET AL. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 17, Misc. RIEHL *v.* GACKENBACK, WARDEN. Superior Court of Pennsylvania. Certiorari denied.

No. 18, Misc. BEASON *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 20, Misc. EYER *v.* SWENSON, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: —— Md. ——, 80 A. 2d 19.

No. 21, Misc. MACBLAIN *v.* BURKE, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 22, Misc. CRONHOLM *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *Herman N. Harcourt* and *Raymond B. Madden,* Assistant Attorneys General, for respondent.

No. 23, Misc. BANDI *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied. Reported below: 367 Pa. 234, 80 A. 2d 62.

No. 24, Misc. SUPERO *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se.* *Ivan A. Elliott,* Attorney General of Illinois, and *William C. Wines* and *Raymond S. Sarnow,* Assistant Attorneys General, for respondent.

No. 26, Misc. MAYS, ADMINISTRATRIX, *v.* SOUTHERN RAILWAY CO. Supreme Court of Appeals of Virginia. Certiorari denied. *Paul Whitehead* for petitioner. *Sidney S. Alderman, H. G. Hedrick, Thomas B. Gay* and *Lewis F. Powell, Jr.* for respondent. Reported below: 192 Va. 68, 63 S. E. 2d 720.

No. 27, Misc. BUTE *v.* RAGEN, WARDEN, ET AL. Supreme Court of Illinois. Certiorari denied.

No. 28, Misc. HOGAN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 30, Misc. ASPERO *v.* MEMPHIS AND SHELBY COUNTY BAR ASSOCIATION. Supreme Court of Tennessee. Certiorari denied. Petitioner *pro se.* *Marion G. Evans* for respondent. Reported below: 242 S. W. 2d 319.

No. 31, Misc. PENNSYLVANIA EX REL. DARCY *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Charles J. Margiotti* and *Joseph B. Keenan* for petitioner. *George W. Keitel,* Deputy Attorney General of Pennsylvania, for respondent. Reported below: 367 Pa. 130, 79 A. 2d 785.

No. 34, Misc. BIELENSKI *v.* BOUND BROOK OIL-LESS BEARING CO. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se. John P. Smith* for respondent. Reported below: 7 N. J. 135, 80 A. 2d 662.

No. 36, Misc. ISRAEL *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 38, Misc. FRISCO *v.* ALVIS, WARDEN. Court of Appeals of Franklin County, Ohio. Certiorari denied.

No. 39, Misc. BERGER *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. *Isaac Mellman* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, *H. Lawrence Hinkley,* Deputy Attorney General, and *Norman H. Comstock,* Assistant Attorney General, for respondent. Reported below: 123 Colo. 403, 231 P. 2d 799.

No. 40, Misc. ARMSTRONG *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. Court of Civil Appeals of Texas, Fifth Supreme Judicial District. Certiorari denied. *Alexander Gullett* for petitioner. *Ralph Elliott* for respondent. Reported below: 233 S. W. 2d 942.

No. 44, Misc. BROOKS *v.* PENNSYLVANIA RAILROAD CO. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Joseph Walker* for respondent. Reported below: 187 F. 2d 869.

No. 46, Misc. SKINNER *v.* ROBINSON, WARDEN. Circuit Court of Lee County, Illinois. Certiorari denied.

No. 47, Misc. BRINK *v.* CRAWFORD COUNTY COURT OFFICIALS ET AL. C. A. 3d Cir. Certiorari denied.

No. 51, Misc. PITTS *v.* INDIANA. Supreme Court of Indiana. Certiorari denied.

No. 52, Misc. LYLE *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 54, Misc. RICHARDSON *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 55, Misc. PEKOVITCH *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 56, Misc. BURGMAN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 88 U. S. App. D. C. 184, 188 F. 2d 637.

No. 57, Misc. BEATTY *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 58, Misc. NASH, ON BEHALF OF HASHIMOTO ET AL., *v.* MACARTHUR, GENERAL OF THE ARMY, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Simon J. Nash* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for respondents. Reported below: See 87 U. S. App. D. C. 268, 184 F. 2d 606.

No. 59, Misc. FARRELL *v.* O'BRIEN, WARDEN. C. A. 1st Cir. Certiorari denied. Reported below: 189 F. 2d 540.

No. 61, Misc. WILLIAMS *v.* UNION RAILWAY CO. C. A. 6th Cir. Certiorari denied. *S. Shepherd Tate* for petitioner. *Edward P. Russell* for respondent. Reported below: 187 F. 2d 489.

No. 63, Misc. TERRY *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 64, Misc. BURNS *v.* CRIMINAL COURT OF COOK COUNTY. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 67, Misc. NELSON *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 68, Misc. HIRONS *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: —— Md. ——, 80 A. 2d 608.

No. 69, Misc. KENNEDY *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 70, Misc. O'NEILL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 72, Misc. COULTER ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *William Richter* and *Robert W. Hicks* for petitioners. *Frank S. Hogan* for respondent.

No. 73, Misc. BORDAY *v.* BURKE, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 74, Misc. BANKS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 75, Misc. LUKIE *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 76, Misc. JERONIS *v.* JACQUES, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 80, Misc. WOODSON *v.* RAGEN, WARDEN. Circuit Court of Pike County, Illinois. Certiorari denied.

No. 83, Misc. BRUNO *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *Grover N. McCormick* for petitioner. *Roy H. Beeler,* Attorney General of Tennessee, and *Nat Tipton,* Assistant Attorney General, for respondent. Reported below: 192 Tenn. 244, 240 S. W. 2d 528.

No. 84, Misc. FRAZIER *v.* ELLIS, PRISON SYSTEM MANAGER. Court of Criminal Appeals of Texas. Certiorari denied.

No. 85, Misc. GEHANT *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 86, Misc. SEELY *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 89, Misc. IN RE SPRAGUE. Supreme Court of California. Certiorari denied. Reported below: 37 Cal. 2d 110, 230 P. 2d 633.

No. 90, Misc. BOONE *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 91, Misc. BINDRIN *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 92, Misc. ZEMAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 93, Misc. JOHNSON *v.* ILLINOIS SUPREME COURT. Supreme Court of Illinois. Certiorari denied.

No. 95, Misc. BARUTHA, DOING BUSINESS AS R. B. TRUCKING CO., *v.* PRENTICE, TRUSTEE. C. A. 7th Cir. Certiorari denied. *David Previant* for petitioner. *Henry G. Petersen, Jr.* for respondent. Reported below: 189 F. 2d 29.

No. 97, Misc. MARINGER *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 100, Misc. TIPTON *v.* OHIO. Court of Appeals of Ohio, First Appellate District. Certiorari denied.

No. 102, Misc. PRESECAN *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied. Reported below: 77 A. 2d 684.

No. 104, Misc. MACK *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 106, Misc. CANNON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 107, Misc. MILLER *v.* SUPERINTENDENT OF SPRING GROVE STATE HOSPITAL. Court of Appeals of Maryland. Certiorari denied. Reported below: —— Md. ——, 80 A. 2d 898.

No. 110, Misc. GOLDBERG *v.* MOSES ET AL. Court of Appeals of New York. Certiorari denied. Reported below: 302 N. Y. 834, 100 N. E. 2d 36.

No. 111, Misc. ANDERSON *v.* DUFFY, WARDEN. Supreme Court of California. Certiorari denied.

No. 112, Misc. SCHULTZ *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 114, Misc. MAHURIN *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 240 S. W. 2d 110.

Rehearing Denied.

No. 336, October Term, 1950. DENNIS ET AL. *v.* UNITED STATES, 341 U. S. 494. The motion for leave to file supplemental petition for rehearing is granted. The motion for leave to file brief of Richard E. Westbrooks and Earl B. Dickerson, as *amici curiae,* is denied. The petitions for rehearing are denied. The motion for leave to file petitions for rehearing of order limiting certiorari is denied. MR. JUSTICE BLACK is of the opinion the petition for rehearing of the order limiting certiorari should be granted. MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

No. 656, October Term, 1950. ANDERSON *v.* COMMISSIONER OF INTERNAL REVENUE, 341 U. S. 935. Motion for leave to file petition for rehearing denied.

No. 374, Misc., October Term, 1950. ROEDEL *v.* UNITED STATES, 341 U. S. 917;

No. 458, Misc., October Term, 1950. PORCH *v.* GEORGIA, 341 U. S. 954;

No. 469, Misc., October Term, 1950. IN RE PHYLE, 341 U. S. 942; and

No. 521, Misc., October Term, 1950. GREEN *v.* UNITED STATES, 341 U. S. 955. The petitions for rehearing in these cases are severally denied.

No. 313, October Term, 1950. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL RICE MILLING CO., INC. ET AL., 341 U. S. 665;

No. 338, October Term, 1950. TENNEY ET AL. *v.* BRANDHOVE, 341 U. S. 367;

No. 387, October Term, 1950. UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, DISTRICT COUNCIL OF KANSAS CITY, MISSOURI, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD, 341 U. S. 947;

No. 399, October Term, 1950. BREARD *v.* ALEXANDRIA, 341 U. S. 622;

No. 421, October Term, 1950. HAMMERSTEIN *v.* SUPERIOR COURT OF CALIFORNIA ET AL., 341 U. S. 491;

No. 453, October Term, 1950. GARNER ET AL. *v.* BOARD OF PUBLIC WORKS OF LOS ANGELES ET AL., 341 U. S. 716;

No. 466, October Term, 1950. WEST TEXAS UTILITIES CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD, 341 U. S. 939;

No. 511, October Term, 1950. SICKMAN, EXECUTRIX, ET AL. *v.* UNITED STATES, 341 U. S. 939;

No. 611, October Term, 1950. MALOY *v.* FLORIDA, 341 U. S. 947;

No. 652, October Term, 1950. RING *v.* SPINA ET AL., 341 U. S. 935;

No. 655, October Term, 1950. CALDERON ET AL. *v.* TOBIN, SECRETARY OF LABOR, ET AL., 341 U. S. 935;

No. 661, October Term, 1950. CARLSON ET AL. *v.* UNITED STATES, 341 U. S. 940;

No. 667, October Term, 1950. ORO FINO CONSOLIDATED MINES, INC. *v.* UNITED STATES, 341 U. S. 948;

No. 680, October Term, 1950. HOLMES *v.* UNITED STATES, 341 U. S. 948;

No. 691, October Term, 1950. SAUCIER *v.* TEXAS, 341 U. S. 949; and

No. 714, October Term, 1950. EASTERN AIR LINES, INC. *v.* CIVIL AERONAUTICS BOARD, 341 U. S. 951. The petitions for rehearing in these cases are severally denied.

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No. 409, Misc., October Term, 1950. TATE *v.* CALIFORNIA ET AL., 341 U. S. 902. Second petition for rehearing denied.

OCTOBER 15, 1951.

Per Curiam Decisions.

No. 147. MUTH *v.* AETNA OIL CO. ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Seventh 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 the purpose of determining whether there was jurisdiction by virtue of diversity of citizenship. MR. JUSTICE BLACK dissents. *William C. Welborn, Albert Ward, Milford M. Miller* and *Palmer K. Ward* for petitioner. *Charles H. Sparrenberger* for respondents. Reported below: 188 F. 2d 844.

No. 159. FLORIDA RAILROAD & PUBLIC UTILITIES COMMISSION ET AL. *v.* ATLANTIC COAST LINE RAILROAD CO. Appeal from the United States District Court for the Northern District of Florida. *Per Curiam:* The judgment is vacated and the case is remanded to the District Court for further consideration in the light of *Alabama Public Service Comm'n* v. *Southern R. Co.*, 341 U. S. 341. *Lewis W. Petteway* for appellants. *Charles Cook Howell* and *G. L. Reeves* for appellee. Reported below: 96 F. Supp. 583.

No. 283. FRANKLIN ET AL. *v.* BOARD OF COMMISSIONERS OF TENSAS BASIN LEVEE DISTRICT. Appeal from the Supreme Court of Louisiana. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Eldridge* v. *Trezevant*, 160 U. S. 452; *Wolfe* v. *Hurley*, 283 U. S. 801. MR. JUSTICE MINTON took no part in the consideration or decision

of this case. *Hector G. Spaulding* for appellants. *C. C. Wood* for appellee. Reported below: 219 La. 859, 54 So. 2d 125.

No. 289. CHICAGO, BURLINGTON & QUINCY RAILROAD CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Illinois. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *United States* v. *United States Smelting Co.*, 339 U. S. 186. MR. JUSTICE MINTON took no part in the consideration or decision of this case. *Harry E. Boe, Frank W. Sullivan, Warren H. Wagner* and *Eldon Martin* for appellants. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission, appellees. Reported below: 98 F. Supp. 119.

No. 10. UNITED STATES EX REL. GIESE *v.* CHAMBERLIN, COMMANDING GENERAL, ET AL. Certiorari, 341 U. S. 902, to the United States Court of Appeals for the Seventh Circuit. Argued October 9, 1951. Decided October 15, 1951. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE MINTON took no part in the consideration or decision of this case. *Albert E. Hallett* argued the cause and filed a brief for petitioner. *John F. Davis* argued the cause for respondents. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg*. Reported below: 184 F. 2d 404.

Miscellaneous Orders.

No. 203. UNITED STATES *v.* PEARSON. Appeal from the United States District Court for the District of Columbia. The appeal is dismissed on motion of counsel for the appellant. *Solicitor General Perlman* for the United States.

No. ——. ADAMS *v.* JENSEN ET AL. Application for leave to docket this case denied. *John W. Anderson* for petitioner.

No. 159, Misc. EX PARTE GRAY ET AL. The motion for leave to file petition for writ of mandamus is granted. A rule is ordered to issue, returnable within 30 days, requiring the respondents to show cause why the petition for writ of mandamus should not be granted. *Z. Alexander Looby, Robert L. Carter* and *Thurgood Marshall* for petitioners. *John J. Hooker* for the Board of Trustees of the University of Tennessee et al., respondents.

No. 125, Misc. GILMORE *v.* STEELE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 131, Misc. PRIDGEN *v.* BUBELLA ET AL. Application denied.

No. 145, Misc. JOHNSON *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Dismissed on motion of petitioner. *Theodore Spaulding* for petitioner.

Certiorari Granted. (*See also No. 147, supra.*)

No. 143. SUTTON *v.* LEIB. C. A. 7th Cir. Certiorari granted. *John Alan Appleman* and *Edward D. Bolton* for petitioner. *Arthur M. Fitzgerald* for respondent. Reported below: 188 F. 2d 766.

No. 167. BOYCE MOTOR LINES, INC. *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. *Joseph C. Glavin* and *A. Harry Moore* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 188 F. 2d 889.

No. 186. CARSON, COMMISSIONER OF FINANCE & TAXATION, *v.* ROANE-ANDERSON COMPANY ET AL.; and

No. 187. CARSON, COMMISSIONER OF FINANCE & TAXATION, *v.* CARBIDE & CARBON CHEMICALS CORP. ET AL. Supreme Court of Tennessee. Certiorari granted. *Roy H. Beeler,* Attorney General of Tennessee, *William F. Barry,* Solicitor General, and *Allison B. Humphreys, Jr.* for petitioner. *Solicitor General Perlman* and *S. Frank Fowler* for the United States et al., respondents. Briefs of *amici curiae* supporting petitioner were filed by *Eugene Cook,* Attorney General, *W. H. Blackshear, Jr.,* Deputy Assistant Attorney General, and *George E. Sims, Jr.* and *Robert H. Gambrell,* Assistant Attorneys General, for the State of Georgia; and *T. C. Callison,* Attorney General, and *Claude K. Wingate,* Assistant Attorney General, for the State of South Carolina. Reported below: 192 Tenn. 150, 239 S. W. 2d 27.

No. 229. PILLSBURY ET AL., DEPUTY COMMISSIONERS, *v.* UNITED ENGINEERING CO. ET AL. C. A. 9th Cir. Certiorari granted. *Solicitor General Perlman* for petitioners. *Lyman Henry* for respondents. Reported below: 187 F. 2d 987.

No. 231. DESPER, ADMINISTRATRIX, *v.* STARVED ROCK FERRY CO. C. A. 7th Cir. Certiorari granted. *Joseph D. Ryan* for petitioner. *Charles T. Shanner* for respondent. Reported below: 188 F. 2d 177.

No. 172. KAUFMAN ET AL. *v.* SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ET AL.; and

No. 178. UEBERSEE FINANZ-KORPORATION, A. G., *v.* MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. 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 these applications. *William Radner, Odell Kominers* and *Henry G. Fischer* for petitioners in No. 172. *Thurman Arnold, Edward J. Ennis* and *Harry M. Plotkin* for petitioner in No. 178. *Solicitor General Perlman, Assistant Attorney General Baynton* and *George B. Searls* for McGrath et al., respondents in No. 172 and McGrath, respondent in No. 178, and with them were *David Schwartz* and *Sidney B. Jacoby* in No. 172 and *James L. Morrisson, Myron C. Baum* and *Joseph Laufer* in No. 178. *Roger J. Whiteford* and *John J. Wilson* for Societe Internationale pour Participations Industrielles et Commerciales, S. A.; and *William P. MacCracken, Jr., Urban A. Lavery* and *William W. Barron* for Remington Rand, Inc., respondents in No. 172. Reported below: 88 U. S. App. D. C. 296, 188 F. 2d 1017; 88 U. S. App. D. C. 182, 191 F. 2d 327.

No. 224. PUBLIC UTILITIES COMMISSION ET AL. *v.* POLLAK ET AL.; and

No. 295. POLLAK ET AL. *v.* PUBLIC UTILITIES COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. The motion for leave to file brief of Radio Cincinnati, Inc. et al., as *amici curiae* in No. 224, is denied. Certiorari granted. *Vernon E. West* and *Lloyd B. Harrison* for the Public Utilities Commission; and *Edmund L. Jones, F. Gloyd Awalt, Samuel O. Clark, Jr., Daryal A. Myse* and *W. V. T. Justis* for the Capital Transit Co., petitioners in No. 224 and respondents in No. 295. *Paul M. Segal* and *Harry P. Warner* for petitioners in No. 295 and respondents in No. 224; *Franklin S. Pollak, pro se.* Reported below: 89 U. S. App. D. C. —, 191 F. 2d 450.

Certiorari Denied.

No. 40. LYNN *v.* LYNN. Court of Appeals of New York. Certiorari denied. *Samuel Gottlieb* and *Harold I. Cole* for petitioner. *Herman A. Benjamin* for respondent. Reported below: 302 N. Y. 193, 97 N. E. 2d 748.

No. 137. BAZZELL *v.* UNITED STATES; and

No. 138. LASBY ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Morris A. Shenker* for petitioner in No. 137. *A. M. Fitzgerald* for petitioners in No. 138. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 187 F. 2d 878.

No. 218. G. RICORDI & Co. *v.* PARAMOUNT PICTURES, INC. C. A. 2d Cir. Certiorari denied. *Asher Blum* for petitioner. *Louis Phillips* and *Louis Nizer* for respondent. Reported below: 189 F. 2d 469.

No. 220. AIR LINE DISPATCHERS ASSOCIATION, A. F. OF L., ET AL. *v.* NATIONAL MEDIATION BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *B. F. Napheys, Jr.* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison* and *J. Roger Wollenberg* for respondents. Reported below: 89 U. S. App. D. C. —, 189 F. 2d 685.

No. 232. CITY AND COUNTY OF HONOLULU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Thomas W. Flynn* for petitioner. *Solicitor General Perlman* and *Assistant Attorney General Vanech* for the United States. Reported below: 188 F. 2d 459.

No. 233. C. A. DURR PACKING CO., INC. *v.* SHAUGHNESSY, COLLECTOR OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Henry T. Dorrance* and *Russell G. Dunmore, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Helen Goodner* and *Fred E. Youngman* for respondent. Reported below: 189 F. 2d 260.

No. 234. UNITED STATES *v.* THOMAS. C. A. 6th Cir. Certiorari denied. *Solicitor General Perlman* for the United States. *R. R. Kramer* for respondent. Reported below: 189 F. 2d 494.

No. 236. BLAKE ET AL. *v.* WONDER PRODUCTS, INC. ET AL. Supreme Court of Michigan. Certiorari denied. *Frederic S. Glover, Jr.* for petitioners. *George E. Brand* for respondents. Reported below: 330 Mich. 159, 47 N. W. 2d 61.

No. 237. ROSE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *George T. Altman* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Helen Goodner* and *S. Dee Hanson* for respondent. Reported below: 188 F. 2d 355.

No. 241. ESTATE OF SOLOWEY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *E. Paul Yaselli* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Robert N. Anderson* for respondent. Reported below: 189 F. 2d 968.

No. 240. PARTRIDGE, EXECUTOR, *v.* PRESLEY, EXECUTOR. United States Court of Appeals for the District of

Columbia Circuit. Certiorari denied. *Frederick A. Ballard* for petitioner. Reported below: 84 U. S. App. D. C. 224, 172 F. 2d 275; 88 U. S. App. D. C. 298, 189 F. 2d 645.

No. 106. WEBER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this application. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Robert S. Erdahl* for the United States. Reported below: 188 F. 2d 575.

No. 239. HUDSON ET AL. *v.* LEWIS ET AL. C. A. 5th Cir. Certiorari denied. *Ben F. Cameron* for petitioners. *J. Morgan Stevens* and *W. S. Welch* for Lewis et al.; and *Garner W. Green, Irwin W. Coleman, W. S. Welch, R. E. Wilbourn* and *Archie D. Gray* for the Gulf Refining Co., respondents. Reported below: 188 F. 2d 679.

No. 244. AMERICAN FIDELITY & CASUALTY CO., INC. *v.* ALL AMERICAN BUS LINES, INC. ET AL. C. A. 10th Cir. The motion for leave to file brief of Rodman W. Keenon and others, as *amici curiae*, is denied. Certiorari denied. *Welcome D. Pierson* and *Richard W. Galiher* for petitioner. *Gus Rinehart* for respondents. Reported below: 190 F. 2d 234.

No. 94, Misc. DORSEY *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *James Coates Lear* for petitioner. Reported below: 219 Ark. 101, 240 S. W. 2d 30.

No. 96, Misc. GAUTHIER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

October 15, 1951. 342 U. S.

No. 199. KOEHLER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. Dissenting memorandum filed by MR. JUSTICE JACKSON. *Elbert R. Jandt* and *Ben F. Foster* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Robert S. Erdahl* for the United States. Reported below: 189 F. 2d 711.

Memorandum by MR. JUSTICE JACKSON, dissenting.

This case involves the power of federal officials to bring state officials to punishment under the remnants of Reconstruction Period legislation.

The state officer in this case, I may observe, richly deserves severe punishment. But the question in the case is one of federal against state power, a line which should not waver with the merits of individuals involved.

The statute, 18 U. S. C. § 242, is vague and general in the extreme. It makes criminal the willful "deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . ."

It is apparent from this case that this statute enables a federal administration to hold over all state officers a threat of prosecution whose vagueness is attested by the fact that this Court cannot decide most issues of deprivation of constitutional right without dissent, and often divides five to four.

The constitutionality of this very statute was recently sustained by a margin so narrow that no opinion could muster a Court majority. Even those who sustained it did so only by an interpretation of "willful" to require more than doing of the forbidden act, saying such "narrower" construction had support in the history of the act. It was construed to require a specific intent to deprive

one of constitutional rights in addition to the evil purpose in doing the act itself. The lower courts were reversed because the issue of specific intent to deprive of a constitutional right was not presented to the jury. *Screws* v. *United States,* 325 U. S. 91.

In this case the trial court properly charged the jury that it must find this specific intent. But it also instructed that "The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. It is a well settled rule, which the law applies to both criminal and civil cases, that the intent is presumed and inferred from the result of the action."

This is wrong even by the test of the *Screws* decision. That opinion, referring to the specific intent, said, "And in determining whether that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstances—the malice of petitioners, the weapons used in the assault, its character and duration, the provocation, if any, and the like." *Screws* v. *United States, supra,* at 107. In other words, while the *Screws* decision contemplated the decision of this issue on the whole evidence, the charge below presumed it from a single act. This is not a technical difference. Under the trial court's construction, the Government may merely prove the act and rest—the presumption does the work of evidence. Under the *Screws* case, no such presumption was authorized—the Government would have to produce evidence, circumstantial in most cases, to be sure, from which the jury could reasonably infer the specific intent. That, of course, made the way of the Government harder, but it was in this fact that the *Screws* opinion found assurance that the vague generalities of the statute could not become a menace to civil liberties or to

state officials. This assurance of protection becomes a hoax if the requirement of specific intent is now to be wiped out with a presumption.

And this is no trivial matter. American criminal law heretofore has had little use for presumptions of criminality. It has required proof beyond a reasonable doubt of all matters that were elements of the crimes. Under the normal charge, which I think the *Screws* opinion contemplated, the jury would be instructed that they must, from all the evidence in the case, be satisfied beyond a reasonable doubt that the specific intent to deprive of a constitutional right was present. Under the decision in this case, they can find a defendant guilty without even considering whether the evidence would show specific intent, for the presumption of law takes the place of the evidence. The burden of proof is on the defendant to overcome the presumption and establish his innocence of intent. If this is not a dangerous and novel importation into American criminal law, I do not recognize danger when I see it.

If this decision is allowed to stand, it is a rather earlier fulfillment of the fears of those of us who dissented in *Screws* than I had anticipated. The dissenting opinion of Judge Russell below seems to me the sound view of the law. I think our duty is to grant the writ.

In not joining this dissent, MR. JUSTICE FRANKFURTER wishes to refer to his views as to the meaning of a denial of certiorari. See *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912.

No. 98, Misc. SPEARS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Isaiah H. Spears* for petitioners. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for the United States.

No. 101, Misc. SCHECHTER *v.* BURFORD, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: —— Okla. Cr. ——, 231 P. 2d 411.

No. 108, Misc. SADOWY *v.* MORAN, CHAIRMAN OF NEW YORK STATE BOARD OF PAROLE, ET AL. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *Herman N. Harcourt* and *Raymond B. Madden,* Assistant Attorneys General, for respondents.

No. 109, Misc. WILSON ET AL. *v.* STATE OF WASHINGTON. Supreme Court of Washington. Certiorari denied. *Reuben G. Lenske* for petitioners. Reported below: 38 Wash. 2d 593, 231 P. 2d 288.

No. 115, Misc. RILEY *v.* TITUS ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se.* *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for respondents. Reported below: 89 U. S. App. D. C. ——, 190 F. 2d 653.

No. 116, Misc. DEAN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 117, Misc. RIOS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 118, Misc. MICHALOWSKI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 119, Misc. MANGAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 120, Misc. TATE *v.* CALIFORNIA ET AL. District Court of Appeal of California, Third Appellate District. Certiorari denied.

No. 122, Misc. SCIALABBA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 128, Misc. COOPER *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 129, Misc. GADSDEN *v.* UNITED STATES. Court of Claims. Certiorari denied. *Henry Lincoln Johnson, Jr.* for petitioner. Reported below: 119 Ct. Cl. 86, 100 F. Supp. 455.

No. 130, Misc. HOWARD *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 132, Misc. HINLEY *v.* OKLAHOMA. Supreme Court of Oklahoma. Certiorari denied.

No. 137, Misc. BENDER *v.* LAINSON, WARDEN. Supreme Court of Iowa. Certiorari denied.

No. 139, Misc. MANDELL *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

Rehearing Denied.

No. 274, October Term, 1950. AUTOGRAPHIC REGISTER CO. *v.* UARCO, INC., 340 U. S. 853. Motion for leave to file petition for rehearing denied.

OCTOBER 22, 1951.

Miscellaneous Orders.

No. 78. VON MOLTKE *v.* GILLIES, SUPERINTENDENT. Certiorari, *ante,* p. 810, to the United States Court of Appeals for the Sixth Circuit. It is ordered that G. Les-

lie Field, Esquire, of Detroit, Michigan, a member of the bar of this Court, be appointed to serve as counsel for the petitioner in this case.

No. 375. SHERMAN *v.* ILLINOIS. Certiorari, *ante*, p. 811, to the Supreme Court of Illinois. It is ordered that Nathaniel L. Nathanson, Esquire, of Chicago, Illinois, a member of the bar of this Court, be appointed to serve as counsel for the petitioner in this case.

No. 77. PACIFIC INSURANCE CO., LTD. *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Petition for writ of certiorari in this case dismissed on motion of counsel for the petitioner. *Urban E. Wild* and *J. Russell Cades* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 188 F. 2d 571.

No. 164, Misc. KARHU *v.* MICHIGAN. Supreme Court of Michigan and Circuit Court for the County of Ontonagon, Michigan. Certiorari denied. Motion for leave to file petition for writ of mandamus also denied.

No. 153, Misc. ALBERTS *v.* IOWA. Application denied.

No. 161, Misc. EX PARTE WEBER. Motion for leave to file petition for writ of mandamus denied. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this motion.

No. 166, Misc. WILLIAMS *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted.

No. 280. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION ET AL. *v.* JUNEAU SPRUCE CORP.

C. A. 9th Cir. Certiorari granted. *Richard Gladstein* for petitioners. *Charles A. Hart* for respondent. Reported below: 189 F. 2d 177.

No. 87, Misc. BRUNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *Charles J. Bloch* and *Ellsworth Hall, Jr.* for petitioner. *Solicitor General Perlman* filed a memorandum for the United States stating that the Government does not oppose the granting of the petition. Reported below: 189 F. 2d 255.

No. 201, October Term, 1950. SACHER ET AL. *v.* UNITED STATES. Petition for rehearing granted. The order entered June 4, 1951, denying certiorari, 341 U. S. 952, is vacated and the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The sole question for review is: Was the charge of contempt, as and when certified, one which the accusing judge was authorized under Rule 42 (a) [Federal Rules of Criminal Procedure] to determine and punish himself; or was it one to be adjudged and punished under Rule 42 (b) only by a judge other than the accusing one and after notice, hearing, and opportunity to defend? The motion for leave to file brief of National Lawyers Guild, as *amicus curiae,* is denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Paul L. Ross* and *Martin Popper* for petitioners. Reported below: 182 F. 2d 416.

Certiorari Denied. (See also No. 164, Misc., supra.)

No. 219. COMMISSIONER OF INTERNAL REVENUE *v.* VISINTAINER. C. A. 10th Cir. Certiorari denied. *Solicitor General Perlman* for petitioner. *F. R. Carpenter* and *Stephen H. Hart* for respondent. Reported below: 187 F. 2d 519.

No. 245. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION ET AL. *v.* ACKERMAN, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. *Harriet Bouslog* for petitioners. *Walter D. Ackerman, Jr.*, Attorney General of Hawaii, *J. Garner Anthony*, Special Deputy Attorney General, and *Rhoda V. Lewis* and *Richard K. Sharpless*, Deputy Attorneys General, for respondents. Reported below: 187 F. 2d 860.

No. 251. WILSON ET AL., EXECUTORS, *v.* KRAEMER, COLLECTOR OF INTERNAL REVENUE, ET AL. C. A. 2d Cir. Certiorari denied. *Lawrence S. Greenbaum* and *Warner Pyne* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, A. F. Prescott* and *L. W. Post* for Kraemer, respondent. Reported below: 190 F. 2d 341.

No. 252. MCNABB *v.* SLATER ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph T. Sherier* and *George C. Gertman* for petitioner. *Charles G. Jaquette* for Slater, respondent. Reported below: 88 U. S. App. D. C. 379, 190 F. 2d 608.

No. 254. AMERICAN STEEL FOUNDRIES *v.* HOLLAND COMPANY. C. A. 7th Cir. Certiorari denied. *George I. Haight* for petitioner. *Casper W. Ooms* and *L. B. Mann* for respondent. Reported below: 190 F. 2d 37.

No. 260. ANN ARBOR PRESS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *George Meader* and *Edward Brown Williams* for petitioner. *Solicitor General Perlman, David P. Findling* and *Mozart G. Ratner* for respondent. Reported below: 188 F. 2d 917.

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No. 261. STANDARD PAVING CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *Gentry Lee* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Irving I. Axelrad* for respondent. Reported below: 190 F. 2d 330.

No. 263. ARMOUR & CO. ET AL. *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. ET AL. C. A. 7th Cir. Certiorari denied. *Paul E. Blanchard, Frank W. Sullivan* and *John P. Staley* for petitioners. *Carson L. Taylor, Albert B. Enoch, S. R. Brittingham, Jr., Bryce L. Hamilton, Edwin R. Eckersall, Elmer W. Freytag, P. F. Gault, James E. Goggin* and *Joseph H. Wright* for respondents. Reported below: 188 F. 2d 603.

No. 267. SOUTHWEST NATURAL GAS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Archie O. Dawson* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Hilbert P. Zarky* for respondent. Reported below: 189 F. 2d 332.

No. 268. AMERICAN FIDELITY & CASUALTY CO. ET AL. *v.* MANUFACTURERS CASUALTY INSURANCE CO. ET AL. C. A. 6th Cir. Certiorari denied. *S. Bartow Strang* and *Forrest S. Smith* for petitioners. *Charles A. Noone* for the Manufacturers Casualty Ins. Co., respondent. Reported below: 188 F. 2d 364.

No. 269. MOORE *v.* BRANNAN, SECRETARY OF AGRICULTURE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Wm. E. Leahy* and *Wm. J. Hughes, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Charles H. Weston* and *Neil Brooks* for respondents. Reported below: 89 U. S. App. D. C. —, 191 F. 2d 775.

No. 270. PEARSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Stephen L. Mayo* and *J. Edwin Fleming* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, A. F. Prescott* and *Harry Baum* for respondent. Reported below: 188 F. 2d 72.

No. 274. UNITED STATES *v.* 88 CASES OF BIRELEY'S ORANGE BEVERAGE, GENERAL FOODS CORP., CLAIMANT. C. A. 3d Cir. Certiorari denied. *Solicitor General Perlman* for the United States. *Henry S. Drinker* and *Lester E. Waterbury* for respondent. Reported below: 187 F. 2d 967.

No. 284. FALK *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, A. F. Prescott* and *Morton K. Rothschild* for respondent. Reported below: 189 F. 2d 806.

No. 256. FRANK B. KILLIAN & CO. *v.* ALLIED LATEX CORP. ET AL.; and

No. 257. YOUNGS RUBBER CORP. *v.* ALLIED LATEX CORP. C. A. 2d Cir. Motions for leave to file briefs of J. Calvin Brown, as *amicus curiae,* denied. Certiorari denied. MR. JUSTICE BLACK is of the opinion that the petitions should be granted. *Blythe D. Watts* and *Morris Hirsch* for petitioners. *Asher Blum* and *George E. Middleton* for the Allied Latex Corporation, respondent. Reported below: 188 F. 2d 940, 945.

No. 258. STEFANIDIS ET AL. *v.* KAKAROUKAS ET AL. Supreme Court of Appeals of Virginia. Certiorari denied. *J. L. Morewitz* for petitioners. *Leon T. Seawell* for respondents.

No. 259. Cities Service Oil Co. *v.* Park Steamship Co., Ltd. C. A. 2d Cir. Motion for leave to file brief of States Marine Corp. et al., as *amici curiae,* denied. Certiorari denied. *Barent Ten Eyck* for petitioner. *Eugene Underwood* for respondent. Reported below: 188 F. 2d 804.

No. 262. Michel *v.* Louisville & Nashville Railroad Co. C. A. 5th Cir. Certiorari denied. *Howard W. Lenfant* for petitioner. *Harry McCall* for respondent. Reported below: 188 F. 2d 224.

No. 277. In re Carter. 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. *Solicitor General Perlman* for the United States District Court for the District of Columbia et al., petitioners. *James A. Cobb* and *George E. C. Hayes* for Carter, respondent. Reported below: 89 U. S. App. D. C. —, 192 F. 2d 15.

No. 25, Misc. Middlebrooks *v.* Ross, Sheriff. C. A. 9th Cir. Certiorari denied. *A. L. Wirin* and *Thurgood Marshall* for petitioner. *Frank W. Richards,* Deputy Attorney General of California, for respondent. Reported below: 188 F. 2d 308.

No. 146, Misc. Van Beek *v.* Michigan. Supreme Court of Michigan. Certiorari denied.

No. 151, Misc. Holly *v.* Pennsylvania et al. Supreme Court of Pennsylvania, Western District. Certiorari denied. Reported below: 368 Pa. 211, 82 A. 2d 244.

No. 152, Misc. Bayken *v.* Michigan. Supreme Court of Michigan. Certiorari denied.

No. 158, Misc. CORANATO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 160, Misc. KIRSCH *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

Rehearing Granted. (*See No. 201, October Term, 1950, supra.*)

NOVEMBER 5, 1951.

Per Curiam Decision.

No. 365. BROOKS *v.* MISSISSIPPI; and

No. 366. BROOKS *v.* MISSISSIPPI. Appeals from the Supreme Court of Mississippi. *Per Curiam:* The appeals are dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeals were allowed as petitions for writs of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. Reported below: 52 So. 2d 609, 616.

Miscellaneous Orders.

No. 1. GEORGIA RAILROAD & BANKING CO. *v.* REDWINE, STATE REVENUE COMMISSIONER. Appeal from the United States District Court for the Northern District of Georgia. This case is restored to the summary docket for reargument.

No. 162. UNITED STATES *v.* DAILEY. Appeal from the United States District Court for the District of Colorado. It is ordered that Bernard Margolius, Esquire, of Washington, D. C., a member of the bar of this Court, be appointed to serve as counsel for the appellee in this case.

No. 321. GENERAL REINSURANCE CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. Petition for writ of certiorari to the United States Court of Appeals for the

Second Circuit dismissed on motion of counsel for the petitioner. *Cedric A. Major* and *E. Clyde Algire* for petitioner. Reported below: 190 F. 2d 148.

No. 526, October Term, 1947. UNITED STATES *v.* KRUSZEWSKI, 333 U. S. 880. Respondent's petition dated October 19, 1951, denied.

No. 79, Misc. BYERS *v.* HUNTER, WARDEN. Motion for leave to file petition for writ of certiorari denied.

No. 144, Misc. PRICE *v.* CRANOR, SUPERINTENDENT. Application denied.

No. 157, Misc. OWENS *v.* HUNTER, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 162, Misc. PAPPAS *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. Application denied.

Certiorari Granted. (*See also No. 400, ante, p. 1.*)

No. 100. UNITED STATES *v.* BLOOM, GENERAL ASSIGNEE. Court of Appeals of New York. Certiorari granted. *Solicitor General Perlman* for the United States. *Irwin Geiger* for respondent. Reported below: 302 N. Y. 206, 97 N. E. 2d 755.

No. 275. UNITED STATES EX REL. JAEGELER *v.* CARUSI, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL. C. A. 3d Cir. Certiorari granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *George C. Dix* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for respondents. Reported below: 187 F. 2d 912.

No. 299. UNITED STATES *v.* EDENS ET AL., TRUSTEES. C. A. 4th Cir. Certiorari granted. *Solicitor General Perlman* for the United States. *Henry Hammer* for respondents. Reported below: 189 F. 2d 876.

No. 300. UNITED STATES *v.* GENERAL ENGINEERING & MANUFACTURING CO. C. A. 8th Cir. Certiorari granted. *Solicitor General Perlman* for the United States. *George C. Willson* for respondent. Reported below: 188 F. 2d 80.

No. 305. CITIES SERVICE CO. ET AL. *v.* MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. C. A. 2d Cir. Certiorari granted. *Timothy N. Pfeiffer* and *Theodore N. Johnsen* for petitioners. *Solicitor General Perlman, Assistant Attorney General Baynton, Stanley M. Silverberg* and *George B. Searls* for respondent. Reported below: 189 F. 2d 744.

No. 329. MULLANEY, COMMISSIONER OF TAXATION, *v.* ANDERSON ET AL. C. A. 9th Cir. Certiorari granted. *J. Gerald Williams,* Attorney General of Alaska, *John H. Dimond,* Assistant Attorney General, and *Harold J. Butcher,* Special Assistant Attorney General, for petitioner. Reported below: 191 F. 2d 123.

No. 331. FRISBIE, WARDEN, *v.* COLLINS. C. A. 6th Cir. Certiorari granted. *Frank G. Millard,* Attorney General of Michigan, and *Edmund E. Shepherd,* Solicitor General, for petitioner. Respondent *pro se.* Reported below: 189 F. 2d 464.

No. 82, Misc. MADSEN *v.* KINSELLA, WARDEN. C. A. 4th Cir. Certiorari granted. *Joseph S. Robinson, Dayton M. Harrington* and *James D. Graham, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney*

General McInerney, Robert W. Ginnane, Beatrice Rosenberg and *J. F. Bishop* for respondent. Reported below: 188 F. 2d 272.

Certiorari Denied. (*See also Nos. 365 and 366, and Misc. No. 79, supra.*)

No. 242. CADDEL *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Joseph T. Enright* for petitioner. *Edmund G. Brown,* Attorney General of California, *Clarence A. Linn,* Assistant Attorney General, and *Doris H. Maier,* Deputy Attorney General, for respondent.

No. 246. FRUEHAUF TRAILER CO. *v.* GUSEWELLE, ADMINISTRATRIX. C. A. 8th Cir. Certiorari denied. *John S. Marsalek* for petitioner. *Joseph N. Hassett* for respondent. Reported below: 190 F. 2d 248.

No. 265. LOVE *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for the United States. Reported below: 119 Ct. Cl. 486, 98 F. Supp. 770.

No. 276. CLEMENTS ET AL. *v.* BRONAUGH ET AL., COMMISSIONERS OF WHITE RIVER DRAINAGE DISTRICT, ET AL. Supreme Court of Arkansas. Certiorari denied. *J. W. House* for petitioners. *J. G. Burke* for respondents. Reported below: 218 Ark. 783, 239 S. W. 2d 1.

No. 278. PEERSON *v.* MITCHELL ET AL. Supreme Court of Oklahoma. Certiorari denied. *Harold C. Stuart* and *Harry D. Moreland* for petitioner. *A. L. Emery* for Mitchell, respondent. Reported below: 205 Okla. 530, 239 P. 2d 1028.

No. 279. Rio *v.* State of Washington. Supreme Court of Washington. Certiorari denied. *Dale D. Drain* for petitioner. *Smith Troy,* Attorney General of Washington, for respondent. Reported below: 38 Wash. 2d 446, 230 P. 2d 308.

No. 285. Guttmann *v.* Illinois Central Railroad Co. C. A. 2d Cir. Certiorari denied. *Lloyd K. Garrison* for petitioner. *John W. Davis, Theodore Kiendl, S. Hazard Gillespie, Jr.* and *Francis W. Phillips* for respondent. Reported below: 189 F. 2d 927.

No. 290. Photochart, a Corporation, et al. *v.* Photo Patrol, Inc. et al. C. A. 9th Cir. Certiorari denied. *Collins Mason* for Photochart et al.; and *Don Marlin* and *William H. Levit* for Del Riccio, petitioners. *Stephen S. Townsend* for respondents. Reported below: 189 F. 2d 625.

No. 291. Freedman Brothers & Co. et al. *v.* Ellis, Trustee. C. A. 6th Cir. Certiorari denied. *Isidore G. Stone* for petitioners. *Orland H. Ellis* for respondent. Reported below: 188 F. 2d 364.

No. 292. Cox et al. *v.* United States. C. A. 10th Cir. Certiorari denied. *Edwin Mechem* for petitioners. *Solicitor General Perlman, Assistant Attorney General Vanech, Roger P. Marquis* and *John C. Harrington* for the United States. Reported below: 190 F. 2d 293.

No. 296. Switzer et al. *v.* Marzall, Commissioner of Patents. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Albert L. Ely* for petitioners. *Solicitor General Perlman, Assistant Attorney General Baldridge, John R. Benney* and *Samuel D. Slade* for respondent.

No. 297. NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. *v.* KORTE. C. A. 2d Cir. Certiorari denied. *Edward R. Brumley* for petitioner. *Randolph J. Seifert* for respondent. Reported below: 191 F. 2d 86.

No. 298. CLAUSEN, DOING BUSINESS AS LUZERNE HIDE & TALLOW CO., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *James S. Hays* for petitioner. *Solicitor General Perlman, David P. Findling, Mozart G. Ratner* and *Bernard Dunau* for respondent. Reported below: 188 F. 2d 439.

No. 303. WALKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Peter L. F. Sabbatino* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 190 F. 2d 481.

No. 306. LOCAL UNION NO. 12, PROGRESSIVE MINE WORKERS OF AMERICA, DISTRICT 1, *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. *A. M. Fitzgerald* and *G. W. Horsley* for petitioner. *Solicitor General Perlman, David P. Findling, Mozart G. Ratner* and *Norton J. Come* for the National Labor Relations Board, respondent. Reported below: 189 F. 2d 1.

No. 307. CLARK ESTATE CO. *v.* GENTRY ET AL. Supreme Court of Missouri. Certiorari denied. *Clarence C. Chilcott* for petitioner. *Armwell L. Cooper* for respondents. Reported below: 362 Mo. 80, 240 S. W. 2d 124.

No. 309. LOUISVILLE & JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT *v.* B. F. GOODRICH CO. Court of Appeals of Kentucky. Certiorari denied. *Blakey Helm* for petitioner. *Squire R. Ogden* for respondent. Reported below: 240 S. W. 2d 621.

No. 313. LEWIS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Otis Beall Kent* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 89 U. S. App. D. C. —, 190 F. 2d 22.

No. 318. DI GIORGIO FRUIT CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Marion B. Plant* for petitioners. *Solicitor General Perlman, David P. Findling, Mozart G. Ratner* and *Bernard Dunau* for respondent. Reported below: 89 U. S. App. D. C. —, 191 F. 2d 642.

No. 319. LEJEUNE, TUTRIX, *v.* EXCESS INSURANCE Co. C. A. 5th Cir. Certiorari denied. *John M. Wisdom* for petitioner. *Moses C. Scharff* for respondent. Reported below: 189 F. 2d 521.

No. 322. UTAH *v.* MONTGOMERY WARD & Co. Supreme Court of Utah. Certiorari denied. *Clinton D. Vernon,* Attorney General of Utah, and *Quentin L. R. Alston,* Assistant Attorney General, for petitioner. *John A. Barr* and *David L. Dickson* for respondent. Reported below: — Utah —, 233 P. 2d 685.

No. 324. BAKER *v.* ANDERSON HOTELS OF OKLAHOMA, INC. ET AL. C. A. 10th Cir. Certiorari denied. *Glenn O. Young* for petitioner. Reported below: 190 F. 2d 741.

No. 327. UNITED STATES ET AL. *v.* ONAN ET AL. C. A. 8th Cir. Certiorari denied. Harold R. Love, petitioner, *pro se. Benedict Deinard* and *R. H. Fryberger* for respondents. Reported below: 190 F. 2d 1.

No. 330. RED TOP SUPER MARKETS, INC. ET AL. *v.* FINDLEY. C. A. 5th Cir. Certiorari denied. *E. Albert Pallot* for petitioners. *John P. Booth* and *Frank J. O'Connor* for respondent. Reported below: 188 F. 2d 834.

No. 332. EDWARDS ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Fritz Lanham Lyne* for petitioners. *Solicitor General Perlman, David P. Findling, Mozart G. Ratner* and *Bernard Dunau* for respondent. Reported below: 189 F. 2d 970.

No. 338. CARTER OIL CO. *v.* McCASLAND ET AL. C. A. 10th Cir. Certiorari denied. *Villard Martin, Forrest M. Darrough* and *Alfred Stevenson* for petitioner. *C. D. Cund* for respondents. Reported below: 190 F. 2d 887.

No. 340. JULIUS HYMAN & CO. ET AL. *v.* VELSICOL CORPORATION. Supreme Court of Colorado. Certiorari denied. *Claude Pepper* for petitioners. *Floyd E. Thompson, Clyde E. Shorey* and *John R. Coen* for respondent. Reported below: 123 Colo. 563, 233 P. 2d 977.

No. 343. EHRHORN *v.* INTERNATIONAL MATCH REALIZATION CO., LTD. C. A. 2d Cir. Certiorari denied. *David M. Palley* for petitioner. *Charles W. McConaughy* for respondent. Reported below: 190 F. 2d 458.

No. 347. ELLIS, RECEIVER, *v.* CATES. C. A. 4th Cir. Certiorari denied. *Charles William Freeman* for petitioner. *Solicitor General Perlman, Assistant Attorney General Underhill, Roger P. Marquis* and *Fred W. Smith* for respondent.

No. 348. ELLIS *v.* GIRARD TRUST CO., TRUSTEE. Supreme Court of Pennsylvania, Eastern District. Certi-

orari denied. *L. B. Schofield* and *Harry J. Alker, Jr.* for petitioner. *Owen Brooke Rhoads* for respondent. Reported below: 367 Pa. 30, 79 A. 2d 415.

No. 238. QUIRK, ADMINISTRATRIX, *v.* NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Roland Obenchain* for petitioner. *Russell P. Harker* for respondent. Reported below: 189 F. 2d 97.

No. 271. MOORE-MCCORMACK LINES, INC. *v.* FOLTZ. C. A. 2d Cir. Certiorari denied. MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE CLARK are of the opinion certiorari should be granted. *Solicitor General Perlman* for petitioner. Reported below: 189 F. 2d 537.

No. 286. MISSOURI EX REL. SOUTHERN RAILWAY CO. *v.* MAYFIELD, CIRCUIT COURT JUDGE; and

No. 287. MISSOURI EX REL. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* MURPHY, CIRCUIT COURT JUDGE. Supreme Court of Missouri. Certiorari denied. *Sidney S. Alderman, Bruce A. Campbell* and *H. G. Hedrick* for petitioner in No. 286. *R. S. Outlaw* and *Thomas J. Barnett* for petitioner in No. 287. *Roberts P. Elam* for respondents. Reported below: 362 Mo. 101, 240 S. W. 2d 106.

No. 308. E. A. LABORATORIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Ferdinand Tannenbaum* for petitioner. *Solicitor General Perlman, David P. Findling, Mozart G. Ratner* and *Frederick U. Reel* for respondent. Reported below: 188 F. 2d 885.

No. 333. McCann *v.* Clark. 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. Reported below: 89 U. S. App. D. C. —, 191 F. 2d 476.

No. 43, Misc. Tabor *v.* Hiatt, Warden. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Felicia H. Dubrovsky* for respondent. Reported below: 188 F. 2d 163.

No. 45, Misc. Maislish *v.* United States. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Felicia H. Dubrovsky* for the United States.

No. 48, Misc. Byers *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 81, Misc. Nero *v.* United States. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 189 F. 2d 515.

No. 88, Misc. Martin *v.* United States. C. A. 4th Cir. Certiorari denied. *Hayden C. Covington* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 190 F. 2d 775.

No. 126, Misc. Turpin *v.* Warden of the Green Haven Prison. C. A. 2d Cir. Certiorari denied. *Henry*

K. Chapman for petitioner. *Nathaniel L. Goldstein*, Attorney General of New York, *Wendell P. Brown*, Solicitor General, and *Herman N. Harcourt* and *Raymond B. Madden*, Assistant Attorneys General, for respondent. Reported below: 190 F. 2d 252.

No. 133, Misc. ODELL *v.* HUDSPETH, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 189 F. 2d 300.

No. 135, Misc. FORD *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. *Tyrah Ernest Maholm* for petitioner. Reported below: 229 Ind. 516, 98 N. E. 2d 655.

No. 138, Misc. BYERS *v.* HUNTER, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 141, Misc. EAGLE *v.* CHERNEY ET AL. Court of Appeals of New York. Certiorari denied. Reported below: 302 N. Y. 768, 98 N. E. 2d 889.

No. 148, Misc. HAWTHORNE *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 154, Misc. SHOLTER *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 173, Misc. KONIGSBERG *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 175, Misc. POTTER *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 123, Misc. McMURRIN *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Thos. H. Dent* for petitioner. *Price Daniel,* Attorney General of Texas, for respondent. Reported below: 155 Tex. Cr. R. —, 239 S. W. 2d 632.

Rehearing Denied.

No. 511, October Term, 1950. SICKMAN, EXECUTRIX, ET AL. *v.* UNITED STATES, 341 U. S. 939. Motion for leave to file a second petition for rehearing denied.

No. 115. WEISS *v.* UNITED STATES, *ante,* p. 820;

No. 130. GEORGIA *v.* WENGER, *ante,* p. 822;

No. 164. SIGURJONNSON ET AL. *v.* TRANS-AMERICAN TRADERS, INC., *ante,* p. 831; and

No. 19, Misc. SEVERA *v.* NEW JERSEY, *ante,* p. 806. The petitions for rehearing in these cases are severally denied.

NOVEMBER 13, 1951.

Per Curiam Decision.

No. 371. CITY OF NEWARK *v.* NEW JERSEY TURNPIKE AUTHORITY ET AL. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Charles Handler* for appellant. *Ward J. Herbert* for appellees. Reported below: 7 N. J. 377, 81 A. 2d 705.

Miscellaneous Orders.

No. —, Original. TEXAS *v.* NEW MEXICO ET AL. A rule is ordered to issue, returnable within 30 days, requiring the defendants to show cause why leave to file the complaint should not be granted. *Price Daniel,* Attorney General of Texas, for plaintiff.

No. 314. AMERICAN CAN CO. *v.* BRUCE'S JUICES, INC. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit dismissed on motion of counsel for the petitioner. *Charles A. Horsky* and *Gerhart A. Gesell* for petitioner. Reported below: 190 F. 2d 73.

No. 177, Misc. HACKNEY *v.* WARREN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted.

No. 247. SAWYER, SECRETARY OF COMMERCE, ET AL. *v.* DOLLAR ET AL.; and

No. 248. IN RE KILLION. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. MR. JUSTICE BLACK and MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Attorney General McGrath* and *Solicitor General Perlman* for petitioners in No. 247. *Arthur B. Dunne* for petitioner in No. 248. *Herman Phleger, Gregory A. Harrison, Moses Lasky, Edmund L. Jones* and *Howard Boyd* for respondents. Reported below: 89 U. S. App. D. C. —, 190 F. 2d 623.

No. 349. FIRST NATIONAL BANK OF CHICAGO, EXECUTOR, *v.* UNITED AIR LINES, INC. C. A. 7th Cir. Certiorari granted. *John H. Bishop* for petitioner. *Howard Ellis* for respondent. Reported below: 190 F. 2d 493.

Certiorari Denied.

No. 315. ALEUTIAN LIVESTOCK CO., INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Ernest L. Wilkinson, Ray R. Murdock* and *Keith L. Seegmiller* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for the United States. Reported below: 119 Ct. Cl. 326, 96 F. Supp. 626.

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No. 320. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. *Clifton Hildebrand* for petitioners. *Clarence M. Mulholland* and *Edward J. Hickey, Jr.* filed a brief for the Railway Labor Executives' Association, as *amicus curiae,* supporting the petition. Reported below: 37 Cal. 2d 412, 232 P. 2d 857.

No. 326. LASSITER ET AL. *v.* ROOS ET AL. C. A. 5th Cir. Certiorari denied. *William E. Leahy* and *Wm. J. Hughes, Jr.* for petitioners. Reported below: 188 F. 2d 427.

No. 328. MOORE-MCCORMACK LINES, INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Melville J. France* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, John R. Benney, Samuel D. Slade* and *Herman Marcuse* for the United States. Reported below: 119 Ct. Cl. 473.

No. 337. NABOB OIL CO. ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 190 F. 2d 478.

No. 344. B. F. GOODRICH CO. *v.* STATE OF WASHINGTON ET AL.; and

No. 345. STATE OF WASHINGTON ET AL. *v.* B. F. GOODRICH CO. Supreme Court of Washington. Certiorari denied. *John J. Kennett* and *Clifford Hoof* for the B. F. Goodrich Co. *Smith Troy,* Attorney General of Washington, and *C. John Newlands,* Assistant Attorney General, for petitioners in No. 345, and *Mr. Troy* for respondents in No. 344. Reported below: 38 Wash. 2d 663, 231 P. 2d 325.

No. 339. BATMAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *George S. McCarthy* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Harry Baum* for respondent. Reported below: 189 F. 2d 107.

No. 342. WARREN COUNTY, MISSISSIPPI, *v.* HESTER, SHERIFF, ET AL. Supreme Court of Louisiana. Certiorari denied. *L. W. Brooks* for petitioner. *F. G. Hudson, Jr.* for respondents. Reported below: 219 La. 763, 54 So. 2d 12.

No. 350. MOGIS *v.* LYMAN RICHEY SAND & GRAVEL CORP. C. A. 8th Cir. Certiorari denied. *Einar Viren* for petitioner. *J. A. C. Kennedy* for respondent. Reported below: 190 F. 2d 202.

No. 364. LERMAN ET AL., TRADING AS LERMAN BROTHERS, *v.* FRUIT PROCESSORS, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert L. Wright* and *Carl W. Berueffy* for petitioners. *Leslie C. Garnett* and *Samuel F. Beach* for respondent. Reported below: 89 U. S. App. D. C. ——, 191 F. 2d 349.

No. 325. FLORIDA EX REL. HAWKINS ET AL. *v.* BOARD OF CONTROL OF FLORIDA ET AL. Petition for writ of certiorari to the Supreme Court of Florida denied for want of a final judgment. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Robert L. Carter* and *Thurgood Marshall* for petitioners. *Richard W. Ervin,* Attorney General of Florida, and *Frank J. Heintz, Ralph M. McLane* and *Howard S. Bailey,* Assistant Attorneys General, for respondents. Reported below: 53 So. 2d 116.

No. 336. GIESSLER *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for the United States. Reported below: 119 Ct. Cl. 446, 96 F. Supp. 950.

No. 354. CHRISMOND *v.* CHRISMOND. Supreme Court of Mississippi. Certiorari denied. *Ross R. Barnett* for petitioner. *William Harold Cox* for respondent. Reported below: 211 Miss. 746, 52 So. 2d 624.

No. 134, Misc. DAVIS ET AL. *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 136, Misc. TAYLOR *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied. Petitioner *pro se*. *Smith Troy,* Attorney General of Washington, and *Jennings P. Felix,* Assistant Attorney General, for respondent.

No. 142, Misc. SCOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *S. M. Graham* and *Lester E. Wills* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney, Morton Liftin* and *John R. Benney* for the United States. Reported below: 189 F. 2d 863.

No. 165, Misc. SMITH ET AL. *v.* POLLIN ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David F. Smith* for petitioners. *Louis Ottenberg* for Pollin et al.; *Edmund D. Campbell* for the Riggs Park Land Co., Inc. et al.; *H. Max Ammerman* for Mensh; *M. M. Doyle* for Bucy; *G. Bowdoin Craighill* for Burke; and *Thomas F. Burke* for Evans, respondents. Reported below: 89 U. S. App. D. C. —, 190 F. 2d 657.

No. 170, Misc. MEDLEY *v.* EIDSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 191 F. 2d 734.

No. 171, Misc. BRENNAN *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 172, Misc. PRING *v.* ROBINSON, WARDEN. Supreme Court of Illinois. Certiorari denied. Reported below: 409 Ill. 105, 98 N. E. 2d 119.

No. 174, Misc. MURPHY *v.* SMYTH, SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 176, Misc. STODULSKI *v.* EIDSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 191 F. 2d 735.

No. 180, Misc. TOMLINSON *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 184, Misc. VAN HORN *v.* ROBINSON, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 185, Misc. COLLINS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

Rehearing Denied.

No. 10. UNITED STATES EX REL. GIESE *v.* CHAMBERLIN, COMMANDING GENERAL, ET AL., *ante*, p. 845;

No. 75. MOFFETT, EXECUTRIX, *v.* COMMERCE TRUST CO. ET AL., *ante*, p. 818;

No. 141. MARKS ET AL., TRUSTEES, *v.* UNITED STATES, *ante*, p. 823; and

No. 188. GILLETTE *v.* UNITED STATES, *ante*, p. 827. Petitions for rehearing denied.

No. 106. WEBER *v.* UNITED STATES, *ante*, p. 851. Rehearing denied. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 58, Misc. NASH, ON BEHALF OF HASHIMOTO ET AL., *v.* MACARTHUR, GENERAL OF THE ARMY, ET AL., *ante*, p. 838;

No. 70, Misc. O'NEILL *v.* ILLINOIS, *ante*, p. 839; and

No. 120, Misc. TATE *v.* CALIFORNIA ET AL., *ante*, p. 856. Petitions for rehearing in these cases severally denied.

No. 409, Misc., October Term, 1950. TATE *v.* CALIFORNIA ET AL., 341 U. S. 902. Third petition for rehearing denied.

NOVEMBER 26, 1951.

Per Curiam Decisions.

No. 403. LOCAL 333B, UNITED MARINE DIVISION OF INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (A. F. L.), ET AL. *v.* BATTLE, GOVERNOR OF VIRGINIA. Appeal from the United States District Court for the Eastern District of Virginia. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Joseph L. Rauh, Jr.* for appellants. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, for appellee. Reported below: 101 F. Supp. 650.

No. 376. HESS ET AL. *v.* CALIFORNIA. 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 the want of a substantial federal question. *Russell E. Parsons* and *Morris Lavine* for appellants. *Edmund G. Brown,* Attorney General of California, *T. A. Westphal, Jr.* and *Henry A. Dietz,* Assistant Attorneys General, and *David K. Lener,* Deputy Attorney General, for appellee. Reported below: 104 Cal. App. 2d 642, 234 P. 2d 65.

No. 80. KEENAN *v.* BURKE, WARDEN;

No. 81. JANKOWSKI *v.* BURKE, WARDEN; and

No. 82. FOULKE *v.* BURKE, WARDEN. Certiorari, 341 U. S. 939, to the Supreme Court of Pennsylvania. Argued November 5, 1951. Decided November 26, 1951. *Per Curiam:* The judgments are reversed. *Townsend* v. *Burke,* 334 U. S. 736. Dissenting memorandum filed by MR. JUSTICE MINTON. *Archibald Cox,* acting under appointment by the Court, argued the cause and filed a brief for petitioners. *James W. Tracey, Jr.* and *John H. Maurer* submitted on brief for respondent.

Memorandum by MR. JUSTICE MINTON, dissenting.

These cases only illuminate the error of this Court in *Townsend* v. *Burke,* 334 U. S. 736. I would not compound the error. I would overrule *Townsend* rather than send these petitioners back to be proceeded against nicely. Their guilt is not questioned. They say, "If we had only had a lawyer, *maybe* we would not have received such long sentences." Yet, the sentencing judge gave two of the petitioners much shorter terms than the maximum provided by statute. They complain not so much of the sentences they received but the manner in which they received them.

Admit the sentencing judge was facetious, even that he bulldozed the petitioners—he sentenced them all within the limits authorized by law. Maybe the judge's conduct called for a curtain lecture. At most, that was a matter for the Pennsylvania Supreme Court, and that court did not see even an error of state law in the judge's conduct, let alone a federal constitutional question. We sit only to determine federal constitutional questions, not to scold state trial judges. It is utterly incomprehensible to me how a judge can commit a denial of federal due

process by being facetious in the sentencing of defendants where the sentences he imposes are within the limits prescribed by statute. I would affirm.

No. 346. NEW YORK ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of New York. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE BLACK dissents to the action of the Court disposing of the case without oral argument. Dissenting memorandum filed by MR. JUSTICE DOUGLAS. *Nathaniel L. Goldstein,* Attorney General of New York, *Lawrence E. Walsh* and *George H. Kenny* for appellants. *Solicitor General Perlman* and *J. Stanley Payne* for appellees. Reported below: 98 F. Supp. 855.

MR. JUSTICE DOUGLAS, dissenting.

The Interstate Commerce Commission has ordered intrastate commuters' fares of the New York, New Haven and Hartford Railroad Company increased in New York to the level of interstate commuters' fares. The Commission found that the transportation conditions surrounding intrastate trains were substantially similar to those surrounding interstate trains. Interstate fares were determined to be reasonable. But present intrastate fares were found not to be producing a reasonable return on investment. The Commission concluded that persons and localities in interstate commerce, and interstate commerce, were being unduly discriminated against. Pursuant to § 13 (4) of the Interstate Commerce Act (49 U. S. C. § 13 (4)), it ordered intrastate fares raised to the level of interstate fares to remove the discrimination. A three-judge district court affirmed the order of the Commission as to the finding of discrimination against interstate commerce, but did not pass on the finding of discrimination against persons and localities in interstate commerce. 98 F. Supp. 855.

We have long insisted that the Interstate Commerce Commission supply us with an adequate basis for its decision. *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U. S. 499, 504–505, 510–511; *United States* v. *Carolina Carriers Corp.,* 315 U. S. 475, 488–489. When, as here, Commission action constitutes an intrusion on state power, there is a duty on that body clearly to justify its action. *Florida* v. *United States,* 282 U. S. 194, 211–212; *Yonkers* v. *United States,* 320 U. S. 685, 690.

To justify its conclusion of discrimination against interstate commerce, the Commission must show that intrastate commutation service is not producing its fair share of the New Haven's revenues. *Wisconsin Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 585–586; *United States* v. *Louisiana,* 290 U. S. 70, 75. Intrastate traffic must, of course, bear a proportionate amount of the burden necessary to meet maintenance and operating costs and yield a fair return on investment. But here, as in *North Carolina* v. *United States,* 325 U. S. 507, 516, the "Commission made no findings as to what contribution from intrastate traffic would constitute a fair proportion of the railroad's total income." It merely found that the interstate rates were reasonable and fixed intrastate rates at the same level.

We have here no finding as to the necessary relation between interstate and intrastate commutation rates. Perhaps intrastate fares need not be as high as interstate fares to produce intrastate's fair share of total revenue. Perhaps they should be higher. The critical issue is at what rates the two types of commuter traffic will be capable of producing their proper shares of revenue. It is not necessary on this record to equate the two rates in order to prevent diversion of traffic to the lower intrastate fare. *Illinois Commerce Commission* v. *United States,* 292 U. S. 474, 485. An adequate basis for a conclusion of rate discrimination in this case would require a finding as to the

amount of revenue expected of the intrastate and interstate commuters and the revenue-producing capacities of the two groups.

Unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty. This case is perhaps insignificant in the annals. But the standard set for men of good will is even more useful to the venal.

No. 418. WEBERMAN *v.* AUSTER; and

No. 419. DONNER ET AL. *v.* NEW YORK ON THE COMPLAINT OF SILVERMAN. Appeals from the Court of Appeals of New York. *Per Curiam:* The appeals are dismissed for the want of a substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion probable jurisdiction should be noted. *Thomas Turner Cooke* for appellants. Reported below: 302 N. Y. 855, 857, 883, 100 N. E. 2d 47, 48, 56, 57.

Miscellaneous Orders.

No. 6, Original. UNITED STATES *v.* CALIFORNIA. An order is entered awarding compensation to the Special Master and allowing his expenses to which MR. JUSTICE DOUGLAS dissents. MR. JUSTICE CLARK took no part in the consideration or decision of this question.

No. 188, Misc. LILLY *v.* HEINZE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted.

No. 361. BLACKMAR *v.* GUERRE, MANAGER, VETERANS' ADMINISTRATION, ET AL. C. A. 5th Cir. Certiorari granted. *Conrad Meyer III* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge,*

Samuel D. Slade and *Benjamin Forman* for respondents. Reported below: 190 F. 2d 427.

Certiorari Denied.

No. 249. NATIONAL LABOR RELATIONS BOARD *v.* ILLINOIS BELL TELEPHONE CO. C. A. 7th Cir. Certiorari denied. *Solicitor General Perlman* for petitioner. *Kenneth F. Burgess* for respondent. Reported below: 189 F. 2d 124.

No. 310. WATSON *v.* SUDDOTH. Supreme Court of Arkansas. Certiorari denied. *Freeman L. Martin* for petitioner. *J. G. Burke* for respondent. Reported below: 218 Ark. 960, 239 S. W. 2d 602.

No. 341. CALIFORNIA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Edmund G. Brown,* Attorney General, *Walter L. Bowers,* Assistant Attorney General, and *Bayard Rhone,* Deputy Attorney General, for the State of California; and *Bertrand W. Gearhart* for Petersen et al., petitioners. *Solicitor General Perlman, Assistant Attorney General Underhill* and *Roger P. Marquis* for the United States. Reported below: 191 F. 2d 154.

No. 351. ROBERTS ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph J. Lyman* and *Josiah Lyman* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 88 U. S. App. D. C. 397, 190 F. 2d 600.

No. 355. PANAMA COCA-COLA BOTTLING CO. *v.* CARMACK ET AL. C. A. 5th Cir. Certiorari denied. *Cicero C. Sessions* and *Richard B. Montgomery, Jr.* for petitioner. Reported below: 190 F. 2d 382.

No. 356. JONES ET AL. *v.* ST. MARY'S ROMAN CATHOLIC CHURCH, OPERATING AS ST. MARY'S ROMAN CATHOLIC SCHOOL (GRAMMAR). Supreme Court of New Jersey. Certiorari denied. *Sylvester S. Garfield* for petitioners. *Allen Conley Mathias* for respondent. Reported below: 7 N. J. 533, 82 A. 2d 187.

No. 358. KYLE *v.* JONES, COLLECTOR OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *Charles E. Dierker* and *John E. Marshall* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Helen Goodner* and *Melva M. Graney* for respondent. Reported below: 190 F. 2d 353.

No. 359. GREDE FOUNDRIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Clark M. Robertson* and *Jackson M. Bruce* for petitioner. *Solicitor General Perlman, David P. Findling* and *Mozart G. Ratner* for respondent. Reported below: 189 F. 2d 258.

No. 360. KATZ *v.* R. HOE & CO., INC. ET AL. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. *Gustave B. Garfield* for petitioner. *Neil P. Cullom* for respondents. Reported below: 278 App. Div. 766, 104 N. Y. S. 2d 14.

No. 363. KING, SPECIAL ADMINISTRATOR, *v.* NICHOLSON TRANSIT CO. Supreme Court of Michigan. Certiorari denied. *Paul R. Trigg, Jr.* for petitioner. *Sparkman Deats Foster* for respondent. Reported below: 329 Mich. 586, 46 N. W. 2d 389.

No. 367. ACF-BRILL MOTORS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *John E. Hughes* for petitioner. *Solicitor General Perl-*

man, Assistant Attorney General Caudle, Ellis N. Slack and *Hilbert P. Zarky* for respondent. Reported below: 189 F. 2d 704.

No. 369. WARFIELD ET AL. *v.* MARKS ET AL. C. A. 5th Cir. Certiorari denied. *L. E. Gwinn* for petitioners. *P. H. Eager, Jr., M. M. Roberts, S. B. Laub* and *Frank E. Everett, Jr.* for respondents. Reported below: 190 F. 2d 178.

No. 377. LEVY *v.* DABNEY, TRUSTEE. C. A. 2d Cir. Certiorari denied. *Herbert Monte Levy* for petitioner. *Harold Harper* for respondent. Reported below: 191 F. 2d 201.

No. 378. UNIVERSAL EQUIPMENT CO. *v.* HARVEY CORPORATION. Supreme Court of Florida. Certiorari denied. *Thomas H. Anderson* for petitioner. *William Gresham Ward* for respondent. Reported below: 53 So. 2d 867.

No. 380. PFISTER ET AL. *v.* COW GULCH OIL CO. ET AL. C. A. 10th Cir. Certiorari denied. *Wendell Berge* for petitioners. *Warwick M. Downing* for the Cow Gulch Oil Co.; and *W. J. Wehrli* and *Ewing T. Kerr* for the Atlantic Refining Co., respondents. Reported below: 189 F. 2d 311.

No. 381. MCCARTY ET AL. *v.* NELSON, ADMINISTRATOR, ET AL. Supreme Court of Minnesota. Certiorari denied. *E. Luther Melin* for petitioners. *L. Glenn Fassett, Jr.* for respondents. Reported below: 233 Minn. 362, 47 N. W. 2d 595.

No. 406. FORD MOTOR CO. *v.* PIERCE ET AL. C. A. 4th Cir. Certiorari denied. *Aubrey R. Bowles, Jr.* for peti-

tioner. *George E. Allen* for respondents. Reported below: 190 F. 2d 910.

No. 174. HAINES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 188 F. 2d 546.

No. 288. MULLEN *v.* FITZ SIMONS & CONNELL DREDGE & DOCK CO. C. A. 7th Cir. Certiorari denied. *Irving Breakstone* for petitioner. *Edward B. Hayes* for respondent. Reported below: 191 F. 2d 82.

No. 353. HICKS *v.* DE BARDELEBEN COAL CORP., DOING BUSINESS AS COYLE LINES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 188 F. 2d 574.

No. 32, Misc. HAMILTON *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se*. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, for respondent.

No. 143, Misc. WOCHNICK *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Morris J. Pollack* for petitioner. Reported below: 104 Cal. App. 2d 541, 231 P. 2d 933.

No. 169, Misc. FORMAN *v.* WOLFSON. Supreme Judicial Court of Massachusetts. Certiorari denied. Reported below: 327 Mass. 341, 98 N. E. 2d 615.

No. 178, Misc. SPEARS *v.* SUTTON ET AL. C. A. 6th Cir. Certiorari denied.

No. 179, Misc. EDDINS *v.* WEST VIRGINIA. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 181, Misc. RIGGS *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 186, Misc. HAMILTON *v.* DUFFY, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 187, Misc. SPARKS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

Rehearing Denied.

No. 148. REMINGTON RAND, INC. *v.* SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ET AL., *ante*, p. 832; and

No. 277. IN RE CARTER, *ante*, p. 862. The petitions for rehearing are denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

No. 99. HUNTER ET AL. *v.* SHEPHERD ET AL., *ante*, p. 819;

No. 137. BAZZELL *v.* UNITED STATES, *ante*, p. 849;

No. 199. KOEHLER ET AL. *v.* UNITED STATES, *ante*, p. 852;

No. 205. WEINMANN *v.* MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL., *ante*, p. 804;

No. 237. ROSE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 850;

No. 283. FRANKLIN ET AL. *v.* BOARD OF COMMISSIONERS OF THE TENSAS BASIN LEVEE DISTRICT, *ante*, p. 844;

No. 50, Misc. LAWSON *v.* SHUTTLEWORTH, WARDEN, *ante*, p. 806;

No. 115, Misc. RILEY *v.* TITUS ET AL., *ante*, p. 855; and

No. 131, Misc. PRIDGEN *v.* BUBELLA ET AL., *ante*, p. 846. Petitions for rehearing in these cases denied.

December 3, 1951.

Per Curiam Decisions.

No. 398. Horsman Dolls, Inc. *v.* Unemployment Compensation Commission. Appeal from and petition for writ of certiorari to the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction, 28 U. S. C. § 1257 (2). The petition for writ of certiorari is denied. *Samuel Kaufman* and *Nathan Bilder* for appellant-petitioner. *Theodore D. Parsons,* Attorney General of New Jersey, *Joseph A. Murphy,* Assistant Deputy Attorney General, *Herman D. Ringle* and *Charles A. Malloy* for appellee-respondent. Reported below: 7 N. J. 541, 82 A. 2d 177.

No. 410. Interstate Commerce Commission et al. *v.* New York Central Railroad Co. et al. Appeal from the United States District Court for the District of Massachusetts. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. Mr. Justice Black and Mr. Justice Reed dissent from the action of the Court in affirming without oral argument. *Daniel W. Knowlton* and *Edward M. Reidy* for the Interstate Commerce Commission; *Harry C. Ames* and *James B. Doak* for the Chamber of Commerce of Philadelphia et al.; and *Paul V. Miller* and *Anthony P. Donadio* for the Baltimore & Ohio Railroad Co. et al., appellants. *Robert J. Fletcher* for the New York Central Railroad Co. et al.; *Timothy J. Murphy,* Assistant Attorney General of Massachusetts, *B. A. Brickley* and *Oliver T. Waite* for the Port of Boston Authority; *Mr. Brickley* and *Mr. Waite* for the Boston Grain & Flour Exchange et al.; *Leander I. Shelley, Wilbur La Roe, Jr., Arthur L. Winn* and *Samuel H. Moerman* for the Port of New York Authority; and *William H. Kerr* for the City of Boston, appellees. Reported below: 99 F. Supp. 394.

Miscellaneous Orders.

No. 6, Original. UNITED STATES *v.* CALIFORNIA. The order of February 12, 1949, appointing William H. Davis, Esquire, of New York City, Special Master herein, is continued and he is directed to conduct hearings and to submit to this Court with all convenient speed his recommended answers to the following questions, with a view to securing from this Court an order for his further guidance in applying the proper principles of law to the seven coastal segments enumerated in Groups I and II of the Master's Report of May 31, 1949, ordered filed June 27, 1949, pp. 1 and 2 of said Report:

Question 1.—What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined?

Question 2.—Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers, and other inland waters to be drawn?

Question 3.—By what criteria is the ordinary low water mark on the coast of California to be ascertained?

In holding hearings, the Master is authorized to exclude such evidence as he may deem immaterial or unduly cumulative in arriving at his recommendations. Each party may make proffer of any part of such excluded evidence in written form to this Court. Excluded evidence so proffered shall accompany the record of proceedings upon which the Master acted, but shall not be a part of that record.

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

MR. JUSTICE BLACK is of the opinion that the case should be set for argument with a view to narrowing and

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making more precise the issues upon which evidence is to be heard.

Attorney General McGrath, Solicitor General Perlman, Assistant Attorney General Vanech, Oscar H. Davis, John F. Davis and *Robert M. Vaughan* for the United States. *Edmund G. Brown,* Attorney General of California, and *Everett W. Mattoon,* Assistant Attorney General, for defendant.

No. 331. FRISBIE, WARDEN, *v.* COLLINS. It is ordered that A. Stewart Kerr, Esquire, of Detroit, Michigan, be appointed to serve as counsel for the respondent in this case.

No. 191, Misc. EKBERG *v.* MCGEE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 202, Misc. CASEY *v.* SUPREME COURT OF INDIANA. Motion for leave to file petition for writ of mandamus denied.

No. 208, Misc. HERZKA *v.* NEW YORK. Application denied.

No. 212, Misc. HOWELL *v.* HANN, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted.

No. 379. CASEY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *F. M. Reischling* for petitioners. *Solicitor General Perlman* filed a memorandum for the United States, suggesting remand of the case to the Court of Appeals for further proceedings. Reported below: 191 F. 2d 1.

Certiorari Denied. (*See also No. 398, supra.*)

No. 370. UNITED STATES *v.* BRANCH BANKING & TRUST CO. ET AL. Court of Claims. Certiorari denied. *Solicitor General Perlman* for the United States. *Ward E. Lattin* for respondents. Reported below: 120 Ct. Cl. 72, 98 F. Supp. 757.

No. 383. DOUGLAS HOTEL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *William J. Hotz* and *William J. Hotz, Jr.* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack, A. F. Prescott* and *Fred E. Youngman* for respondent. Reported below: 190 F. 2d 766.

No. 385. MCGIRL ET AL., TRUSTEES, *v.* MINTZ ET AL. C. A. 3d Cir. Certiorari denied. *James D. Carpenter* and *Samuel M. Coombs, Jr.* for petitioners. *Solicitor General Perlman, Louis Loss, George Zolotar* and *David Ferber* for the Securities & Exchange Commission; and *Morton Stavis* for Mintz, respondents. Reported below: 190 F. 2d 273.

No. 399. COSTON SUPPLY CO. ET AL. *v.* PABELLON ET AL. C. A. 2d Cir. Certiorari denied. *Lowell Wadmond, David Hartfield, Jr., John W. Burke, Jr., Wilbur M. Jones, I. Arnold Ross* and *Walter E. Warner, Jr.* for petitioners. *Vernon Sims Jones* for the Grace Line Inc., respondent. Reported below: 191 F. 2d 169.

No. 402. LEAHY, CHIEF JUDGE OF U. S. DISTRICT COURT FOR DELAWARE, ET AL. *v.* CANISTER COMPANY ET AL. C. A. 3d Cir. Certiorari denied. *Wm. S. Potter* and *Edward C. McLean* for petitioners. *Arthur C. Gillette* and *John J. Morris, Jr.* for respondents. Reported below: 191 F. 2d 255.

No. 382. McCoy et al. *v.* Providence Journal Co. et al. C. A. 1st Cir. Certiorari denied. Mr. Justice Black is of the opinion certiorari should be granted. *Joseph L. Breen* for petitioners. *William H. Edwards* and *Gerald W. Harrington* for respondents. Reported below: 190 F. 2d 760.

No. 440. Hammett et al. *v.* United States; and

No. 441. Field *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion certiorari should be granted. *Charles Rothenberg* for petitioners in No. 440. *Victor Rabinowitz* for petitioner in No. 441. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 193 F. 2d 92, 109.

No. 167, Misc. Davis *v.* Illinois. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *Ivan A. Elliott,* Attorney General of Illinois, *William C. Wines,* Assistant Attorney General, and *John S. Boyle* for respondent.

No. 192, Misc. De Leon *v.* Heinze, Warden. Supreme Court of California. Certiorari denied.

No. 196, Misc. Coker *v.* California. District Court of Appeal of California, Third Appellate District. Certiorari denied.

No. 197, Misc. Janiec *v.* New Jersey. Supreme Court of New Jersey. Certiorari denied.

No. 199, Misc. McBride *v.* New Jersey. Supreme Court of New Jersey. Certiorari denied.

No. 210, Misc. BECKER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 213, Misc. SWITZER *v.* CIRCUIT COURT OF McDONOUGH COUNTY ET AL. Supreme Court of Illinois. Certiorari denied.

Rehearing Denied.

No. 656, October Term, 1950. ANDERSON *v.* COMMISSIONER OF INTERNAL REVENUE, 341 U. S. 935. Motion for leave to file a second petition for rehearing denied.

No. 128. RISBERG *v.* DULUTH, MISSABE & IRON RANGE RAILWAY CO., *ante,* p. 832. Motion for leave to file brief of Warehouse Employees Union, Local 169, et al., as *amici curiae,* denied. Rehearing denied.

No. 256. FRANK B. KILLIAN & CO. *v.* ALLIED LATEX CORP. ET AL., *ante,* p. 861;

No. 257. YOUNGS RUBBER CORP. *v.* ALLIED LATEX CORP., *ante,* p. 861;

No. 266. MASKE *v.* WASHINGTON, MARLBORO & ANNAPOLIS MOTOR LINES, INC., *ante,* p. 834; and

No. 340. JULIUS HYMAN & CO. ET AL. *v.* VELSICOL CORPORATION, *ante,* p. 870. Petitions for rehearing in these cases are severally denied.

DECEMBER 11, 1951.

Miscellaneous Orders.

No. 387. REMINGTON *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Motion of respondent for leave to apply to the United States District Court for leave to dismiss indictment denied. MR. JUSTICE CLARK took no part in the consideration or decision of this motion. *William C. Chanler* and *Joseph L. Rauh, Jr.* for petitioner. *Solicitor General Perlman* for the United States.

No. 144, Misc. PRICE *v.* CRANOR, SUPERINTENDENT. Petition dated November 11, 1951, denied.

No. 214, Misc. CALHOUN *v.* ROBINSON, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted.

No. 388. ROBERTSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted. *Samuel E. Blackham* and *Clyde D. Sandgren* for petitioner. *Solicitor General Perlman* filed a memorandum for the United States stating that the Government does not oppose the issuance of the writ. Reported below: 190 F. 2d 680.

Certiorari Denied.

No. 183. GANDELMAN *v.* MERCANTILE INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. *Don Marlin* for petitioner. Reported below: 187 F. 2d 654.

No. 293. UNITED STATES *v.* LANCE, INCORPORATED. C. A. 4th Cir. Certiorari denied. *Solicitor General Perlman* for the United States. *Welborn B. Cody* for respondent. Reported below: 190 F. 2d 204.

No. 294. UNITED STATES *v.* LOVKNIT MANUFACTURING CO., INC. ET AL. C. A. 5th Cir. Certiorari denied. *Solicitor General Perlman* for the United States. Reported below: 189 F. 2d 454.

No. 335. PEAY ET AL. *v.* COX. C. A. 5th Cir. Certiorari denied. *Thomas C. Hannah* for petitioners. *M. M. Roberts* for respondent. Reported below: 190 F. 2d 123.

No. 357. UNITED STATES *v.* OSAGE NATION OF INDIANS. Court of Claims. Certiorari denied. *Solicitor General*

Perlman for the United States. *Wesley E. Disney* and *F. M. Goodwin* for respondent. Reported below: 119 Ct. Cl. 592, 97 F. Supp. 381.

No. 304. LITTLETON *v.* DELASHMUTT. C. A. 4th Cir. Mathy, Executor, substituted for Littleton. Certiorari denied. *Elmer McClain* for petitioner. *James H. Simmonds* for respondent. Reported below: 188 F. 2d 973.

No. 323. CRUMMER COMPANY ET AL. *v.* BARKER, U. S. DISTRICT JUDGE. C. A. 5th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Robert J. Pleus, Chris Dixie* and *Joseph P. Lea, Jr.* for petitioners. *Richard W. Ervin,* Attorney General of Florida, *Ralph McLane,* Assistant Attorney General, *Charles R. Scott, Henry P. Adair, Donald Russell* and *H. M. Voorhis* for respondent.

No. 386. RYAN ET AL. *v.* SIMONS, PRESIDENT OF NEWSPAPER & MAIL DELIVERERS' UNION OF NEW YORK, ET AL. Court of Appeals of New York. Certiorari denied. *Arthur G. Warner* and *James E. Birdsall* for petitioners. *Samuel Duker* for the Newspaper & Mail Deliverers' Union of New York; and *Stuart N. Updike* for the News Syndicate Co., respondents.

No. 390. BROADY *v.* ILLINOIS CENTRAL RAILROAD CO. C. A. 7th Cir. Certiorari denied. *Edward J. Fruchtman* and *Richard F. Watt* for petitioner. *Herbert J. Deany, Joseph H. Wright, Charles A. Helsell* and *John W. Freels* for respondent. Reported below: 191 F. 2d 73.

No. 393. WILSON ET AL. *v.* KITCHENS. Supreme Court of Arkansas. Certiorari denied. *J. E. Gaughan*

for petitioners. *W. H. Kitchens, Jr.* and *J. R. Wilson* for respondent. Reported below: 218 Ark. 845, 239 S. W. 2d 270.

No. 42, Misc. DAUER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Felicia H. Dubrovsky* for the United States. Reported below: 189 F. 2d 343.

No. 147, Misc. KIMLER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Edmund G. Brown,* Attorney General of California, and *Clarence A. Linn,* Assistant Attorney General, for respondent. Reported below: 37 Cal. 2d 568, 233 P. 2d 902.

No. 182, Misc. MONAGHAN *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 195, Misc. MEINER *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 200, Misc. MCDERMITT *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 206, Misc. HENDERSON *v.* OKLAHOMA. Criminal Court of Appeals of Oklahoma. Certiorari denied.

No. 222, Misc. HANSON *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 225, Misc. MATTISON *v.* CLAUDY, WARDEN, ET AL. Supreme Court of Pennsylvania. Certiorari denied.

Rehearing Denied.

No. 155, October Term, 1950. SABIN ET AL. *v.* LEVORSEN; and

No. 156, October Term, 1950. SABIN ET AL. *v.* MIDLAND SAVINGS & LOAN CO., 340 U. S. 833. Motions for leave to file second petitions for rehearing denied.

No. 17. MCMAHON *v.* UNITED STATES ET AL., *ante,* p. 25;

No. 303. WALKER *v.* UNITED STATES, *ante,* p. 868;

No. 313. LEWIS *v.* UNITED STATES, *ante,* p. 869;

No. 338. CARTER OIL CO. *v.* MCCASLAND ET AL., *ante,* p. 870;

No. 30, Misc. ASPERO *v.* MEMPHIS & SHELBY COUNTY BAR ASSN., *ante,* p. 836;

No. 37, Misc. SMITH *v.* UNITED STATES ET AL., *ante,* p. 807;

No. 81, Misc. NERO *v.* UNITED STATES, *ante,* p. 872; and

No. 141, Misc. EAGLE *v.* CHERNEY ET AL., *ante,* p. 873. Petitions for rehearing in these cases severally denied.

JANUARY 2, 1952.

Per Curiam Decisions.

No. 421. ACHESON, SECRETARY OF STATE, *v.* OKIMURA. Appeal from the United States District Court for the District of Hawaii. *Per Curiam:* The judgment is vacated and the case is remanded to the District Court for specific findings as to the circumstances attending appellee's service in the Japanese Army and voting in the Japanese elections and the reasonable inferences to be drawn therefrom. MR. JUSTICE BLACK is of the opinion the judgment should be affirmed. MR. JUSTICE DOUGLAS, being of the view that the findings are adequate to show that the services of appellee to Japan were rendered under the compulsion

of military and other sanctions, evidenced in some instances by physical beatings, dissents to vacation and remand. *Solicitor General Perlman* and *Howard K. Hoddick* for appellant. *A. L. Wirin, Fred Okrand* and *Katsuo Miho* for appellee. Reported below: 99 F. Supp. 587.

No. 422. ACHESON, SECRETARY OF STATE, *v.* MURATA. Appeal from the United States District Court for the District of Hawaii. *Per Curiam:* The judgment is vacated and the case is remanded to the District Court for specific findings as to the circumstances attending appellee's service in the Japanese Army and the reasonable inferences to be drawn therefrom. MR. JUSTICE BLACK is of the opinion the judgment should be affirmed. MR. JUSTICE DOUGLAS, being of the view that the findings are adequate to show that the services of appellee to Japan were rendered under the compulsion of military and other sanctions, evidenced in some instances by physical beatings, dissents to vacation and remand. *Solicitor General Perlman* and *Howard K. Hoddick* for appellant. *A. L. Wirin, Fred Okrand* and *Katsuo Miho* for appellee. Reported below: 99 F. Supp. 591.

No. 427. BARKER *v.* LEGGETT, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF MISSOURI, ET AL. Appeal from the United States District Court for the Western District of Missouri. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Walter A. Raymond, William H. Becker* and *Robert L. Howard* for appellant. *J. E. Taylor,* Attorney General of Missouri, and *Harry H. Kay,* Assistant Attorney General, for appellees. Reported below: 102 F. Supp. 642.

No. 460. ILLINOIS CENTRAL RAILROAD CO. *v.* GARNER, COUNTY TRUSTEE OF SHELBY COUNTY, ET AL. Appeal from the Supreme Court of Tennessee. *Per Curiam:*

The appeal is dismissed for the want of a substantial federal question. *Charles A. Helsell* for appellant. Reported below: 193 Tenn. 91, 241 S. W. 2d 926.

Miscellaneous Orders.

No. 216, Misc. MARINGER *v.* SUPREME COURT OF CALIFORNIA; and

No. 219, Misc. ROBERTS *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. Motions for leave to file petitions for writs of mandamus denied.

No. 227, Misc. HICKS *v.* JACKSON, WARDEN, ET AL.; and

No. 253, Misc. WORTH *v.* CALIFORNIA ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 239, Misc. SANDERS *v.* WATERS, WARDEN. Motion for leave to withdraw petition for writ of mandamus granted.

No. 241, Misc., October Term, 1948. RODRIQUEZ *v.* NEW YORK, 335 U. S. 899. Motion for return of the record to petitioner denied.

Certiorari Granted.

No. 401. JOHANSEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *William L. Standard* for petitioner. *Solicitor General Perlman* filed a memorandum for the United States stating that the Government does not oppose the granting of the petition. Reported below: 191 F. 2d 162.

No. 414. MANDEL, ADMINISTRATOR, *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. *Abraham E. Freedman* for petitioner. *Solicitor General Perlman* filed a

memorandum for the United States stating that the Government does not oppose the granting of the petition. Reported below: 191 F. 2d 164.

Certiorari Denied.

No. 15. UNITED STATES *v.* DUVARNEY. C. A. 1st Cir. Certiorari denied. *Solicitor General Perlman* for the United States. Reported below: 185 F. 2d 612.

No. 139. NICHOLSON TRANSIT CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Sparkman Deats Foster* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for the United States. Reported below: 118 Ct. Cl. 344.

No. 207. SEDIVY ET AL. *v.* SUPERIOR HOME BUILDERS, INC. ET AL. C. A. 7th Cir. Certiorari denied. Petitioners *pro se*. *Arthur R. Seelig* for respondents. Reported below: 188 F. 2d 729.

No. 362. MEAD SERVICE CO. ET AL. *v.* MOORE, DOING BUSINESS AS MOORE'S BAKERY. C. A. 10th Cir. Certiorari denied. *Edward W. Napier* and *Howard F. Houk* for petitioners. *Dee C. Blythe* for respondent. Reported below: 190 F. 2d 540.

No. 372. CHERRYWOOD APARTMENTS, INC. ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Carl L. Shipley* for petitioners. *Solicitor General Perlman, Assistant Attorney General Underhill* and *Roger P. Marquis* for the United States. Reported below: 120 Ct. Cl. 309, 98 F. Supp. 577.

No. 389. FLORIDA EX REL. HICKS-KESSLER FLYING SCHOOL, INC. *v.* HOLT, CIRCUIT COURT JUDGE. Supreme

Court of Florida. Certiorari denied. *T. J. Blackwell* for petitioner. *William C. Gaither* for respondent.

No. 394. SGITCOVICH *v.* SGITCOVICH. Supreme Court of Texas. Certiorari denied. *W. A. Combs* for petitioner. Reported below: 150 Tex. ——, 241 S. W. 2d 142.

No. 397. UNITED STATES *v.* STATE ROAD DEPARTMENT OF FLORIDA ET AL. C. A. 5th Cir. Certiorari denied. *Solicitor General Perlman* for the United States. *Richard W. Ervin, Jr.*, Attorney General of Florida, *T. Paine Kelly*, Assistant Attorney General, and *J. McHenry Jones* for respondents. Reported below: 189 F. 2d 591.

No. 404. COTTMAN COMPANY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *John H. Skeen, Jr.* for petitioners. *Solicitor General Perlman, Assistant Attorney General Baldridge, Samuel D. Slade* and *Melvin Richter* for the United States. Reported below: 190 F. 2d 805.

No. 407. KANE *v.* UNION OF SOVIET SOCIALIST REPUBLICS ET AL. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* for petitioner. Reported below: 189 F. 2d 303.

No. 408. SAFEWAY STORES, INC. *v.* DISALLE, PRICE DIRECTOR. United States Emergency Court of Appeals. Certiorari denied. *Elisha Hanson, Arthur B. Hanson, Joseph C. Wells* and *Garland Clarke* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Samuel D. Slade* and *Herman Marcuse* for respondent.

No. 412. KALMUS *v.* KALMUS ET AL. District Court of Appeal of California, Second Appellate District. Cer-

tiorari denied. *R. A. Rogers* for petitioner. *Frank B. Belcher* for respondents. Reported below: 103 Cal. App. 2d 405, 230 P. 2d 57.

No. 416. TEXAS *v.* GROUP OF INSTITUTIONAL INVESTORS ET AL. C. A. 8th Cir. Certiorari denied. *Price Daniel,* Attorney General of Texas, and *C. K. Richards,* Assistant Attorney General, for petitioner. *Charles W. McConaughy* for the Group of Institutional Investors; *Sanford H. E. Freund* for the Bondholders Protective Committee; and *Leonard P. Moore* and *Clair B. Hughes* for the Manufacturers Trust Co., respondents. Reported below: 191 F. 2d 265.

No. 424. FRAD *v.* COLUMBIAN NATIONAL LIFE INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari denied. *Harris Jay Griston* for petitioner. *Samuel M. Lane* for the Columbian National Life Insurance Co., respondent. Reported below: 191 F. 2d 22.

No. 425. STOW MANUFACTURING CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *William J. Donovan, George G. Coughlin* and *Carbery O'Shea* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *Irving I. Axelrad* for respondent. Reported below: 190 F. 2d 723.

No. 432. PALUMBO *v.* GANEY, U. S. DISTRICT JUDGE. C. A. 3d Cir. Certiorari denied. *Frederick Bernays Wiener* and *Jacob Kossman* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for respondent.

No. 435. LEE *v.* FINLEY ET AL. Supreme Court of Illinois. Certiorari denied. *Richard E. Westbrooks* for petitioner. *Isaac I. Bender* for respondents. Reported below: 409 Ill. 435, 100 N. E. 2d 606.

No. 417. ANCICH ET AL. *v.* BORCICH ET AL. C. A. 9th Cir. The motions for leave to file briefs of Atlantic Fishermen's Union et al., and Fishermen and Allied Workers Division, International Longshoremen's and Warehousemen's Union, as *amici curiae,* denied. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted and the judgment reversed. *David A. Fall* and *Arch E. Ekdale* for petitioners. *Claude A. Ferguson* for respondents. Reported below: 191 F. 2d 392.

No. 420. H. J. HEINZ CO. *v.* OWENS. C. A. 9th Cir. Certiorari denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *William H. Parmelee* and *Hector M. Holmes* for petitioner. Reported below: 189 F. 2d 505.

No. 423. HERWIG *v.* CRENSHAW, COLLECTOR OF INTERNAL REVENUE, ET AL. C. A. 4th Cir. Certiorari denied. *L. J. H. Herwig pro se. Solicitor General Perlman, Acting Assistant Attorney General Slack, John F. Davis* and *Carolyn R. Just* for respondents. Reported below: 188 F. 2d 572.

No. 7, Misc. SMITH *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. Petitioner *pro se. Hall Hammond,* Attorney General of Maryland, and *Kenneth C. Proctor,* Assistant Attorney General, for respondent. Reported below: —— Md. ——, 80 A. 2d 38.

No. 113, Misc. TOUHY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Robert B. Johnstone* for petitioner. *Ivan A. Elliott,* Attorney General of Illinois, for respondent.

No. 41, Misc. THOMPSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se.* *Ivan A. Elliott,* Attorney General of Illinois, for respondent.

No. 105, Misc. HAIDAS ET AL. *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioners *pro se.* *Ivan A. Elliott,* Attorney General of Illinois, for respondent.

No. 168, Misc. MILANKO ET AL. *v.* AUSTIN ET AL. Supreme Court of Missouri. Certiorari denied. *Frank Mashak* for petitioners. Reported below: 362 Mo. 357, 241 S. W. 2d 881.

No. 193, Misc. ROBERTS *v.* WESTERN PACIFIC RAILROAD CO. District Court of Appeal of California, First Appellate District. Certiorari denied. Petitioner *pro se.* *Harriet P. Tyler* for respondent. Reported below: 104 Cal. App. 2d 816, 232 P. 2d 560.

No. 194, Misc. UNITED STATES EX REL. ROBERTS ET AL. *v.* WESTERN PACIFIC RAILROAD CO. C. A. 9th Cir. Certiorari denied. Petitioners *pro se.* *Harriet P. Tyler* for respondent. Reported below: 190 F. 2d 243.

No. 204, Misc. DOLAN *v.* ALVIS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: See 186 F. 2d 586.

No. 215, Misc. CASH *v.* NEW JERSEY. Superior Court of New Jersey, Appellate Division. Certiorari denied.

No. 221, Misc. STEELE *v.* JACKSON, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 228, Misc. HIDDEN *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 237, Misc. OKULCZYK *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 410 Ill. 115, 101 N. E. 2d 529.

No. 250, Misc. JONES *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

Rehearing Denied.

No. 25. SUTPHEN ESTATES, INC. *v.* UNITED STATES ET AL., *ante,* p. 19. Rehearing denied. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 290. PHOTOCHART, A CORPORATION, ET AL. *v.* PHOTO PATROL, INC. ET AL., *ante,* p. 867;

No. 315. ALEUTIAN LIVESTOCK CO., INC. *v.* UNITED STATES, *ante,* p. 875; and

No. 336. GIESSLER *v.* UNITED STATES, *ante,* p. 878. Petitions for rehearing in these cases severally denied.

No. 390, October Term, 1948. PROPPER, RECEIVER, *v.* CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, 337 U. S. 472. The motion for leave to file a second petition for rehearing is denied. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of this motion.

No. 526, October Term, 1947. UNITED STATES *v.* KRUSZEWSKI, 333 U. S. 880. Rehearing denied.

No. 152, Misc. BAYKEN *v.* MICHIGAN, *ante,* p. 862. Petition for rehearing denied for the reason that the application was not received within the time provided by Rule 33.

No. 165, Misc. SMITH ET AL. *v.* POLLIN ET AL., *ante,* p. 878. Rehearing denied.

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JANUARY 7, 1952.

Per Curiam Decision.

No. 464. UNITED AIR LINES, INC. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA; and

No. 465. WESTERN AIR LINES, INC. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA. Appeals from the Supreme Court of California. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for the want of a substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE BURTON are of the opinion probable jurisdiction should be noted. *Oscar A. Trippet* and *Paul M. Godehn* for appellant in No. 464. *Hugh W. Darling* for appellant in No. 465. *Everett C. McKeage* for appellee.

Miscellaneous Order.

No. 453. FIELD *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit dismissed on motion of counsel for petitioner. *Victor Rabinowitz* for petitioner. Reported below: 193 F. 2d 92.

Certiorari Denied.

No. 384. INTER-CITY ADVERTISING CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *Whiteford S. Blakeney* for petitioners. *Solicitor General Perlman, David P. Findling, Mozart G. Ratner* and *Frederick U. Reel* for respondent. Reported below: 190 F. 2d 420.

No. 405. BARBEE *v.* CAPITAL AIRLINES, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Solicitor General Perlman* for petitioner. *Charles H. Murchison* for respondent. Reported below: 89 U. S. App. D. C. —, 191 F. 2d 507.

No. 434. GENDELMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Charles H. Carr* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *John Lockley* for the United States. Reported below: 191 F. 2d 993.

No. 438. CALIFORNIA STATE BOARD OF EQUALIZATION *v.* GOGGIN, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. *Edmund G. Brown,* Attorney General of California, *Walter L. Bowers,* Assistant Attorney General, and *James E. Sabine* and *Edward Sumner,* Deputy Attorneys General, for petitioner. Reported below: 191 F. 2d 726.

No. 439. MILWAUKEE TOWNE CORP. *v.* LOEW'S INCORPORATED ET AL.; and

No. 454. LOEW'S INCORPORATED ET AL. *v.* MILWAUKEE TOWNE CORP. C. A. 7th Cir. Certiorari denied. *Thomas C. McConnell* for the Milwaukee Towne Corp. *Miles G. Seeley, Edward R. Johnston, John F. Caskey* and *Vincent O'Brien* for Loew's Incorporated et al. Reported below: 190 F. 2d 561.

No. 445. UNION PACKING CO. *v.* CARIBOO LAND & CATTLE CO., LTD. C. A. 9th Cir. Certiorari denied. *Benjamin W. Shipman* for petitioner. *Charles E. Beardsley* for respondent. Reported below: 191 F. 2d 814.

No. 452. VILLAGE OF SKOKIE *v.* FIRST NATIONAL BANK & TRUST CO. C. A. 7th Cir. Certiorari denied. *Emmett J. McCarthy* and *Joseph J. Witry* for petitioner. *Charles F. Short, Jr.* for respondent. Reported below: 190 F. 2d 791.

No. 463. SUNBEAM CORPORATION *v.* CIVIL SERVICE EMPLOYEES COOPERATIVE ASSOCIATION. C. A. 3d Cir.

Certiorari denied. *C. Russell Phillips* and *Herman T. Van Mell* for petitioner. *Delbert T. Kirk* for respondent. Reported below: 192 F. 2d 572.

No. 316. BIGELOW *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Morris Lavine* for petitioner. Reported below: 104 Cal. App. 2d 380, 231 P. 2d 881.

No. 437. PASS *v.* MCGRATH, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Raoul Berger* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baynton, James D. Hill* and *George B. Searls* for respondent. Reported below: 89 U. S. App. D. C. —, 192 F. 2d 415.

No. 494. DOLLAR ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Herman Phleger, Gregory A. Harrison, Moses Lasky, Edmund L. Jones* and *Howard Boyd* for petitioners. *Solicitor General Perlman* filed a memorandum for the United States stating that the Government does not oppose the grant of the petition for a writ of certiorari. Reported below: 190 F. 2d 547.

No. 205, Misc. BRAASCH ET AL. *v.* UTAH. Supreme Court of Utah. Certiorari denied. Petitioners *pro se*. *Clinton D. Vernon,* Attorney General of Utah, and *Quentin L. R. Alston,* Assistant Attorney General, for respondent. Reported below: — Utah —, 229 P. 2d 289.

No. 240, Misc. MINUTOLO *v.* KAUFMAN, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied.

No. 244, Misc. PAULDING ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 191 F. 2d 829.

No. 249, Misc. MARSH *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 255, Misc. MCDONALD *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

Rehearing Denied.

No. 174. HAINES *v.* UNITED STATES, *ante,* p. 888;

No. 346. NEW YORK ET AL. *v.* UNITED STATES ET AL., *ante,* p. 882;

No. 351. ROBERTS ET AL. *v.* UNITED STATES, *ante,* p. 885;

No. 377. LEVY *v.* DABNEY, TRUSTEE, *ante,* p. 887; and

No. 187, Misc. SPARKS *v.* CALIFORNIA, *ante,* p. 889. Petitions for rehearing denied.

JANUARY 14, 1952.

Per Curiam Decisions.

No. 46. UNITED STATES *v.* JORDAN ET AL. Certiorari, 342 U. S. 809, to the United States Court of Appeals for the Sixth Circuit. Argued November 27, 1951. Decided January 14, 1952. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE FRANKFURTER is of the opinion the writ should be dismissed as improvidently granted and has expressed his views in a memorandum filed in No. 47, *United States* v. *Shannon,* decided this day, *ante,* pp. 288, 294. *Roger P. Marquis* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Underhill* and *Harold S. Harrison. John D. Martin, Jr.* argued the cause for respondents. With him on the brief was *Sam Costen.* Reported below: 186 F. 2d 803.

No. 100. UNITED STATES *v.* BLOOM. Certiorari, 342 U. S. 864, to the Court of Appeals of New York;

No. 299. UNITED STATES *v.* EDENS ET AL., TRUSTEES. Certiorari, 342 U. S. 865, to the United States Court of Appeals for the Fourth Circuit; and

No. 300. UNITED STATES *v.* GENERAL ENGINEERING & MANUFACTURING CO. Certiorari, 342 U. S. 865, to the United States Court of Appeals for the Eighth Circuit. Argued January 10, 1952. Decided January 14, 1952. *Per Curiam:* The judgments are affirmed. *City of New York* v. *Saper,* 336 U. S. 328. *I. Henry Kutz* argued the cause in No. 100, and *John F. Davis* argued the causes in Nos. 299 and 300, for the United States. With them on the briefs were *Solicitor General Perlman* and *Acting Assistant Attorney General Slack. Helen Goodner* was also with them on the brief in No. 100. *Henry Hammer* argued the cause and filed a brief for respondents in No. 299. *James S. McClellan* argued the cause, and *George C. Willson* filed a brief, for respondent in No. 300. *Irwin Geiger* submitted on brief for respondent in No. 100. Reported below: No. 100, 302 N. Y. 206, 97 N. E. 2d 755; No. 299, 189 F. 2d 876; No. 300, 188 F. 2d 80.

No. 477. GEUSS ET AL. *v.* PENNSYLVANIA. Appeal from the Supreme Court of Pennsylvania. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Kovacs* v. *Cooper,* 336 U. S. 77. MR. JUSTICE DOUGLAS dissents. *Hayden C. Covington* for appellants. *Ralph H. Griesemer* and *Joseph B. Walker* for appellee. Reported below: 368 Pa. 290, 81 A. 2d 553.

Miscellaneous Order.

No. 409. UNITED STATES *v.* SHOSO NII. Appeal from the United States District Court for the Territory of Hawaii. Dismissed on motion of counsel for the appellant. *Solicitor General Perlman* for the United States. Reported below: 96 F. Supp. 971.

Certiorari Granted.

No. 450. UNITED STATES *v.* ATLANTIC MUTUAL INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari granted. *Solicitor General Perlman* for the United States. *Oscar R. Houston* and *Leonard J. Matteson* for respondents. Reported below: 191 F. 2d 370.

Certiorari Denied.

No. 446. LIBBY, MCNEILL & LIBBY *v.* ALASKA INDUSTRIAL BOARD ET AL. C. A. 9th Cir. Certiorari denied. *R. E. Robertson* for petitioner. Reported below: 191 F. 2d 260.

No. 447. LIBBY, MCNEILL & LIBBY *v.* ALASKA INDUSTRIAL BOARD ET AL. C. A. 9th Cir. Certiorari denied. *R. E. Robertson* for petitioner. Reported below: 191 F. 2d 262.

No. 457. CHIARELLI ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Wm. Scott Stewart* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 192 F. 2d 528.

No. 459. SCHREYER ET AL. *v.* CASCO PRODUCTS CORP. C. A. 2d Cir. Certiorari denied. *David S. Day* for petitioners. *Stephen H. Philbin* and *David Goldstein* for respondent. Reported below: 190 F. 2d 921.

No. 467. ARMOUR & CO. *v.* LOUISIANA SOUTHERN RAILWAY CO. C. A. 5th Cir. Certiorari denied. *Paul E. Blanchard* and *Harry McCall* for petitioner. *Henry B. Curtis* for respondent. Reported below: 190 F. 2d 925.

No. 198, Misc. COBB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Herman Phleger, Alvin J. Rock-*

well and *Allan H. Fish* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Herman Marcuse* for the United States. Reported below: 191 F. 2d 604.

No. 207, Misc. FISHBAUGH *v.* ARMOUR & Co. ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se. Hilary W. Gans* and *Charles Markell, Jr.* for Armour & Co., respondent.

No. 209, Misc. DUNCAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 217, Misc. FLETCHER ET AL. *v.* UNITED STATES ATOMIC ENERGY COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioners *pro se. Solicitor General Perlman, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for respondent. Reported below: 89 U. S. App. D. C. —, 192 F. 2d 29.

No. 236, Misc. SWAIN *v.* DUFFY, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 243, Misc. MCKENNA *v.* NEBRASKA ET AL. Supreme Court of Nebraska. Certiorari denied.

No. 248, Misc. KOVACIVICH *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 251, Misc. QUICK *v.* HARDIEK, CIRCUIT COURT CLERK. Supreme Court of Illinois. Certiorari denied.

No. 256, Misc. WOODS *v.* KING ET AL. Supreme Court of California. Certiorari denied.

No. 257, Misc. WILSON *v.* CALIFORNIA. District Court of Appeal of California, First Appellate District. Certiorari denied. Reported below: 106 Cal. App. 2d 716, 236 P. 2d 9.

No. 260, Misc. ODDO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

Rehearing Denied.

No. 115. WEISS *v.* UNITED STATES, *ante*, p. 820. Motion for leave to file a second petition for rehearing denied.

No. 293. UNITED STATES *v.* LANCE, INCORPORATED; and

No. 294. UNITED STATES *v.* LOVKNIT MANUFACTURING CO., INC. ET AL., *ante*, p. 896. The motion for leave to file brief of Congress of Industrial Organizations, as *amicus curiae*, is denied. The petition for rehearing is denied.

MR. JUSTICE FRANKFURTER joins the Court in denying the motion of the Congress of Industrial Organizations for leave to file a brief *amicus curiae*, but desires to add the following:

The United States, like any other party to a litigation, may refuse consent for any reason or no reason, selectively or uniformly, to the filing of a brief here on behalf of an *amicus curiae*. But such action by the Solicitor General is to be deemed to be taken entirely at his discretion, in no wise governed by a rule of this Court or the policy underlying it.

No. 42. BRACK *v.* GROSS, *ante*, p. 813;

No. 310. WATSON *v.* SUDDOTH, *ante*, p. 885;

No. 348. ELLIS *v.* GIRARD TRUST CO., TRUSTEE, *ante*, p. 870; and

No. 89, Misc. IN RE SPRAGUE, *ante*, p. 840. Petitions for rehearing denied.

JANUARY 28, 1952.

Per Curiam Decisions.

No. 169. MCGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* NAGANO. Certiorari, 342 U. S. 809, to the United States Court of Appeals for the Seventh Circuit. Argued November 29, 1951. Decided January 28, 1952. *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. *James D. Hill* argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Baynton, George B. Searls* and *Irwin A. Seibel. Edward R. Johnston* argued the cause and filed a brief for respondent. Reported below: 187 F. 2d 759.

No. 503. REMMEY ET AL. *v.* SMITH, SECRETARY OF PENNSYLVANIA, ET AL. Appeal from the United States District Court for the Eastern District of Pennsylvania. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted. *S. Lloyd Moore* and *A. L. Wheeler* for appellants. *Robert E. Woodside,* Attorney General of Pennsylvania, *Robert M. Mountenay,* Deputy Attorney General, and *H. F. Stambaugh* for appellees. Reported below: 102 F. Supp. 708.

Miscellaneous Orders.

No. 242, Misc. DOMAKO *v.* NEW JERSEY;

No. 277, Misc. IN RE KING;

No. 278, Misc. KOENIG *v.* CRANOR, SUPERINTENDENT; and

No. 301, Misc. WILLIAMS *v.* UNITED STATES. Applications denied.

No. 254, Misc. IN RE THORBUS; and

No. 288, Misc. MULVEY *v.* JACQUES, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 263, Misc. CARROLL *v.* SUPREME COURT OF APPEALS OF WEST VIRGINIA. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted.

No. 442. BRUNNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *A. L. Wirin* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *John R. Wilkins* for the United States. Reported below: 190 F. 2d 167.

No. 448. FEDERAL TRADE COMMISSION *v.* RUBEROID COMPANY; and

No. 504. RUBEROID COMPANY *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari granted. *Solicitor General Perlman* for the Federal Trade Commission. *Cyrus Austin* for the Ruberoid Co. Reported below: 191 F. 2d 294.

No. 456. UNITED STATES *v.* HENNING ET AL. C. A. 1st Cir. Certiorari granted. *Solicitor General Perlman* for the United States. Reported below: 191 F. 2d 588.

No. 461. GREENBERG *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. *Frederick Bernays Wiener* and *Jacob Kossman* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, John F. Davis, Beatrice Rosenberg* and *John R. Wilkins* for the United States. Reported below: 192 F. 2d 201.

Certiorari Denied.

No. 54. Parry Navigation Co., Inc. *v.* Todd Shipyards Corp. C. A. 2d Cir. Certiorari denied. *Raymond Parmer* and *Irving L. Evans* for petitioner. *James I. Cuff* for respondent. Reported below: 187 F. 2d 257.

No. 311. Caminos *v.* Territory of Hawaii. C. A. 9th Cir. Certiorari denied. *O. P. Soares* for petitioner. Reported below: 191 F. 2d 148.

No. 368. Massachusetts, Division of Employment Security, *v.* Thompson, Receiver. C. A. 1st Cir. Certiorari denied. *Francis E. Kelly,* Attorney General of Massachusetts, and *John A. Brennan* for petitioner. *Lee M. Friedman* for respondent. Reported below: 190 F. 2d 10.

No. 415. Morris et al. *v.* Group of Institutional Investors et al. C. A. 8th Cir. Certiorari denied. *Lemuel Skidmore* and *Carl H. McClure III* for the Protective Committee for Holders of Missouri Pacific Gold Bonds; *De Lancey C. Smith* for Smith et al.; and *Fred N. Oliver* and *Willard P. Scott* for Morris, petitioners. *Carroll C. Gilpin* of counsel for petitioners. *Charles W. McConaughy* for the Group of Institutional Investors; *Sanford H. E. Freund* for the Protective Committee for Holders of General Mortgage Bonds; and *Leonard P. Moore* and *Clair B. Hughes* for the Manufacturers Trust Co., Trustee, respondents. Reported below: 191 F. 2d 265.

No. 433. Giffen et al. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. *Gilbert H. Jertberg* for petitioners. *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *Robert N. Anderson* for respondent. Reported below: 190 F. 2d 188.

No. 449. FOSTER *v.* UNITED STATES. Court of Claims. Certiorari denied. *Nathan L. Silberberg* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Herman Marcuse* for the United States. Reported below: 120 Ct. Cl. 93, 98 F. Supp. 349.

No. 462. LUCAS *v.* INDIANA EX REL. BOARD OF MEDICAL REGISTRATION AND EXAMINATION. Supreme Court of Indiana. Certiorari denied. *Dan C. Flanagan* for petitioner. *J. Emmett McManamon,* Attorney General of Indiana, and *Thomas L. Webber,* Deputy Attorney General, for respondent. Reported below: 229 Ind. 633, 99 N. E. 2d 419.

No. 469. MILEY *v.* LOVETT, SECRETARY OF DEFENSE, ET AL. C. A. 4th Cir. Certiorari denied. *Edmund D. Campbell* and *Grant W. Wiprud* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Robert G. Maysack* for respondents.

No. 472. MITCHELL *v.* TRIBUNE COMPANY. Appellate Court of Illinois, First District, and Supreme Court of Illinois. Certiorari denied. Reported below: 343 Ill. App. 446, 99 N. E. 2d 397.

No. 475. CONFERENCE OF STUDIO UNIONS ET AL. *v.* LOEW'S, INCORPORATED ET AL. C. A. 9th Cir. Certiorari denied. *Robert W. Kenny* for petitioners. *Harold F. Collins, Homer I. Mitchell* and *William W. Alsup* for Loew's, Incorporated et al.; and *Henry G. Bodkin, George M. Breslin* and *Michael G. Luddy* for Walsh et al., respondents. Reported below: 193 F. 2d 51.

No. 478. NU-CAR CARRIERS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *Jacob S. Spiro* for petitioner. *Solicitor General Perlman,*

David P. Findling and *Mozart G. Ratner* for respondent. Reported below: 189 F. 2d 756.

No. 481. HUMBLE OIL & REFINING CO. ET AL. *v.* SUN OIL CO. C. A. 5th Cir. Certiorari denied. *Gordon Boone, Robert H. Kelley, R. E. Seagler, Rex G. Baker* and *Nelson Jones* for petitioners. *Chas. D. Turner, Fritz L. Lyne* and *Martin A. Row* for respondent. *Price Daniel,* Attorney General, and *Jesse P. Luton, Jr.,* Assistant Attorney General, filed a brief for the State of Texas, as *amicus curiae,* supporting respondent. Reported below: 191 F. 2d 705.

No. 482. BARSHOP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Sylvan Lang, Bernard Ladon, Leslie Byrd* and *Dan Moody* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack, Meyer Rothwacks* and *Fred G. Folsom* for the United States. Reported below: 192 F. 2d 699.

No. 488. HEAGNEY *v.* BROOKLYN EASTERN DISTRICT TERMINAL. C. A. 2d Cir. Certiorari denied. *Carlton A. Walls* and *B. Nathaniel Richter* for petitioner. *Henry A. Mulcahy* for respondent. Reported below: 190 F. 2d 976.

No. 4. UNITED STATES *v.* COPLON. C. A. 2d Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Solicitor General Perlman* for the United States. *Leonard B. Boudin, Samuel A. Neuburger* and *Sidney S. Berman* for respondent. Reported below: 185 F. 2d 629.

No. 9, Misc. BARNES *v.* HUNTER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 188 F. 2d 86.

No. 413. BONDHOLDERS, INC. *v.* POWELL ET AL., RECEIVERS, ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE FRANKFURTER has filed an opinion in connection with the denial of the petition for writ of certiorari. *Frank B. Gary, Jr.* and *Aubrey R. Bowles, Jr.* for petitioner. *James B. McDonough, Jr., Harold J. Gallagher, Leonard D. Adkins* and *W. R. C. Cocke* for respondents. Reported below: 190 F. 2d 74.

Opinion of MR. JUSTICE FRANKFURTER in connection with the denial of the petition for writ of certiorari.

On more than one occasion I have indicated the inherent bars to stating, however briefly, the reasons for denying petitions for certiorari. See, *e. g., Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, 917–918. The practical administration of justice, not any interest of secrecy, precludes. Since the denials of petitions for certiorari cannot be accompanied with explanations, a public recording of a dissent from such a denial cannot, without more, fairly disclose to what such dissent is directed. The ambiguous and unrevealing information afforded by noting such dissent is rendered still more dubious if dissent is not noted systematically, but only in selected cases. For these and reinforcing reasons it has been my unbroken practice not to note when I have dissented from the denial of petitions by the Court.

It has also been my view, however, that it becomes appropriate from time to time to set forth some of the issues that may be involved in a case in which a petition for review here is denied. This is such an instance.

In December 1930 the Seaboard Air Line Railway Company, operator of railway lines in the southeastern States, defaulted on its debts as they fell due. It applied to the Federal District Court in Virginia for a moratorium. This was granted and the control and management of the road were thereupon transferred to the Dis-

trict Court, functioning through receivers. In December 1943 the District Court announced its readiness to give up control upon terms drawn from doctrines of this Court. See *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448; *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523.

The District Court required drastic changes in the ownership of the property and in the respective rights of the beneficial owners as between themselves. Only some of the Seaboard securities were to be permitted to share in the ownership of the railroad; others were to be eliminated. The removal of the junior securities from the Seaboard scene and the delivery of the entire property to the senior securities deprived the junior securities of nothing—so it was assumed. The District Court concluded that the dispossessed securities, both bonds and stock, were worthless on the forecast that the Seaboard would never earn enough to yield an income on these junior securities. The District Court assumed, as did this Court in 1943, that the future earnings of a railroad could be estimated with substantial accuracy. Any error in such computation was deemed to be insubstantial, so that the amount of the destroyed junior securities that might have been saved had error been avoided would likewise be negligible.

The elimination of the junior securities was naturally reflected in an alteration of the financial structure of the Seaboard. This was deemed desirable in any event in order to simplify that structure. It became impossible to preserve intact the respective positions of the holdings that survived the reorganization plan, that is, the rights as between themselves fixed in the terms of the old securities. But it was thought that substantially fair substitutes for those older securities and those rights would be afforded by the new financial structure. Thus, in the case of senior securities which had a senior claim on the

income of specified portions of the Seaboard property, the amount of the future income of each of these portions could be computed in advance by the District Court and the new securities offered in exchange for the old would be based on such computation. Such a view obviously assumed the practicability of computing with substantial accuracy the future earnings of different portions of the Seaboard system, just as the doctrine justifying the abolition of junior securities assumed the practicability of computing with substantial accuracy future earnings of the whole Seaboard system.

The presuppositions of this judicial attitude toward railroad financial problems in the depression and post-depression eras were applied by the federal courts in a number of railroad cases. The validity of these principles came under criticism, both in and out of Congress, in part by comparing the estimates of future earnings made by experts whose views District Courts had followed, with the subsequent actual earnings of the roads. Extensive studies of this nature were made by the Senate Committee on Interstate Commerce in 1945 and 1946. Since these Senate investigations, six more years of actual earnings furnish the means of testing the earlier estimates. The facts now available as to the Seaboard are illuminating.

The doctrines formulated by this Court on the basis of abnormal depression and early war years—before the implications of the accelerated momentum of economic expansion were generally appreciated—require District Courts to make two basic prophecies: a road's future earnings and the income rate on bonds and other securities appropriate for the future. From these two figures is derived, largely, the total amount of new securities under a new capitalization of a reorganized railroad. Put in over-simplified terms, the procedure for determining a new financial structure is something like this. The face

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amount of a security, say $1,000, is settled and the interest rate of that security, say 4%. The annual income of such a bond is therefore computed to be $40. Reversing the sequence, by taking first the income yield of $40 and the interest rate of 4% it is deduced that the face amount of the bond is $1,000. This is arrived at by using the multiplier 25, fixed by the interest rate, and multiplying the dollar yield and the multiplier to ascertain the capital amount of the security.

In the estimate of the two basic figures errors may enter in either or both. The highest probability of error and the largest amount of possible error is with respect to the estimate of future earnings. Thus, assuming a 4% interest rate and therefore a multiplier of 25, and estimating the average annual earnings of the Seaboard at $7,500,000, the formula would lead to a capitalization of $187,500,000. This amount of securities would then be distributed to the owners of the Seaboard's pre-receivership securities in the order of the seniority or priority of their old securities. If the amount of new securities is insufficient to provide anything for the old junior bondholders and stockholders, their old securities, being thus proved worthless, would be wiped out.

If, however, the future average earnings were estimated not at $7,500,000 but at $16,500,000 per year, the same multiplier as before, 25, would produce a capitalization of $412,500,000. The difference between the capitalizations based on two different estimates of earnings would be $225,000,000. This amount would be the measure of the old junior securities saved by the higher estimate of earnings but destroyed as valueless by the lower estimate. In many reorganizations older methods of valuation are given some, usually minor, weight, *e. g.*, book figures on which the Interstate Commerce Commission approved the issue of securities, reproduction cost less depreciation, etc., etc.

When the District Court in 1943 approved the destruction of junior Seaboard securities, it did so by accepting the estimate of $7,500,000 as the future annual earnings of the road. Since that estimate was made and judicially decreed, the average annual earnings for almost a decade have been $16,500,000. (The figures of earnings for 1943–1951 are reported earnings; real earnings may be higher, even though accounting technique may not wholly reflect them. The figures here given for estimated and actual earnings are in round sums.)

On such a showing, what amount of the old Seaboard securities were unjustly destroyed? This might be computed by indulging in a new estimate, comparing it with the $7,500,000 estimate and multiplying the difference by the multiplier of 25. Or the computation can be based on the earnings in fact made since the original estimate. On the latter basis we find that at least $81,000,000 of old Seaboard securities were destroyed on an invalidated guess. All valuations based on estimates of future earnings are bound to be guesses in the sense of reaching into the future. That is a reason against, not for, turning guesswork into dogma and a reason for correcting bad guesses as much as is reasonably practical by hindsight. In view of the impressive demonstration afforded by the Seaboard as to the frailty of pretentious guessing which causes ruthless, however unintended, destruction of property, perhaps District Courts should today be far more reluctant to sanction destruction of massive proportions of securities on the basis of such illusory estimates.

For what the Seaboard situation proves is not the mischance of a mere guess. It calls into question the whole process of dealing with this problem. The estimates that have been so vastly negatived by the event were the product of four years of intensive study by a Special Master, qualified as a specialist in railroad affairs, with special knowledge of the Seaboard, estimates confirmed by a vast

judicial apparatus. And the Seaboard is not an isolated case. In other railroad cases post-prediction earnings over a substantial period are far above the estimates on which extinction was decreed against junior securities. Indeed, the records of these railroad reorganizations at the hands of the Interstate Commerce Commission and special masters and courts have inevitably aroused deep scepticism as to expertise in this field, or, at least, as to reliance in decreeing drastic forfeitures on the basis of it. It is not to be wondered that both the Executive and the Congress have recorded dissatisfaction with the heavy incidence of forfeiture decreed by courts, not by virtue of specific authorization but as a matter of judicial administration.

No. 214. UNITED STATES *v.* COPLON. 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. *Solicitor General Perlman* for the United States. *Leonard B. Boudin* for respondent. Reported below: 89 U. S. App. D. C. —, 191 F. 2d 749.

No. 272. COPLON *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. *Leonard B. Boudin* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Robert S. Erdahl* filed a memorandum for the United States. Reported below: 89 U. S. App. D. C. —, 191 F. 2d 749.

No. 392. DIPSON THEATRES, INC. *v.* BUFFALO THEATRES, INC. ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Robert L. Wright* for

petitioner. *Frank G. Raichle, Edward C. Raftery* and *John F. Caskey* for respondents. *Solicitor General Perlman* filed a memorandum for the United States, as *amicus curiae*, in support of the petitioner. Reported below: 190 F. 2d 951.

No. 455. KROCH ET AL. *v.* MCGRATH, ATTORNEY GENERAL, ET AL. 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. *George Eric Rosden* for petitioners. *Solicitor General Perlman, Assistant Attorney General Baynton, James D. Hill* and *George B. Searls* for respondents. Reported below: 89 U. S. App. D. C. —, 192 F. 2d 416.

No. 473. COYNE ELECTRICAL SCHOOL, INC. *v.* BUCKLEY ET AL., DOING BUSINESS AS F. J. BUCKLEY & CO. Appellate Court of Illinois, First District. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Irwin N. Walker, Peter B. Atwood* and *Urban A. Lavery* for petitioner. *Vincent O'Brien* for respondents. Reported below: 343 Ill. App. 420, 99 N. E. 2d 370.

No. 470. ADERMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *O. John Rogge* and *Murray A. Gordon* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *J. F. Bishop* for the United States. Reported below: 191 F. 2d 980.

No. 127, Misc. HATHEWAY *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se*. *J. E. Taylor*, Attorney General of Missouri, and *Gordon P. Weir* and *Samuel M. Watson*, Assistant Attorneys General, for respondent.

No. 149, Misc. DUNCAN ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William E. Owen* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 89 U. S. App. D. C. —, 191 F. 2d 779.

No. 150, Misc. LOUISIANA EX REL. WASHINGTON *v.* CLANCY, SHERIFF. Twenty-fourth Judicial District Court of the Parish of Jefferson, Louisiana, and/or Supreme Court of Louisiana. Certiorari denied. *James T. Wright* for petitioner. *Bolivar E. Kemp, Jr.*, Attorney General of Louisiana, *M. E. Culligan,* Assistant Attorney General, *Frank H. Langridge* and *John E. Fleury* for respondent.

No. 156, Misc. FOUQUETTE *v.* NEVADA. Supreme Court of Nevada. Certiorari denied. *Charles E. Catt* for petitioner. *W. T. Mathews,* Attorney General of Nevada, *Geo. P. Annand* and *Thomas A. Foley,* Deputy Attorneys General, and *Alan Bible* for respondent. Reported below: 68 Nev. —, 233 P. 2d 859.

No. 189, Misc. POWERS *v.* MICHIGAN. Circuit Court for the County of Allegan, in the Twentieth Judicial Circuit, Michigan. Certiorari denied. *Leo W. Hoffman* for petitioner. *Frank G. Millard,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent.

No. 224, Misc. BUCKOWSKI *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Morris Lavine* for petitioner. *Edmund G. Brown,* Attorney General of

California, and *Frank W. Richards,* Deputy Attorney General, for respondent. Reported below: 37 Cal. 2d 629, 233 P. 2d 912.

No. 226, Misc. SAMPSELL *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. *P. Bateman Ennis* for petitioner. Reported below: 191 F. 2d 721.

No. 245, Misc. THOMPSON *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Louis C. Glasso* and *Zeno Fritz* for petitioner.

No. 259, Misc. SANDERS *v.* WATERS, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: —— Okla. Cr. ——, 238 P. 2d 840.

No. 262, Misc. EDWARDS *v.* SWENSON, WARDEN. Court of Appeals of Maryland. Certiorari denied.

No. 264, Misc. BALDRIDGE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 265, Misc. HOLT *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 266, Misc. CROMBIE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 269, Misc. PARKER *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied.

No. 270, Misc. PRIDGEN *v.* BUBELLA ET AL. Supreme Court of Texas. Certiorari denied.

No. 272, Misc. ROBINSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 273, Misc. GRAHAM *v.* WARDEN, NEW JERSEY STATE PRISON. Supreme Court of New Jersey. Certiorari denied.

No. 275, Misc. CLARK *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 276, Misc. PEER *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 280, Misc. ZIPKIN *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 292, Misc. DIXON *v.* ROBINSON, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 295, Misc. CORDTS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 297, Misc. FARLEY *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

FEBRUARY 4, 1952.

Per Curiam Decisions.

No. 497. ILLINOIS ET AL. *v.* UNITED STATES ET AL.; and No. 498. CHICAGO *v.* UNITED STATES ET AL. Appeals from the United States District Court for the Northern District of Illinois. *Per Curiam:* The motions to affirm, in No. 497, are granted and the judgment is affirmed. *Ivan A. Elliott,* Attorney General, *William R. Ming, Jr.,* Special Assistant Attorney General, and *Milton Mallin,* Assistant Attorney General, for the State of Illinois et al.; and *Walter E. Wiles* for the Village of Flossmoor et al., appellants in No. 497. *Joseph F. Grossman* for appellant in No. 498. He also filed a brief for the City of Chi-

cago, as *amicus curiae*, supporting appellants in No. 497. *Daniel W. Knowlton* and *J. Stanley Payne* for the Interstate Commerce Commission; and *Erle J. Zoll, Jr., Charles A. Helsell, John W. Freels* and *Herbert J. Deany* for the Illinois Central Railroad Co., appellees in No. 497. Reported below: 101 F. Supp. 36.

Miscellaneous Orders.

No. 273. * BRIGGS ET AL. *v.* ELLIOTT ET AL., *ante*, p. 350. The mandate is ordered to issue forthwith on motion of appellants, appellees not objecting.

No. 427. BARKER *v.* LEGGETT, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF MISSOURI, ET AL., *ante*, p. 900. Petition for rehearing denied. Motion to modify and supplement the order of January 2, 1952, also denied.

No. 293, Misc. BYERS *v.* HUNTER, WARDEN, ET AL.; and

No. 298, Misc. BYERS ET AL. *v.* UNITED STATES. Applications denied.

Certiorari Granted.

No. 428. PENNSYLVANIA WATER & POWER CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 429. PENNSYLVANIA PUBLIC UTILITY COMMISSION *v.* FEDERAL POWER COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Wilkie Bushby, Randall J. LeBoeuf, Jr., James Piper, Raymond Sparks, William J. Grove* and *Thomas M. Kerrigan* for petitioners. *Solicitor General Perlman, Assistant Attorney General Baldridge, Robert L. Stern, Paul A. Sweeney, Melvin Richter, Bradford Ross, Howard Wahrenbrock, Reuben Goldberg* and *Theodore French* for the Federal Power Commission; *Charles D. Harris* for the Public Service Commission of Mary-

land; and *Alfred P. Ramsey* for the Consolidated Gas Electric Light & Power Co. of Baltimore, respondents. Reported below: 89 U. S. App. D. C. —, 193 F. 2d 230.

No. 220, Misc. KAWAKITA *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Morris Lavine, A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 190 F. 2d 506.

Certiorari Denied.

No. 352. REED ET AL. *v.* NEW MEXICO. Supreme Court of New Mexico. Certiorari denied. Motion to tax certain printing costs against respondent also denied. *Robert B. Bennett* for petitioners. *Joe L. Martinez,* Attorney General of New Mexico, *James B. Cooney* and *Willard F. Kitts,* Assistant Attorneys General, and *Richard M. Krannawitter* for respondent. Reported below: 55 N. M. 231, 230 P. 2d 966.

No. 430. COMMUNITY SERVICES, INC. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Fleming Bomar* for petitioner. *Solicitor General Perlman* filed a memorandum for the United States stating that the Government does not oppose the issuance of a writ of certiorari in this case. Reported below: 189 F. 2d 421.

No. 471. TEXAS EMPLOYERS' INSURANCE ASSOCIATION ET AL. *v.* VORIS, DEPUTY COMMISSIONER, EIGHTH COMPENSATION DISTRICT, ET AL. C. A. 5th Cir. Certiorari denied. *M. L. Cook* for petitioners. *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Herman Marcuse* for the Deputy Commissioner, respondent. Reported below: 190 F. 2d 929.

No. 480. PATERSON PARCHMENT PAPER CO. *v.* INTERNATIONAL BROTHERHOOD OF PAPER MAKERS ET AL. C. A. 3d Cir. Certiorari denied. *George E. Beechwood* for petitioner. *Warren Woods* for respondents. Reported below: 191 F. 2d 252.

No. 484. UNITED STATES *v.* R-B FREIGHT LINES, INC. Petition for writ of certiorari to the United States Motor Carrier Claims Commission denied. *Solicitor General Perlman* for the United States. *Clark M. Clifford* filed a brief for respondent stating that it acquiesces in the prayer of petitioner that the writ of certiorari be issued.

No. 516. NATIONAL BELLAS HESS, INC. *v.* KALIS. C. A. 8th Cir. Certiorari denied. *R. B. Caldwell, John W. Oliver* and *Herman A. Benjamin* for petitioner. *Harry L. Jacobs* for respondent. Reported below: 191 F. 2d 739.

No. 183, Misc. SCHELL *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se*. *J. E. Taylor,* Attorney General of Missouri, and *Gordon P. Weir* and *Samuel M. Watson,* Assistant Attorneys General, for respondent.

No. 223, Misc. LEWIS ET AL. *v.* MCDANIEL. Supreme Court of Tennessee, Western Division. Certiorari denied. *Scott P. Fitzhugh* for petitioners. *Harold R. Ratcliff* for respondent.

No. 234, Misc. WHITEHEAD *v.* HENRY. Court of Appeals of Georgia. Certiorari denied. *John A. Dunaway* for petitioner. Reported below: 84 Ga. App. 495, 66 S. E. 2d 448.

No. 247, Misc. WILLIAMS *v.* ILLINOIS. Criminal Court of Cook County, Illinois, and/or Supreme Court of Illinois. Certiorari denied. *George M. Johnson, Frank D. Reeves* and *Charles W. Quick* for petitioner. *Ivan A. Elliott,* Attorney General of Illinois, *William C. Wines,* Assistant Attorney General, and *John S. Boyle* for respondent.

No. 285, Misc. MILLER ET AL. *v.* NEW JERSEY ET AL. Supreme Court of New Jersey. Certiorari denied.

No. 294, Misc. TYSON *v.* SWENSON, WARDEN. Court of Appeals of Maryland. Certiorari denied.

Rehearing Denied. (*See also No. 427, supra.*)

No. 231. DESPER, ADMINISTRATRIX, *v.* STARVED ROCK FERRY CO., *ante,* p. 187;

No. 417. ANCICH ET AL. *v.* BORCICH ET AL., *ante,* p. 905;

No. 423. HERWIG *v.* CRENSHAW, COLLECTOR OF INTERNAL REVENUE, ET AL., *ante,* p. 905;

No. 445. UNION PACKING CO. *v.* CARIBOO LAND & CATTLE CO., LTD., *ante,* p. 909; and

No. 460. ILLINOIS CENTRAL RAILROAD CO. *v.* GARNER, COUNTY TRUSTEE OF SHELBY COUNTY, ET AL., *ante,* p. 900. Petitions for rehearing denied.

No. 420. H. J. HEINZ CO. *v.* OWENS, *ante,* p. 905. Rehearing denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 249, Misc. MARSH *v.* MICHIGAN, *ante,* p. 911. Rehearing denied.

MARCH 3, 1952.

Per Curiam Decisions.

No. 189. SQUIRE *v.* WHEELING & LAKE ERIE RAILWAY CO. On petition for writ of certiorari to the Supreme Court of Ohio. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359. MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON, and MR. JUSTICE BURTON concur, adhering to the views expressed in *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359, 364. *Melvin L. Griffith* and *Francis H. Monek* for petitioner. Reported below: 155 Ohio St. 201, 98 N. E. 2d 313.

No. 476. NATIONAL FURNITURE TRAFFIC CONFERENCE, INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of Massachusetts. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Board of Trade* v. *United States*, 314 U. S. 534. *Henry E. Foley* for appellant. *Solicitor General Perlman* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; and *Francis L. Brown, R. J. Fletcher* and *John Dickinson* for the Pennsylvania Railroad Co. et al., appellees.

No. 506. CENTRAL RAILROAD CO. OF NEW JERSEY *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of New Jersey. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Alexander H. Elder, Edward A. Markley* and *Judson C. McLester, Jr.* for appellant. *Solicitor General Perlman* and *J. Stanley Payne* for the United States and the Interstate Commerce Commission; and

Augustus C. Studer, Jr., Theodore H. Burgess and *Parker Fulton* for the Akron, Canton & Youngstown Railroad Co. et al., appellees. Reported below: 99 F. Supp. 564.

No. 581. PYEATTE *v.* BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA ET AL. Appeal from the United States District Court for the Western District of Oklahoma. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Paul W. Updegraff* for appellant. *Mac Q. Williamson,* Attorney General of Oklahoma, and *Fred Hansen,* First Assistant Attorney General, for appellees. Reported below: 102 F. Supp. 407.

No. 520. CENTRAL RAILROAD CO. OF NEW JERSEY *v.* DIRECTOR, DIVISION OF TAX APPEALS OF THE DEPARTMENT OF THE TREASURY. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. THE CHIEF JUSTICE, MR. JUSTICE JACKSON, and MR. JUSTICE BURTON are of the opinion that probable jurisdiction should be noted. *James D. Carpenter* and *Judson C. McLester, Jr.* for appellant. *Theodore D. Parsons,* Attorney General of New Jersey, and *Bejamin C. Van Tine,* Deputy Attorney General, for appellee. Reported below: 8 N. J. 15, 83 A. 2d 527.

No. 540. COX *v.* PETERS ET AL. Appeal from the Supreme Court of Georgia. *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. *W. S. Allen, Hamilton Douglas, Jr., C. Baxter Jones, Jr.* and *David L. Mincey* for appellant. *Eugene Cook,* Attorney General of Georgia, *M. H. Blackshear, Jr.,* Deputy Assistant Attorney

General, *B. D. Murphy, Edward E. Dorsey* and *M. F. Goldstein* for appellees. Reported below: 208 Ga. 498, 67 S. E. 2d 579.

No. 541. RISS & CO., INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Missouri. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted and the case set down for argument. *John B. Gage, Wendell Berge* and *A. Alvis Layne, Jr.* for appellant. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission; *Carl L. Steiner* for the Spector Motor Service, Inc.; and *John R. Norris* for the Interstate Common Carrier Council of Maryland, Inc. et al., appellees. Reported below: 100 F. Supp. 468.

No. 545. MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION *v.* OWEN. Appeal from the Supreme Court of Kansas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Henry I. Eager, E. S. Hampton* and *Philip E. Horan* for appellant. *John T. Barker* for appellee. Reported below: 171 Kan. 457, 233 P. 2d 706.

No. 557. LORD ET AL. *v.* HENDERSON, DIRECTOR OF THE MOTOR VEHICLE DEPARTMENT, 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 the want of a substantial federal question. *Warren E. Libby* for appellants. *Edmund G. Brown,* Attorney General of California, and *Frank W. Richards,* Deputy Attorney General, for appellees. Reported below: 105 Cal. App. 2d 426, 234 P. 2d 197.

No. 569. ANDERSON-PRICHARD OIL CORP. *v.* CORPORATION COMMISSION OF OKLAHOMA 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. *W. H. Brown* for appellant. *Ralph W. Garrett* for the Sinclair Oil & Gas Co.; and *Paul Pinson* for the Oklahoma Natural Gas Co., appellees. Reported below: 205 Okla. 672, 241 P. 2d 363.

No. 552. TERRA ET AL. *v.* NEW YORK. Appeal from the Court of Appeals of New York. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Ira H. Morris* for appellants. Reported below: 303 N. Y. 332, 102 N. E. 2d 576.

No. 555. MORTGAGE FINANCE CORP. ET AL. *v.* WATSON, REAL ESTATE COMMISSIONER. Appeal from the District Court of Appeal of California, First Appellate District. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Arthur L. Johnson* for appellants.

No. 565. SHELL OIL CO., INC. *v.* BOARD OF COUNTY COMMISSIONERS OF GRANT COUNTY ET AL. Appeal from the Supreme Court of Kansas. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Geo. W. Cunningham* and *Kirke W. Dale* for appellant. Reported below: 171 Kan. 595, 237 P. 2d 257.

No. 574. EACHUS *v.* COLORADO. Appeal from the Supreme Court of Colorado. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *C. J. Moynihan* for appellant. Reported below: 124 Colo. ——, 238 P. 2d 885.

No. 560. COMBS *v.* SNYDER, SECRETARY OF THE TREASURY, ET AL. Appeal from the United States District Court for the District of Columbia. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE BLACK, MR. JUSTICE JACKSON, and MR. JUSTICE BURTON are of the opinion that probable jurisdiction should be noted and the case set down for argument. *Myron G. Ehrlich* for appellant. *Solicitor General Perlman* for appellees. Reported below: 101 F. Supp. 531.

No. 35, Misc. GEACH *v.* ILLINOIS; and

No. 49, Misc. SMITH *v.* ILLINOIS. On petitions for writs of certiorari to the Supreme Court of Illinois. *Per Curiam:* The petitions for writs of certiorari are granted. The judgments are vacated and the cases are remanded to the Illinois Supreme Court for further proceedings. *Jennings* v. *Illinois,* 342 U. S. 104. Petitioners *pro se.* *Ivan A. Elliott,* Attorney General of Illinois, for respondent.

Miscellaneous Orders.

No. —, Original. TEXAS *v.* NEW MEXICO ET AL. This case is set down for argument on the motion for leave to file the complaint. *Price Daniel,* Attorney General of Texas, *Jesse P. Luton, Jr.* and *K. B. Watson,* Assistant Attorneys General, and *Eugene T. Edwards* for plaintiff. *Joe L. Martinez,* Attorney General, and *Fred E. Wilson,* Special Assistant Attorney General, for the State of New Mexico; and *D. A. Macpherson, Jr.* for the Middle Rio Grande Conservancy District et al., defendants.

No. 310, Misc. GARCIA *v.* UNITED STATES;

No. 315, Misc. HARRIS *v.* ROBINSON, WARDEN;

No. 323, Misc. EX PARTE VON POSERN; and

No. 325, Misc. MONGAR *v.* MICHIGAN. Motions for leave to file petitions for writs of habeas corpus denied.

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No. 261, Misc. ROBINETTE ET AL. *v.* CAMPBELL, U. S. DISTRICT JUDGE;

No. 311, Misc. KARHU *v.* MICHIGAN; and

No. 329, Misc. LANE *v.* MUNICIPAL COURT OF CHICAGO. Motions for leave to file petitions for writs of mandamus denied. *Walter E. Wiles* for petitioners in No. 261.

No. 312, Misc. RIVERS *v.* SWYGERT, U. S. DISTRICT JUDGE. Petition for writ of mandate denied.

Certiorari Granted. (*See also No. 189 and Misc. Nos. 35 and 49, supra.*)

No. 458. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* HOWARD ET AL. C. A. 8th Cir. Certiorari granted. *Wayland K. Sullivan* and *Charles R. Judge* for petitioners. *Victor Packman* and *Joseph C. Waddy* for Howard, respondent. Reported below: 191 F. 2d 442.

No. 474. STEMBRIDGE *v.* GEORGIA. Court of Appeals of Georgia and Supreme Court of Georgia. Certiorari granted. Reported below: See 84 Ga. App. 413, 65 S. E. 2d 819.

No. 493. ISBRANDTSEN COMPANY, INC. *v.* JOHNSON. C. A. 3d Cir. Certiorari granted. *Thomas E. Byrne, Jr.* for petitioner. Reported below: 190 F. 2d 991.

No. 479. FEDERAL TRADE COMMISSION *v.* MINNEAPOLIS-HONEYWELL REGULATOR CO. C. A. 7th Cir. Certiorari granted. Counsel are requested to discuss on briefs and oral argument the question as to the timeliness of the application for the writ. *Solicitor General Perlman* for petitioner. *Albert R. Connelly* and *Will Freeman* for respondent. Reported below: 191 F. 2d 786.

No. 483. FEDERAL POWER COMMISSION *v.* IDAHO POWER CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *Solicitor General Perlman* for petitioner. *A. C. Inman* and *Harry A. Poth, Jr.* for respondent. Reported below: 89 U. S. App. D. C. —, 189 F. 2d 665.

No. 543. ON LEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Henry K. Chapman* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 193 F. 2d 306.

No. 271, Misc. DANIELS ET AL. *v.* ALLEN, WARDEN. C. A. 4th Cir. Certiorari granted. *O. John Rogge, Murray A. Gordon* and *Herman L. Taylor* for petitioners. *Harry McMullan,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent. Reported below: 192 F. 2d 763.

Certiorari Denied.

No. 16. JOHNSON *v.* JOHNSON. Supreme Court of Florida. Certiorari denied. *Karl F. Steinmann* for petitioner. *L. J. Cushman* for respondent. Reported below: 49 So. 2d 340.

No. 486. SOMERVILLE *v.* CAPITAL TRANSIT CO. ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Dorsey K. Offutt* for petitioner. Reported below: 89 U. S. App. D. C. —, 192 F. 2d 413.

No. 487. UNITED STATES *v.* AMERICAN-HAWAIIAN STEAMSHIP CO. C. A. 2d Cir. Certiorari denied. *So-*

licitor General Perlman for the United States. *Clement C. Rinehart* for respondent. Reported below: 191 F. 2d 26.

No. 489. ERNEST M. LOEB CO., INC. ET AL. *v.* AVOYELLES DRAINAGE DISTRICT NUMBER 8. C. A. 5th Cir. Certiorari denied. *Robert A. Ainsworth, Jr.* for petitioners. Reported below: 189 F. 2d 965.

No. 490. COLUMBIA AUTO LOAN, INC., TRADING AS COLUMBIA CREDIT CO., *v.* DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Samuel F. Beach* and *Leslie C. Garnett* for petitioner. *Vernon E. West, Chester H. Gray* and *Milton D. Korman* for respondent. Reported below: 90 U. S. App. D. C. —, 193 F. 2d 34.

No. 491. PHIPPS *v.* PHIPPS. Supreme Court of Pennsylvania. Certiorari denied. *David Berger* for petitioner. *Raymond T. Law* for respondent. Reported below: 368 Pa. 291, 81 A. 2d 523.

No. 492. KUNIYUKI *v.* ACHESON, SECRETARY OF STATE. C. A. 9th Cir. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Stanley M. Silverberg, Beatrice Rosenberg* and *John R. Wilkins* for respondent. Reported below: 190 F. 2d 897.

No. 496. THOMPSON *v.* LEARNED. United States Court of Customs and Patent Appeals. Certiorari denied. *D. Gordon Angus* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney* and *John R. Benney* for respondent. Reported below: 39 C. C. P. A. (Pat.) 730, 191 F. 2d 409.

No. 499. COLEMAN COMPANY, INC. *v.* GRAY ET AL. C. A. 10th Cir. Certiorari denied. *Howard T. Fleeson* and *Wayne Coulson* for petitioner. *Emmet A. Blaes* for respondents. Reported below: 192 F. 2d 265.

No. 502. ANHEUSER-BUSCH, INC. *v.* DU BOIS BREWING CO. C. A. 3d Cir. Certiorari denied. *Wallace H. Martin, Minturn de S. Verdi* and *Walter J. Halliday* for petitioner. *Elder W. Marshall* and *John C. Bane, Jr.* for respondent. Reported below: 191 F. 2d 733.

No. 507. SYLVANUS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Roger Sherman, Henry F. Tenney* and *S. Ashley Guthrie* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 192 F. 2d 96.

No. 511. CARROLL *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *E. Guy Hammond* for petitioner.

No. 512. GENTILA *v.* PACE, SECRETARY OF THE ARMY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Cornelius H. Doherty* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Samuel D. Slade* and *Herman Marcuse* for respondent. Reported below: 90 U. S. App. D. C. —, 193 F. 2d 924.

No. 514. LEISHMAN *v.* GENERAL MOTORS CORP. C. A. 9th Cir. Certiorari denied. *John Flam* for petitioner. *Leonard S. Lyon* for respondent. Reported below: 191 F. 2d 522.

No. 515. WYCHE ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Myron G. Ehrlich* for petitioners. *Solicitor General Perlman, Assistant Attorney*

General McInerney and *Beatrice Rosenberg* for the United States. Reported below: 90 U. S. App. D. C. —, 193 F. 2d 703.

No. 518. GOOGINS *v.* E. W. HABLE & SONS. Court of Civil Appeals of Texas, Tenth Supreme Judicial District. Certiorari denied. *Cecil C. Rotsch* for petitioner. *J. Chrys Dougherty, Joe R. Greenhill* and *Ireland Graves* for respondent. Reported below: 237 S. W. 2d 705.

No. 519. RAAB *v.* STATE MEDICAL BOARD. Supreme Court of Ohio. Certiorari denied. *M. L. Bernsteen* for petitioner. *C. William O'Neill,* Attorney General of Ohio, *Robert E. Leach,* Chief Counsel, and *Hugh A. Sherer,* Assistant Attorney General, for respondent. Reported below: 156 Ohio St. 158, 101 N. E. 2d 294.

No. 521. KEPHART *v.* KEPHART. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John F. Lillard, John F. Lillard, Jr.* and *N. Meyer Baker* for petitioner. Reported below: 89 U. S. App. D. C. —, 193 F. 2d 677.

No. 523. ILLINOIS EX REL. LOUGHRY *v.* BOARD OF EDUCATION OF CHICAGO. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se. Frank R. Schneberger* and *Frank S. Righeimer* for respondent.

No. 531. BUFFUM *v.* CHASE NATIONAL BANK. C. A. 7th Cir. Certiorari denied. *Walter F. Dodd* and *Harry G. Fins* for petitioner. *Kenneth F. Burgess* and *Walter J. Cummings, Jr.* for respondent. Reported below: 192 F. 2d 58.

No. 534. UNITED STATES TRUST CO. OF NEW YORK, TRUSTEE, ET AL. *v.* ZELLE, TRUSTEE, ET AL. C. A. 8th Cir. Certiorari denied. *George W. Morgan* and *M'Cready*

Sykes for the United States Trust Co.; and *Reese D. Alsop* for the Gaston Group of Holders of Mortgage Bonds, petitioners. *Leland W. Scott* for Zelle; *Henry S. Mitchell* for the Canadian Pacific R. Co.; *Thomas P. Helmey* for the Empire Trust Co.; *James L. Hetland* for the Minneapolis, St. Paul & Sault Ste. Marie R. Co.; *Josiah E. Brill* for the Mortgage Bondholders Protective Committee; and *Abraham K. Weber* for the Wisconsin Central R. Co., respondents. Reported below: 191 F. 2d 822.

No. 535. Lobel *v.* American Airlines, Inc. C. A. 2d Cir. Certiorari denied. *Jay Leo Rothschild* for petitioner. *William J. Junkerman* for respondent. Reported below: 192 F. 2d 217.

No. 536. McClelland et al. *v.* Fruco Construction Co. C. A. 8th Cir. Certiorari denied. *Arnot L. Sheppard* for petitioners. *Jacob M. Lashly* for respondent. Reported below: 192 F. 2d 241.

No. 537. Davis, Trustee, *v.* B. F. Avery & Sons Co. C. A. 5th Cir. Certiorari denied. *J. Madden Hatcher* and *Theo J. McGee* for petitioner. *Max F. Goldstein* and *Leonard Farkas* for respondent. Reported below: 192 F. 2d 255.

No. 539. Norman *v.* Spokane, Portland & Seattle Railway Co. C. A. 9th Cir. Certiorari denied. *Elton Watkins* for petitioner. *Charles A. Hart, Hugh L. Biggs* and *Cleveland C. Cory* for respondent. Reported below: 192 F. 2d 1020.

No. 542. Creamette Company *v.* Conlin et al. C. A. 5th Cir. Certiorari denied. *Frank A. Whiteley* for petitioner. *Willard Ayres* for respondent. Reported below: 191 F. 2d 108.

No. 544. RICHARDS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Josiah Lyman* and *Sophie B. Lyman* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 89 U. S. App. D. C. —, 192 F. 2d 602.

No. 546. HUFF ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Myer I. Goldberg* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Murry Lee Randall* for the United States. Reported below: 192 F. 2d 911.

No. 547. HOROWITZ ET AL. *v.* KAPLAN ET AL., TRUSTEES. C. A. 1st Cir. Certiorari denied. *Milton Pollack* for petitioners. *Jacob J. Kaplan* and *C. Keefe Hurley* for Kaplan et al., Trustees; and *LaRue Brown* for the Common Stockholders Protective Committee, respondents. Reported below: 193 F. 2d 64.

No. 551. STOVES, INCORPORATED *v.* TENNESSEE ENAMEL MANUFACTURING CO. C. A. 6th Cir. Certiorari denied. *Albert Williams* for petitioner. *William Waller* and *George H. Armistead, Jr.* for respondent. Reported below: 192 F. 2d 863.

No. 451. RICE *v.* ARNOLD, SUPERINTENDENT OF THE MIAMI SPRINGS COUNTRY CLUB. The petition for writ of certiorari to the Supreme Court of Florida is denied for the reason that the judgment of the court below is based upon a nonfederal ground adequate to support it. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Robert L. Carter,*

John D. Johnson and *Thurgood Marshall* for petitioner. *J. W. Watson, Jr.* and *John D. Marsh* for respondent. Reported below: 54 So. 2d 114.

No. 468. COHEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Morris Lavine* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack, Meyer Rothwacks* and *John Lockley* for the United States. Reported below: 192 F. 2d 933.

No. 485. LEE ON ET AL. *v.* LONG, SHERIFF. Supreme Court of California. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Ivan C. Sperbeck* for petitioners. Reported below: 37 Cal. 2d 499, 234 P. 2d 9.

No. 495. WEIGERT-DAGEN ET AL. *v.* UNITED STATES. United States Court of Customs and Patent Appeals. Motion for leave to file brief of National Council of American Importers, Inc., as *amicus curiae,* denied. Certiorari denied. *Allerton de Cormis Tompkins* for petitioners. *Solicitor General Perlman* and *John R. Benney* for the United States. Reported below: 39 C. C. P. A. (Cust.) 58.

No. 501. HOSKINS COAL & DOCK CORP. *v.* TRUAX TRAER COAL CO. ET AL. C. A. 7th Cir. Motion for leave to file brief of Seymour F. Simon et al., as *amici curiae,* denied. Certiorari denied. *Anthony Bradley Eben, Edward Atlas* and *Richard F. Watt* for petitioner. *Harold A. Smith* and *Thomas A. Reynolds* for the Truax Traer Coal Co.; and *Weymouth Kirkland, Howard Ellis, A. Leslie Hodson* and *John C. Butler* for the United Electric Coal Companies, respondents. Reported below: 191 F. 2d 912.

No. 505. DURYEE, TRUSTEE, *v.* ERIE RAILROAD CO. ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *Richard Swan Buell* for petitioner. *John A. Hadden* and *John S. Beard, Jr.* for respondents. Reported below: 191 F. 2d 855.

No. 530. MACHADO *v.* MCGRATH, ATTORNEY GENERAL, ET AL. 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. *Jack Wasserman* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *John R. Wilkins* for respondents. Reported below: 90 U. S. App. D. C. —, 193 F. 2d 706.

No. 532. CLEMENT *v.* WOODS, HOUSING EXPEDITER. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Ed Dupree, A. M. Edwards, Jr.* and *Nathan Siegel* for respondent. Reported below: 191 F. 2d 855.

No. 121, Misc. JAMES ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry Lincoln Johnson, Jr.* and *Frank D. Reeves* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Felicia H. Dubrovsky* for the United States. Reported below: 89 U. S. App. D. C. —, 191 F. 2d 472.

No. 267, Misc. BEALE *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. Reported below: — Miss. —, 54 So. 2d 921.

No. 279, Misc. STEMEN *v.* OHIO. Court of Appeals of Darke County, Ohio. Certiorari denied. *George A. Meekison* for petitioner. *Howard G. Eley* for respondent. Reported below: 90 Ohio App. 309.

No. 281, Misc. VAN ANTWERP *v.* KAVANAGH, COLLECTOR OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Acting Assistant Attorney General Slack, Lee A. Jackson* and *Homer R. Miller* for respondent.

No. 283, Misc. BOURKE *v.* JACKSON, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 287, Misc. MULKEY *v.* UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. C. A. 6th Cir. Certiorari denied.

No. 304, Misc. MARKS *v.* WATERS, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied.

No. 307, Misc. CAREY *v.* COUNTY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 317, Misc. HOWINGTON *v.* WATERS, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied.

No. 330, Misc. VAN PELT *v.* RAGEN, WARDEN. Circuit Court of Du Page County, Illinois, at Wheaton, Illinois. Certiorari denied.

No. 336, Misc. LAWRENCE *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 373, Misc. DUSSELDORF *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied.

Rehearing Denied.

No. 413. BONDHOLDERS, INC. *v.* POWELL ET AL., RECEIVERS, ET AL., *ante*, p. 921;

No. 457. CHIARELLI ET AL. *v.* UNITED STATES, *ante*, p. 913;

No. 470. ADERMAN *v.* UNITED STATES, *ante*, p. 927;

No. 207, Misc. FISHBAUGH *v.* ARMOUR & CO. ET AL., *ante*, p. 914;

No. 270, Misc. PRIDGEN *v.* BUBELLA ET AL., *ante*, p. 929; and

No. 292, Misc. DIXON *v.* ROBINSON, WARDEN, *ante*, p. 930. Petitions for rehearing denied.

MARCH 10, 1952.

Per Curiam Decisions.

No. 134. A/S J. LUDWIG MOWINCKELS REDERI ET AL. *v.* ISBRANDTSEN CO., INC. ET AL.; and

No. 135. FEDERAL MARITIME BOARD *v.* UNITED STATES ET AL. Appeals from the United States District Court for the Southern District of New York. Argued January 29–30, 1952. Decided March 10, 1952. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE CLARK took no part in the consideration or decision of these cases. *Roscoe H. Hupper* argued the cause for appellants in No. 134. With him on the brief was *Burton H. White*. *Arthur M. Boal* argued the cause for appellant in No. 135. With him on the brief were *Francis S. Walker* and *George F. Galland*. *J. Roger Wollenberg* argued the cause for the United States and the Secretary of Agriculture, appellees. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, W. Carroll Hunter* and *Neil Brooks*. *William L. McGovern* argued the cause for the Isbrandtsen Co., Inc., appellee. With him on the brief was *John J. O'Connor*. Reported below: 96 F. Supp. 883.

No. 312. L'HOMMEDIEU ET AL. *v.* BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK ET AL. Appeal from the Court of Appeals of New York. *Per Curiam:* The judgment is affirmed. *Adler* v. *Board of Education,* 342 U. S. 485, decided March 3, 1952. MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, and MR. JUSTICE DOUGLAS dissent for the reasons stated in their respective dissenting opinions in *Adler* v. *Board of Education, supra,* at pp. 496, 497, 508. *Edward J. Ennis* for appellants. *Nathaniel L. Goldstein,* Attorney General of New York, for appellees. Reported below: 301 N. Y. 476, 95 N. E. 2d 806.

No. 579. INTERSTATE COMMERCE COMMISSION ET AL. *v.* JAMES MCWILLIAMS BLUE LINE, INC. ET AL. Appeal from the United States District Court for the Southern District of New York. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567. *Daniel W. Knowlton, H. L. Underwood, Hewitt Biaett, Martin A. Meyer, Jr., H. Merle Mulloy, John R. Wall* and *J. P. Fishwick* for the Interstate Commerce Commission et al.; and *Bernard Sobol* for the Chesapeake & Ohio R. Co. et al., appellants. *Parker McCollester* for the James McWilliams Blue Line, Inc. et al.; and *Robert W. Knox* for Wyatt, Inc. et al., appellees. Reported below: 100 F. Supp. 66.

Miscellaneous Orders.

No. 319, Misc. BIRCHAM *v.* BUCHANAN, WARDEN, ET AL.; and

No. 320, Misc. BIRCHAM *v.* KENTUCKY. Petitions for writs of certiorari to the Court of Appeals of Kentucky dismissed on motions of counsel for petitioner. *William M. Burkhalter* and *Rodes K. Myers* for petitioner. Reported below: No. 319, 245 S. W. 2d 934.

No. 357, Misc. PRITCHETT *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit dismissed on motion of counsel for petitioner. *James J. Laughlin* for petitioner.

No. 345, Misc. HICKS *v.* JACKSON, WARDEN. C. A. 2d Cir. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 313, Misc. CHAPMAN *v.* LAMNECK ET AL. Petition for writ of quo warranto dismissed on motion of petitioner.

No. 314, Misc. EX PARTE PHILADELPHIA & NORFOLK STEAMSHIP CO. ET AL. Motion for leave to file petition for writ of prohibition and/or mandamus denied. *Leon T. Seawell, Jr.* and *Thomas E. Byrne, Jr.* for petitioners.

No. 331, Misc. EX PARTE PAQUETTE. Motion for leave to file petition for writs of mandamus and habeas corpus denied.

No. 334, Misc. EX PARTE UNRECHT; and

No. 370, Misc. WILLIAMS *v.* OVERHOLSER, SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

No. 359, Misc. PORTER *v.* MUNICIPAL COURT OF CHICAGO, ILLINOIS. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted.

No. 517. MCGEE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* EKBERG. C. A. 9th Cir. Certi-

orari granted. *Edmund G. Brown*, Attorney General of California, *Clarence A. Linn*, Assistant Attorney General, and *Doris H. Maier*, Deputy Attorney General, for petitioners. Respondent *pro se*. Reported below: 191 F. 2d 625.

No. 274, Misc. SPELLER *v.* ALLEN, WARDEN. C. A. 4th Cir. Certiorari granted. *Herman L. Taylor* for petitioner. *Harry McMullan*, Attorney General of North Carolina, and *Ralph Moody*, Assistant Attorney General, for respondent. Reported below: 192 F. 2d 477.

Certiorari Denied. (*See also No. 345, Misc., supra.*)

No. 281. MACINNIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 191 F. 2d 157.

No. 466. UNITED STATES *v.* GREAT LAKES DREDGE & DOCK CO. Court of Claims. Certiorari denied. *Solicitor General Perlman* for the United States. *Joseph J. Cotter* and *Arthur J. Phelan* for respondent. Reported below: 119 Ct. Cl. 504, 96 F. Supp. 923.

No. 500. PARISH, DOING BUSINESS AS ALLEGHANY ASPHALT & PAVING CO., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Godfrey L. Munter* and *Charles H. Sachs* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for the United States. Reported below: 120 Ct. Cl. 100, 98 F. Supp. 347.

No. 548. CENTURY ELECTRIC CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Abraham Lowenhaupt* and *Henry C. Lowenhaupt* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack, Lee A. Jackson* and *Melva M. Graney* for respondent. Reported below: 192 F. 2d 155.

No. 549. MUTH *v.* AETNA OIL CO. ET AL. C. A. 7th Cir. Certiorari denied. *William C. Welborn, Albert Ward, Milford M. Miller* and *Palmer K. Ward* for petitioner. *Charles H. Sparrenberger* for respondents. Reported below: 192 F. 2d 1014.

No. 558. EVERLASTING DEVELOPMENT CORP. ET AL. *v.* DESCARTES ET AL. C. A. 1st Cir. Certiorari denied. *Joseph B. Keenan, Alvin O. West, Walter L. Newsom, Jr.* and *William G. Grant* for petitioners. *Victor Gutierrez Franqui,* Attorney General of Puerto Rico, *José Trias Monge* and *Abe Fortas,* Special Assistant Attorneys General, and *Norman Diamond* for respondents. Reported below: 192 F. 2d 1.

No. 563. POOLE FOUNDRY & MACHINE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *John H. Hessey* and *John H. Herold* for petitioner. *Solicitor General Perlman, David P. Findling, Mozart G. Ratner* and *Frederick U. Reel* for respondent. Reported below: 192 F. 2d 740.

No. 572. THOMPSON ET AL. *v.* AMERICAN POWER & LIGHT CO. C. A. 5th Cir. Certiorari denied. *Elijah Crippen* and *Webster Atwell* for petitioners. *Lucian Touchstone* and *Dan Moody* for respondent. Reported below: 192 F. 2d 651.

No. 155, Misc. LOWE *v.* OVERLADE, WARDEN. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman* for respondent.

No. 201, Misc. REEVES *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Edmund G. Brown*, Attorney General of California, *Clarence A. Linn*, Assistant Attorney General, and *Doris H. Maier*, Deputy Attorney General, for respondent.

No. 211, Misc. SPENCER *v.* STEELE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 230, Misc. GRIZZANTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *William Charles Brown* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 192 F. 2d 259.

No. 231, Misc. LANOVARA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *William Charles Brown* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 192 F. 2d 259.

No. 268, Misc. HOWARD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 290, Misc. ANTHONY *v.* KAUFMAN, U. S. DISTRICT JUDGE, ET AL. C. A. 2d Cir. Certiorari denied. *Louis B. Davidson* and *David Haar* for petitioner. *Roy W. McDonald* for Kaufman, respondent. Reported below: 193 F. 2d 85.

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No. 308, Misc. KILL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 309, Misc. FREAPANE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 338, Misc. CUBBLER *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 340, Misc. RIPPE, EXECUTRIX, *v.* STAHLHUTH ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 192 F. 2d 952.

No. 344, Misc. BYARS *v.* SWENSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 192 F. 2d 739.

No. 349, Misc. BERRY *v.* MCDONNELL, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 363, Misc. MINER *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 366, Misc. HOLLY *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied.

Rehearing Denied.

No. 300, October Term, 1950. HALLINAN *v.* UNITED STATES, 341 U. S. 952. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 381. MCCARTY ET AL. *v.* NELSON, ADMINISTRATOR, ET AL., *ante*, p. 887; and

No. 480. PATERSON PARCHMENT PAPER CO. *v.* INTERNATIONAL BROTHERHOOD OF PAPER MAKERS ET AL., *ante*, p. 933. Petitions for rehearing denied.

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References to particular subjects under title Jurisdiction: Adequate Remedy, IV, 1; Administrative Procedure Act, I, 5; Alaska, IV, 2; Bail, III; Case or Controversy, I, 6; II, 3; Certiorari, II, 2, 8; Civil Rights Act, I, 2; Civil Service Commission, I, 5; Continuance, II, 6–7; Criminal Law, I, 2; IV, 4; Declaratory Judgments Act, IV, 3; Dismissal, I, 6; District of Columbia, I, 3; Employers' Liability Act, I, 4; Evidence, I, 2; Exhaustion of Remedies, IV, 4; Federal Question, I, 4; II, 4, 6; Final Judgment, III; Hatch Act, I, 5; Injunction, I, 1–3, 6; IV, 1; Labor Management Relations Act, IV, 2; Louisiana, I, 5; Moot Case, I, 6; II, 3; Multiplicity of Suits, IV, 3; Negroes, I, 3, 6; II, 1; New Jersey, II, 3; Parties, I, 5; II, 3; Patents, IV, 3; Release, I, 4; Remand, II, 1, 4; Repeal, II, 7; Schools, I, 6; II, 1, 3; Scope of Review, II, 2, 5; Segregation, I, 6; II, 1; South Carolina, II, 1; State Officers, I, 1; Suit Against State, I, 1; Taxation, I, 1; IV, 1; Tennessee, I, 6; Three-Judge Court, I, 3; Unconstitutional Law, I, 1, 3; Venue, I, 5; IV, 3.

I. In General.

1. *Federal courts—Unconstitutional state tax—Suit against state.*—Suit to enjoin state official from collecting allegedly unconstitutional state tax was not suit against state. Georgia R. Co. v. Redwine, 299.

2. *Federal courts—Injunction—State criminal proceedings.*—Federal court in suit under Civil Rights Act should not enjoin use in state criminal proceeding of evidence though illegally obtained. Stefanelli v. Minard, 117.

3. *Three-judge court—When required—District of Columbia.*—Query whether 28 U. S. C. § 2282 requires three-judge court in suit to enjoin enforcement on constitutional grounds of Act affecting only the District of Columbia; decision by Court of Appeals for the District of Columbia Circuit awaited. Ex parte Cogdell, 163.

4. *State courts—Federal question—Federal Employers' Liability Act.*—Validity of release under Federal Employers' Liability Act was federal question. Dice v. Akron, C. & Y. R. Co., 359.

5. *Jurisdiction of parties—Civil Service Commission—Venue.*—Suit in federal court in Louisiana against U. S. Civil Service Commission *eo nomine* unauthorized; not authorized by Hatch Act; court

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