# UNITED STATES REPORTS

VOLUME 343

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## CASES ADJUDGED

IN

# THE SUPREME COURT

AT

## OCTOBER TERM, 1951

FROM MARCH 10 (CONCLUDED) THROUGH JUNE 9, 1952
(END OF TERM)

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WALTER WYATT
REPORTER

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# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS.*

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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.

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J. HOWARD McGRATH, Attorney General.[1]
JAMES P. McGRANERY, Attorney General.[2]
PHILIP B. PERLMAN, Solicitor General.[3]
CHARLES ELMORE CROPLEY, Clerk.[4]
WALTER WYATT, Reporter.
THOMAS ENNALLS WAGGAMAN, Marshal.[5]
HELEN NEWMAN, Librarian.

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*Notes on p. iv.

NOTES.

[1] The service of the Honorable J. Howard McGrath as Attorney General terminated at the close of business on April 7, 1952.

[2] The Honorable James P. McGranery, United States District Judge, of Pennsylvania, was nominated by President Truman on April 4, 1952, to be Attorney General; the nomination was confirmed by the Senate on May 20, 1952; he was commissioned on May 21, 1952; and he took the oath of office and entered upon his duties on May 27, 1952.

[3] Solicitor General Perlman resigned July 1, 1952, effective on August 15, 1952.

[4] Mr. Cropley died on June 17, 1952, at the National Naval Medical Center, Bethesda, Md. See *post*, p. IX. Funeral services were held at All Souls Memorial Episcopal Church and interment was in Oak Hill Cemetery, Washington, D. C., on June 19, 1952.

[5] Mr. Waggaman retired as Marshal effective at the close of business on June 30, 1952. Mr. T. Perry Lippitt was appointed Marshal, effective upon the retirement of Mr. Waggaman. See *post*, p. VII.

## 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.

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

## RETIREMENT OF MARSHAL AND APPOINTMENT OF SUCCESSOR.

SUPREME COURT OF THE UNITED STATES

MONDAY, JUNE 9, 1952

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THE CHIEF JUSTICE said:

I regret I must announce the retirement of Thomas E. Waggaman as Marshal of this Court, but with gratitude for his services. His name will now be added to the Honor Roll of those who through long years of service have given themselves to the great interests of the Court.

Mr. Waggaman came here as a page boy more than forty years ago. For nearly fifteen years he has discharged the complicated and pervasive demands made upon the Marshal with wisdom and conspicuous devotion. The duties of that office are not dramatic. The more they are performed with quiet and almost unseen effectiveness, the better they are discharged. But they are duties that require tact, resourcefulness, disregard of self—high intelligence and character. Mr. Waggaman has all these qualities and he has devoted them wholeheartedly to the service of the Court. He leaves behind him grateful memories. He goes with our best wishes for long years of health and for the happy exercise of his faculties.

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On Monday, June 9, 1952, THE CHIEF JUSTICE also announced the following Order of the Court:

IT IS ORDERED by the Court that T. Perry Lippitt be, and he is hereby, appointed Marshal of this Court effective upon the retirement of the present Marshal, Thomas Ennalls Waggaman, at the close of business June 30, 1952.

## DEATH OF CHARLES ELMORE CROPLEY, CLERK OF THE COURT.

Mr. Charles Elmore Cropley, who had been Clerk of the Court since June 6, 1927, died on June 17, 1952; and MR. CHIEF JUSTICE VINSON issued the following statement:

I regret to announce the death of Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

From page boy to Clerk, he served the Court 44 years with ability and distinction. His 25 years' tenure as Clerk won for him the friendship and respect of the Court, its staff, and legions of friends throughout the Nation amongst lawyers and litigants. He was unfailing in his attention to his work. He possessed a courteous dignity that will be long remembered. In great degree, he lived for the Court. For several years, he fought courageously to live. Thousands will mourn and miss him.

# TABLE OF CASES REPORTED

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1951.

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## SACHER ET AL. *v.* UNITED STATES.

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

No. 201, Oct. Term, 1950. Argued January 9, 1952.—Decided March 10, 1952.

1. Rule 42 (a) of the Federal Rules of Criminal Procedure allows a trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his opinion, delay will prejudice the trial. If he believes the exigencies of the trial require that he defer judgment until its completion, he may do so without extinguishing his power. P. 11.
2. During a turbulent nine-months' trial of eleven Communist Party leaders on charges of violating the Smith Act, defense counsel, in the presence of the trial judge and in the face of repeated warnings from him that their conduct was regarded as contemptuous, persisted in a course of conduct that was highly contemptuous and that tended to disrupt and delay the trial and possibly to cause a mistrial. Upon receiving the verdict of the jury at the conclusion of the trial, the trial judge, without further notice or hearing, immediately filed a certificate under Rule 42 (a) of the Federal Rules of Criminal Procedure summarily finding such counsel guilty of criminal contempt and sentencing them to imprisonment. *Held:* This action was within the power of the trial judge under Rule 42 (a). Pp. 3–11.

   (a) The word "summary" as used in Rule 42 (a) does not refer to the timing of the action with reference to the offense but refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of com-

plaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial. P. 9.

(b) Neither the language of the Rule nor the reasons for permitting straightway exercise of summary power requires immediate action. Pp. 9–10.

(c) The overriding consideration is the integrity and efficiency of the trial process; and, if the judge deems immediate action inexpedient, he should be allowed discretion to follow the procedure taken in this case. P. 10.

3. It is not necessary for this Court to consider the trial judge's charge that petitioners deliberately entered into an agreement to impair his health, since the Court of Appeals found the judgment amply sustained without this count, the sentences ran concurrently, and reversal on one count does not require reversal on the others. P. 11.
4. Rule 42 (a) does not deny a trial judge power summarily to punish a contempt that is personal to himself, even when it is not necessary to forestall abortion of the trial. Pp. 11–12.
5. The sentences imposed in this case need not intimidate lawyers in the proper performance of their professional duties as trial counsel, for they know that from any summary conviction under Rule 42 (a) they have an appeal on law and fact to the Court of Appeals. Pp. 12–13.
6. If its aid be needed, this Court will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. Pp. 13–14.

182 F. 2d 416, affirmed.

At the conclusion of the trial in *Dennis* v. *United States*, 341 U. S. 494, the trial court, under Rule 42 (a) of the Federal Rules of Criminal Procedure, summarily adjudged petitioners guilty of contempt while acting as counsel for the defendants during the trial and sentenced them to imprisonment. The Court of Appeals reversed some specifications of contempt but affirmed the conviction and sentences. 182 F. 2d 416. This Court denied certiorari, 341 U. S. 952, but later granted certiorari limited to one question. 342 U. S. 858. *Affirmed*, p. 14.

*Paul L. Ross* argued the cause for petitioners. With him on the brief were *Martin Popper, Earl B. Dickerson* and *Robert W. Kenny.*

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

MR. JUSTICE JACKSON delivered the opinion of the Court.

After a turbulent nine months of trial, eleven Communist Party leaders were convicted of violating the Smith Act.[1] On receiving the verdict, the trial judge at once filed a certificate under Rule 42 (a), Fed. Rules Crim. Proc., finding petitioners guilty of criminal contempt and imposing various jail terms up to six months. Those sentenced were defense counsel, with the exception of one defendant who had elected to conduct his own case.

The Court of Appeals reviewed the judge's action, both on facts and law, reversed some specifications of contempt, but affirmed the conviction and sentences.[2] Judge Augustus Hand, who favored affirmance on all charges, pronounced petitioners' conduct concerted and wilfully obstructive and described it as including "persistent obstructive colloquies, objections, arguments, and many groundless charges against the court . . . ."[3] Judge Frank, who favored reversal of those specifications which were reversed, declared that the court affirmed the remaining ones "only because of the lawyers' outrageous conduct—conduct of a kind which no lawyer owes his client, which cannot ever be justified, and which was never em-

[1] *Dennis* v. *United States,* 341 U. S. 494.

[2] *United States* v. *Sacher,* 182 F. 2d 416.

[3] *Id.,* at 423.

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ployed by those advocates, for minorities or for the unpopular, whose courage has made lawyerdom proud." [4] Judge Clark, who would have reversed the entire judgment because of the procedure under consideration by us, began his opinion: "To one schooled in Anglo-Saxon traditions of legal decorum, the resistance pressed by these appellants on various occasions to the rulings of the trial judge necessarily appears abominable." [5]

The actual effect of petitioners' conduct on the trial and on the burden of subsequent courts in reviewing an unnecessarily large record also was noted by a differently composed Court of Appeals when they sought reversal of their clients' conviction and assigned misconduct and bias of the trial judge as one of the grounds. The Court found that it could not consider the accusations against the judge separately from behavior of counsel. It unanimously found their charges against the trial judge "completely unconvincing," and of their own conduct said, "All was done that could contribute to make impossible an orderly and speedy dispatch of the case . . . ." [6] The nature of this obstruction was thus described:

> "The record discloses a judge, sorely tried for many months of turmoil, constantly provoked by useless bickering, exposed to offensive slights and insults, harried with interminable repetition, who, if at times he did not conduct himself with the imperturbability of a Rhadamanthus, showed considerably greater self-control and forbearance than it is given to most judges to possess." [7]

We denied petition for further review of the contempt issue.[8] On reconsideration, however, the importance of

[4] *Id.*, at 454.

[5] *Id.*, at 463.

[6] *United States* v. *Dennis*, 183 F. 2d 201, 225.

[7] *Id.*, at 226.

[8] 341 U. S. 952.

clarifying the permissible practice in such cases persuaded us to grant certiorari, limited to one question of procedure on which there was disagreement in the court below. Our order stated the issue for consideration:

> ". . . 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) . . . 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?" [9]

The certificate of contempt fills sixty pages of our record and incorporates, by reference, the 13,000 pages of trial record. The certificate in full [10] and summary of relevant evidence have been reported below. Because our limited review does not require or permit reexamination of the facts, no purpose would be served by detailed recitals. It is relevant to the questions of law to observe that the behavior punished as a result of the Court of Appeals' judgment has these characteristics: It took place in the immediate presence of the trial judge; it consisted of breaches of decorum and disobedience in the presence of the jury of his orders and rulings upon the trial; the misconduct was professional in that it was that of lawyers, or of a layman acting as his own lawyer. In addition, conviction is not based on an isolated instance of hasty contumacious speech or behavior, but upon a course of conduct long-continued in the face of warnings that it was regarded by the court as contemptuous. The nature of the deportment was not such as merely to offend personal sensitivities of the judge, but it prejudiced the expeditious, orderly and dispassionate conduct of the trial.

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[9] 342 U. S. 858.

[10] 182 F. 2d at 430–453.

We have taken no issue as to the statute which confers power on a federal court to punish for contempt,[11] but only as to the regularity of the procedure under Rule 42,[12] designed to provide for the manner of exercising

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[11] 18 U. S. C. § 401, "Power of court," provides:

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

18 U. S. C. § 402, "Contempts constituting crimes," provides for criminal contempt prosecutions of acts which are in themselves criminal as well as contemptuous, but adds:

"This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law."

[12] Rule 42, Fed. Rules Crim. Proc., "Criminal Contempt," reads:

"(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

"(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in

that power. The issue we accepted for review is a narrow one. Petitioners do not deny that they might have been summarily punished for their conduct without hearing under Rule 42 (a) if the trial judge had acted at once upon occurrence of each incident. But it is contended that this power of summary punishment expired by reason of two circumstances: (1) that the trial judge awaited completion of the trial, at which time its progress could no longer be obstructed, and hence, it is said, summary action had become unnecessary; and (2) that he included in the certificate a charge that the contemptuous instances were the result of agreement between counsel which, if it existed, was not made in his presence. Therefore, it is argued that petitioners could not be convicted or sentenced except after notice, time for preparation of a defense, and hearing, probably before another judge, as provided in Rule 42 (b).

Rule 42 obviously was intended to make more explicit "the prevailing usages at law" by which the statute has authorized punishment of contempts. 18 U. S. C. §§ 401, 402. No legislative history sheds light on this issue. Practice of District Judges has not been uniform when they have deemed resort to the power necessary.[13] A variety of questions concerning contempt powers, limitations

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which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

[13] In *Hallinan* v. *United States*, 182 F. 2d 880, cert. denied, 341 U. S. 952, defense counsel was summarily adjudged in contempt under Rule 42 (a) and sentenced to six months' imprisonment while the trial was still in progress. The trial judge's power to do so was sustained over the objection that he had delayed overnight and that part of the conduct specified was that of four and five days earlier. In *MacInnis* v. *United States*, 191 F. 2d 157, cert. denied this date, 342 U. S. 953,

and procedures have been considered by this Court,[14] but none construed this Rule, which was promulgated by this Court in 1944 and became effective March 26, 1946. Cases prior to it grew out of facts so distinguishing that their decisions are of little value as precedents.

Summary punishment always, and rightly, is regarded with disfavor and, if imposed in passion or pettiness, brings discredit to a court as certainly as the conduct it penalizes. But the very practical reasons which have led every system of law to vest a contempt power in one who presides over judicial proceedings also are the reasons which account for it being made summary. Our criminal processes are adversary in nature and rely upon the self-interest of the litigants and counsel for full and adequate development of their respective cases. The nature of the proceedings presupposes, or at least stimulates, zeal in the opposing lawyers. But their strife can pervert as well as aid the judicial process unless it is supervised and controlled by a neutral judge representing the overriding social interest in impartial justice and with power to curb both adversaries. The rights and immunities of accused persons would be exposed to serious and obvious abuse if the trial bench did not possess and frequently exert power to curb prejudicial and excessive zeal of prosecutors. The interests of society in the preservation of court-room control by the judges are no more to be frustrated through unchecked improprieties by defenders.

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defense counsel was adjudged in contempt for conduct the day before. Filing of the certificate of contempt was delayed more than three weeks, and it was announced that the fixing of the punishment would be deferred until the end of the trial. When the trial was concluded two months after the contempt, counsel was immediately sentenced to three months' imprisonment. The trial judge's power to do so was upheld.

[14] Among them: *Ex parte Terry,* 128 U. S. 289; *Cooke* v. *United States,* 267 U. S. 517; *Nye* v. *United States,* 313 U. S. 33; *Pendergast* v. *United States,* 317 U. S. 412; *In re Michael,* 326 U. S. 224.

Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal. During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation. These are such obvious matters that we should not remind the bar of them were it not for the misconceptions manifest in this case.

The Rule in question contemplates that occasions may arise when the trial judge must immediately arrest any conduct of such nature that its continuance would break up a trial, so it gives him power to do so summarily. But the petitioners here contend that the Rule not only permits but requires its instant exercise, so that once the emergency has been survived punishment may no longer be summary but can only be administered by the alternative method allowed by Rule 42 (b). We think "summary" as used in this Rule does not refer to the timing of the action with reference to the offense but refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial. The purpose of that procedure is to inform the court of events not within its own knowledge. The Rule allows summary procedure only as to offenses within the knowledge of the judge because they occurred in his presence.

Reasons for permitting straightway exercise of summary power are not reasons for compelling or encourag-

ing its immediate exercise. Forthwith judgment is not required by the text of the Rule. Still less is such construction appropriate as a safeguard against abuse of the power. If the conduct of these lawyers warranted immediate summary punishment on dozens of occasions, no possible prejudice to them can result from delaying it until the end of the trial if the circumstances permit such delay. The overriding consideration is the integrity and efficiency of the trial process, and if the judge deems immediate action inexpedient he should be allowed discretion to follow the procedure taken in this case. To summon a lawyer before the bench and pronounce him guilty of contempt is not unlikely to prejudice his client. It might be done out of the presence of the jury, but we have held that a contempt judgment must be public.[15] Only the naive and inexperienced would assume that news of such action will not reach the jurors. If the court were required also then to pronounce sentence, a construction quite as consistent with the text of the Rule as petitioners' present contention, it would add to the prejudice. It might also have the additional consequence of depriving defendant of his counsel unless execution of prison sentence were suspended or stayed as speedily as it had been imposed. The procedure on which petitioners now insist is just the procedure most likely to achieve the only discernible purpose of the contemptuous conduct. Had the trial judge here pursued that course, they could have made a formidable assertion that it was unfair to them or to their clients and that a new trial was required on account of it.

In this case counsel repeatedly were warned that their conduct was regarded as contemptuous. No claim can be made that the judge awaited the close of the trial to pounce upon them for some offense unnoted at the time

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[15] *In re Oliver*, 333 U. S. 257.

it occurred. If we were to hold that summary punishment can be imposed only instantly upon the event, it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment. We think it less likely that unfair condemnation of counsel will occur if the more deliberate course be permitted.

We hold that Rule 42 allows the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his opinion, delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power.

The other reason ascribed for reversing this case is that the accusing judge charged the petitioners, among other things, with an agreement deliberately entered into in a cold and calculated manner, "to impair my health." It is not charged that such an agreement was made in the presence of the judge. We need not determine whether a proper construction of the certificate would be that the concert of action which did take place in his presence amounted to an implied agreement or as charging an earlier express verbal agreement to act in concert. This specification was reversed by the Court of Appeals, which, however, found the judgment amply sustained without it, and considered the substantive offenses separable and independent, as do we. It found the judgment amply sustained without the conspiracy count. The sentences ran concurrently, so reversal of one does not require reversal of the other.

A construction of the Rule is advocated which would deny a judge power summarily to punish a contempt that is personal to himself except, perhaps, at a moment when it is necessary to forestall abortion of the trial. His only recourse, it is said, is to become an accuser or complaining witness in a proceeding before another judge.

The Rule itself expresses no such limitation, and the contrary inference is almost inescapable. It is almost inevitable that any contempt of a court committed in the presence of the judge during a trial will be an offense against his dignity and authority. At a trial the court is so much the judge and the judge so much the court that the two terms are used interchangeably in countless opinions in this Court and generally in the literature of the law, and contempt of the one is contempt of the other. It cannot be that summary punishment is only for such minor contempts as leave the judge indifferent and may be evaded by adding hectoring, abusive and defiant conduct toward the judge as an individual. Such an interpretation would nullify, in practice, the power it purports to grant.

We are urged that these sentences will have an intimidating effect on the legal profession, whose members hereafter will decline to appear in trials where "defendants are objects of hostility of those in power," or will do so under a "cloud of fear" which "threatens the right of the American people to be represented fearlessly and vigorously by counsel."

That contempt power over counsel, summary or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir. Most judges, however, recognize and respect courageous, forthright lawyerly conduct. They rarely mistake overzeal or heated words of a man fired with a desire to win, for the contemptuous conduct which defies rulings and deserves punishment. They recognize that our profession necessarily is a contentious one and they respect the lawyer who makes a strenuous effort for his client.

The profession knows that no lawyer is at the mercy of a single federal trial judge. This case demonstrates

that before punishment takes effect he may have appeal on law and fact to the Court of Appeals. Petitioners, as yet, have served no part of their sentences but have been enlarged on bail while their conduct has been directly reviewed by one Court of Appeals on their own appeal and considered indirectly by a differently composed Court of Appeals on their clients' appeal. Some of those judges had trial and appellate experience almost unparalleled in length and variety. These lawyers have not been condemned, as they claim, merely by the impulse of one lone and hostile judge. Their conduct has been condemned by every judge who has examined this record under a duty to review the facts. It is to be doubted whether the profession will be greatly terrorized by punishment of some of its members after such extended and detached consideration. Moreover, if power of contempt excites fear and terror in the bar, it would hardly be relieved by upholding petitioners' contention that the judge may proceed against a lawyer at the precise moment of maximum heat but may not do so if he awaits a cooler second thought.

We are not unaware or unconcerned that persons identified with unpopular causes may find it difficult to enlist the counsel of their choice. But we think it must be ascribed to causes quite apart from fear of being held in contempt, for we think few effective lawyers would regard the tactics condemned here as either necessary or helpful to a successful defense. That such clients seem to have thought these tactics necessary is likely to contribute to the bar's reluctance to appear for them rather more than fear of contempt.

But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. But it will

not equate contempt with courage or insults with independence. It will also protect the processes of orderly trial, which is the supreme object of the lawyer's calling.

*Affirmed.*

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

MR. JUSTICE BLACK, dissenting.

I would reverse these convictions because of my belief that (1) the Judge should not have passed on the contempt charges he preferred; (2) whatever judge considered the charges, guilt should not have been summarily decided as it was—without notice, without a hearing and without an opportunity for petitioners to defend themselves; (3) petitioners were constitutionally entitled to have their guilt or innocence of criminal contempt decided by a jury.

After a nine months' trial of leaders of the Communist Party a jury brought in a verdict of guilty and was discharged. Immediately, presiding Judge Medina asked all the defendants' lawyers [1] to stand up, then read them a very minor part of a lengthy "contempt certificate" in which they were alleged to have committed many acts of contempt at various times during the protracted trial. Without affording any of them a chance to say a word before he acted, the presiding Judge held all of them guilty of contempt and sentenced each one to prison.

*First.* I think it was a grave error for the Judge to pass on the charges he brought. Reasons why he should not have done so have been forcefully presented by MR. JUSTICE FRANKFURTER here and by Judge Charles Clark in the Court of Appeals. Their arguments that Judge Medina should not have made these adjudications

[1] The defendant Dennis, who had acted as his own lawyer, is included in this group.

are vividly buttressed by the collection of trial episodes placed in the appendix to MR. JUSTICE FRANKFURTER'S opinion, *post,* p. 42. These episodes bespeak an attitude of distrust of the lawyers and, I regret to add, of hostility to them, generally deemed inconsistent with that complete impartiality the process of judging demands. Facts that appear of special importance to me in considering what were the Judge's personal feelings towards those he convicted are these:

The presiding Judge was convinced that the lawyers had deliberately and calculatingly badgered and insulted him throughout the long months of trial. Among these insults, so the Judge believed and declared, were insolent, sarcastic, impudent and disrespectful charges that he angled for newspaper headlines; connived with the United States Attorney; entertained racial prejudice; judicially acted with "bias, prejudice, corruption, and partiality." He found and repeatedly declared that these lawyers were acting in concerted agreement in an attempt to create confusion, provoke incidents and break down his health. As the trial progressed, the record shows that the Judge expressed stronger and stronger fears that the alleged conspiracy to destroy his health was about to succeed. This belief may explain his sharp and somewhat heated repartee in his frequent controversies with counsel. But whatever the provocation, the record shows a constantly growing resentment of the Judge against the lawyers.

The Judge's distrust of and disrespect for the lawyers clearly appear from his frequent charges that their statements were false and unreliable. These repeated accusations, as particularly shown by the following colloquy, impress me as showing such bitter hostility to the lawyers that the accuser should be held disqualified to try them:

> "Mr. Sacher: I am offended on these constant aspersions on the veracity of representations that I

make. I am an officer of this court and I resent these—

"The Court: There was an instance when you deliberately lied to me when they were passing these press releases. You said that they were not and you were caught red-handed.

"Mr. Sacher: That is the most offensive charge that can be made against an officer of the court. . . . What has a lawyer got but his honor.

"The Court: . . . you were caught red-handed.

"Mr. Sacher: That is the most detestable thing I ever heard from a judge. I resent that and I urge that it be expunged from the record. . . . I will defend my honor as a member of the bar against your Honor or anybody else. . . . I think an idiot resorts to lying. I don't have to do it.

"The Court: You did it.

"We better let these little amenities go. I can see from your belligerent manner if you thought you could, you might physically come up to the bench and physically attack me. I know your manner, and it doesn't frighten me in the slightest degree." [2]

Liar ordinarily is a fighting word spoken in anger to express bitter personal hostility against another. I can think of no other reason for its use here, particularly since the Judge's charge was baseless.[3] And the Judge's personal feeling towards these lawyers, Sacher in particular, is further indicated by an occurrence immediately *after* they had been sentenced. Sacher asked and was granted the privilege of making a brief statement. This

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[2] While the full text of the colloquy is pertinent, all of it is not repeated here as it is set out at pp. 80–81 of the appendix to MR. JUSTICE FRANKFURTER'S opinion.

[3] The Court of Appeals held that the record failed to sustain the accusations that Sacher had spoken falsely about the press releases. Specification XV based on that charge was reversed.

statement was relevant and dignified.[4] Nevertheless the Judge interrupted him and used this language to a lawyer he had just abruptly and summarily sentenced to prison: "You continue in the same *brazen* manner that you used throughout the whole trial. . . . despite all kinds of warnings throughout the case, you continue with the same old *mealy-mouth* way of putting it which I have been listening to throughout the case." (Emphasis supplied.) Candor compels me to say that in this episode the decorum and dignity of the lawyer who had just been sentenced to prison loses nothing by comparison with others.

Certainly repeatedly calling a lawyer a liar marks a drastic deviation from the desirable judicial standard. A judge who does this should no more be permitted to try the lawyer he accuses than a judge should be permitted to try his own case. Cf. *Tumey* v. *Ohio,* 273 U. S. 510. No man should be forced to trial before a judge who has previously publicly attacked his personal honor and integrity. The risk to impartial justice is too great.

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[4] The parts of Sacher's statement immediately preceding the court's interruption were as follows:

"And I respectfully submit, your Honor, that a country with an intimidated bar is a country whose liberties are in danger. Here in America we know that the American bar occupies a place of honor in the achievement and preservation of the liberties of our people, and I say, your Honor, with all due respect to your decision and judgment here that any threat to the integrity, independence and courage of the bar can only constitute a threat to the integrity and wholesomeness and preservation of our civil liberties.

"For myself let me say, your Honor, that I speak of intimidation not in personal terms. If it be necessary that in the cause of American liberty I shall have to serve six months, then I say to your Honor the price will have been very, very small. I hope that it will not be necessary in our country for an advocate to have to do that, but if it be necessary—

"The Court: It isn't the price of liberty; it is the price of misbehavior and disorder as stated in the certificate.

"Mr. Sacher: I say to your Honor—"

*Second.* Before sentence and conviction these petitioners were accorded no chance at all to defend themselves. They were not even afforded an opportunity to challenge the sufficiency or the accuracy of the charges. Their sentences were read to them but the full charges were not. I cannot reconcile this summary blasting of legal careers with a fair system of justice. Such a procedure constitutes an overhanging menace to the security of every courtroom advocate in America. The menace is most ominous for lawyers who are obscure, unpopular or defenders of unpopular persons or unorthodox causes.

Conviction without trial is not only inherently unfair in the first court, but the unfairness is carried up to the appellate level. This case proves that. A fair review requires scrutiny of 13,000 pages of evidence most of which is irrelevant. For the contempt certificate states: "As isolated quotations from or references to the transcript can give but a partial view of the acts, statements, and conduct above referred to, I hereby make the entire record part of these proceedings." Such a record obscured the lawyers' trial conduct in a maze of evidence that has nothing to do with their own guilt or innocence. It is not surprising that this Court shrinks from reading such a record; it refuses to do so. No assertion is made that the Court of Appeals waded through it. Consequently there is every indication that the Court of Appeals appraised the factual accuracy of Judge Medina's charges on a basis deemed by him as "inadequate" because presenting only "a partial view" of the numerous court-lawyer controversies.[5] Such an "inadequate" basis of re-

[5] I do not think the convictions of these lawyers for contempt should be affirmed on the theory that such has already been expressly or impliedly done by the "differently composed Court of Appeals" that affirmed conviction of the Communist leaders. That "differently composed" court merely held that no conduct of the trial judge called for reversing the convictions of the Communist leaders. I think that

view is to be expected since no hearing was held which could have framed concrete issues and focused attention on evidence relevant to them.

There are other manifest elements of unfairness in a system which calls on appellate courts to judge the trial conduct of lawyers accused of contempt on the basis of all evidence introduced against their clients in a prior criminal case. This unfairness is particularly emphasized here. The root of Judge Medina's charges was that these lawyers followed a concerted course deliberately designed to bring the whole judicial system into public contempt and disgrace. Their clients were Communist leaders. Much of the 13,000 pages of evidence was offered to show that they planned to subvert and destroy all governmental institutions, including courts. Unless we are to depart from high traditions of the bar, evil purposes of their clients could not be imputed to these lawyers whose duty it was to represent them with fidelity and zeal. Yet from the very parts of the record which Judge Medina specified, it is difficult to escape the impression that his inferences against the lawyers were colored, however unconsciously, by his natural abhorrence for the unpatriotic and treasonable designs attributed to their Communist leader clients. It appears to me that if there have ever been, or can ever be, cases in which lawyers are entitled to a full hearing before their liberty is forfeited and their professional hopes are blighted, these are such cases.

For reasons stated above and for reasons stated in the dissent of MR. JUSTICE FRANKFURTER and the dissent of Judge Charles Clark, I think these cases should be re-

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affirmance does not support an inference that the "differently composed" court would also have sustained a judgment of contempt against the lawyers. Moreover while this "differently composed" court severely condemned the lawyers' conduct, it apparently felt constrained to imply that the trial judge "did not conduct himself with the imperturbability of a Rhadamanthus . . . ." 183 F. 2d 226.

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versed because Judge Medina denied petitioners a hearing. But I would reverse on the further ground that petitioners are entitled to all the constitutional safeguards provided to protect persons charged with crime, including a trial by jury.

*Third.* Art. III, § 2 of the Constitution provides that "The Trial of all Crimes . . . shall be by Jury." Not satisfied with this single protection for jury trial, the Founders reemphasized the guaranty by declaring in the Sixth Amendment that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." And the Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." These contempt proceedings are "criminal prosecutions" brought to avenge an alleged public wrong. Petitioners were imprisoned for terms up to six months, but these terms could have been longer. The Government's position in *United States* v. *United Mine Workers of America,* 330 U. S. 258, was that the amount of punishment for the crime of contempt can be fixed at a judge's discretion, with no limit but the Eighth Amendment's prohibition against cruel and unusual punishment. Certainly, petitioners have been sentenced for crimes.[6] Consequently these lawyers have been wrongfully deprived of the jury benefits of the foregoing constitutional provisions unless they are inapplicable to the crime of contempt.

There are undoubtedly sayings in some past opinions of this Court broad enough to justify what was done here. Indeed judges and perhaps lawyers pretty generally subscribe to the doctrine that judicial institutions would

[6] *New Orleans* v. *Steamship Co.,* 20 Wall. 387, 392; *Gompers* v. *United States,* 233 U. S. 604, 610, 611; *Michaelson* v. *United States,* 266 U. S. 42, 66–67; *Pendergast* v. *United States,* 317 U. S. 412, 416–418; but cf. *Myers* v. *United States,* 264 U. S. 95, 103.

be imperiled if judges were without power summarily to convict and punish for courtroom offenses. Our recent decisions, however, have expressed more cautious views about the judicial authority to punish for contempt. Returning to the early views of this Court, we have marked the limits of that authority as being "the least possible power adequate to the end proposed." *In re Oliver,* 333 U. S. 257, 274, and cases there cited. The "end proposed" is "power adequate" in the court to preserve order and decorum and to compel obedience to valid court orders. To achieve these ends—decorum and obedience to orders—courts must have power to act immediately, and upon this need the power of contempt rests. Concurring opinion, *United States* v. *United Mine Workers of America, supra,* 330 U. S. at 331–332. Measured by this test, as Judge Charles Clark's dissenting opinion pointed out, there was no necessity here for Judge Medina's summary action, because the trial was over and the danger of obstructing it was passed. For the same reason there was no longer need, so far as that trial was concerned, to try petitioners for their courtroom conduct without benefit of the Bill of Rights procedural safeguards.

A concurring judge in the Court of Appeals feared that it might bring about "demoralization of the court's authority" should any one other than Judge Medina try the case. The reason given was: "For instance, in all likelihood, at a trial of the lawyers, Sacher would introduce the testimony of himself and others in an effort to prove that he was not 'angrily shouting,' as charged in Specification VII, and did not speak 'in an insolent manner,' as charged in Specification VIII; Gladstein would similarly seek to prove there he did not 'angrily' advance 'toward the bench' or make remarks in a 'truculent manner,' as charged in Specification VIII, and did not speak to the judge 'in a sarcastic and impertinent manner,' as charged

in Specification XI; etc., etc." 182 F. 2d 416, 461. What would be wrong with this? Are defendants accused by judges of being offensive to them to be conclusively presumed guilty on the theory that judges' observations and inferences must be accepted as infallible? There is always a possibility that a judge may be honestly mistaken. Unfortunately history and the existence of our Bill of Rights indicate that judicial errors may be from worse causes.

The historic power of summary contempt grew out of the need for judicial enforcement of order and decorum in the courtroom and to compel obedience to court orders. I believe the idea of judges having unrestricted power to by-pass the Bill of Rights in relation to criminal trials and punishments is an illegitimate offspring of this historic coercive contempt power. It has been said that such a "summary process of the Star Chamber slipped into the common law courts," and that the alleged ancient history to support its existence is "fiction." [7] With the specific reservation that I think summary contempt proceedings may be employed solely to enforce obedience and order, and not to impose unconditional criminal punishment, I agree with this statement of Mr. Justice Holmes: "I would go as far as any man in favor of the sharpest and most summary enforcement of order in Court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts." *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 425–426.

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[7] Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts, 37 Harv. L. Rev. 1010, 1047. See also Nelles and King, Contempt by Publications in the United States, 28 Col. L. Rev. 401; Fox, History of Contempt of Court (1927).

I believe these petitioners were entitled to a jury trial. I believe a jury is all the more necessary to obtain a fair trial when the alleged offense relates to conduct that has personally affronted a judge. The majority here and the majority below appear to have affirmed these convictions on the assumption that appellate review so fully guarantees a fair trial that it is an adequate substitute for trial by jury. While I agree that the power of lawyer-judges to set aside convictions deemed prejudicial or erroneous is one vital safeguard of liberty, I cannot agree that it affords the full measure of security which the Constitution has provided against unjust convictions.[8] Preference for trial by a jury of laymen over trial by lawyer-judges lies behind the constitutional guarantee of trial by jury. I am among those who still believe in trial by jury as one of the indispensable safeguards of liberty.

MR. JUSTICE FRANKFURTER, dissenting.

Bitter experience has sharpened our realization that a major test of true democracy is the fair administration of justice. If the conditions for a society of free men formulated in our Bill of Rights are not to be turned into mere rhetoric, independent and impartial courts

[8] During the parliamentary discussion of Mr. Fox's libel bill, which sought to preserve trial by jury, it was called to the Parliament's attention that Mr. Justice Buller, while trying the Dean of St. Asaph at Shrewsbury, had declared the "rights of appeal" to be the "dearest birth-rights" of an Englishman: "The marquis [of Lansdowne] ridiculed the declaration, that a right of appeal in arrest of judgment, and of moving for a writ of error, was one of the dearest birth-rights of Englishmen, asserting that it was neither more nor less than the being turned over from one set of lawyers to another, and from that other to a third. In fact, it was to be turned over from the judge who tried the cause, to himself and three others, in a second place; and from them to themselves again, mixed with a few more judges, in a third place!" 29 Hansard, Parliamentary History of England, p. 1419.

must be available for their enforcement. To that end, courts must have the power to deal with attempts to disrupt the course of justice. This safeguard concerns not merely the litigants in a particular case; it is everyone's concern. The impartial administration of justice presupposes the dignified and effective conduct of judicial proceedings. That in turn is dependent on a proper atmosphere in the courtroom. Thus, the power of courts to punish for contempt is a means of assuring the enforcement of justice according to law. The protection of the most generously conceived civil liberties presupposes a court overawed neither by interests without nor by disruptive tactics within the courtroom. Such is the teaching of the history of English-speaking nations.

No decision of this Court has rejected this teaching. Certainly none of the professions of the Court's opinions has. While, to be sure, in a few instances restrictions too confining and, from my point of view, unwarranted have been placed upon this power of courts to punish for contempt, the power itself has never been denied. The Federal courts may, under appropriate circumstances, inflict punishment for contempt without those constitutional procedural safeguards necessary for the prosecution of crime in its historical and colloquial sense.

But this power does not authorize the arbitrary imposition of punishment. To dispense with indictment by grand jury and trial by a jury of twelve does not mean the right to disregard reason and fairness. Reason and fairness demand, even in punishing contempt, procedural safeguards within which the needs for the effective administration of justice can be amply satisfied while at the same time the reach of so drastic a power is kept within limits that will minimize abuse. While experience has shown the necessity of recognizing that courts possess this authority, experience has also proven that restrictions appropriate to the purposes of the power must fence

in its exercise. Hence Congress, by legislation dating back more than a hundred years, has put geographic and procedural restrictions upon the power of United States courts to punish summarily for contempt. See *Michaelson* v. *United States,* 266 U. S. 42; *Nye* v. *United States,* 313 U. S. 33. And even before Congress drew on its power to put limits on inherent judicial authority, this Court derived the general boundaries of this power from its purpose, see *Anderson* v. *Dunn,* 6 Wheat. 204; more recently, the Court has defined the procedure appropriate for its exercise. See *Cooke* v. *United States,* 267 U. S. 517.

The Court did so for a reason deeply imbedded in our legal system and by that very fact too often neglected. Times of tension, which are usually periods of war and their aftermath, bring it to the surface. Reflecting no doubt their concern over untoward events in law enforcement arising out of the First World War, Mr. Justice Brandeis and Mr. Justice Holmes gave quiet warning when they observed that "in the development of our liberty insistence upon procedural regularity has been a large factor." *Burdeau* v. *McDowell,* 256 U. S. 465, 477. It is not for nothing that most of the provisions of our Bill of Rights are concerned with matters of procedure.

That is what this case is about—"procedural regularity." Not whether these petitioners have been guilty of conduct professionally inexcusable, but what tribunal should sit in judgment; not whether they should be punished, but who should mete out the appropriate punishment; not whether a Federal court has authority to prevent its proceedings from being subverted, but how that authority should be exercised so as to assure the rectitude of legal proceedings and at the same time not detract from the authority of law itself.

This case arises out of the trial of the eleven Communist Party leaders whose convictions were sustained in

*Dennis* v. *United States,* 341 U. S. 494. In many ways it was a trial wholly out of the ordinary—in its length, the nature of the issues, the political and emotional atmosphere in which they were enveloped, the conduct of court and counsel, the conflicts between them. After several weeks of proceedings on pre-trial motions, the trial proper got under way. Nine weeks were consumed in getting a jury and thirty more in trying the case to the jury. Immediately after the jury brought in the verdict of guilty against the defendants, the trial judge charged the five defense lawyers and one of the defendants (who had conducted his own defense) with contempt of court during the trial. He filed a carefully prepared, elaborate certificate of contempt containing forty charges, and without further hearing found them guilty and imposed sentences ranging from thirty days' to six months' imprisonment. These specifications charged misconduct of a nature especially reprehensible when committed by lawyers, who, as officers of the court, are part of our judicial system. As such they are under a duty to further, not obstruct, the rational and fair administration of justice.

The certificate on which petitioners were found guilty of contempt charged thirty-nine occurrences during the trial as thirty-nine items of misconduct. However, these specified items were not regarded by the judge as discrete instances. He deemed them manifestations of a conspiracy by the contemnors against him. To be sure, Specifications II to XL were individually charged and therefore are technically sustainable by themselves and not merely as overt acts of the conspiracy, set forth with much detail as Specification I. But the core of the charges—the gravamen of the accusations against these petitioners—was that the petitioners had

> "joined in a wilful, deliberate, and concerted effort to delay and obstruct the trial of *United States* v. *Foster,*

> *et al.*, C 128–87, for the purpose of causing such disorder and confusion as would prevent a verdict by a jury on the issues raised by the indictment; and for the purpose of bringing the Court and the entire Federal judicial system into general discredit and disrepute, by endeavoring to divert the attention of the Court and jury from the serious charge against their clients of a conspiracy in substance to teach and advocate the overthrow of the Government of the United States by force and violence, by attacking the Presiding Judge and all the Judges of this Court, the jury system in this District, the Department of Justice of the United States, the President of the United States, the police of New York City, and the public press of New York and other cities."

Though the certificate makes it plain enough, a reading of the record leaves no doubt that in the judge's mind the individual occurrences set forth in Specifications II to XL derived their chief significance from his finding that they were tributary to the design upon which the petitioners had embarked—a conspiracy against the judge in order to prevent a fair trial of the issues. He found them guilty of that. But the Court of Appeals reversed—and the Government has not questioned this reversal of the trial judge—the convictions of the petitioners on the main charge, that of conspiracy. However, that court, with one judge dissenting, did sustain the convictions on thirty-seven other specifications. 182 F. 2d 416. Convictions on two specifications were found unsupported by evidence. *Ibid.*

I would not remotely minimize the gravity of the conduct of which the petitioners have been found guilty, let alone condone it. But their intrinsic guilt is not relevant to the issue before us. This Court brought the case here in order to consider whether the trial court followed the proper procedure in determining that the misconduct of

the petitioners subjected them to punishment. 342 U. S. 858. Time out of mind this Court has reversed convictions for the most heinous offenses, even though no doubt about the guilt of the defendants was entertained. It reversed because the mode by which guilt was established disregarded those standards of procedure which are so precious and so important for our society. So here, the only question for decision is whether, in the circumstances of this case, the trial judge himself should, without notice and hearing and after the successful termination of the trial, have summarily punished a series of contempts growing out of what he conceived to be a central mischievous design, committed over a period of nine months; or whether another judge, designated by the Chief Judge of the Court of Appeals or of the District Court for the Southern District of New York, should have heard, after due notice, the charges of contempt made by the trial judge. At the end of the trial the judge was not confronted with the alternatives of doing what he did or allowing the contemnors to go unpunished. The question was not punishment, but who should punish. Due regard for such procedural questions, too often misconceived as narrow and technical, alone justifies the truth of one of the great boasts of our democracy, the essential fairness of our judicial system.

The particular circumstances of this case compel me to conclude that the trial judge should not have combined in himself the functions of accuser and judge. For his accusations were not impersonal. They concerned matters in which he personally was deeply engaged. Whatever occasion may have existed during the trial for sitting in judgment upon claims of personal victimization, it ceased after the trial had terminated. It falls to this Court as head of the Federal judicial system to correct such abuse of judicial power.

All grants of power, including the verbally unlimited terms of Rule 42 (a) of the Rules of Criminal Procedure, are subject to the inherent limitation that the power shall be fairly used for the purpose for which it is conferred. It is a limitation derived not merely from general considerations of reason but from the traditional concepts of the proper discharge of the judicial function. "A criminal contempt may be punished summarily," so runs Rule 42 (a), "if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." The Rule merely permits summary punishment. It does not command summary punishment of all contempts "committed in the actual presence of the court," in all circumstances and at any time. That there are unexpressed limits to this power is recognized even by the Government. For it concedes that a judge could not summarily punish contempt without notice and hearing at any undefined time long after it has occurred in his presence. In short, Rule 42 (a), which in 1946 declared what the law was,[1] acknowledges an undefined power for imposing summary punishment without expressly laying down the boundaries of the power granted. Legislation normally carries such implications.

To recognize the generality of a power is the beginning not the end of the inquiry whether in the specific circumstances which invoked the power due regard was had for the implied restrictions. Among the restrictions to be implied, as a matter of course, are two basic principles of our law—that no judge should sit in a case in which he is personally involved and that no criminal punishment should be meted out except upon notice and due hearing, unless overriding necessity precludes such indispensable

[1] See Notes of Advisory Committee on Rule 42 (a), Federal Rules of Criminal Procedure.

safeguards for assuring fairness and affording the feeling that fairness has been done. Observance of these commonplace traditions has its price. It sometimes runs counter to public feeling that brooks no delay. At times it seems to entail a needlessly cumbersome process for dealing with the obvious. But as a process it is one of the cherished and indispensable achievements of western civilization. It is his disregard of these controlling traditions that forces me to conclude that the district judge, however sorely tried, erred in using the summary contempt procedure in the circumstances before him.

Happily few such exercises of summary authority have come before this Court. Still rarer are the instances where a judge is deeply involved in the conduct on which he has to pass judgment. Such a situation did come here some twenty-five years ago in *Cooke* v. *United States,* 267 U. S. 517. Mr. Chief Justice Taft then took occasion, on behalf of the whole Court, to lay down the guiding considerations which should have been followed in this case:

> "The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme

should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place. *Cornish* v. *The United States,* 299 Fed. 283, 285; *Toledo Company* v. *The United States,* 237 Fed. 986, 988.

"The case before us is one in which the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows. We think, therefore, that when this case again reaches the District Court to which it must be remanded, the judge who imposed the sentence herein should invite the senior circuit judge of the circuit to assign another judge to sit in the second hearing of the charge against the petitioner." 267 U. S. at 539.

In the *Cooke* case the Court did much more than set aside a sentence of thirty days for contempt because "the procedure pursued was unfair and oppressive," 267 U. S. 517, 538. There, as here, the contempt was by a lawyer; there, as here, the trial court's action was affirmed by a Court of Appeals in an opinion by one of the most eminent judges of his day. 295 F. 292. In reversing the two lower courts and finding an abuse of judicial discretion by the trial court, this Court did what it feels called upon to do from time to time in a class of cases that have a close kinship to matters deemed fundamental within the concept of Due Process. It defined the procedural stand-

ards to be observed by the lower courts. The general direction thus given to lower courts is not likely to be respected by them if this Court is too genial in enforcing its observance.

Enforcement is not had by repetition of generalities and sanction of their disregard in practice. We must start, no doubt, with a predisposition in favor of the propriety of a trial judge's action. His is the initial responsibility, and we must assume that the discretion with which he is entrusted will normally be exercised by judges of firmness, self-discipline, and good sense. These considerations should count heavily on review. But when men are given short shrift in being punished, abstract rules cannot dispense with the duty of the reviewing court imaginatively to re-create the courtroom drama. In order to save trial courts from being unduly hampered, it is not necessary to leave them with arbitrary power by relying on the presumption of judicial propriety to the exclusion of a sophisticated, even if indulgent, scrutiny of the record.

If we are to understand the circumstances in which the sentences under review were imposed, a close study of the record in the *Dennis* case cannot be avoided. The certificate of contempt incorporated the whole record of that case and made its findings on the basis of it. We cannot do less in passing on the propriety of the summary convictions. We cannot do less if we are to appraise fairly the power assumed by the trial court of punishing without further ado at the end of the trial conduct that took place during its long travail. This does not imply reviewing whether the conduct of these petitioners was contemptuous. The whole record is indispensably relevant to the procedural question which we brought here: how was such misconduct to be punished?

Deeply as I believe in the importance of giving wide and not niggardly scope to the discretionary powers of

trial judges and with a lifelong regard for the wisdom of the judge who, on behalf of the Court of Appeals, found that the discretion of the trial judge was not abused, I cannot escape the conviction that another district judge should have tried the contempt issue. And this, though one may well assume that any other judge would have been compelled to find contempt in this case and might have imposed even severer sentences. Preserving and enhancing respect for law is always more important than sustaining the infliction of punishment in a particular case.

A reading of the fifteen volumes of testimony in the *Dennis* record leaves one with the strong feeling that the conduct found contemptuous was in the main directed against the trial judge personally and that the judge himself so regarded it. In the preamble of his contempt certificate he states that one of the purposes of the nefarious agreement with which he charged the lawyers was "impairing my health so that the trial could not continue." The great majority of the specific acts to "effect this plan" had the judge personally as their target. The petitioners, so the judge found in Specification I,

> "b. Suggested that various findings by the Court were made for the purpose of newspaper headlines;
>
> "c. Insinuated that there was connivance between the Court and the United States Attorney;
>
> . . . . .
>
> "e. Persisted in making long, repetitious, and unsubstantial arguments, objections, and protests, working in shifts, accompanied by shouting, sneering, and snickering;
>
> "f. Urged one another on to badger the Court;
>
> "g. Repeatedly made charges against the Court of bias, prejudice, corruption, and partiality;
>
> "h. Made a succession of disrespectful, insolent, and sarcastic comments and remarks to the Court;
>
> . . . . .

"k. Persisted in asking questions on excluded subject matters, knowing that objections would be sustained, to endeavor to create a false picture of bias and partiality on the part of the Court;

"l. Accused the Court of racial prejudice without any foundation; and

"m. Generally conducted themselves in a most provocative manner in an endeavor to call forth some intemperate or undignified response from the Court which could then be relied upon as a demonstration of the Court's unfitness to preside over the trial."

The conviction on Specification I was, as already indicated, reversed by the Court of Appeals. But its theme underlies the whole certificate. It conveys inescapably what the judge deemed to have been the permeating significance of the behavior of these lawyers. The "overt acts" listed in Specification I are but a compendium of the other specifications. At least twenty-nine of these describe conduct directed against the trial judge personally: charges of prejudice and racial bias, of collusion with the prosecution, of headline-seeking.

Not only were the contempts directed against the trial judge. The conduct of the lawyers had its reflex in the judge. At frequent intervals in the course of the trial his comments plainly reveal personal feeling against the lawyers, however much the course of the trial may have justified such feeling. On numerous occasions he expressed his belief that the lawyers were trying to wear him down, to injure his health, to provoke him into doing something that would show prejudice, or cause a mistrial or reversal on appeal.

The certificate of the trial judge quotes excerpts of the record from the principal case. But these excerpts are too brief for a picture that even remotely reveals the course of the trial. The specified contempts cannot properly be appraised with a view to determining the pro-

cedure appropriate for dealing with them, unless they are given a much more balanced perspective than can be got from the certificate of contempt. In order to put the specified contempts in their trial setting, an appendix to this opinion supplements the meager excerpts in the certificate. The only adequate way to document this case would be to make the whole *Dennis* record part of this opinion, as did the trial judge by reference in his certificate. But even within the limits of space imposed by an appendix it is indubitably established that the judge felt deeply involved personally in the conduct for which he punished the defense lawyers. He was not merely a witness to an occurrence, as would be a judge who observed a fist fight in his courtroom or brutal badgering of a witness or an impropriety towards the jury. The judge acted as the prosecuting witness; he thought of himself as such. His self-concern pervades the record; it could not humanly have been excluded from his judgment of contempt. Judges are human, and it is not suggested that any other judge could have been impervious to the abuse had he been subjected to it. But precisely because a judge is human, and in common frailty or manliness would interpret such conduct of lawyers as an attack on himself personally, he should not subsequently sit in judgment on his assailants, barring only instances where such extraordinary procedure is compellingly necessary in order that the trial may proceed and not be aborted.[2]

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[2] *Ex parte Terry*, 128 U. S. 289, presented a totally different situation and lends no support whatever to the action of the trial court in this case. As was stated in the order of commitment: "David S. Terry was guilty of a contempt of this court by misbehavior in its presence and by a forcible resistance in the presence of the court to a lawful order thereof . . . ." *Id.*, at 298. This briefly indicates the differentiating circumstances between the *Terry* case and this case. While the United States Circuit Court was sitting and one member was delivering its opinion in a pending case, Mrs. Terry in-

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Summary punishment of contempt is concededly an exception to the requirements of Due Process. Necessity dictates the departure. Necessity must bound its limits. In this case the course of events to the very end of the trial shows that summary measures were not necessary to enable the trial to go on. Departure from established judicial practice, which makes it unfitting for a judge who is personally involved to sit in his own case, was therefore unwarranted. Neither self-respect nor the good name of the law required it. Quite otherwise. Despite the many incidents of contempt that were charged, the trial went to completion, nine months after the first incident, without a single occasion making it necessary to lay any one of the lawyers by the heel in order to assure that the trial proceed. The trial judge was able to keep order and to continue the court's business by occasional brief recesses calculated to cool passions and restore decorum, by periodic warnings to defense lawyers, and by shutting off obstructive arguments whenever rulings were concisely stated and firmly held to.

This, then, was not a situation in which, even though a judge was personally involved as the target of the contemptuous conduct, peremptory action against contemnors was necessary to maintain order and to salvage the proceedings. Where such action is necessary for the

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terrupted the reading by a violent outburst. When the United States Marshal was ordered by the court to remove her from the courtroom, her husband, Mr. Terry, intervened to assault the Marshal. Upon the conclusion of the reading of the opinion, following this interruption, the court, having duly deliberated, found both Mr. and Mrs. Terry guilty of contempt and sentenced them for it. Plainly enough Terry's contempt did not touch the judges personally, nor implicate their attitude toward counsel. It involved simple physical actions in full view of the three judges. The judgment of contempt and sentencing followed promptly upon events that constituted a single brawl interrupting the actual administration of justice. See *In re Terry*, 36 F. 419; Swisher, Stephen J. Field—Craftsman of the Law, 321–341.

decorous continuance of a pending trial, disposition by another judge of a charge of contempt is impracticable. Interruption for a hearing before a separate judge would disrupt the trial and thus achieve the illicit purpose of a contemnor.

But the administration of justice and courts as its instruments are vindicated, and lawyers who might be tempted to try similar tactics are amply deterred, by the assurance that punishment will be certain and severe regardless of the tribunal that imposes it. It is a disservice to the law to sanction the imposition of punishment by a judge personally involved and therefore not unreasonably to be deemed to be seeking retribution, however unconsciously, at a time when a hearing before a judge undisturbed by any personal relation is equally convenient. It does not enhance a belief that punishment is a vindication of impersonal law; it does not fortify the deterrent function of punishment.

Had the judge here found the petitioners guilty of contempt during the actual course of the trial a different problem would be presented. Even then, however, only compelling circumstances would justify a peremptory judgment of contempt. For while "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence," the power that may thus be exercised is "the least possible power adequate to the end proposed." *Anderson* v. *Dunn,* 6 Wheat. 204, 227, 231. Resort by a judge to criminal sanctions without the usual safeguards in imposing punishment is to be supported only if the moral authority of a trial judge cannot command order and respect, only if a firm reprimand calculated to secure obedience would not halt an incipient course of misconduct.

Criminal justice is concerned with the pathology of the body politic. In administering the criminal law, judges

wield the most awesome surgical instruments of society. A criminal trial, it has been well said, should have the atmosphere of the operating room. The presiding judge determines the atmosphere. He is not an umpire who enforces the rules of a game, or merely a moderator between contestants. If he is adequate to his functions, the moral authority which he radiates will impose the indispensable standards of dignity and austerity upon all those who participate in a criminal trial.

Truth compels the observation, painful as it is to make it, that the fifteen volumes of oral testimony in the principal trial record numerous episodes involving the judge and defense counsel that are more suggestive of an undisciplined debating society than of the hush and solemnity of a court of justice. Too often counsel were encouraged to vie with the court in dialectic, in repartee and banter, in talk so copious as inevitably to arrest the momentum of the trial and to weaken the restraints of respect that a judge should engender in lawyers. Counsel were not made to understand that in a criminal case not merely the liberty of individuals is at stake. Law itself is on trial as the "stern daughter of the voice of God." Throughout the proceedings, even after the trial judge had indicated that he thought defense counsel were in conspiracy against him and were seeking thereby to subvert the trial, he failed to exercise the moral authority of a court possessed of a great tradition. He indulged them, sometimes resignedly, sometimes playfully, in lengthy speeches. These incontinent wrangles between court and counsel were punctuated by occasional minatory intimations from the Bench. As in the case of parental warnings to children, feckless repetition deprived them of authority.

To call counsel officers of the court is no idle phrase. Our whole conception of justice according to law, espe-

cially criminal justice, implies an educated, responsible, and independent Bar. Counsel are not freed from responsibility for conduct appropriate to their functions no matter what the encouragements and provocations. Petitioners must be held to strict accountability for the contempts they committed. But until the inherent authority that should radiate from the Bench is found ineffective in securing seemly conduct by counsel, there is no need for drastic peremptory procedure in bringing contemnors to book even during a trial. History records too many abuses to look indulgently upon the exercise of such arbitrary power. And when the trial in fact goes to completion, as here, without invoking summary convictions, that in itself proves that there was no occasion for departure from the historic method of trying criminal charges, that is, after notice and an opportunity for defense before a disinterested judge.

It only remains to point out the differences between this case and two other cases now before this Court on petitions for certiorari. (As to the desirable disposition of these petitions no view is intended to be indicated.) In *Hallinan* v. *United States,* 182 F. 2d 880, and *MacInnis* v. *United States,* 191 F. 2d 157, the Court of Appeals for the Ninth Circuit affirmed convictions for contempt committed by two lawyers in a trial in the Northern District of California which lasted some twenty weeks, from November 14, 1949, to April 4, 1950. The contempt charge in the *Hallinan* case was for conduct which occurred during Thursday, Friday and Monday of the first two weeks of the long trial and consisted in disobedience of the court's order to limit the opening statement and the cross-examination of a Government witness. The complained-of conduct did not at all bring the judge personally into controversy. On Tuesday morning after the time necessary for preparation of the contempt certificate the judge

found Hallinan in contempt and sentenced him to six months' imprisonment. On the face of the record it would require even more than the boldness of hindsight to say that the trial judge could not have reasonably believed that immediate vindication of the disobedience of the court's order was necessary to secure respect for his authority during the remainder of the trial.

Later, on February 1, 1950, the other defense attorney—MacInnis—thus addressed the court after one of its rulings: "I think you should cite yourself for misconduct. . . . I have never heard anything like that. You ought to be ashamed of yourself." Soon after this remark the court recessed until the next day. After overnight consideration, the judge informed the lawyer that his remark constituted contempt and that a certificate of contempt in accordance with Rule 42 would be filed. Here again, the judge took prompt action in order, as he concluded, to assure the orderly continuance of a trial which still had many weeks to go.

The *Hallinan* and *MacInnis* cases disprove the Government's claim that prompt citation for contempt, if the circumstances warranted it, would have caused delay and disruption in the New York trial. In the California case Hallinan remained as defense counsel by virtue of a stay in the execution of his sentence; and MacInnis, by a postponement of his sentence until after the verdict in the principal case. MacInnis evidently abstained from further misconduct in the principal trial because of the certainty of punishment, though he did not know its magnitude. Either device was available to the trial judge in New York had he felt that only by a prompt judgment of contempt could he keep control of the proceedings. In fact he did keep order by measures short of those used in the California case. At the end of the trial the only question was whether he or another judge, not personally involved, should pass on issues of contempt that had

arisen during a trial that had ended, and impose punishment if guilt was found.

It is suggested, however, that a judge should be allowed to punish contempt peremptorily, as did the judge here, long after the contempt occurs. Otherwise he might be impelled, so it is surprisingly argued, to act on the inflamed impulse of the moment for fear of losing the opportunity to punish the offender himself. The *Hallinan* and *MacInnis* cases suggest the answer: power to cite for contempt summarily is not lost by taking a reasonable, brief time for judicious consideration whether such drastic action is necessary in a pending trial. Moreover, the guides to right conduct which Mr. Chief Justice Taft laid down in the *Cooke* case, and on which I rely, rest on the assumption that federal judges are not undisciplined creatures whose feelings are their masters. Presumably they are responsible beings with cool heads. In any event, this Court sits to correct a rare occurrence of irresponsible action. Finally, the Government urges that a hearing before a different judge would give petitioners another opportunity for harassing tactics, and that to subject the trial judge to cross-examination and refutation by witnesses drawn from court-room spectators would embroil the federal judiciary in damaging controversy. Once more the Government depreciates the status of federal judges. It derogates from the high conception which one should have of them not to attribute to the judge who would preside in the contempt hearing those capabilities by which federal judges, especially in non-jury cases, conduct proceedings in an effective, expeditious and dignified manner, with appropriate control over the scope of cross-examination and the offer of witnesses.

Public respect for the federal judiciary is best enhanced by exacting high standards of judicial competence in the conduct of proceedings and by discouraging an assertion

of power which is not restricted by the usual demands of Due Process and which too often manifests a failure of moral mastery.

## APPENDIX TO OPINION OF MR. JUSTICE FRANKFURTER.[1]

### EXCERPTS FROM THE RECORD OF THE PRINCIPAL CASE, DENNIS *v.* UNITED STATES.

The Court: Well, if you think I am going to conduct an inquiry as to the reasons why everybody is in each one of the seats here you are making a big mistake, because I am not going to do that. There are lots of people here who came for reasons that are sufficient for themselves.

Mr. Gladstein: I understand, but your Honor will certainly permit me to call your Honor's attention at least to the facts that I want to complain about, even though I am told that your Honor is not going to do anything about it. And you will permit me, will you not, your Honor—

The Court: You know, Mr. Gladstein, I don't like that crack. I don't know who told you that I am not going to do anything about this or that. (Pp. 72–73; Jan. 17, 1949.)

* * * * *

Mr. Gladstein: I think Mr. Sacher was referring to the question of the hours that you want to sit today, the

[1] Since the whole certificate of contempt was published as an appendix to the opinion in the Court of Appeals and is readily available, 182 F. 2d 416, 430–453, there is here not reproduced any part of the record which has already been quoted adequately in the specifications of the certificate. Each specification should be examined in connection with this Appendix, at the appropriate point indicated herein. Each specified episode involving contemptuous conduct should be placed in the trial setting as shown by the further excerpts reproduced here from the whole record.

The page references are to the printed record before this Court in *Dennis* v. *United States*, 341 U. S. 494.

time. That is why he asked. I was getting a little hungry myself. And you look a little peaked I think.

The Court: If I felt any stronger than I do right now I would be sick. So don't worry about my looking peaked, I feel all right. (P. 88.)

* * * * *

Mr. Gladstein: . . . Standing behind me here are two men who are attaches of this court, they are bailiffs.

The Court: But they are always there, at every criminal trial.

Mr. Gladstein: Your Honor, you haven't heard me yet. I have no objection, precisely.

The Court: If I seem impatient to you I am sure it is a very misleading impression.

Mr. Gladstein: I will accept that, your Honor, with what I think you intended to convey. (Pp. 146–147.)

* * * * *

The Court: . . . I think you have squeezed all the juice out of that particular orange.

Now, why don't you get on to the merits of your claim that the judges here should not try this issue.

Mr. Gladstein: If you would permit me, your Honor, to carry forward a little bit the allusion that you have just made, which happens to be closely identified with the State from which I come, from which the citrus fruits are a product—

The Court: No Californian ever misses the chance. (Pp. 207–208.)

* * * * *

The Court: If you mean that as applicable to me, I say I don't know anything about it. I don't. I haven't the remotest idea how these juries are got together. I have only been on the bench here as you know a short time.

Mr. Gladstein: How long has it been, your Honor?

The Court: Well, July 1st, 1947, was the great day, as I remember it.

Mr. Gladstein: Well, that is over a year and a half. (P. 212.)

* * * * *

Mr. Gladstein: But what happened about ten years ago was that it was decided to throw that system into the ashcan, so to speak, and to substitute for it a system which is the opposite of democratic, fair, truly representative; and this is what took place, as our affidavits show: instead—well, first of all—

The Court: Now all this time I am thinking, where is the bias? Where is the prejudice? What kind of a judge must you have specially? I am think[ing] about that, and doubtless you have got it in mind.

Mr. Gladstein: I certainly have, your Honor.

The Court: Don't creep up on it too suddenly. (Pp. 238–239.)

* * * * *

Mr. Gladstein: . . . You as a practicing attorney stood before the Supreme Court of the United States and spoke about the necessity of having a democratic jury system in the State of New York.

The Court: And as I understand it the fact that I then fought for a democratic jury system shows now that my mind is so biased that I am not fit to sit here and hear your case? That seems a little inconsistent to me.

Mr. Gladstein: If your Honor please, please don't distort the meaning of what I say, because what I am saying is: the fact that 18 months ago or thereabouts your Honor stood before the Supreme Court demanding that it condemn an illegal, vicious kind of jury system in the State courts, plus the fact that for 18 months your

Honor has sat on this bench in the Federal courts and has seen in operation a system which to the naked eye reveals the kind of discrimination and exclusions that have been taking place and your Honor has done nothing about it. (P. 242.)

* * * * *

The Court: Mr. Dennis has a little suggestion for you there that Mr. Sacher is looking at. I think he means to give it to you.

Mr. Sacher: No. This is a private communication. Thank you.

The Court: I had no idea of desiring to see it, Mr. Sacher.

Mr. Sacher: Oh, I understand that.

The Court: I thought he intended it for Mr. Gladstein and I attempted to do what I thought was a courteous thing in calling his attention to it.

Now, please, don't try to misunderstand things like that. You may assume that when I say things I say them in good faith. I have no desire to do otherwise, and I think you gentlemen will do better to recognize that.

Mr. Sacher: I don't like to get the feeling that the clients are under the surveillance of the Court.

The Court: Well, all right. I am sorry that you take it that way. (P. 244.)

* * * * *

Mr. Gladstein: The key to the difference between what you have just said, your Honor, and what I am contending is a little magic phrase consisting of four words that you slipped into that last statement. I think it was "regardless of the justification"—

The Court: I don't think you ought to say "slipped in" now. I gather you meant that colloquial expression in a nice way.

Mr. Gladstein: Oh yes. Everything I say to the Court is always meant in a nice way, your Honor.

The Court: I know. (P. 247.)

* * * * *

Mr. Sacher: . . . I heard your Honor say a few minutes ago that the witness did not look like a banker.

The Court: No, I said he did not look like a mechanic.

Mr. Sacher: Oh, I beg your pardon. All right.

Now, the point I want to get at is this, that what the decisions of the Supreme Court are concerned with are not the appearances, for I have seen many workers and mechanics who look a darn sight more handsome and more personable and pleasant than a lot of fat bankers.

The Court: Well, we won't go into the question of how good-looking everybody is. We might not come out so well on that.

Mr. Sacher: That may be. (P. 383.)

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(*Conduct involved in Specification II*[2]*—pp. 384–385; Jan. 21, 1949.*)

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Mr. Sacher: Well, I don't think you would have called him if you had anything to do with the trial. You were too good a lawyer to do any such thing.

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[2] Since Specification I charged generally "a wilful, deliberate, and concerted effort to delay and obstruct the trial," Specification II charges the first specific act of contempt in the principal trial. See 182 F. 2d at 431–432. The portions of the trial record reproduced in the specifications of the contempt certificate give, because of their brevity, only a mutilated picture of the trial. The places in the record where the alleged contempts occurred are indicated in order that each incident of contempt may be viewed in relation to the record excerpts set forth here.

The Court: Well, it is quite flattering to have you keep talking about me as a lawyer, and I am glad to hear your comments on the subject as long as they are favorable. And if not I will preserve my equanimity in any event. (P. 399.)

* * * * *

The Court: You can reopen the matter of consideration when I hear from Mr. Isserman who doubtless is about to add something of importance in just a moment.

Mr. Isserman: I object to your Honor's remark. I think it is sarcastic. It doesn't show the respect that this Court should show to counsel. I object to it.

The Court: Well, I intended no disrespect to counsel. I will listen to what you have to say.

Mr. Isserman: I once more object to your Honor's ruling on matters affecting the clients I represent in this proceeding before hearing my position in respect to those matters. (P. 404.)

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Mr. McCabe: . . . Just take, for instance, an employee of the McGraw-Hill Company. The fact that he got a salary somewhat less than $5,000 I do not think would put him in the class of those whose economic outlook or whose economic philosophy would be at variance with that expressed by that of his employer. An employee of the National Association of Manufacturers might very well be drawing a salary which would, under the arbitrary rule which we are just toying with here—I don't say we are setting it up arbitrarily, but we have tried to come around—

The Court: You are certainly toying with it all right.

Mr. McCabe: Well, maybe it will be like my grandchild—when she toys with toys there isn't much left of the toys after about ten minutes.

The Court: Well, I seem to be surviving all right. (Pp. 428–429.)

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The Court: . . . After all this [is] not the trial in chief. This is the preliminary challenge, and the situation is a little bit different. I suppose I should take it under advisement. I do not want to act hastily about it. I must say that my study of this record in this interval has indicated to me, has for the first time put in my mind the thought of a series of concerted and deliberate moves to delay the case. I am exceedingly reluctant to take the view that any lawyer would do that, and even press by this occurrence this morning—

Mr. Sacher: I would like to deny that we have ever done it or that we are doing it now, your Honor.

The Court: I have put that thought from my mind for the present, but I will say that it is a rather difficult situation that has been brought up here by the conduct of counsel. (P. 465.)

* * * * *

Mr. Crockett: . . . I think the Court is aware that my arguments are usually pretty short and to the point, though I must confess they have not been any too convincing to your Honor—

The Court: Yes, much better than Mr. Sacher and Mr. Isserman who have been—well, shall I say, prolix and vociferous and repetitious, but all in good taste, and I have listened, although I must say, as I said a few moments ago, that the thought has finally entered my mind that all this business that has been going on is just a series of wilful and deliberate maneuvers for delay.

Mr. Sacher: I resent that and I want to deny it once again. (Pp. 467–468.)

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Mr. McCabe: Your Honor told us to saw wood the other day.

The Court: Yes.

Mr. McCabe: And it seems to me that the sawdust is getting in somebody's eye. We are sawing wood a little bit too rapidly.

The Court: If you mean by that that you have perhaps got me in an ill humor, you are entirely mistaken, because I feel very pleasant and genial, and I have no desire or no thought of feeling disturbed at all; so if you meant by your comment that my attitude was perhaps changed or different, I think you are mistaken.

Mr. McCabe: I did not infer that at all, your Honor.

The Court: What did you mean?

Mr. McCabe: What I said, that the sawdust was getting in somebody's eyes?

The Court: Yes. Whose eyes were you talking about?

Mr. McCabe: I say the eyes of anybody who is interested in defending a system of selection of jurors which is as we claim it to be. I will say this, your Honor—

The Court: But you did not mean my eyes, I take it, did you? You could either say yes or no. Now which is it?

Mr. McCabe: Well, when sawdust starts flying around I guess it gets in everybody's eyes.

The Court: So you didn't mean me?

Mr. McCabe: No, I will say I did not. I will say this: Your Honor, if I walked into this courtroom and told you that the legs of that chair you are sitting on were cracked and were about to fall, or if I said that this wall had a big crack in it, and that the whole system looked bad—

The Court: It wouldn't scare me.

Mr. McCabe (Continuing): If I said to your Honor that perhaps there were other serious things wrong with this courtroom, just the physical aspects of the courtroom, I think that I am not far off in assuming that your Honor would cause the fullest investigation to be made to see that the physical safety, not of yourself—

The Court: That is where you are making a big, 100 per cent mistake. It would roll off my back like water off a duck, and I would not even look at the legs of the chair. (Pp. 573–574.)

* * * * *

Mr. McCabe: That is not regulating the order of proof, your Honor, when just as it looks, as everybody realizes, that the initial proof absolutely supports our assertion then suddenly we are cut off and shunted on to some other way; that our orderly procedure and expeditious procedure in proving our case is suddenly disrupted by your Honor's ruling. I say it certainly indicates some fear on your Honor's part.

The Court: Well, I have no fear. If you have any impression that I am afraid you may put that out of your mind entirely, because I have not felt any fear, and I can only remember once in my life that I was afraid, and I am not accustomed to be afraid, and I am not afraid now. So you can just drop that subject. If you want to know what that one time was that I was afraid, I will tell you sometime.

Mr. McCabe: Your Honor picks up the word "fear." I would like to get back to the word "bias," then. (P. 582.)

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The Court: You have a curious way of expressing yourself, to say the least.

1 Appendix to Opinion of FRANKFURTER, J., dissenting.

Mr. Sacher: Perhaps that may be so, your Honor, but unfortunately I can express myself in no other way. And I would like, if your Honor would be kind enough to indulge me to refrain from personalities so that I may develop what I regard as a most important argument on this question,—

The Court: You ask me to refrain from personalities?

Mr. Sacher: I think so. You have just accused me—

The Court: For what purpose? I indulged in no personalities.

Mr. Sacher: You said I have a curious way of expressing myself.

The Court: Yes. You said the United States Attorney had confessed his guilt. I considered that—

Mr. Sacher: I did not use those words. I said he made a confession of guilt and I stand by that statement.

The Court: Well, that is no personality. That is a comment on a sort of argument that I think is out of place and not helpful.

Mr. Sacher: All right. (P. 607.)

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The Court: . . . But you have made so many challenges of bias and prejudice and said that every time I ruled against you there is something about it that is abnormal, so I have been disposed to let you go on. But I think the record has indicated an amount of repetition that is utterly unprecedented.

Mr. McCabe: Your Honor, when the demonstration of the bias is repeated the objections to it must [by] necessity be repeated.

The Court: Well, you may, as I said before, you may challenge my bias and prejudice just as often as you think you should.

Mr. McCabe: We shall, your Honor.

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The Court: I take no umbrage at that. But I should think that you had covered that ground pretty well. (Pp. 612–613.)

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The Court: Well, so many things have happened that seem, as I read back over that record, hardly consistent with anything other than a concerted and deliberate and wilful effort to delay. But I have told you that the thought merely occurred to me and I have put it out of my mind for the present. I wouldn't want to have something come along later and have anyone fail to understand that there is this interpretation of what has been going on. I do not say it is the right interpretation; it may well not be. And all I do say is that the thought for the first time came into my mind and I put it out.

So we adjourn now until tomorrow morning at 10.30.

Mr. Sacher: I want to state on the record, however, that I deny what your Honor said.

The Court: You don't need to shout, Mr. Sacher.

Mr. Sacher: No. I resent—

The Court: It is possible to address the Court occasionally without shouting.

Mr. Sacher: Yes. Your Honor in a quiet manner is picking out a point which will result in certain headlines tomorrow morning. For the record I want to make it clear that I have done nothing and will never do anything to delay or hinder the progress of this case. And whatever I or any other counsel in this case have done or has done has been directed solely to the achievement of the end of proving that this jury system is bad.

And I think, your Honor, that there is no justification for closing every day's session with the observation as to what thought was entering your Honor's mind concerning our state of mind. (P. 623.)

* * * * *

The Court: Now a little incident occurred this morning about which I will have no mystery. Due to the numerous communications of one kind or another that have been arriving up at my home my wife came down here this morning. I suppose I should have told her not to, and it is my fault, but she did. And, then, there was a little disturbance here due to a woman who saw the empty seats over on the side where the press have their location and she felt she was entitled to go there and made a little, slight disturbance with the bailiffs. And so my wife sent this note to the police which reads, "Tell Detective Mitchell to guard the Judge at lunch hour." And as the messenger proceeded with the note one of the alert reporters was able to get a hold of the note, and so the rumors started around the building, and goodness knows where else they have gone.

As to the woman who desired to sit on the other side where the empty seats are, I noticed the matter and I sent a little communication of my own to the bailiffs to tell them to leave her alone. I thought she was right. I saw her during the recess hour in my chambers, and I told her that I thought she was right, and that while those members of the press were not occupying the empty seats perhaps it was only reasonable to have the last row at least made available to those who were waiting to get in.

Now, that is all there is to it. There is no mystery. There is no danger. I haven't felt the slightest concern about the communications I have been receiving. And there it is.

I have no notion that any of those communications have been inspired by the defendants or by any of their counsel. I do not feel that I am in any personal danger at all. But if I am wrong, I shall face the risk calmly and I shall do my duty.

Now I think perhaps it is apparent to everyone that the character of the accusations that have been made against me here from day to day and the extravagant charges that have not only been made once or twice but repeatedly and emotionally and loudly may well cause some misguided and poor people or others to get a wrong impression of the administration of justice and of what I am doing. I have no great opinion of myself as an individual. I do have great respect for the office which I hold. I represent here not the rich, not the poor, but all the people and the majesty of the Government of the United States. And I am cognizant of that and I am trying to do the best I can, to be just and to be fair according to my lights. I may make mistakes, I suppose I often do, but I can only do my best.

You may proceed with the trial.

Mr. Sacher: If the Court please, I think we too, both the defendants and defendants' counsel, have received a series of letters with threats of violence against ourselves, our wives and our children. Indeed, when I returned to my home at one o'clock this morning my wife greeted me, not with a note to a detective, but with several letters.

I might in passing say that your Honor may have received crank notes. I am sure that they were not inspired by anything we said or did. And in that connection I may say that so far as the defendants are concerned they have received much more than crank notes. You will recall that in one of the arguments I pointed out—

The Court: I am glad you can tell the difference—

Mr. Sacher: Will your Honor—

The Court: I am glad you can tell the difference between a crank note and others. But I am not disposed to have argument about everything.

Mr. Sacher: I know, your Honor.

The Court: May we not even pass this incident without extended discussion? (Pp. 664–665.)

* * * * *

Mr. Sacher: Mr. Gladstein, now we can't hear you.

The Court: Now (that [*sic*] is a strange accusation, Mr. Gladstein, because your voice is very penetrating and pleasant.

Mr. Sacher: Why, your Honor, I must say, however, that I did not hear Mr. Gladstein. He was speaking so softly.

The Court: I don't doubt it. That is all right.

Mr. Gladstein: Perhaps the newspapers should take note. They have been saying that I am very loud and brash, and so forth, but it does not really matter to me personally, your Honor.

The Court: No, we must not worry about what the newspapers say about it.

Mr. Gladstein: There would be very little to entertain us if we took too seriously what some of them say.

The Court: You know, I have often felt, as I have often expressed myself here, that it is better not to be stuffy. I try not to be.

Mr. Gladstein: All right. (P. 667.)

* * * * *

The Court: Now, Mr. Gladstein, I know all about leading questions, and when the Court in his discretion will allow them, and when he won't. Now you go ahead and lead him as little as necessary.

Mr. Gladstein: I don't have to lead him at all, and I won't, your Honor.

The Court: That is all right. It is just not to get into an unnecessary argument about it. Because I know plenty about leading questions. I have probably tried a few of them myself in my day. (P. 714.)

* * * * *

Mr. Sacher: . . . we shall ask for and insist upon the time necessary to explore those records in order—

The Court: I wish you would not use that expression "insist upon."

Mr. Sacher: That means urging, that is all.

The Court: You know, you use it all the time.

Mr. Sacher: I don't do it all the time. I think the record should indicate that "all the time" to your Honor in this instance means once.

The Court: Perhaps when I used the expression "all the time" I used it in a rhetorical sense. But, anyway, I would like to have you understand that you will insist upon nothing.

Mr. Sacher: Well, we will urge that.

The Court: I will rule what is to be done. (P. 884.)

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Mr. Sacher: I have just one observation to make, your Honor, concerning delay. While speed is a very commendable objective, I think justice is a greater one, and that if it be—

The Court: Well, it is nice to have you remind me of that.

Mr. Sacher: What is that, your Honor?

The Court: I say, it is nice to have you remind me of that. (P. 885.)

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1 Appendix to Opinion of FRANKFURTER, J., dissenting.

Mr. Gladstein: . . . Now it seems to me very plain that Mr. McGohey is here toying with possibilities. This witness or other witnesses—

The Court: Well, he has got some competition in that.

Mr. Gladstein: Well, we are not going to let him toy. We are very serious about this.

The Court: Oh, well, I know.

Mr. Gladstein: We are quite serious.

The Court: You take over the courtroom any time, but I am here running the court, so don't say, as you and Mr. Sacher are apt to do: you insist on this and we are going to do this. You are going to do what I tell you to.

Mr. Gladstein: Well, I am going to remain serious, regardless of what your Honor tells me.

The Court: That is right. (Pp. 931–932.)

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(*Conduct involved in Specification III—pp. 933–934; Feb. 2, 1949.*)

(*Conduct involved in Specification IV—pp. 1034–1038; Feb. 3, 1949.*)

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Mr. Gladstein: . . . Now, although everybody, one would think, who did not prejudge the matter here—

The Court: Well I deny the motion to disqualify me.

Mr. Gladstein: Well, you were anticipating. I wasn't going to make one.

The Court: I am very quick to catch on, and I thought when you said "anybody who does not prejudge," it was just another way of telling me again what you have told me so many times, and your colleagues have told me so many times: that I have prejudged it all; that I am

biased and prejudiced and unfit to sit here. Now, I am familiar with that, and if you think you are going to get me excited saying that over again, you are making a big mistake.

Mr. Gladstein: I wasn't going to say it over again, and if I were it would not be for the purpose of getting you excited. It is true I have a definite mind on the question of whether legally you are disqualified, whether you are biased, but I wasn't going to express it.

The Court: They went all the way up to the United States Supreme Court with it, and I suppose if there was any further you could go, you would do that.

Mr. Gladstein: They didn't pass on your Honor's bias. They did not say you were unbiased—

The Court: They denied the application for certiorari.

Mr. Gladstein: Yes, they refused to hear the question of whether or not you were biased, that is true, but that does not mean, your Honor, that they passed favorably on the contention of the Court. It does not mean, of course, that they held that you were biased, but neither does it mean that they held you were unbiased.

The Court: Well, you don't really need to keep rubbing it in and telling me every day that I am prejudiced, biased, corrupt, and all that sort of thing, because after a man has been called names a certain number of times they have no effect on him any more. (Pp. 1034–1035.)

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(*Conduct involved in Specification V—pp. 1049–1059; Feb. 3, 1949.*)

(*Conduct involved in Specification VI—pp. 1085–1092; Feb. 4, 1949.*)

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The Court: Well, you see, you and your colleagues have apparently adopted a new technique in criminal

cases by which instead of the defendants who are indicted being tried, the Court and all the members of the court are the ones who must suffer the excoriations and accusations of counsel. But I think, perhaps, with patience there will be an end. So you will please let the matter drop there, and Mr. Isserman will proceed with his questions.

Mr. Isserman: I will proceed, your Honor, but I am again constrained on behalf of my clients to object to your Honor's remark characterizing the questioning which I am indulging in, or suggesting that the questioning is a stalling and delaying tactics, and to the description of this challenge to a jury, which under the law we have a right to make on behalf of our clients, as a new technique— (Pp. 1090–1091.)

* * * * *

The Court: Well, perhaps we had better let each one of the counsel for the defendants say a word or two now, because they look as though they desire to state their positions too.

Mr. McCabe, would you like to say something?

Mr. McCabe: I had not intended to say anything, your Honor, but as long as your Honor invites it I would like to express a thought that has been going through my mind for several days: (P. 1091.)

* * * * *

The Court: It might be prejudice, I suppose?

Mr. McCabe: No, it has become clear to me that your Honor is doing the very same thing. Your Honor by constantly referring to our tactics as delaying tactics; by referring to evidence which seems to me to be very clear and precise, as being confusing, and referring to gaps in the testimony—I think that your Honor seems to have in his mind doing the very thing which you, I think un-

justly, indicated that we might be doing. It seems to me that your Honor's words, that constant repetition of our new techniques and delaying tactics, and dragging things out and rambling on, that that is addressed—

The Court: Well, maybe I do ramble a little now and then, but I think that may be the privilege of the Court. (P. 1092.)

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*(Conduct involved in Specification VII—pp. 1134–1141; Feb. 4, 1949.)*

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Mr. Gladstein: Thank you, your Honor.

I have just pulled out a random—something that the clerk in this court does not do when he picks jurors—two—

Mr. McGohey: I move to strike that, your Honor.

The Court: I did not even hear that part. I hope it wasn't anything good. (P. 1569.)

* * * * *

Mr. Isserman: I am sorry, I object to your Honor's remark again. It is wholly uncalled for.

The Court: You may do all the objecting you want, but I am running this court and we are not going to have this interminable delay. (P. 1574.)

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*(Conduct involved in Specification VIII—pp. 1660–1671; Feb. 14, 1949.)*

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The Court: Mr. Sacher, you are becoming positively insolent.

Mr. Sacher: Well, I am not. I am stating—

The Court: Now I won't have it.

Mr. Sacher: I am stating what your Honor seems—

The Court: You have charged me with about everything that a lawyer can charge a court—

Mr. Sacher: I am making no charge—

The Court: You are charging me by this innuendo of some sort of connivance with the United States Attorney, and I just will not have any more of that. (P. 1661.)

* * * * *

The Court: Mr. Gladstein, I hope I am misunderstanding the purpose of that comment. It does not seem to me that you needed to do it. It seemed to have just one of those little fishhooks in that you so often sprinkle in your conversation, and I suggest that you omit them, if possible.

Now, you have been allowed every reasonable latitude here, and it is my intention to give you every reasonable latitude to bring out whatever you want to bring out—

Mr. Gladstein: Very well.

The Court (Continuing): But I cannot continue to do it indefinitely, and if I get the impression that sarcastic comments and criticisms of the Court by innuendoes are being dropped in here and there, it is perhaps going to affect my discretion somewhat in the rulings I make on the extent of your cross-examination. (Pp. 1813–1814.)

* * * * *

The Court: Do you wish to make a motion that I disqualify myself for prejudice, as you have already made?

Mr. Crockett: I want to reserve the right to make such a motion, your Honor.

The Court: You have made it, I suppose, you and your colleagues, I don't know how many times, and I

think we all understand that you charge I am biased and prejudiced and corrupt and everything else. (P. 2094.)

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(*Conduct involved in Specification IX—p. 2097; Feb. 18, 1949.*)

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The Court: Of course, you abandoned all thought of that, you and your colleagues, long ago here because you charged me again and again with corruption, bias, prejudice and having something to do with the system that I had nothing to do with. So I understand thoroughly what you think about me. Now, I can't help that. I must do my duty as best I can. So if you want to go on and call me some more names, go ahead and do it. It may come within part of your duty as you see it, and certainly it would be relevant to the case, and I am not going to stop you, so go right ahead and call me anything you want. (P. 2098.)

* * * * *

Mr. Gladstein: . . . That the Court is not concerned with the consumption of time is evident from the fact that during the past 35 or 40 or 45 minutes, perhaps longer, as each of the four attorneys who preceded me attempted to present his statement of objections, the Court constantly and frequently interrupted for the purpose of—

The Court: If you expect I am going to sit here like a bump on a log while they make statements that are absolutely not so, I can tell you now I won't do it.

Mr. Gladstein: I desire—

The Court: There is no rule I ever heard of that a judge is supposed to sit silent while the attorneys flay him.

Mr. Gladstein: I desire to make an orderly, logical presentation of what I have to say,—

The Court: Go ahead and do it. (P. 2099.)

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Mr. Gladstein: Your Honor, I would like to finish my statement for the record. I wish the record to show my objection to the tone and the manner in which the Court delivered that command as unbecoming a Court, and I object to it. I also—

The Court: There is nothing unbecoming about it. I am through being fooled with in this case.

Mr. Gladstein: Now, if your Honor please—

The Court: If you don't like it you can lump it. Put that down.

Mr. Isserman: I object to your Honor's remark and characterization of the conduct of counsel, and I ask that your Honor strike that remark.

The Court: Oh yes, yes, I have heard all that. Now I am sick of it.

Mr. Gladstein: Now I wish to add to my objection the unseemly remark of the Court saying that if we do not like it we could lump it. I object to it and ask the Court to withdraw and strike that statement from the record.

The Court: Yes, I refuse—I deny the motion. (Pp. 2276–2277.)

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(*Conduct involved in Specification X—pp. 2383–2385; Feb. 28, 1949.*)

(*Conduct involved in Specification XI—p. 2404; Feb. 28, 1949.*)

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Mr. McGohey: Well, it is a dishonest question, your Honor, and that is the basis of the objection to it.

The Court: It is in Mr. Gladstein's best style. (P. 2490.)

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(*Conduct involved in Specification XII—pp. 2528–2529; March 1, 1949.*)

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Mr. Gladstein: . . . I desire the right, and I request the Court to grant it, for us to have an inventory made of the contents of those envelopes before they are taken from us permanently. We will also ask leave at times, suitable to the Court, to make copies of those—

The Court: Do you realize, Mr. Gladstein, you are insinuating that I have possession of those exhibits and will destroy some of them?

Mr. Gladstein: I make no such insinuation. (P. 2556.)

* * * * *

Mr. Sacher: . . . There is really nothing funny about this.

The Court: I was just thinking it was only a little while ago you were talking about Judge Knox's book in a rather different way. But you can do that. That is all right.

Mr. Sacher: But this is a statement of fact.

The Court: I am not going to stop smiling when I see some occasion to smile just because Mr. Sacher does not like it.

Mr. Sacher: It is not the smile. I welcome smiles. I indulge in them a good deal, but I don't think you ought to treat this argument with levity because I think it is an important question. (Pp. 2640–2641.)

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The Court: . . . We will then, by the usual process of selecting names out of the wheel, put 12 jurors in the

jury box, but the questions will be not only to them but to the others who may be sitting in the courtroom. Otherwise the repetition of the questions will be such as to utterly wear me out, or anyone else under the circumstances, and be utterly unnecessary. (P. 2665.)

* * * * *

The Court: Well you know, it seems so easy for the Court to send a letter. My pre-occupations now are such that I simply could not do it. It is hard for people to realize the burden that I have been carrying here and the many details of one kind or another that I have to take care of, and I don't think it would be proper for me to do it anyway, but the main question is whether there would be some special hardship to you. (P. 2707.)

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Mr. McCabe: I just want to give you the citation. It is Farnsworth vs. Sanford in [115] Fed. (2d) 375.

The Court: Thank you. Let me glance at this, but I can tell you all that I am not going to dash off any determination on some question of law by glancing at a case or two on the spur of the moment. I don't like to see judges do that and I don't do it myself. I have tried here to give every question that comes up careful consideration, and that has been one of the things that has been wearing me out here because I have been getting propositions of law in rather close proximity to one another. (P. 3121.)

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Mr. Sacher: It is very strange that on the occasions when you scratched your head and pulled your ear, we were speaking and not Mr. McGohey.

The Court: Maybe you were not watching me.

Mr. Sacher: I just want to say that your conduct at all times—you see, you are doing it again.

The Court: I know, you are going to say I am corrupt and I am disqualified. You called me all those things before. Now you can run the catalogue again and I will listen patiently. Make it just as bad as you can.

Mr. Sacher: Your Honor, I am certainly aware of the fact that if I bear false witness against your Honor in anything I have said that I am subject to disciplinary measures and I am not inviting disciplinary measures by making false statements.

The Court: You mean that I will take disciplinary measures against you because you said I scratched my head? Don't be absurd, Mr. Sacher. Don't be absurd.

Mr. Sacher: The point I am making is that in every available means your Honor is conveying to the jury your lack of sympathy if not hostility to the defendants, their counsel's presentation of the case, and in these circumstances I want certainly to note on behalf of my clients a vigorous objection to your Honor's conduct and I wish to join Mr. Gladstein in the motion to declare a mistrial by the withdrawal of a juror.

The Court: Motion denied. (Pp. 3316–3317.)

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Mr. Gladstein: . . . There is nothing unusual about that request and we make it, and we ask the Court to really give some consideration to it.

The Court: You know, that word "really," there, that is the way you do. You put that little sly insinuation in, as much as to say that heretofore I haven't really given the matter any consideration. (P. 3332.)

* * * * *

Mr. Gladstein: I move that the remarks you have just made concerning the enjoyment—

The Court: I see them smiling, sneering and snickering there. The jury undoubtedly sees it as well.

Mr. Gladstein: Just a minute. If your Honor please, I assign those remarks as prejudicial misconduct on the part of the Court. I assign as misconduct your refusal to permit me to make an objection.

The Court: When did I refuse?

Mr. Gladstein: By your interruption at the present time and by pyramiding the misconduct which I am assigning. I ask the Court to instruct the jury—

The Court: You are now told that you may go ahead and make your remarks in extenso. (P. 3769.)

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(*Conduct involved in Specification XIII—pp. 3942–3943; April 4, 1949.*)

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Mr. Gladstein: Your Honor, I am allowed, am I not, to assign as misconduct remarks of the Court that, as a lawyer, I think constitute misconduct?

The Court: You may attack me all you want.

Mr. Gladstein: That is not what I said.

The Court: You may claim that I have been guilty of judicial misconduct of every name, nature and description, that is your right—and I shall take no offense at it.

Mr. Gladstein: I object to the Court's remarks and assign the Court's last remark as misconduct.

The Court: Very well. (P. 4028.)

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994084 O—52——9

(*Conduct involved in Specification XIV—pp. 4058–4059; April 5, 1949.*)

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Mr. Crockett: I must object to that statement, your Honor, as suggesting to Mr. Gordon how he can get what he seems to be troubled about getting out of this witness.

The Court: Mr. Crockett, it is the function of the Court here to administer justice which I am trying to do to the best of my ability. Now you must know that such comment as you just made is not right.

Mr. Crockett: But I think the Court appreciates the fact—

The Court: Now I have been standing for all kinds of picking on me by the lawyers for the defense here and I am not going to raise any great issue about this one, but I really—I really think if it gets to a point where the Judge may not indicate what he thinks is the proper thing to do, it has reached a strange and pitiful state of affairs. (P. 4177.)

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(*Conduct involved in Specification XV—pp. 4228–4229; April 7, 1949.*)

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Mr. Gladstein: May I call your Honor's attention to the fact that because you just took umbrage at an objection which Mr. Isserman made as a lawyer—

The Court: I took no umbrage.

Mr. Gladstein: —you then reacted—

The Court: I suppose you begin—

Mr. Gladstein: May I finish, your Honor?

The Court: —to talk about my inflection of voice—

Mr. Gladstein: No, I am not talking about your inflection.

The Court: But I am not taking any umbrage at all.

Mr. Gladstein: But, your Honor—

The Court: But I am not going to have a long-drawn-out discussion of something that is perfectly clear to me. (P. 4403.)

* * * * *

Mr. Gladstein: I assign your Honor's handling of my objection as misconduct.

The Court: I am getting used to these charges of misconduct. I don't think there has ever been a case where so many charges of misconduct have been made with so little foundation. (P. 4622.)

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(*Conduct involved in Specification XVI—pp. 4787–4788; April 19, 1949.*)

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Mr. Gladstein: I ask your Honor to strike that evidence, and I will also assign, as I did before, your Honor's statement as misconduct because it gives the impression that there is some possible relationship, which there cannot be, between this kind of statement and the charges in the case.

The Court: How can I rule that the evidence is inadmissible without necessarily giving the inference that it has a bearing on the case. And every time a Judge rules that way, the doctrine that you gentlemen have developed here is that that is judicial misconduct. Now I can't stop lawyers from calling me names and saying I am guilty of judicial misconduct and that I am prejudiced,

and this, that and the other thing, and you can keep that up until the cows come home; that is all right, and I take no umbrage at it. (P. 4799.)

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The Court: Why all of the defendants are smiling broadly.

Defendant Gates: Why certainly we are.

Defendant Potash: Certainly we are.

The Court: We are getting back to that country club atmosphere again. Well, there isn't going to be any country club atmosphere in my court.

Mr. Gladstein: When a man hears something that is ludicrous and absurd to the extreme I suppose he is permitted the human reaction of a smile of contempt.

The Court: That to me is in the same line as some of the comments we have had in the past. It may seem very funny to the defendants. They seem to enjoy it, but I don't think it is, and their laughing is not going to have any effect. (P. 4805.)

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Mr. Gladstein: That is what we get. Your Honor asked why people are smiling, but there is an irony to it.

The Court: I had occasion to put a stop to some of that before. I am familiar with the practice in criminal cases of trying to laugh something off, and I am not going to have anything but order in my court. When the defendants get hilarious and start laughing and smiling and that sort of thing it is going to be stopped. You can put that in your book. (*Ibid.*)

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(*Conduct involved in Specification XVII—p. 4807; April 22, 1949.*)

1 Appendix to Opinion of FRANKFURTER, J., dissenting.

*(Conduct involved in Specification XVIII—pp. 4829–4834, 4860–4861; April 22, 1949.)*

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Mr. Isserman: If the Court please, I would like to ask the Court to take judicial notice of the fact that the man Haym Solomon is dead some several years. He was a figure in the American Revolution.

The Court: This is the first time I ever have become acquainted with the gentleman. I don't see what that has got to do with it. You Communists have a way of taking all kinds of names.

Mr. Sacher: I object to that remark and ask your Honor to strike that remark and to direct the jury to disregard it.

The Court: I will deny the motion.

Mr. Gladstein: I wish to say that the remark was intended to be derogatory to the defendants and it couldn't have been intended any other way. I object to it.

The Court: You have done a lot of—

Mr. Gladstein: I would like an objection rather than an invitation to engage in repartee.

The Court: What is the objection that you want me to rule on?

Mr. Gladstein: The objection is that your Honor made a remark which is inappropriate, improper for a Judge sitting in a trial to make because it was intended to convey some kind of slur against the defendants.

The Court: Well, you see it is the old story. Mr. Isserman gets up and has his say and if I remain quiet and let you spread eagle all over the place everything is fine. But the minute I say something it is judicial misconduct. I thought the statement I made was well borne out by the

record, you have objected to it, and there it is. Now that's that. (Pp. 4956–4957.)

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(*Conduct involved in Specification XIX—pp. 4968–4970; April 25, 1949.*)

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Mr. Gladstein: Your Honor, may I correct one statement that I think the Court made inadvertently?

The Court: You may correct any statement that you made. I think you had better leave me alone for the time being. (P. 4970.)

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The Court: Yes, I am now proceeding to read.

Mr. Crockett: I am very glad to notice that, your Honor.

The Court: What do you mean by that, Mr. Crockett?

Mr. Crockett: I take it you said it for my benefit. You looked directly at me and I wanted you to know that I had heard it.

The Court: Well, I did not look directly at you and I did not mean that for you but for all of the counsel for the defendants, who seem to be sedulously watching and clocking the time I use looking at papers and things of that kind.

Incidentally, I consider that an impertinence.

It may be assumed, when I am looking at papers, and I rule on them, that I read them, without having counsel make remarks of that character. (Pp. 5132–5133.)

* * * * *

Mr. Gordon: Mr. Sacher thinks that this is very funny.

Mr. Sacher: I do.

The Court: He is a great fellow. There is no question he can give more indication of what he thinks about by tittering and laughing and giggling.

Mr. Sacher: I move that that be stricken on the ground it is utterly unwarranted and not founded on the record and solely as a diversion.

The Court: I take it that that is intended to be another imputation on my motives, Mr. Sacher. You are piling up quite a record for yourself in this case. (P. 5256.)

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(*Conduct involved in Specification XX—p. 5302; May 2, 1949.*)

(*Conduct involved in Specification XXI—p. 5526; May 4, 1949.*)

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Mr. Gladstein: The statement that your Honor made and the implication and innuendo that it carried.

The Court: I haven't the remotest idea what you are talking about.

Mr. Gladstein: I will be very happy to tell you.

The Court: Go ahead.

Mr. Gladstein: One of the attorneys rose to ask a question of the Court and your Honor distorted that question by asking another question, the purpose of which was to convey an implication that the question of the attorney was improper, that the attorney was indeed impliedly stating something that reflected on the Court's motives and the Court seized that opportunity to make that kind of innuendo.

The Court: Pretty ingenious.

Mr. Gladstein: It was; but not mine.

The Court: You are trying to throw some more imputations on my motives and showing what I thought in the first place was evidently not well justified. (P. 5700.)

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Mr. Gladstein: Your Honor, my assignment of misconduct was at the remarks of the Court, and I therefore submit it was improper for the Court in making—in giving any instruction to the jury on that subject, to do so in the manner that your Honor just did, and I assign therefore your remarks as misconduct.

The Court: Well, I must be very bad, all these misconducts that you have charged, and I must say it is very sad. (P. 5794.)

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The Court: No, you may not have them marked. They may be submitted at some later time if you desire, but I am not going to have them submitted now for publicity purposes.

Mr. Sacher: I object to that statement. These are not put in for publicity purposes. This is put in to protect the rights of the defendants. I think that is an improper remark.

The Court: That can all be done without having all this in the record now. That is my ruling for the present. Later they may be properly identified. I have had experience with a lot of prior things that surprised me.

Mr. Sacher: I object to that remark.

The Court: You may object your head off.

Mr. Sacher: I object to that one too. It is highly prejudicial to the interests of all the defendants and I

think it is not observant of the due decorum of a courtroom to make these references, your Honor.

The Court: Yes, that is all right. (P. 6116.)

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Mr. Sacher: I object to this, your Honor—

The Court: Overruled. Mr. Sacher, I will not hear from you further.

Mr. Sacher: —unless the time and place are fixed, your Honor.

The Court: Overruled. You needn't smile and sneer at me that way either.

Mr. Sacher: I wish to state that I did not sneer or smile.

The Court: I am not going to have any more of that than I can help, I will tell you that. (P. 6118.)

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Defendant Dennis: Is your Honor trying to intimidate the defense and counsel for the defense?

The Court: I am afraid I am not very good at intimidation, but I have had a lot of it tried on me in this case. (P. 6130.)

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(*Conduct involved in Specification XXII—pp. 6262–6268; May 19, 1949.*)

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Defendant Dennis: Yes. I would like to present my point of view here.

The Court: When you begin talking about a mockery of justice and all that, you know, you cannot expect me to sit here like a bump on a log and hear you call me names without saying anything. I don't like to do that.

You go ahead now and call me some more names. (P. 6264.)

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Mr. Gladstein: . . . And I would say that your Honor should consider in determining the application of the law that Mr. Crockett has cited to this question the statement that this Court made in the course of this trial on this very question. Unwittingly your Honor has perhaps made a singular contribution to jurisprudence.

The Court: Thank you for that "unwittingly." You really are something, Mr. Gladstein. (P. 6331.)

* * * * *

The Court: Mr. Sacher, I have been in a great many criminal cases. I have never been in one—and I have been in many that were very important, too—where so much time was taken by counsel on arguments on a motion to dismiss at the close of the Government's case—never one that even approximated the time taken here. Of course, if you would assume, as you gentlemen all appear to, that the Judge just sits as an automaton and does not hear all this, or notice anything, or study the matter at all, or look up any law, and that then he comes to the close of the Government's case wholly uninformed as to the law and as to the facts, then perhaps further argument might be needed, but I have given this case the closest attention; I have studied it from early morning until late at night. I have studied every authority I could lay my hands on, and I feel that the amount of argument that I have permitted here has been more than adequate.

Mr. Sacher: May I say this to your Honor, that I think that your Honor's statements simply mean that advocacy no longer has a place in our courts.

1 Appendix to Opinion of FRANKFURTER, J., dissenting.

The Court: Well, you have told me that, and Mr. Gladstein in his pleasant way has made it even more plain; but, of course, I know what is done in cases generally. When the Judge feels that he doesn't require any more argument he says so, and counsel ordinarily acquiesce. In this case, of course, it is different—

Mr. Sacher: I should like—

The Court: But I have to do the best I can to keep things going as well as I can, with making rulings that I deem proper ones, and I don't intend to be blackjacked by any form or method into doing anything that I don't think is right. (Pp. 6343–6344.)

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(*Conduct involved in Specification XXIII—pp. 6401–6402; May 24, 1949.*)

(*Conduct involved in Specification XXIV—pp. 6520–6522; May 25, 1949.*)

(*Conduct involved in Specification XXV—p. 6565; May 26, 1949.*)

(*Conduct involved in Specification XXVI—p. 6761; June 2, 1949.*)

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Mr. Sacher: May I point out, your Honor, that I have used the exact words of a question that you yourself put to the witness Budenz?

Mr. Gladstein: If the Court doesn't desire to answer Mr. Sacher's question I would like to ask the Court a question. Is it to be the rule, your Honor, that the jury is to hear only from the Government witnesses as to what they understood documents or teachings to mean, or are the defendants to be allowed to give their state of mind, their beliefs and their intentions?

The Court: I think I see what you are up to. You have had a good rest, and you are right back here because of that.

Mr. Gladstein: I assign those remarks as improper, unwarranted and misconduct.

The Court: That is all right. (P. 6765.)

* * * * *

The Court: I see you came back after a long rest determined to be provocative.

Mr. Gladstein: I had no rest. I was working on this case.

The Court: You can be just as provocative, you can be just as unruly as you choose. You know, you have tried it so often and found that it is unavailing. Now go ahead and do as you like. (P. 6791.)

* * * * *

Mr. Gladstein: That is objected to.

The Court: Object away. There is no jury present.

Mr. Gladstein: I assign that as judicial misconduct. I object very seriously and I assign it as prejudice and bias of the Court.

The Court: You did refuse to answer questions when I put them to you and your colleagues again and again. What is the use of making out you didn't do it?

Mr. Gladstein: And I assign those remarks as evidence of the prejudice of the Court.

The Court: You hear your own voice and you think because you say something that makes it so. You have been doing it here for months. Now go ahead, Mr. Crockett. Let's see what the rest of your argument is. (Pp. 6815–6816.)

* * * * *

1 Appendix to Opinion of FRANKFURTER, J., dissenting.

(*Conduct involved in Specification XXVII—pp. 6845–6847; June 3, 1949.*)

* * * * *

Mr. McCabe: . . . I say that the reason counsel—I am speaking for myself now—the reason that I have perhaps not made similar utterances is simply because of my greater training to restrain myself under great provocation.

The Court: Well, you have been impudent enough to me on numerous occasions, and were it not for the fact that I have determined that this trial shall not be disrupted by such things I should have taken action against you and against each of your colleagues long before this, but I shall not do it. I shall leave that to the proper authorities to take care of in due course, and there it shall rest, but you need be under no misapprehension; I have been quite fully cognizant of your contemptuous conduct and your impudence.

Defendant Winter: Your Honor, may I—

Mr. McCabe: I deny the imputation of impudence or misconduct. I am perfectly willing to answer to any proper body for any actions of mine in this courtroom or out.

The Court: Do you remember, Mr. McCabe, the date when you accused me of doing certain things just so that the reporters could meet the deadline for the press? Do you remember that occasion?

Mr. McCabe: Yes, I recall it quite well.

The Court: You thought what you said then was entirely proper, no doubt.

Mr. McCabe: I thought it was accurate.

The Court: Well, yes, I thought it was contemptuous. Now I just mention that so that you may not suppose that I am not aware of the precise incidents that I speak of. (Pp. 6848–6849.)

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*(Conduct involved in Specification XXVIII—pp. 6936–6937; June 7, 1949.)*

* * * * *

Mr. Sacher: I am offended on these constant aspersions on the veracity of representations that I make. I am an officer of this court and I resent these—

The Court: There was an instance when you deliberately lied to me when they were passing these press releases. You said that they were not and you were caught red-handed.[3]

Mr. Sacher: That is the most offensive charge that can be made against an officer of the court. Your Honor knew that that was happening in the back part of the courtroom and I was unable to see that. That is one of the most offensive things you can do to a lawyer. What has a lawyer got but his honor.

The Court: That is the first thing you did and you were caught red-handed.

Mr. Sacher: That is the most detestable thing I ever heard from a judge. I resent that and I urge that it be expunged from the record.

The Court: You asked me why I wouldn't take your word for anything and I told you. I might enumerate other incidents were I so inclined. You can get just as violent as you want; the fact is I do not take your word for anything.

Mr. Sacher: I will defend my honor as a member of the bar against your Honor or anybody else. I will not accept a denunciation that I am a liar. When the time comes that I don't have the mental capacity to defend

[3] The incident referred to by the judge—reported at pages 4228–4229 of the record—was the basis for his Specification XV. The conviction of Sacher on that specification was unanimously reversed by the Court of Appeals because that court did not think it was sufficiently clear "that Sacher was attempting to mislead the court." 182 F. 2d 416, 424–425.

my clients on any other basis than lying I will resign from the bar. I think an idiot resorts to lying. I don't have to do it.

The Court: You did it.

We better let these little amenities go. I can see from your belligerent manner if you thought you could, you might physically come up to the bench and physically attack me. I know your manner, and it doesn't frighten me in the slightest degree. Let's get back to what we were doing. (P. 7029.)

* * * * *

The Court: I have a very definite opinion of you, too, Mr. Crockett.

Mr. Crockett: But I am not speaking about Mr. Crockett.

The Court: But I shall not express it because I see no occasion to do it. I should not have done it to Mr. Sacher, had he not asked me.

Mr. Crockett: I am not speaking about Mr. Crockett, and I am fully aware that you probably do have a very definite opinion as to Mr. Crockett.

The Court: Why, I have never been so insulted and baited, nor have I ever heard of any other judge being so insulted and baited, during the trial as I have by you lawyers representing the defendants here in this case from the 17th of January on, and I will make no bones about it. That is what has been going on, and I have tolerated it because of the reasons I have indicated, but make no misunderstanding as to what I think about it. (Pp. 7030–7031.)

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(*Conduct involved in Specification XXIX—pp. 7086–7087; June 9, 1949.*)

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The Court: I see Mr. Sacher smiling.

Mr. Sacher: Your Honor takes awfully good notice about my facial expressions, but when Mr. Gladstein spoke about Mr. Gordon jumping up like a poppinjay you saw nothing.

The Court: Well, you did seem pleased. Now you seem different.

Mr. Sacher: We are under surveillance but you never see anything that the prosecution does.

The Court: That is what you say. It may be because there is nothing done by the prosecution to make it necessary for comment.

I told you some little time ago that I wasn't going to permit you or the other lawyers to get away with anything while I was presiding here and I shall not. (P. 7094.)

* * * * *

The Court: I wish you would stop talking about my nodding my head, scratching my head and pulling my ears. Why don't you leave that all out? What good does that do.

Mr. Isserman: Well, whether your Honor—

Mr. Crockett: Pardon me one minute. I think it is very important because there are some things that are not made a matter of record on the Court—

The Court: You haven't missed any of them.

Mr. Crockett: —so far as the transcript is concerned. Very frequently I notice in the course of testimony your Honor makes frequent glances over toward the jury or some facial expression that gives the impression, to me at least, that the Court—

The Court: Well, it is funny—

Mr. Crockett: Pardon me. I think that whenever it is so obvious, as it was a while ago, some mention of it should be made so that it will be carried in the record.

The Court: If there is something about my winking at the jury or something of that kind, I am surprised that you did not mention it at the time.

Mr. Crockett: No, I have not noticed a winking yet. If I had I would have mentioned it.

The Court: Well, there isn't much that you have missed, but you may just as well go ahead and get it all down and out of your system. I deny that I have ever done anything of the kind. I wouldn't stoop to such a thing, and I do not see how you lawyers have the effrontery to keep saying so. (Pp. 7269–7270.)

* * * * *

Mr. Gladstein: Now your Honor has said that if this exhibit were received it would be unprecedented. Now first of all I think that that wouldn't be an obstacle because a number of unprecedented things have already occurred commencing with the returning of the indictment.

The Court: Ha ha, you know I expected you were going to do that.

Mr. Gladstein: I can't overlook the opportunity nor the necessity to reply to your Honor.

The Court: All right.

Mr. Gladstein: This is an unprecedented case. It presents unprecedented issues. It has been handled in an unprecedented way.

The Court: I'll say it has. (P. 7670.)

* * * * *

Mr. Gladstein: May I say one word?

The Court: If you ever did that, Mr. Gladstein, I think I would drop dead.

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Mr. Gladstein: When I say one word, I mean it in a lawyer's sense.

The Court: All right. (P. 7676.)

* * * * *

The Court: Well, you accuse me of being an old tyrant and everything under the sun, accuse me of judicial misconduct of various kinds, and I take that in good temper, and you speak about not having a chance to prove your case. You have had ample chance to prove your case and anybody who reads this record can see that you have had. So there is no need of your saying how I cut you out and how I won't take the necessary time. I am going to take the necessary time but I am going to be the one to decide what is necessary. (P. 7929.)

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(*Conduct involved in Specification XXX—p. 8045; June 30, 1949.*)

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The Court: Mr. Sacher, you cannot laugh these things off.

Mr. Sacher: I am not laughing anything off.

The Court: You must have laughed at something, and it is very offensive to me.

Mr. Sacher: It is so obviously unrelated to the case, I cannot imagine why it is being asked.

The Court: Well, I can imagine, and I imagine there are others who can too, and I think, perhaps, that is the reason you are laughing—

Mr. Sacher: No, that is not the reason at all.

The Court: —laughing it off.

Mr. Sacher: That is not the reason I am laughing.

The Court: You should stop.

Mr. Sacher: And I should say that I haven't been laughing.

The Court: You should have thought of that first. (P. 9167.)

* * * * *

Mr. Sacher: It used to be done to me on cross-examination.

The Court: What used to be done to you?

Mr. Sacher: This business of pointing out that a question was not in the precise words of the preceding question.

The Court: I recall nothing of that kind. I take it that is another one of your offensive comments attempting to make it appear that I am partial to the Government— (P. 9185.)

* * * * *

Mr. Sacher: But it is contradictory. It speaks of a rule and it speaks of "sometimes." Now which is it? Is it sometimes or is it a general rule?

Mr. McGohey: I will withdraw the question and reframe it, your Honor, so that we can save the argument and get on.

The Court: I wish to state on the record that I am physically and mentally incapable of going through very much more of this wrangling and argument and I shall have to do something about it if it is continued and counsel refuse to obey my admonition. It is more than any human being can stand. (P. 9220.)

* * * * *

Mr. Isserman: If the Court please, may I be heard for a moment?

The Court: I suppose my mentioning my state of fatigue has merely served as a spur to additional argument this morning. (P. 9224.)

* * * * *

Defendant Dennis: . . . In view of the biased and prejudicial rulings, restricting the—

The Court: You mean bias of mine?

Defendant Dennis: Biased, as I understood them, your Honor.

The Court: I say, but you mean bias by me? Do you say that?

Defendant Dennis: On the part of the Court.

The Court: That is what I thought. I thought it might be well to have it clear what you claimed. (P. 9344.)

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(*Conduct involved in Specification XXXI—pp. 9376–9377, 9403–9405; Aug. 1, 1949.*)

(*Conduct involved in Specification XXXII—pp. 9533–9537, 9541–9543; Aug. 3, 1949.*)

* * * * *

Mr. Sacher: . . . I don't want to appeal to you on the basis of serving Mr. Isserman's comfort or Mr. Gladstein's or Mr. Crockett's—

The Court: Or that golf player, Mr. McCabe.

Mr. Sacher: Well, he is not a golf player. I think you do him an injustice.

The Court: If he hadn't been playing golf for about a week when I saw him the other day, I miss my guess.

Mr. Sacher: No. I am sure if you are not a golf enthusiast then you are doing him an injustice; if you are, then you are just envious.

The Court: Well, to tell you the honest truth, that is just putting the finger right on it. (P. 9688.)

* * * * *

The Court: You see, I have made certain rulings in the last few days which I felt the circumstances compelled me to make and which have led to the rulings that I am now making. I am determined to survive this case.

Mr. Sacher: Well, no one has any purpose that you shouldn't, your Honor.

The Court: And it is very true that there has been an evolution in my rulings, and necessarily so, and although all the defense, including some of the defendants and all of the lawyers are calling me all kinds of names, I was trying, according to my lights, to be extremely liberal, and I am quite sure that the record will show that I was. I then found that a lot of these matters, such as the one you speak of now, simply had to be cut out. They have no bearing on the case, and so I have had to change the character of my rulings on the basis of preventing cumulative evidence and on the basis generally of having a power that must exist to terminate a case within bounds, such as to be consistent with the maintenance of the health of the jurors and the Judge and everybody concerned. (P. 9689.)

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(*Conduct involved in Specification XXXIII—p. 9731; Aug. 5, 1949.*)

(*Conduct involved in Specification XXXIV—pp. 9886–9887; Aug. 10, 1949.*)

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Mr. Crockett: I object, your Honor, unless Mr. Gordon is specifying some particular classic by some particular author.

The Court: I think he will get around to it in a minute. Overruled.

Mr. Crockett: I thought we were not having these general questions, though.

The Court: Well, you see, I get the import of what you say. You are just trying to make it appear, perhaps for the benefit of the spectators, that I ruled one way this morning as to your general questions and that I am so prejudiced and biased that I ruled just the opposite on similar questions put by Mr. Gordon. Now, you know there is nothing in that. These questions are put on cross-examination here and they are perfectly proper, and I suggest that those little ironical insinuations be omitted. (P. 10228.)

* * * * *

Mr. Gladstein: I object to your Honor's question.

The Court: Overruled.

Mr. Gladstein: Also to the manner in which your Honor asked the question.

The Court: There is nothing about the manner.

Mr. Gladstein: And the gesture that accompanied it.

The Court: I raised my hand and you criticized me a number of times and I see no basis for such criticisms. I am going to get at this—

Mr. Gladstein: Naturally your Honor sees no basis for criticism but an attorney who represents and defends clients may have a different view.

The Court: What I object to is false statements of the things that are said to be done by me and not done by me. That is what I object to and you and your colleagues have filled this record with statements of things I am supposed to have done and I never did. Every time

you start that I am going to see the record is kept straight. (Pp. 10718–10719.)

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(*Conduct involved in Specification XXXV—p. 10748; Aug. 26, 1949.*)

(*Conduct involved in Specification XXXVI—pp. 10855–10856; Aug. 29, 1949.*)

(*Conduct involved in Specification XXXVII—p. 11213; Sept. 9, 1949.*)

(*Conduct involved in Specification XXXVIII—pp. 11418–11421; Sept. 14, 1949.*)

(*Conduct involved in Specification XXXIX—p. 11432; Sept. 14, 1949.*)

(*Conduct involved in Specification XL—pp. 12064–12065; Oct. 4, 1949.*)[4]

MR. JUSTICE DOUGLAS, dissenting.

I agree with MR. JUSTICE FRANKFURTER that one who reads this record will have difficulty in determining whether members of the bar conspired to drive a judge from the bench or whether the judge used the authority of the bench to whipsaw the lawyers, to taunt and tempt them, and to create for himself the role of the persecuted. I have reluctantly concluded that neither is blameless, that there is fault on each side, that we have here the spectacle of the bench and the bar using the courtroom for an unseemly demonstration of garrulous discussion and of ill will and hot tempers.

I therefore agree with MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER that this is the classic case where the trial for contempt should be held before another judge. I also agree with MR. JUSTICE BLACK that petitioners were entitled by the Constitution to a trial by jury.

[4] The judgments of contempt on all specifications were filed on October 14, 1949.

# LILLY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 158. Argued December 3, 1951.—Decided March 10, 1952.

Petitioners were engaged in the optical business in North Carolina and Virginia in 1943 and 1944. Pursuant to agreements reflecting an established and widespread practice in that industry in those localities, they paid to the respective doctors who prescribed the eyeglasses which they sold one-third of the retail sales price received for the glasses. *Held:*

1. Such payments were deductible by petitioners as "ordinary and necessary" business expenses under § 23 (a) (1) (A) of the Internal Revenue Code. Pp. 91–94.

2. Disallowance of the deductions on the ground that the payments violated or frustrated "public policy" was unwarranted, since in 1943 and 1944 there was no governmentally declared public policy, national or state, proscribing such payments. *Textile Mills Corp.* v. *Commissioner*, 314 U. S. 326, distinguished; *Commissioner* v. *Heininger*, 320 U. S. 467, followed. Pp. 94–97.

188 F. 2d 269, reversed.

The Commissioner's determination of a deficiency in petitioners' income tax was sustained by the Tax Court. 14 T. C. 1066. The Court of Appeals affirmed. 188 F. 2d 269. This Court granted certiorari. 342 U. S. 808. *Reversed and remanded,* p. 98.

*Randolph E. Paul* argued the cause for petitioners. With him on the brief was *Louis Eisenstein.*

*Solicitor General Perlman* argued the cause for respondent. With him on the brief were *Acting Assistant Attorney General Slack, James L. Morrisson* and *I. Henry Kutz.*

MR. JUSTICE BURTON delivered the opinion of the Court.

Petitioners, Thomas B. Lilly and Helen W. Lilly, his wife, were engaged in the optical business in North Carolina and Virginia in 1943 and 1944. Pursuant to agreements reflecting an established and widespread practice in that industry in those localities, they paid to the respective doctors, who prescribed the eyeglasses which they sold, one-third of the retail sales price received for the glasses. The question here is whether such payments were deductible by petitioners as ordinary and necessary business expenses under § 23 (a)(1)(A) of the Internal Revenue Code.[1] For the reasons hereafter stated we hold that they were.

Petitioners owned and operated as partners the City Optical Company with offices in Wilmington, Fayetteville and Greensboro, North Carolina, and Richmond, Virginia. Petitioner Helen W. Lilly also owned and operated the Duke Optical Company in Fayetteville.

Since long before 1922 when Thomas B. Lilly established his business in Wilmington, eye doctors, in that locality and to a substantial extent throughout comparable communities in North Carolina, Virginia and elsewhere in the United States, not only examined their patients' eyes and prescribed glasses, but also sold them the glasses. The doctors bought the frames and lenses at wholesale, prepared and fitted the glasses to the patients and sold the glasses at a profit.

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[1] "SEC. 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions:

"(a) EXPENSES.—

"(1) TRADE OR BUSINESS EXPENSES.—

"(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ." 53 Stat. 12, 56 Stat. 819, 26 U. S. C. § 23 (a) (1) (A).

Lilly and other opticians offered to fill the prescriptions for the doctors and to supply and fit the frames to the patients. To compensate the doctors for their loss of profit on the sales, the opticians generally paid the doctors one-third of the retail price of the glasses. While information as to this arrangement was not volunteered to the patients, it was freely disclosed on inquiry. The doctors made it a practice to ask their patients to bring in their new glasses for verification of the prescriptions and to enable the doctors to see that the frames were properly fitted. Without further charge, they made whatever reexaminations and modifications were needed.

For income tax purposes, petitioners treated their payments to the doctors as ordinary and necessary expenses of carrying on business and deducted them from their gross incomes. The doctors, in turn, included them in their taxable gross incomes. However, in 1943 and 1944, the respondent Commissioner of Internal Revenue disallowed these deductions in petitioners' returns and thereby increased petitioners' taxable income as follows:

| | *City Optical Company* | *Duke Optical Company* |
|---|---|---|
| 1942 | $57,063.45 [2] | |
| 1943 | 61,601.95 | $6,568.87 |
| 1944 | 60,021.65 | 4,798.35 |

The Tax Court sustained the Commissioner on the ground that the payments to the doctors were contrary to public policy. One judge dissented. 14 T. C. 1066. The resulting tax deficiences totaled $124,107.78. The Court of Appeals affirmed. 188 F. 2d 269. We granted certiorari, 342 U. S. 808, to resolve the disputed question of statutory construction and to pass upon the application

[2] The year 1942 was involved in the calculation of the tax for 1943 because of § 6 of the Current Tax Payment Act of 1943, 57 Stat. 145–149.

to these facts of the principles announced in *Textile Mills Corp.* v. *Commissioner,* 314 U. S. 326, and *Commissioner* v. *Heininger,* 320 U. S. 467.

The facts are not in dispute. The payments to the doctors were made by petitioners monthly in the regular course of their business. Under the long-established practice in the optical industry in the localities where petitioners did business, these payments, in 1943 and 1944, were normal, usual and customary in size and character. The transactions from which they arose were of common or frequent occurrence in the type of business involved. They reflected a nationwide practice.[3] Consequently, they were "ordinary" in the generally accepted meaning of that word. See *Deputy* v. *du Pont,* 308 U. S. 488, 495; *Welch* v. *Helvering,* 290 U. S. 111, 114.

The payments likewise were "necessary" in the generally accepted meaning of that word. It was through making such payments that petitioners had been able to establish their business. Discontinuance of the payments would have meant, in 1943 or 1944, either the resumption of the sale of glasses by the doctors or the doctors' reference of their patients to competing opticians who shared profits with them. Several doctors testified that they had recommended petitioners and petitioners' competitor, the American Optical Company, simultaneously. Both were sharing profits with the doctors on substantially the same basis. If either had stopped making the payments while the other continued them, there is no reason to doubt that the doctors thereafter would have omitted their recommendation of the nonpaying optician. In 1943 and 1944

[3] The American Optical Company, with more than 250 outlets distributed over 47 states, followed this practice, both in competition with petitioners and elsewhere. See also, Snell, Some Principles of Medical Ethics Applied to the Practice of Ophthalmology, 117 A. M. A. J. 497–499 (1941); "What Do You Pay for Eyeglasses?" Fortune Magazine, Oct. 1940, p. 103.

the continuance of these payments was as essential to petitioners as were their other business expenses. As has been said of legal expenses under somewhat comparable circumstances, "To say that this course of conduct and the expenses which it involved were extraordinary or unnecessary would be to ignore the ways of conduct and the forms of speech prevailing in the business world." *Commissioner* v. *Heininger,* 320 U. S. 467, 472.[4]

There is no statement in the Act, or in its accompanying regulations, prohibiting the deduction of ordinary and necessary business expenses on the ground that they violate or frustrate "public policy."

The Tax Court in the instant case made no finding of fact that the payments to the doctors were not ordinary and necessary business expenses. It sustained the Commissioner's disallowance of their deductibility because it held that, as a matter of law, the contracts under which the payments were made violated public policy.[5]

We do not have before us the issue that would be presented by expenditures which themselves violated a federal or state law or were incidental to such violations.[6]

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[4] ". . . Without this expense, there would have been no business. Without the business, there would have been no income. Without the income, there would have been no tax. To say that this expense is not ordinary and necessary is to say that that which gives life is not ordinary and necessary." *Heininger* v. *Commissioner,* 133 F. 2d 567, 570.

[5] "We conclude that the payments under the contracts between the two optical businesses, composed of petitioners, and the oculists are not deductible as ordinary and necessary expenses *because* the contracts under which these payments were made violated public policy." (Emphasis supplied.) 14 T. C. at 1086.

[6] Deductions to cover penalties for unlawful conduct were disallowed in *Commissioner* v. *Longhorn Portland Cement Co.,* 148 F. 2d 276 (penalties for violation of state antitrust laws); and *Great Northern R. Co.* v. *Commissioner,* 40 F. 2d 372 (penalties against railroad for violating federal statutes or regulations). Cf. *Rossman*

In such a case it could be argued that the outlawed expenditures, by virtue of their illegality, were not "ordinary and necessary" business expenses within the meaning of § 23 (a)(1)(A).[7]

In *Textile Mills Corp.* v. *Commissioner,* 314 U. S. 326, this Court accepted an interpretation of that section by a Treasury Regulation which disallowed the deduction of certain expenditures for lobbying purposes. In doing so, the Court referred to the fact that some types of lobbying expenditures had long been condemned by it, and that the interpretative regulation had itself been in effect many years with congressional acquiescence. The instant case does not come within that precedent.

In *Commissioner* v. *Heininger,* 320 U. S. 467, this Court was asked to go further and to disallow certain attorneys'

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*Corp.* v. *Commissioner,* 175 F. 2d 711, 713–714 (where an overcharge under the Emergency Price Control Act was allowed to be deducted because it did not frustrate any "sharply defined policies" of the Act). As to deductibility of legal fees incident to the defense of a taxpayer against charges of illegal conduct, see *Commissioner* v. *Heininger,* 320 U. S. 467, s. c., 133 F. 2d 567; *Kornhauser* v. *United States,* 276 U. S. 145; *Commissioner* v. *Longhorn Portland Cement Co., supra;* 4 Mertens, Law of Federal Income Taxation, 384-389; and see generally, Note, 54 Harv. L. Rev. 852-860.

[7] The Government calls attention to its prosecution of certain other opticians in other states, in 1946, for violations of the Sherman Antitrust Act due to price-fixing agreements made with oculists in the course of interstate commerce. The consent decrees in those cases lend little support to the Government's contention that the payments made by petitioners in 1943 and 1944 in North Carolina and Virginia were not deductible. In fact, the recitals in those decrees tend to confirm the existence of a long-established, widespread, undisturbed practice of the kind described. *United States* v. *Bausch & Lomb Optical Co.,* Civil Action No. 46C 1332; *United States* v. *American Optical Co.,* Civil Action No. 46C 1333; *United States* v. *House of Vision-Belgard-Spero, Inc.,* Civil Action No. 48C 607; and *United States* v. *Uhlemann Optical Co. of Illinois,* Civil Action No. 48C 608 (all in U. S. D. C. N. D. Ill.).

fees and other legal expenses. They were reasonable in amount and had been lawfully incurred by a licensed dentist (1) in resisting the issuance by the Postmaster General of a fraud order which would have destroyed the dentist's business and (2) in connection with subsequent proceedings on judicial review of the same controversy. While the services resulted in an injunction which stayed the order during the time that the taxable income in question was received, the final result of the litigation was unsuccessful for the taxpayer. Nevertheless, the expenditures were permitted to be deducted as ordinary and necessary expenses of the taxpayer's business. The opinion in that case reviews the position of the Bureau of Internal Revenue, the Board of Tax Appeals and the federal courts. *Id.*, at 473–474. It refers to the narrowing of "the generally accepted meaning of the language used in § 23 (a) in order that tax deduction consequences *might not frustrate sharply defined national or state policies* proscribing particular types of conduct." (Emphasis supplied.) *Id.*, at 473. It concludes that the "language of § 23 (a) contains no express reference to the lawful or unlawful character of the business expenses which are declared to be deductible. . . . If the respondent's litigation expenses are to be denied deduction, it must be because allowance of the deduction would frustrate the sharply defined policies of 39 U. S. C. §§ 259 and 732 which authorize the Postmaster General to issue fraud orders." *Id.*, at 474. Neither that decision nor the rule suggested by it requires disallowance of petitioners' expenditures as deductions in the instant case.

Assuming for the sake of argument that, under some circumstances, business expenditures which are ordinary and necessary in the generally accepted meanings of those words may not be deductible as "ordinary and necessary" expenses under § 23 (a)(1)(A) when they "frustrate sharply defined national or state policies proscribing par-

ticular types of conduct," *supra,* nevertheless the expenditures now before us do not fall in that class. The policies frustrated must be national or state policies evidenced by some governmental declaration of them. In 1943 and 1944 there were no such declared public policies proscribing the payments which were made by petitioners to the doctors.

Customs and the actions of organized professional organizations have an appropriate place in determining in a factual sense what are ordinary and necessary expenses at a given time and place. For example, they materially affect competitive standards which determine whether certain expenditures are in fact ordinary and necessary. Evidence of them is admissible on that issue. They do not, however, in themselves constitute the "sharply defined national or state policies" the frustration of which may, as a matter of law, preclude the deductibility of an expense under § 23 (a)(1)(A).

We voice no approval of the business ethics or public policy involved in the payments now before us. We recognize the province of legislatures to translate progressive standards of professional conduct into law and we note that legislation has been passed in recent years in North Carolina and other states outlawing the practice here considered.[8] We recognize also the organized activities of the medical profession in dealing with the subject.[9] A resulting abolition of the practice will reflect

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[8] Remington's Wash. Rev. Stat., 1949 Supp., § 10185–14; Deering's Cal. Business and Professions Code, 1951, §§ 650, 652; N. C. Laws 1951, c. 1089, §§ 21, 23.

[9] The present trend may lead to the complete abolition of the practice. If so, its abolition will have been accomplished largely by the direct action of those qualified to pass judgment on its justification. This gradually increasing opposition to the practice bears witness to the widespread existence of the practice in such recent times as 1943 and 1944. See Resolution of Section on Ophthalmology of

itself in the tax returns of the parties without the retroactive hardship complained of here.[10]

The judgment of the Court of Appeals is reversed and the cause is remanded with directions to remand to the Tax Court with instructions to set aside its judgment insofar as it is inconsistent with this opinion.

*It is so ordered.*

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

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the American Medical Association adopted in June, 1924, but not then presented to the A. M. A. House of Delegates, quoted in 117 A. M. A. J. 498 (1941); Address of Chairman Albert C. Snell, M. D., before the Section on Ophthalmology, 117 A. M. A. J. 497–499 (1941); Principles of Medical Ethics of the American Medical Association (1943 and 1949); editorials in 131 A. M. A. J. 1128 (1946); 136 A. M. A. J. 176–177 (1948).

[10] The payments made to the doctors in the instant case, and disallowed as deductions by the courts below, amounted to between 56% and 72% of petitioners' taxable business income. The income thus taxed had been transferred long ago to the doctors and they had paid their income tax on it.

## BUCK ET AL. *v.* CALIFORNIA.

APPEAL FROM THE SUPERIOR COURT IN AND FOR THE COUNTY OF SAN DIEGO, CALIFORNIA.

No. 165. Argued November 28–29, 1951.—Decided March 10, 1952.

1. Appellants are taxicab drivers who transported passengers from Mexico across an unincorporated area of San Diego County, California, to points not in the unincorporated area. They were convicted of driving taxicabs in an unincorporated area of the county without a permit from the sheriff required by a county ordinance. The ordinance required a written application for a permit, payment of a $1 fee, and compliance with certain standards relating to the public safety. *Held:* The ordinance as here applied was not invalid under the Commerce Clause of the Federal Constitution. Pp. 100–104.

   (a) The ordinance was not inconsistent with the Motor Carrier Act of 1935 or Interstate Commerce Commission regulations. Pp. 101–102.

   (b) Nor was the ordinance an unreasonable burden on foreign commerce. Pp. 102–103.

2. The question of the constitutional validity of a provision of the ordinance requiring a taxicab operator's license and payment of a $50 fee therefor is not here presented. Pp. 103–104.

101 Cal. App. 2d 907, 226 P. 2d 87, affirmed.

Appellants' conviction of violating a county ordinance was affirmed by the Superior Court of California. 101 Cal. App. 2d 907, 226 P. 2d 87. On appeal to this Court, *affirmed,* p. 104.

*Manuel Ruiz, Jr.* argued the cause for appellants. With him on the brief was *Morris Lavine.*

*Duane J. Carnes* argued the cause for appellee. With him on the brief were *Edmund G. Brown,* Attorney General of California, *Clarence A. Linn,* Assistant Attorney General, and *Carroll H. Smith.*

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Mr. Justice Minton delivered the opinion of the Court.

Appellants, American citizens, are taxicab drivers. They were arrested by the Sheriff of San Diego County, California, and charged with driving taxicabs in the unincorporated area of San Diego County without a permit from the Sheriff as required by § 9 of Ordinance 464, the pertinent provisions of which are set forth in the margin.* The facts were stipulated without the taking of any evidence. From the stipulation we learn that appellants had picked up passengers across the line in Mexico and were transporting them across the unincorporated area of San Diego County to points not in the unincorporated area when they were arrested. They had made oral requests for permits from the Sheriff, rather than application in writing on the forms provided therefor, as required by § 9 of the ordinance. When these requests

*"Applicants for such permits shall file applications therefor with the sheriff of the County of San Diego on a form furnished by the sheriff which, when completed, will contain full personal information concerning the applicant.

"Upon obtaining a permit as herein required the holder of such permit shall be entitled to an identification card of such design, and bearing such number as the sheriff may prescribe, upon payment of a fee of $1.00 annually, therefor, which shall be paid by the applicant to the tax collector and shall be due on the 1st day of June of each year. Such card shall be carried by the permittee during all business hours and shall not be transferable.

"Each applicant for a permit shall be examined by the sheriff as to his knowledge of the provisions of this ordinance, the Vehicle Code, traffic regulations and the geography of the county, and if the result of the examination is unsatisfactory he shall be refused a permit. The sheriff may deny the application or having issued the permit may revoke the same if the sheriff shall determine that the applicant or taxicab driver is of bad moral character or is guilty of violation of any of the provisions of this ordinance or of any lawful regulation promulgated pursuant thereto or has been convicted of any offense involving moral turpitude."

were denied, they continued to transport passengers, although upon advice of counsel they did not pick up or discharge any passengers in the unincorporated area. We take their action to mean that they claimed that because they were engaged in foreign commerce, they had either the right to a permit without complying with the other provisions of the ordinance or the right to operate without a permit. Appellants contend that the County had no right to burden that foreign commerce by regulation.

They were found guilty of violating § 9 of the ordinance by the Justice's Court of National Township, San Diego County. The Superior Court of California, in and for the County of San Diego, Appellate Department, affirmed the conviction and allowed an appeal to this Court. 101 Cal. App. 2d Supp. 912, 226 P. 2d 87. We noted probable jurisdiction under 28 U. S. C. § 1257 (2).

The Motor Carrier Act of 1935 gave broad power of regulation over motor vehicles to the Interstate Commerce Commission; but Congress partially excluded taxicabs from such regulation in the following words:

> "Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (2) taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini . . . ." 49 Stat. 545, 49 U. S. C. § 303 (b).

The Interstate Commerce Commission, acting under authorization of Congress, has promulgated regulations establishing minimum qualifications for drivers of motor vehicles for carriers, including taxicabs, engaged in interstate and foreign commerce, 49 CFR § 192.2. This does

not prevent the state or a subdivision thereof, in the exercise of its police power, from providing additional specifications as to qualifications, not inconsistent or in conflict with the regulations of the Interstate Commerce Commission. Especially is this true since the regulations of the Commission are only minimum.

As the ordinance is not in conflict with and may be construed consistently with the federal regulations and in keeping with the latter's purpose, they may stand together. *Kelly* v. *Washington,* 302 U. S. 1, 10; *Missouri, K. & T. R. Co.* v. *Harris,* 234 U. S. 412, 419; *Savage* v. *Jones,* 225 U. S. 501, 539; *Reid* v. *Colorado,* 187 U. S. 137, 148.

California has a legitimate interest in the kind and character of persons who engage in the taxicab business in the State. The authority to issue permits has been granted by the State to the Board of Supervisors of each county. *In re Martinez,* 22 Cal. 2d 259, 262, 138 P. 2d 10. Such delegation by the State to the county has been approved by this Court. *Sprout* v. *South Bend,* 277 U. S. 163, 171, 172.

The operation of taxicabs is a local business. For that reason, Congress has left the field largely to the states. Operation of taxicabs across state lines or international boundaries is so closely related to the local situation that the regulation of all taxicabs operating in the community only indirectly affects those in commerce, and so long as there is no attempt to discriminatorily regulate or directly burden or charge for the privilege of doing business in interstate or foreign commerce, the regulation is valid. The operation is "essentially local," and in the absence of federal regulation, state regulation is required in the public interest. *Panhandle Pipe Line Co.* v. *Michigan Pub. Serv. Comm'n,* 341 U. S. 329, 333. Even if appellants were engaged in foreign commerce at the time of their arrest and did not intend to engage in intra-

state commerce, the permit was not required *because* they were engaged in foreign commerce. Under the permit they were free to engage in both intrastate and foreign commerce. The ordinance requires a written application for a permit, a small fee, and compliance with certain standards relating to the service and to the public safety. Our prior cases would not justify us in holding that the ordinance is an unreasonable burden on foreign commerce in its application to the stipulated facts here. *Aero Transit Co.* v. *Georgia Comm'n,* 295 U. S. 285; *Hicklin* v. *Coney,* 290 U. S. 169; cf. *Railway Express Agency* v. *New York,* 336 U. S. 106, 111.

Thus far we have dealt only with § 9 of the ordinance, which exacts the $1 fee for a driver's permit. That is all the court we are reviewing passed upon. That is all appellants were tried and convicted for. But it is suggested that the permit *may have been denied* them because they had violated § 4 of the ordinance by not getting a taxicab operator's license and paying the $50 fee therefor. But appellants may also have been denied permits under § 9 for the reason that oral requests only were made and not written applications to the Sheriff, as required by the ordinance, or the Sheriff may have found them without knowledge as to the geography of the county and traffic regulations, or that they were persons of bad moral character or had been convicted of a crime involving moral turpitude, all adequate state grounds. In that event, this Court would not take jurisdiction to pass upon the question. Chief Justice Hughes, speaking for the Court in *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52, 54–55, said:

> "[I]f it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." (Citing numerous cases.)

This Court should not be reaching for constitutional questions to cast doubt upon state legislation not before the Court. The constitutional validity of the $50 requirement is not now before the Court and was not before the lower court.

The judgment of the Superior Court of California is

*Affirmed.*

MR. JUSTICE REED, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE JACKSON and MR. JUSTICE BURTON join, dissenting.

The appellants are American citizens who were prosecuted in the Justice's Court of National Township, County of San Diego, California, for violating San Diego County Ordinance No. 958 (New Series), amending § 9 of Ordinance 464 (New Series), as amended by Ordinance 609 (New Series). The complaint specified that appellants violated § 9 of the ordinance by wilfully driving their taxicabs in the unincorporated area of the County of San Diego without first having obtained a written permit from the Sheriff authorizing them to do so.

Under the terms of § 9, every driver of a taxicab in the unincorporated area of the County, hereinafter called simply the County, is required to obtain a written permit from the Sheriff.[1] After the permit is issued, the County exacts a $1 fee for an identification card. The Sheriff has authority to deny an application for the permit if

[1] "Section 9. (*Amended by Ord. No. 609 (New Series) adopted 5–12–47; and again amended by Ord. 958 (New Series) adopted 4–10–50, to read as follows:*) It shall be unlawful for any person to drive or to be in actual physical control of any taxicab in the unincorporated area of the County of San Diego without first obtaining a permit in writing so to do from the sheriff of the County of San Diego.

"Applicants for such permits shall file applications therefor with the sheriff of the County of San Diego on a form furnished by the

he determines that the applicant (1) is of bad moral character; or (2) has failed to comply with any of the other provisions of the ordinance; or (3) has been convicted of an offense involving moral turpitude. Section 13 provides that a violation of § 9 is a misdemeanor, punishable by a fine of not more than $500, or imprisonment for not more than six months, or both.

Appellants were convicted of violating § 9, and each was fined $250. They appealed to the Superior Court of California, in and for the County of San Diego, Appellate Department, where the judgments were affirmed. 101 Cal. App. 2d Supp. 912, 226 P. 2d 87. That court, by allowing an appeal to this Court, confirms our understanding that no further review was available in the California courts.[2] Accordingly, we noted probable jurisdiction. 28 U. S. C. § 1257 (2).

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sheriff which, when completed, will contain full personal information concerning the applicant.

"Upon obtaining a permit as herein required the holder of such permit shall be entitled to an identification card of such design, and bearing such number as the sheriff may prescribe, upon payment of a fee of $1.00 annually, therefor, which shall be paid by the applicant to the tax collector and shall be due on the 1st day of June of each year. Such card shall be carried by the permittee during all business hours and shall not be transferable.

"Each applicant for a permit shall be examined by the sheriff as to his knowledge of the provisions of this ordinance, the Vehicle Code, traffic regulations and the geography of the county, and if the result of the examination is unsatisfactory he shall be refused a permit. The sheriff may deny the application or having issued the permit may revoke the same if the sheriff shall determine that the applicant or taxicab driver is of bad moral character or is guilty of violation of any of the provisions of this ordinance or of any lawful regulation promulgated pursuant thereto or has been convicted of any offense involving moral turpitude. . . ."

[2] See Cal. Penal Code, § 1466; Cal. Const., Art. VI, § 4; *People* v. *McKamy*, 168 Cal. 531, 143 P. 752; *People* v. *Reed*, 13 Cal. App. 2d 39, 56 P. 2d 240.

Of the multiple errors assigned, only one need be considered, for it disposes of the case: That the California courts erred in holding that § 9 of Ordinance No. 464, as construed and applied to this complaint, does not exceed the constitutional limits of the power of San Diego County to regulate foreign commerce. This question was raised in the trial court by motion for arrest of judgment, and was treated as properly in issue by both California courts. Clearly they rejected, as a matter of California law, appellee's contention that the constitutional questions were not properly presented because appellants had failed to exhaust the administrative or other judicial remedies allegedly available for review of the denial of the driver's permits, the Superior Court saying: ". . . we will have to decide whether the ordinance is valid as tested by the commerce clause . . . ." [3] We are, of course, bound by this determination of California law. It is therefore unnecessary to consider whether there was available to appellants any effective method to test in the California courts the constitutionality of the denial of their permits, or whether—if such remedies were available—the failure to exercise them would preclude the defense of unconstitutionality in this criminal prosecution.

The case was tried on a stipulation of facts. It is not disputed, therefore, that appellants applied for the driver's permits required by § 9 of the ordinance.[4] These applications were denied, although the record does not show the reasons for the denials. The Superior Court stated: "Each of the defendants had applied for and been

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[3] Opinion of the Superior Court, Appellate Department, 101 Cal. App. 2d Supp. at 914, 226 P. 2d at 89.

[4] Since appellants are complaining of the denial of the permits, not of exaction of the $1 fee, we assume, without deciding, that San Diego County can constitutionally require a $1 fee for the identification card, on the theory that the $1 is reasonably calculated to reimburse the County for the costs of administering its valid traffic regulations.

denied the license [permit] required by the ordinance in question." No issue was made as to the sufficiency of the application, and the opinion makes no point of any irregularity in applying. Thereafter, appellants, on the advice of counsel, continued nonetheless to transport persons by taxicab to and from Mexico across the unincorporated territory of the County. It is this transportation, after denial of the driver's permits, for which appellants are being prosecuted in this case.

The stipulation further discloses that appellants neither picked up nor discharged passengers in San Diego County. Their only operations in the County consisted of driving passengers through the County, to and from Mexico. So far as the record shows, appellants are engaged solely in foreign commerce. Thus it is clear that San Diego County, by refusing to issue the driver's permits, is attempting by regulation to exclude appellants from transporting persons in foreign commerce across San Diego County unless they meet the qualifications for drivers established by the ordinance. The issue is whether this exclusion can be reconciled with the constitutional delegation to Congress of the power to regulate foreign commerce.

Generally, it is well settled that the power to regulate foreign commerce is lodged in the Federal Government. U. S. Const., Art. I, § 8. Of course, this does not mean that the states are powerless in all cases to take reasonable measures to protect their legitimate interests.[5] For example, in the absence of conflicting congressional

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[5] *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 211–212: "In the absence of applicable federal regulation, a State may impose non-discriminatory regulations on those engaged in foreign commerce 'for the purpose of insuring the public safety and convenience; . . . a license fee no larger in amount than is reasonably required to defray the expense of administering the regulations may be demanded.' *Sprout* v. *South Bend,* 277 U. S. 163, 169."

legislation,[6] we assume that San Diego County might require that loads should not exceed a reasonable minimum weight and that, if appellants violated such regulation, the County could properly prohibit them from driving their taxicabs across the County.[7]

The burden, of course, is upon appellants as challengers of the validity of the ordinance to establish its unconstitutionality. That burden is met prima facie when they show that the ordinance exacts payment from foreign commerce of fifty dollars ($50) for an operator's license, note 10, *infra,* plus the driver's permit. The stipulated facts show the foreign commerce; the opinion of the trial court shows that appellants relied upon the $50 license fee as an unconstitutional burden.[8] Thereupon the government body, seeking to regulate, must make it affirmatively appear in some way that the regulation is directed toward an incident subject to state control. Cf. *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183, 186; *Ingels* v. *Morf,* 300 U. S. 290, 294; *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583, 599. A taxing municipality must show, for example, that the tax on interstate commerce is in-

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[6] Because the regulation here attacked should fall in any event, it is not necessary to consider what, if any, effect the existing federal legislation might have on the validity of this ordinance. See 49 U. S. C. (1946 ed.) § 303 (b) (2). See also 49 CFR (1949 ed.) § 192.2.

[7] *South Carolina State Highway Department* v. *Barnwell Bros., Inc.,* 303 U. S. 177. Cf. *Morf* v. *Bingaman,* 298 U. S. 407; *Central Greyhound Lines, Inc.* v. *Mealey,* 334 U. S. 653.

[8] The opinion reads in part: "The defendants . . . advance the following contentions: . . . That the fifty dollar license fee is an unreasonable burden on foreign commerce. . . . The defendants contend that the fifty dollar annual license fee is an unreasonable burden on foreign commerce. There is no evidence in the stipulated facts as to the cost of enforcing the Ordinance, and, in the absence of such evidence, the Court will assume that the fee was reasonable." This objection was pressed throughout the appeal in the Superior Court and in this Court.

tended to compensate for facilities provided by the state. *Aero Mayflower Transit Co.* v. *Commissioners,* 332 U. S. 495, 505; *Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542; see *Elgin* v. *Capitol Greyhound Lines,* 192 Md. 303, 310, 318, 64 A. 2d 284, 288, 291–292. This does "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." *Mullaney* v. *Anderson,* 342 U. S. 415, 418.

While this permit might have been properly denied for an adequate state reason and not for lack of the $50 operator's license, it is incumbent on the State (or, in this case, the County) to state that reason at the trial. Appellants need not, and as a practical matter could not, explain why the Sheriff of San Diego County denied their permits. The alternative to requiring explanation by the County of the reason for refusing a license would be to compel the applicants to prove their compliance with all valid requirements. Thus, assuming that the remainder of the ordinance is valid, they would be compelled under the terms of the ordinance to show, for example, that the Sheriff believes that they are of good moral character, and that they have never been convicted of an offense involving moral turpitude. In view of the fact that only the County through its officers can know the reasons for denial of the permits, and can, by placing these reasons on the record, narrow the issues to manageable proportions and give appellants a fair opportunity to present their objections, the burden of going forward with this evidence must rest on the County.

In this case, San Diego County has offered no explanation for its action. The record shows no basis for any conclusion by us. Cf. *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 658. We cannot determine, on this record, whether the Sheriff denied the permits because he had

formed a low opinion of appellants' moral character,[9] or because the Sheriff was dissatisfied with their knowledge of the geography of the County, or for lack of the $50 operator's license. Without some explanation, it is impossible for this Court to decide that the County is justified in excluding appellants from engaging in foreign commerce in the County. Cf. *Smith* v. *Cahoon,* 283 U. S. 553, 565. In comparable situations this Court has felt the need of greater particularity for adjudication. *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 575.

Of course, it might be unnecessary for the County to explain the precise reason why the permits were denied, if the ordinance itself limited the Sheriff to constitutionally valid reasons. But this ordinance does not so limit the Sheriff's decisions. For example, § 9 of the ordinance in question here contemplates that the Sheriff will deny a driver's permit to any person who has failed to comply with the other provisions of the ordinance. While we cannot be sure, on this record, why the Sheriff refused to issue the permits to appellants, it is likely that his refusal was based on the fact that appellants had not previously acquired a license to operate their taxicabs in San Diego County, as required by § 4 of the ordinance.[10]

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[9] The Superior Court opinion refers to bad moral character as a proper ground for denial of permits. Without a record showing as to the facts upon which that conclusion is based, we cannot appraise the significance of the comment.

[10] "Section 4. (*Amended by Ord. No. 958 adopted 4–10–50, and amended again by Ord. No. 964 (New Series) adopted 5–22–50 to read as follows:*) Within 10 days from the effective date of this ordinance every taxicab operator shall apply to the sheriff and procure from the Tax Collector a license and pay an annual license fee of $50.00 (plus $1.00 per year per taxicab), which shall be paid by the applicant to the Tax Collector and shall be due on the first day of June of each year. Licenses issued subsequent to the first day of September, the first day of December, and the first day of March shall be issued at a quarterly reduction of $12.50 per quarter. . . ."

That section imposes an annual flat fee of $50 (plus $1 for each taxicab) on the privilege of operating taxicabs in San Diego County. There is no suggestion that the $50 fee is levied only as compensation for the use of the roads of the County, or to defray the expense of regulating motor traffic. Clearly such a tax for the privilege of engaging in foreign commerce could not constitutionally be imposed by San Diego County. Cf. *Sprout* v. *South Bend,* 277 U. S. 163; *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183; *Ingels* v. *Morf,* 300 U. S. 290; *Spector Motor Service, Inc.* v. *O'Connor,* 340 U. S. 602. See *Crutcher* v. *Kentucky,* 141 U. S. 47, 57; *International Textbook Co.* v. *Pigg,* 217 U. S. 91; *Aero Mayflower Transit Co.* v. *Commissioners,* 332 U. S. 495. Nor can the County indirectly enforce the unconstitutional privilege tax of § 4 by denying the driver's permit without explanation. Thus it is clear that this ordinance purports to impose an unconstitutional burden on foreign commerce. While it is possible that appellants' permits were denied for some other, and valid, reason, only the County (not appellants) could show that this is true. Since the County has offered no explanation for prohibiting appellants from engaging in foreign commerce within the County, the judgment should be reversed and the cause remanded for such action as might be deemed desirable and not inconsistent with this opinion.

## BRUNER *v.* UNITED STATES.

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

No. 391. Argued January 30, 1952.—Decided March 24, 1952.

The Act of October 31, 1951, 65 Stat. 727, amending 28 U. S. C. § 1346 so as to withdraw the jurisdiction of federal district courts over actions against the United States to recover compensation for official services of "employees," applies to actions pending on the effective date of the amendment. Pp. 113–117.

(a) When a law conferring jurisdiction is repealed without any reservation of jurisdiction over pending cases, all pending cases fall with the law. *Insurance Co.* v. *Ritchie,* 5 Wall. 541. Pp. 115–117.

(b) A different result is not required by the provision of 1 U. S. C. § 109 that "repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute." P. 117.

189 F. 2d 255, affirmed.

Petitioner's action against the United States to recover compensation for official services was dismissed by the District Court. The Court of Appeals affirmed. 189 F. 2d 255. This Court granted certiorari. 342 U. S. 858. *Affirmed,* p. 117.

*Denmark Groover, Jr.* argued the cause for petitioner. With him on the brief were *Charles J. Bloch* and *Ellsworth Hall, Jr.*

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

*Monroe Oppenheimer* and *Robert E. Sher* filed a brief for Beal et al., as *amici curiae,* urging reversal.

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

In 1941, petitioner was appointed a civilian fire chief at Camp Wheeler, Georgia, by a local army commander acting under authority delegated by the Secretary of War. In 1948, petitioner brought this action in the District Court to recover overtime compensation allegedly due for his services as fire chief. Jurisdiction to enter judgment against the United States was based on the Tucker Act which granted to the District Court jurisdiction, concurrent with the Court of Claims, over certain civil actions against the United States.[1]

At the time this action was commenced, Congress had provided that nothing in the Tucker Act shall be construed as giving the District Court—

> "jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the 27th day of June 1898 shall abate or be affected by this provision." [2]

The District Court, holding that petitioner was an "officer of the United States," entered judgment dismissing petitioner's complaint for want of jurisdiction. The Court of Appeals for the Fifth Circuit affirmed. 189 F. 2d 255.

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[1] 24 Stat. 505 (1887), now 28 U. S. C. (Supp. IV) § 1346.

[2] 30 Stat. 494, 495 (1898), as amended, 28 U. S. C. § 41 (20). As incorporated into the 1948 revision of the Judicial Code, the provision read:

"The district courts shall not have jurisdiction under this section of:

. . . . . .

"(2) Any civil action to recover fees, salary, or compensation for official services of officers of the United States." 28 U. S. C. (Supp. IV) § 1346 (d).

In *Beal* v. *United States,* 182 F. 2d 565 (1950), the Court of Appeals for the Sixth Circuit sustained jurisdiction of the District Court over a suit brought by another civilian fire fighter appointed by the War Department on the ground that he was only an "employee" and not an "officer of the United States." We granted certiorari in the case at bar to resolve the conflict of decisions. 342 U. S. 858.

After certiorari had been granted in this case, the Act of October 31, 1951, Pub. L. No. 248, became effective. Section 50 (b) of that Act amended the applicable clause of the Judicial Code "by inserting, immediately after 'officers' in such clause, the words 'or employees' . . . ." [3] As a result of this amendment we are confronted at the threshold of this case with the question whether the Act of October 31, 1951, withdrawing the jurisdiction of the District Court over actions for compensation brought by "employees," applies to an action pending on the effective date of the Act. The power of Congress to withhold jurisdiction from the District Court "in the exact degrees and character which to Congress may seem proper for the public good" [4] is not challenged.

The problem presented by this case has arisen before in the administration of the Tucker Act. In 1887, jurisdiction concurrent with the Court of Claims was given the circuit and district courts in all cases involving claims below stated dollar amounts. In 1898, difficulties in defending claims for compensation brought in different courts prompted Congress to withdraw from the circuit and district courts jurisdiction over cases "brought to recover fees, salary, or compensation for official services of

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[3] 65 Stat. 710, 727 (1951).

[4] *Lockerty* v. *Phillips,* 319 U. S. 182, 187 (1943); *Cary* v. *Curtis,* 3 How. 236, 245 (1845).

officers of the United States . . .," [5] thereby centralizing all such cases in the Court of Claims. Congress made no provision for cases pending at the effective date of the Act withdrawing jurisdiction and, for this reason, Courts of Appeals ordered pending cases terminated for want of jurisdiction. *United States* v. *McCrory,* 91 F. 295 (C. A. 5th Cir. 1899); *United States* v. *Kelly,* 97 F. 460 (C. A. 9th Cir. 1899). Thereafter, Congress restored the jurisdiction of the circuit and district courts to consider cases pending on the date that jurisdiction had been withdrawn.[6]

The Act of October 31, 1951, withdrawing the jurisdiction of the District Court over suits by "employees," did not reserve jurisdiction over pending cases,[7] even though reservation of jurisdiction over pending cases had been held required and later had been made by Congress in respect to the 1898 provisions withdrawing jurisdiction over suits by "officers." Absent such a reservation, only the Court of Claims has jurisdiction to hear and determine claims for compensation brought by employees of the United States even though the District Court had jurisdiction over such claims when petitioner's action was brought. *Insurance Co.* v. *Ritchie,* 5 Wall. 541 (1867).

In *Ritchie,* a case arising under the internal revenue laws, jurisdiction was based upon an Act of 1833 granting the circuit courts jurisdiction over all cases arising under the revenue laws. After decision in the Circuit Court and while an appeal to this Court was pending, an Act of 1866 withdrew the jurisdiction of the circuit courts

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[5] 30 Stat. 494, 495 (1898). See H. R. Rep. No. 325, 55th Cong., 2d Sess. (1898).

[6] 31 Stat. 33 (1900).

[7] No mention of pending cases is found in the Act. In § 56 (1) of the same Act, Congress expressly saved "any rights or liabilities" existing at the effective date of the Act under statutes repealed by § 56. 65 Stat. 710, 730 (1951).

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over cases arising under the internal revenue laws, without any reservation saving cases such as Ritchie's. This Court held:

> "It is clear, that when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction. And it is equally clear, that where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction.
>
> "It is quite possible that this effect of the act of 1866 was not contemplated by Congress. The jurisdiction given by the act of 1833 in cases arising under the customs revenue laws is not taken away or affected by it. In these cases suits may still be maintained against collectors by citizens of the same State. It is certainly difficult to perceive a reason for discrimination between such suits and suits under the internal revenue laws; but when terms are unambiguous we may not speculate on probabilities of intention." 5 Wall. at 544–545.

In another case arising under the same jurisdictional statutes, the Court, in following *Ritchie,* stated the applicable rule as follows:

> "Jurisdiction in such cases was conferred by an act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress." *The Assessors* v. *Osbornes,* 9 Wall. 567, 575 (1870).

This rule—that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all

cases fall with the law—has been adhered to consistently by this Court.[8]

This case is not affected by the so-called general savings statute which provides that "repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute."[9] Congress has not altered the nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities. *Hallowell* v. *Commons,* 239 U. S. 506, 508 (1916). Compare *Lynch* v. *United States,* 292 U. S. 571 (1934).

Under the Judicial Code, as amended by the Act of October 31, 1951, the jurisdiction of the District Court does not extend to actions for compensation brought by either "officers" or "employees" of the United States. Since we find that Act applicable to petitioner's action, the judgment of the District Court dismissing petitioner's complaint for want of jurisdiction is correct. Accordingly, the judgment below is

*Affirmed.*

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

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[8] *Ex parte McCardle,* 7 Wall. 506, 514 (1869); *Railroad Co.* v. *Grant,* 98 U. S. 398, 401 (1879); *Sherman* v. *Grinnell,* 123 U. S. 679, 680 (1887); *Gurnee* v. *Patrick County,* 137 U. S. 141, 144 (1890); *Gwin* v. *United States,* 184 U. S. 669, 675 (1902). See *Kline* v. *Burke Constr. Co.,* 260 U. S. 226, 234 (1922).

This jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication. Compare *United States* v. *St. Louis, S. F. & T. R. Co.,* 270 U. S. 1, 3 (1926), with *Smallwood* v. *Gallardo,* 275 U. S. 56, 61 (1927).

[9] 1 U. S. C. (Supp. IV) § 109.

# LYKES *v.* UNITED STATES.

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

No. 173. Argued November 29–30, 1951.—Decided March 24, 1952.

Under § 23 (a) (2) of the Internal Revenue Code, an individual taxpayer was not entitled to deduct from his gross income, for federal income tax purposes, an attorney's fee paid for contesting the amount of his federal gift tax in the circumstances of this case. Pp. 119–127.

(a) The attorney's fee was not deductible under § 23 (a) (2) as an expense "for the production or collection of income." Pp. 121–124.

(b) There is no adequate basis in the record in this case for holding the attorney's fee deductible under § 23 (a) (2) as an incident of petitioner's "management, conservation, or maintenance of property held for the production of income." Pp. 124–125.

(c) Expenses for legal services do not become deductible merely because they are paid for services which relieve a taxpayer of liability; nor because the size of the claim to which the services relate is large in proportion to the income-producing resources of the taxpayer; nor because the claim, if allowed, will consume income-producing property of the taxpayer. Pp. 125–126.

(d) The result here reached is not inconsistent with 1944 Treasury Regulations; and it is in accord with specific provisions of Treasury Regulations since 1946, containing an administrative interpretation of § 23 (a) (2) which is entitled to substantial weight, especially since Congress has made many amendments to the Internal Revenue Code without revising that administrative interpretation. Pp. 126–127.

188 F. 2d 964, affirmed.

In a suit for a refund of federal income tax, the District Court entered judgment for petitioner. 84 F. Supp. 537. The Court of Appeals reversed. 188 F. 2d 964. This Court granted certiorari. 342 U. S. 810. *Affirmed,* p. 127.

*George W. Ericksen* argued the cause for petitioner. With him on the brief was *Chester H. Ferguson.*

*Harry Baum* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *John F. Davis.*

MR. JUSTICE BURTON delivered the opinion of the Court.

The question here is whether, for federal income tax purposes, an individual taxpayer was entitled to deduct, from his gross income, an attorney's fee paid for contesting the amount of his federal gift tax. For the reasons hereafter stated we hold that he was not.

In 1940, Joseph T. Lykes, petitioner herein, gave to his wife and to each of his three children, respectively, 250 shares of common stock in Lykes Brothers, Inc., a closely held family corporation. In his federal gift tax return he valued the shares at $120 each and, on that basis, paid a tax of $13,032.75. In 1944, the Commissioner of Internal Revenue revalued the shares at $915.50 each and notified petitioner of a gift tax deficiency of $145,276.50. Through his attorney, petitioner sought a redetermination of the deficiency, forestalled an assessment, and, in 1946, paid $15,612.75 in settlement of the deficiency pursuant to a finding of the Tax Court based on stipulated facts. In 1944, petitioner had paid his attorney $7,263.83 for legal services in the gift tax controversy but, in his federal income tax return, had not deducted that expenditure from his taxable income. In 1946, he claimed a tax refund on the ground that the attorney's fee should have been deducted under § 23 (a)(2) of the Internal Revenue Code.[1] His claim was denied by the Commissioner and petitioner

[1] "SEC. 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions:

"(a) EXPENSES.—

. . . . . .

"(2) NON-TRADE OR NON-BUSINESS EXPENSES.—In the case of an individual, all the ordinary and necessary expenses paid or incurred

sued for a refund. On stipulated and uncontroverted facts the District Court held, as a matter of law, that the payment should have been deducted and entered judgment for petitioner. 84 F. Supp. 537.[2] The Court of Appeals reversed. 188 F. 2d 964. Because of the important statutory issue involved and petitioner's claim that this case is distinguishable from *Cobb* v. *Commissioner,* 173 F. 2d 711, we granted certiorari. 342 U. S. 810.

I. Deductions from an individual's taxable income are limited to those allowed by § 23.[3] Their extent depends upon the legislative policy expressed in the fair and natural meaning of that section.[4]

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during the taxable year *for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.*" (Emphasis supplied.) 53 Stat. 12, 56 Stat. 819, 26 U. S. C. § 23 (a)(2).

[2] "To construe the law as giving to the Commissioner the power to assess a taxpayer with a deficiency tax greatly in excess of what he owes and to hold that such law denies to the taxpayer the right to contest such assessment, except at his own personal expense, just isn't justice under the law. The statute in question gives the Commissioner no such power . . . ." 84 F. Supp. 537, 539.

[3] The tax is "levied, collected, and paid for each taxable year upon the net income of every individual . . . ." 53 Stat. 5, 26 U. S. C. § 11. " 'Net income' means the gross income computed under section 22, less the deductions allowed by section 23." 53 Stat. 9, 26 U. S. C. § 21.

[4] There have been expressions by this Court placing a restrictive interpretation upon allowable deductions by virtue of "the now familiar rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer." *Interstate Transit Lines* v. *Commissioner,* 319 U. S. 590, 593; *Deputy* v. *du Pont,* 308 U. S. 488, 493; *New Colonial Ice Co.* v. *Helvering,* 292 U. S. 435, 440. Such an interpretation is not necessary here and is not relied upon in this case. See Griswold, An Argument against the Doctrine that Deductions Should Be Narrowly Construed as a Matter of Legislative Grace, 56 Harv. L. Rev. 1142.

Section 24 adds that in "computing net income no deduction shall in any case be allowed in respect of—(1) Personal, living, or family expenses . . . ." 53 Stat. 16, 56 Stat. 826, 26 U. S. C. § 24 (1). Insofar as gifts to members of a donor's family are in the nature of personal or family expenses, the donor's expenditures for accounting, legal or other services incurred in making those gifts are of a like nature. The nondeductibility of such expenditures, therefore, is indicated both by the absence of any affirmative allowance of their deductibility under § 23 and by the express denial of the deductibility of all personal or family expenses under § 24.

If the expenditure in the instant case had been made before 1942, it is clear that it would not have been deductible. At that time § 23 permitted an individual to deduct "ordinary and necessary expenses paid or incurred during the taxable year *in carrying on any trade or business* . . . ." (Emphasis supplied.) 53 Stat. 12, 26 U. S. C. (1940 ed.) § 23 (a)(1). It made no mention of nontrade or nonbusiness expenses. Accordingly, in *Higgins* v. *Commissioner,* 312 U. S. 212, when this Court held that expenses incurred by an individual taxpayer in looking after his own income-producing securities were not expenses "incurred . . . in carrying on any trade or business," it also held that they were not deductible.[5]

To change that result, Congress, in 1942, added the present § 23 (a)(2).[6] That provision, as demonstrated in its legislative history, permits the deduction of some, but not all, of the nontrade and nonbusiness expenses of an

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[5] And see *United States* v. *Pyne,* 313 U. S. 127 (attorney's fees and other expenses of executors in caring for securities and investments not deductible); *City Bank Co.* v. *Helvering,* 313 U. S. 121 (similar expenses of testamentary trustee not deductible); *Van Wart* v. *Commissioner,* 295 U. S. 112 (attorney's fee for litigation to recover income for a ward not deductible).

[6] See note 1, *supra.*

individual taxpayer. It specifies those paid or incurred (1) "for the production or collection of income" or (2) "for the management, conservation, or maintenance of property held for the production of income." See H. R. Rep. No. 2333, 77th Cong., 2d Sess.[7] Congress might have gone further. However, neither the decision that occasioned the amendment, the Committee Reports on it, nor the language adopted in it indicate that Congress sought to make such a change of policy as would authorize widespread deductibility of personal, living or family expenditures in the face of § 24 (1). *Bingham's Trust* v.

[7] ". . . Due partly to the inadequacy of the statute and partly to court decisions, nontrade or nonbusiness expenses are not deductible, although nontrade or nonbusiness income is fully subject to tax. The bill corrects this inequity by allowing all of the ordinary and necessary expenses paid or incurred for the production or collection of income or for the management, conservation or maintenance of property held for the production of income. Thus, whether or not the expense is in connection with the taxpayer's trade or business, if it is expended in the pursuit of income or in connection with property held for the production of income, it is allowable.

. . . . . .

". . . The expenses, however, of carrying on a transaction which does not constitute a trade or business of the taxpayer and is not carried on for the production of income or for the management, conservation, or maintenance of property, but which is carried on primarily as a sport, hobby, or recreation are not allowable as nontrade or nonbusiness expenses.

"Expenses, to be deductible under section 23 (a) (2), must be ordinary and necessary, which rule presupposes that they must be reasonable in amount and must bear a reasonable and proximate relation to the production or collection of income, or to the management, conservation, or maintenance of property held for that purpose.

"A deduction under this section is subject, except for the requirement of being incurred in connection with a trade or business, to all the restrictions and limitations that apply in the case of the deduction under section 23 (a) (1) (A) of an expense paid or incurred in carrying on any trade or business." *Id.*, at 46, 75. To the same effect, see S. Rep. No. 1631, 77th Cong., 2d Sess., at 87–88.

*Commissioner,* 325 U. S. 365, 374; *McDonald* v. *Commissioner,* 323 U. S. 57, 61–63.

Inasmuch as the ordinary and necessary character of the legal expenses incurred in the instant case is not questioned, their deductibility turns wholly upon the nature of the activities to which they relate.[8] The first issue, therefore, is whether petitioner's gifts, and the legal expenses related to them, were made for the "production or collection of income" within the meaning of § 23 (a)(2). Generally a gift is the antithesis of such production or collection because it reduces the donor's resources whether income producing or not. However, petitioner suggests that although he stated in his gift tax return that the purpose of his gifts was to express his love for the donees, yet the gifts were part of a general plan to produce income for himself. In support of this, he points out that the gifts consisted of 1,000 shares of stock in a closely held family corporation of which he is the president and in which he retained personal ownership of about 2,000 like shares, and that one of the donees, his son, is now actively identified with the corporation and is one of its directors.[9]

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[8] For cases resulting in the nondeductibility of legal expenses, see *e. g., Croker* v. *Burnet,* 61 App. D. C. 342, 62 F. 2d 991 (C. A. D. C. Cir., *en banc*) (defending suit to have taxpayer's husband declared incompetent and to set aside his transfer of property to taxpayer); *Dickey* v. *Commissioner,* 14 B. T. A. 1295 (defense against suit for malicious prosecution); *Joyce* v. *Commissioner,* 3 B. T. A. 393 (defense of validity of postnuptial agreement); *Oransky* v. *Commissioner,* 1 B. T. A. 1239 (defense and settlement of action for death due to negligence of taxpayer's minor son using taxpayer's automobile). See *Kornhauser* v. *United States,* 276 U. S. 145, for an example of legal expenses held deductible as business expenditures rather than personal ones.

[9] The record shows that the corporation was organized in 1910 by petitioner's elder brothers and was originally engaged in the cattle, ranching and meat packing business. Later it engaged in extensive steamship and stevedoring operations through a subsidiary. While

The District Court did not find that these facts, or anything else in the record, provided an adequate basis for reclassifying petitioner's stock transfers and his payment of a related legal fee as expenditures for the production of income, rather than as gifts accompanied by an ordinary and necessary attorney's fee for contesting the amount of a federal gift tax treating the stock transfers as gifts. The Court of Appeals, on review of the entire record, expressly held that the transfers were gifts and that the attorney's fee was not proximately related to the production of income. That court then applied to the attorney's fee the interpretation of § 23 (a)(2) approved in *Cobb* v. *Commissioner, supra.* We agree to the applicability of that interpretation which disallows the fee as a deduction from taxable income.[10]

Similarly, there is no substantial factual basis here for treating the stock transfers and the related attorney's fee as mere incidents of petitioner's "management, conservation, or maintenance of property held for the production of income." Even assuming that petitioner's 3,000 shares in Lykes Brothers, Inc., did constitute property originally held by him for the production of income, there is no finding, and no adequate basis for a finding,

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it was a large enterprise with numerous stockholders besides petitioner, his wife and children, the stock never had been on the open market. It was held by sons, nephews and sons-in-law of the Lykes brothers. It was the practice of the brothers to foster in this way a continuity of family ownership and management. At the time of petitioner's gift of 1,000 shares of common stock, there were outstanding about 25,000 shares of that class of stock.

[10] The issue here is distinguishable from that in *Bingham's Trust* v. *Commissioner, supra.* In that case the legal expenses were incurred partly in contesting an income tax deficiency assessed against the taxpaying trust and partly in winding up the trust after its expiration. All of those expenses were integral parts of the management or conservation of the trust property for the production of income and, as such, deductible under § 23 (a)(2).

that his donation of one-third of that stock actually was not the gift he represented it to be. Petitioner does not claim that the gift itself is deductible and, if it, as the principal item in the transaction, is not deductible, we find no adequate basis in this record for holding the related attorney's fee deductible.

II. Legal expenses do not become deductible merely because they are paid for services which relieve a taxpayer of liability. That argument would carry us too far. It would mean that the expense of defending almost any claim would be deductible by a taxpayer on the ground that such defense was made to help him keep clear of liens whatever income-producing property he might have. For example, it suggests that the expense of defending an action based upon personal injuries caused by a taxpayer's negligence while driving an automobile for pleasure should be deductible. Section 23 (a)(2) never has been so interpreted by us. It has been applied to expenses on the basis of their immediate purposes rather than upon the basis of the remote contributions they might make to the conservation of a taxpayer's income-producing assets by reducing his general liabilities. See *McDonald* v. *Commissioner, supra,* at 62–63.

While the threatened deficiency assessment of nearly $150,000 added urgency to petitioner's resistance of it, neither its size nor its urgency determined its character. It related to the tax payable on petitioner's gifts, as gifts, and it was finally settled on an agreed revaluation of the securities constituting those gifts. The expense of contesting the amount of the deficiency was thus at all times attributable to the gifts, as such, and accordingly was not deductible.

If, as suggested, the relative size of each claim, in proportion to the income-producing resources of a defendant, were to be a touchstone of the deductibility of the expense

of resisting the claim, substantial uncertainty and inequity would inhere in the rule. For example, the expense of defending a personal injury suit for negligence, or a suit for alienation of affections, claiming $1,000 damages, probably would not be a deductible expense for any defendant. On the other hand, if the same plaintiff on the same facts asked for $5,000, $10,000 or $100,000 damages, and the defendant held some income-producing property, that defendant might be permitted to deduct from his taxable income the same expense for precisely the same services as those upon which his less well-to-do neighbor would have to pay a tax in the other case. It is not a ground for defense that the claim, if justified, will consume income-producing property of the defendant. We find no such distinction made or implied in the Revenue Act.

III. While the Treasury Regulations, in 1944, did not refer to the issue now before us, they were consistent with the position we have taken.[11] Furthermore, since 1946, T. D. 5513, 26 CFR § 29.23 (a)–15 (k), has unequivocally stated that legal expenses incurred by an individual in the determination of gift tax liability are not deductible. That interpretation of § 23 (a)(2) appears in the following language:

> "Expenses paid or incurred by an individual in determining or contesting any liability asserted against him do not become deductible . . . by reason of the fact that property held by him for the production of income may be required to be used or sold for the purpose of satisfying such liability. Thus, *expenses paid or incurred by an individual in the determination of gift tax liability,* except to the extent that such expenses are allocable to interest on a refund of gift taxes, *are not deductible, even though prop-*

[11] Treas. Reg. 111, § 29.23 (a)–15 (*b*).

*erty held by him for the production of income must be sold to satisfy an assessment for such tax liability* or even though, in the event of a claim for refund, the amount received will be held by him for the production of income." (Emphasis supplied.)

Such a regulation is entitled to substantial weight. See *Commissioner* v. *South Texas Co.,* 333 U. S. 496, 501; *Morrissey* v. *Commissioner,* 296 U. S. 344, 355; *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378. Since the publication of that Treasury Decision, Congress has made many amendments to the Internal Revenue Code without revising this administrative interpretation of § 23 (a) (2). See Revenue Act of 1948, c. 168, 62 Stat. 110; Revenue Act of 1950, c. 994, 64 Stat. 906; Revenue Act of 1951, c. 521, 65 Stat. 452; *Higgins* v. *Commissioner, supra,* at 216; *Morrissey* v. *Commissioner, supra,* at 355.

The judgment of the Court of Appeals accordingly is

*Affirmed.*

MR. JUSTICE BLACK dissents.

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

Lykes made a gift of corporate stock to his children. It was a legitimate transaction, duly reported for gift-tax purposes and a tax of over $13,000 paid thereon. By overvaluing the stock which had been given, the Commissioner asserted a gift-tax deficiency of $145,276.50, of which about $130,000 was found by the Tax Court to be unjustified. But, to protect himself against the Government's unjustified claim, Lykes spent $7,263.83 for legal services.

I am unable to understand why this payment was not deductible as being an expense incurred "for the management, conservation, or maintenance of property held for the production of income." Had the taxpayer yielded to

the Government's unjustified demand, it would have depleted his capital by about $130,000 and thenceforward he could not have enjoyed income from it. Of course, it is not the amount but the principle that is significant. Indeed, the burden of legal expense is likely to be in inverse proportion to the amount of the deficiency asserted. Here the expense was only about 5% of the saving. In small cases of small taxpayers the percentage will be far greater and in many may exceed 100%. Certainly contest against unwarranted exaction, regardless of its amount or outcome, is for the conservation of property and its reasonable cost is deductible.

A majority of my brethren seem to think they can escape this conclusion by going further back in the chain of causation. They say the cause of this legal expense was the gift. Of course one can reason, as my brethren do, that if there had been no gifts there would have been no tax, if there had been no tax there would have been no deficiency, if there were no deficiency there would have been no contest, if there were no contest there would have been no expense. And so the gifts caused the expense. The fallacy of such logic is that it would be just as possible to employ it to prove that the lawyer's fees were caused by having children. If there had been no children there would have been no gift, and if no gift no tax, and if no tax no deficiency, and if no deficiency no contest, and if no contest no expense. Hence, the lawyer's fee was not due to the contest at all but was a part of the cost of having babies. If this reasoning were presented by a taxpayer to avoid a tax, what would we say of it? So treacherous is this kind of reasoning that in most fields the law rests its conclusion only on proximate cause and declines to follow the winding trail of remote and multiple causations.

As for the Treasury Regulation, I would not give it one bit of weight. The Treasury may feel that it is good

public policy to discourage taxpayers from contesting its unjustified demands for taxes and thus justify penalizing resistance. It is hard to imagine any instance in which the Treasury could have a stronger self-interest in its regulation. I cannot put my finger on a case where we have said that this reason would avoid Treasury Regulations. But we have disregarded them when they were not consistent with the statute, and that seems to be the case here. I think Congress allows a taxpayer to protect his estate, even against the Treasury. It seems to me a tacit slander of the Nation's credit that need for money should drive us to such casuistry as this.

# RUTKIN *v.* UNITED STATES.

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

No. 195. Argued December 3, 1951.—Decided March 24, 1952.

1. Money obtained by extortion is income taxable to the extortioner under § 22 (a) of the Internal Revenue Code. Pp. 131–139.
   (a) An unlawful gain, as well as a lawful one, constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it. P. 137.
2. Under the instructions given the jury in the prosecution of petitioner for willfully attempting to evade and defeat federal taxes, the verdict of the jury must be taken as reflecting its conclusion that the money in question was obtained by petitioner by extortion; and there was substantial evidence supporting that result. Pp. 132–137.
3. The factual issue whether, under all the circumstances, petitioner's omission of the amount in question from his tax return constituted a willful attempt to evade and defeat the federal tax is not open to review here, since that issue is settled by the verdict of the jury supported by substantial evidence. *Spies* v. *United States,* 317 U. S. 492, applied. P. 135.
4. The case of *Commissioner* v. *Wilcox,* 327 U. S. 404, is limited to its facts. P. 138.
5. Congress has power under the Sixteenth Amendment to tax as income monies received by extortion. Pp. 138–139.

189 F. 2d 431, affirmed.

Petitioner was convicted in the Federal District Court under 26 U. S. C. § 145 (b) for willfully attempting to evade or defeat federal taxes. The Court of Appeals affirmed. 189 F. 2d 431. This Court granted certiorari. 342 U. S. 808. *Affirmed,* p. 139.

*Jack L. Cohen* argued the cause for petitioner. With him on the brief was *Edward Halle.*

*Irving I. Axelrad* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *Lee A. Jackson.*

MR. JUSTICE BURTON delivered the opinion of the Court.

The principal issue before us is whether money obtained by extortion is income taxable to the extortioner under § 22 (a) of the Internal Revenue Code.[1] For the reasons hereafter stated we hold that it is.

The petitioner, Rutkin, was indicted under 26 U. S. C. § 145 (b) [2] for willfully attempting to evade and defeat a large part of his income and victory taxes for 1943. He was charged with filing a false and fraudulent return stating his net income to be $18,966.64, whereas he knew that it was $268,622.04. That difference, which would increase his tax liability from $6,843.93 to $222,408.32, was due largely to his omission from his original return

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[1] "SEC. 22. GROSS INCOME.

"(a) GENERAL DEFINITION.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or *the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . .*" (Emphasis supplied.) 53 Stat. 9, 53 Stat. 574, 26 U. S. C. § 22 (a).

[2] "SEC. 145. PENALTIES.

. . . . . .

"(b) . . . ATTEMPT TO DEFEAT OR EVADE TAX.—. . . any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution." 53 Stat. 62–63, 26 U. S. C. § 145 (b).

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of $250,000 received by him in cash from Joseph Reinfeld. The United States claims that this sum was obtained by petitioner by extortion and as such was taxable income. Petitioner contests both the fact that the money was obtained by extortion and the conclusion of law that it was taxable income if so obtained. He contends also that he did not willfully attempt to evade or defeat the tax. Petitioner was found guilty by a jury in the United States District Court for the District of New Jersey, fined $10,000 and sentenced to four years in prison. The Court of Appeals affirmed, one judge dissenting. 189 F. 2d 431. We granted certiorari, 342 U. S. 808, so as to pass upon the alleged conflict between that decision and the decision in *Commissioner* v. *Wilcox,* 327 U. S. 404.

The facts are unusual but there can be no doubt that, under the instructions given the jury, we must regard its verdict as reflecting its conclusion that the $250,000 was obtained by petitioner by extortion.[3] There was substantial evidence supporting that result. Reinfeld's first association with petitioner was in 1929 with several others in a bootlegging operation known as the "High seas venture." It was accomplished through the use of a ship in the sale of whiskey at sea more than 12 miles from shore. Reinfeld testified that petitioner contributed no money to the enterprise but was taken in because Reinfeld's associates were afraid that otherwise they would get "in-

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[3] The instructions included the following:

"That somebody lied and committed perjury is perfectly patent because contradictory stories have been told, and you must say where the truth lies; and the problem of determining that truth is solely and peculiarly yours. . . .

. . . . . .

"But then we come to the admitted payment of $250,000. *Rutkin says that that $250,000 was a final settlement of his claim in Browne Vintners, and if that is so*—and the government does not contend that the capital gains tax was not paid—*he would not be obliged to*

terference and trouble" from petitioner. His interest was recognized to be 6% but, when the venture was liquidated in 1933, he already was overdrawn and no distribution was made to him. Without including petitioner, the others then organized Browne Vintners Co., Inc., a New York corporation, to engage in the liquor business. In 1936 petitioner, without making an investment, claimed a 6% interest in Browne Vintners. Despite Reinfeld's denial of petitioner's claim, Reinfeld paid him $60,000 and took from him an assignment of "any and all of such shares of capital stock in the said BROWNE VINTNERS CO. INC., that I am entitled to." In 1940 all the Browne Vintners stock was sold for $7,500,000 to a purchaser who also assumed $8,000,000 of the company's debts. The shares of stock when sold stood in the names of, and were transferred by, "nominees" so as to conceal the identity of Reinfeld and the other beneficial owners. A capital gains tax upon the profits from these sales was paid by the respective nominees.[4] Petitioner was neither a stock-

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*report that income.* But Reinfeld says no, 'that was the result of extortion. He got that money out of me by threatening me and my family,' and he told the instances where those threats were made. There is one piece of corroboration of that, and that is from one of the six or seven people who were present in Holtz's cellar. . . .

"*If that money was extorted and was paid as a result of threats, then it was taxable income and Rutkin was under the duty of reporting that tax.* . . .

. . . . . .

". . . There is no contention here that the defendant didn't know he got the $250,000; *the whole point is whether he got it by extortion or whether he got it properly. If he got it properly the tax was already paid.*" (Emphasis supplied.)

[4] The United States concedes that although, on a strict construction of the Internal Revenue Code, it may be that the proceeds of the sales should have been reported by the beneficial rather than by the record owners, their failure to so report the proceeds does not provide a satisfactory basis for a charge against them of a willful attempt to evade and defeat the tax in violation of § 145 (b).

holder of record nor a beneficial owner of any of the stock of the company at any time.

In 1941, in response to petitioner's request, Reinfeld gave him about $10,000 to help buy a tavern. When petitioner used the money for other purposes Reinfeld refused to finance him further and his "trouble" with petitioner began. In 1942 petitioner again claimed that he had had an interest in Browne Vintners Company and that Reinfeld must give him $100,000 to help him pay his debts. Upon Reinfeld's refusal, petitioner threatened to kill him. From that time on, the record presents a lurid story of petitioner's unsatisfied demands upon Reinfeld for various sums up to $500,000, petitioner's threatening use of a gun and his repeated statements that he would kill Reinfeld and Reinfeld's family unless his demands were met. Finally, on May 11, 1943, in New Jersey, Reinfeld paid petitioner $250,000 in cash.[5]

Throughout this melodrama petitioner asserted that he was entitled to the payments he demanded from Reinfeld because of petitioner's alleged former interest in Browne Vintners Company. That interest never was identified by petitioner. Reinfeld and others testified positively that petitioner never had any such interest. Nevertheless, on May 11, Reinfeld handed to petitioner $250,000 in cash at the same time that Reinfeld paid $358,000 to Zwillman and Stacher representing their conceded interest in the proceeds of Browne Vintners stock. Petitioner, with Zwillman and Stacher, thereupon signed a "general release." It did not state the amounts paid but it did

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[5] Reinfeld testified:

"Q. And did you think that their [your family's] lives were in danger? A. I thought so, yes.

"Q. Did you do anything to protect their lives? A. I paid off.

"Q. You thought that would protect them from a gunning man? A. I hoped so."

purport to release Reinfeld, Browne Vintners Company and others from all claims the signers had against them.

Under the jury's verdict, we accept the fact to be that petitioner had no basis for his claim to this $250,000 and that he obtained it by extortion. Accordingly, if proceeds of extortion constitute income taxable to the extortioner, his omission of it from his tax return was unlawful. The further factual issue whether, under all the surrounding circumstances, petitioner's omission of the $250,000 from his tax return amounted to a willful attempt to evade and defeat the tax is not open to review here. That issue is settled by the verdict of the jury supported by substantial evidence.[6] It remains for us to determine the legal issue of whether money obtained by extortion is taxable to the extortioner under § 22 (a).

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[6] That issue was presented to the jury in conformity with the views of this Court expressed in *Spies* v. *United States*, 317 U. S. 492, 499. The charge included the following:

"If that money was extorted and was paid as a result of threats, then it was taxable income and Rutkin was under the duty of reporting that tax. But as I indicated to you before, the mere failure to report it doesn't satisfy the requirements of the law with regard to the violation of this statute, there must be something else which will indicate the willful intent to defeat and evade the tax. You may consider other elements that appear in the evidence, the fact that this money was paid over in cash; that no record of any kind was made of the receipt of that money; that the money was split and $100,000 of it sent to the sister-in-law of the defendant to be placed in her vault or 'wault' as it has been called here, and that the other $150,000 was placed in the defendant's own vault. You may consider these as factors surrounding the whole transaction.

"Rutkin says that he kept no books; kept no books at that time nor at any other time; kept no books when he received his profit, sixty, seventy, eighty thousand dollars a year, I think it was, from the bootlegging, and admits that he paid no tax; kept no books when he got this $250,000. These are all things that you may consider as circumstances surrounding the whole procedure. The payment of $250,000 was made in the presence of other people, these people being Zwillman, as I recall it, and Stacher who were there with Rutkin

Under the instructions to the jury, extortion here meant that the $250,000 was paid to petitioner in response to his false claim thereto, his harassing demands therefor and his repeated threats to kill Reinfeld and Reinfeld's family unless the payment were made.[7] Petitioner was unable to induce Reinfeld to believe petitioner's false and fraudulent claims to the money to be true. He induced Reinfeld to consent to pay the money by creating a fear in Reinfeld that harm otherwise would come to him and to his family. Reinfeld thereupon delivered his own money to petitioner. Petitioner's control over the cash so received was such that, in the absence of Reinfeld's unlikely repudiation of the transaction and demand for

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and the lawyers. Well, neither the lawyers nor any of these people, it seems to me, would be inclined to go out and publish it."

There is no suggestion that petitioner relied, at any time, upon any defense for his omission of the $250,000 from his tax return other than his false claim that it represented his beneficial interest in Browne Vintners stock and that the stockholding nominees had paid a capital gains tax on that interest when it was sold in 1940. When this claim was proved to have been false, and necessarily known by petitioner to have been false, that proof not only destroyed petitioner's claim to the money itself, but it also demonstrated the willfulness of his attempt to evade or defeat paying any tax on the $250,000.

[7] In the New Jersey statute, in effect in 1943, extortion was defined as follows:

"Any person who, with intent to extort from any person any money or other thing of value . . . shall directly or indirectly threaten to kill or to do any bodily injury to any man, woman or child unless a sum of money be paid, shall be guilty of a high misdemeanor and punished by imprisonment at hard labor for a term not exceeding thirty years, or by a fine not exceeding five thousand dollars, or both." N. J. S. A. 2:127–4.

See also, the federal statute, now in effect, relating to extortion affecting interstate commerce: "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 60 Stat. 420, 18 U. S. C. § 420e–1 (c).

the money's return, petitioner could enjoy its use as fully as though his title to it were unassailable.

An unlawful gain, as well as a lawful one, constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it. *Burnet* v. *Wells,* 289 U. S. 670, 678; *Corliss* v. *Bowers,* 281 U. S. 376, 378. That occurs when cash, as here, is delivered by its owner to the taxpayer in a manner which allows the recipient freedom to dispose of it at will, even though it may have been obtained by fraud and his freedom to use it may be assailable by someone with a better title to it.

Such gains are taxable in the yearly period during which they are realized. This statutory policy is invoked in the interest of orderly administration. "[C]ollection of the revenue cannot be delayed, nor should the Treasury be compelled to decide when a possessor's claims are without legal warrant." *National City Bank* v. *Helvering,* 98 F. 2d 93, 96. There is no adequate reason why assailable unlawful gains should be treated differently in this respect from assailable lawful gains. Certainly there is no reason for treating them more leniently. *United States* v. *Sullivan,* 274 U. S. 259, 263.

There has been a widespread and settled administrative and judicial recognition of the taxability of unlawful gains of many kinds under § 22 (a).[8] The application of

[8] *Johnson* v. *United States,* 318 U. S. 189 (money paid to a political leader as protection against police interference with gambling); *United States* v. *Sullivan,* 274 U. S. 259 (illicit traffic in liquor); *Humphreys* v. *Commissioner,* 125 F. 2d 340 (protection payments to racketeer and ransom paid to kidnapper); *Chadick* v. *United States,* 77 F. 2d 961 (graft); *United States* v. *Commerford,* 64 F. 2d 28 (bribes); *Patterson* v. *Anderson,* 20 F. Supp. 799 (unlawful insurance policies); *Petit* v. *Commissioner,* 10 T. C. 1253 (black market gains); *Droge* v. *Commissioner,* 35 B. T. A. 829 (lotteries); *Rickard* v. *Commissioner,* 15 B. T. A. 316 (illegal prize fight pictures); *McKenna* v. *Commissioner,* 1 B. T. A. 326 (race track bookmaking).

this section to unlawful gains is obvious from its legislative history. Section II B of the Income Tax Act of 1913 provided that "the net income of a taxable person shall include gains, profits, and income . . . from . . . the transaction of any *lawful* business carried on for gain or profit, or gains or profits and income derived from any source whatever . . . ." (Emphasis supplied.) 38 Stat. 167. In 1916 this was amended by omitting the one word "lawful" with the obvious intent thereafter to tax unlawful as well as lawful gains, profits or income derived from any source whatever.[9]

There is little doubt now that where unlawful gains are secured by the fraud of the taxpayer they are taxable.[10] In the instant case it is not questioned that the $250,000 would have been taxable to petitioner if he had obtained it by fraudulently inducing Reinfeld to believe petitioner's false claims to be true. That being so, it would be an extraordinary result to hold here that petitioner is to be tax free because his fraud was so transparent that it did not mislead his victim and his victim paid him the money because of fear instead of fraud.

We do not reach in this case the factual situation involved in *Commissioner* v. *Wilcox,* 327 U. S. 404. We limit that case to its facts. There embezzled funds were held not to constitute taxable income to the embezzler under § 22 (a). The issue here is whether money extorted from a victim with his consent induced solely by harassing demands and threats of violence is included in the definition of gross income under § 22 (a). We think the power of Congress to tax these receipts as income

[9] For further discussion see dissent in *Commissioner* v. *Wilcox,* 327 U. S. 404, 410–411.

[10] For example, see *Akers* v. *Scofield,* 167 F. 2d 718. There the taxpayer swindled a wealthy widow out of substantial funds with which he was to conduct fraudulently represented treasure hunts. He was required to pay taxes on those funds.

under the Sixteenth Amendment is unquestionable. The broad language of § 22 (a) supports the declarations of this Court that Congress in enacting that section exercised its full power to tax income.[11] We therefore conclude that § 22(a) reaches these receipts.

We have considered the other contentions of petitioner but find them without merit sufficient to justify a reversal or remand of the case.

The judgment of the Court of Appeals accordingly is

*Affirmed.*

MR. JUSTICE BLACK, with whom MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE DOUGLAS concur, dissenting.

In *Commissioner* v. *Wilcox,* 327 U. S. 404, decided February, 1946, we held that embezzled money did not constitute taxable income to the embezzler under § 22 (a) of the Internal Revenue Code. We there pointed out that the embezzler had no bona fide legal or equitable claim to the money, was under a definite legal obligation to return it to its rightful owner, and consequently had no more received the kind of "gain" or "income" which Congress has taxed than if he had merely borrowed money. One who extorts money not owed him stands in this precise situation. He has neither legal nor equitable claim to the extorted money and is under a continuing

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[11] *Helvering* v. *Bruun,* 309 U. S. 461, 468; *Helvering* v. *Clifford,* 309 U. S. 331, 334; *Helvering* v. *Midland Ins. Co.,* 300 U. S. 216, 223; *United States* v. *Safety Car Heating Co.,* 297 U. S. 88, 93; *Douglas* v. *Willcuts,* 296 U. S. 1, 9; *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84, 89; *Bowers* v. *Kerbaugh-Empire Co.,* 271 U. S. 170, 174; *Irwin* v. *Gavit,* 268 U. S. 161, 166; *Eisner* v. *Macomber,* 252 U. S. 189, 203. The scope of § 22 (a) in some instances is limited by specific provisions, *e. g.,* § 22 (b) (9) (income from discharge of indebtedness), § 22 (b) (13) (compensation of members of armed forces), but no such provisions apply here.

obligation to return it to its owner. See, *e. g., Bank of the United States* v. *Bank of Washington,* 6 Pet. 8, 19; *Miller* v. *Eisele,* 111 N. J. L. 268, 168 A. 426; N. J. Stat. Ann. 2:73–1. A comparison of MR. JUSTICE BURTON'S opinion in this case with his dissent in the *Wilcox* case reveals beyond doubt that the Court today adopts the reasoning of his prior dissent, thereby rejecting the *Wilcox* interpretation of § 22 (a). A tax interpretation which Congress has left in effect for six years is thus altered largely as a consequence of a change in the Court's personnel. I think that our former interpretation was right and do not believe that the Government is suffering because of a failure to collect income taxes from embezzlers and extortioners. Indeed further considerations strengthen my support of our *Wilcox* holding.

I fully agree that earnings from businesses such as gambling and bootlegging are subject to the income tax law even though these earnings are derived from illegal transactions. *United States* v. *Sullivan,* 274 U. S. 259. The majority seems to think that the *Wilcox* case holds otherwise because some states have laws which under special circumstances permit some particular groups to assert a legal claim for recovery of gambling losses or money paid for bootleg liquor. But these state laws vary far too much in their scope and operation to justify saying that these businessmen never have a bona fide legal or equitable claim to monies paid them. And ". . . we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Jerome* v. *United States,* 318 U. S. 101, 104. Moreover, even if we were to take these state recoupment laws into consideration, the sums recovered under them would do no more than decrease the yearly net earnings of such questionable businesses. To all intents and purposes bootleggers and gamblers are engaged in going busi-

nesses and make regular business profits which should be taxed in the same manner as profits made through more legitimate endeavor. However, in my judgment it stretches previous tax interpretations too far to classify the sporadic loot of an embezzler, an extortioner or a robber as taxable earnings derived from a business, trade or a profession. I just do not think Congress intended to treat the plunder of such criminals as *theirs*.

It seems illusory to believe, as the majority apparently does, that the burden on honest American taxpayers will be lightened by a governmental policy of pursuing extortioners in futile efforts to collect income taxes. I venture the guess that this one trial has cost United States taxpayers more money than the Government will collect in taxes from extortioners in the next twenty-five years. If this statute is to be interpreted on the basis of what is financially best for honest taxpayers, it probably should be construed so as to save money by eliminating federal prosecutions of state crimes under the guise of punishing tax evaders.

Since it seems pretty clear that the Government can never collect substantial amounts of money from extortioners, there must be another reason for applying the tax law to money they extract from others. The Government's brief is suggestive of the only other reason that occurs to me—to give Washington more and more power to punish purely local crimes such as embezzlement and extortion. Today's decision illustrates an expansion of federal criminal jurisdiction into fields of law enforcement heretofore wholly left to states and local communities. I doubt if this expansion is wise from the standpoint of the United States or the states.

Insofar as the United States is concerned, many think that taking over enforcement of local criminal laws lowers the prestige of the federal system of justice. It certainly tends to make the federal system top-heavy. Of supreme

importance is the fact that the United States cannot perform the monumental tasks which lie beyond state power if the time, energy and funds of federal institutions are expended in the field of state criminal law enforcement.[1]

Federal encroachment upon local criminal jurisdiction can also be very injurious to the states. Extortion, robbery, embezzlement and offenses of that nature are traditionally matters of local concern.[2] The precise elements of these offenses as well as the problems underlying them vary from state to state. Federal assumption of the job of enforcing these laws must of necessity tend to free the states from a sense of responsibility for their own local conditions.[3] Even when states attempt

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[1] In opposing certain anti-theft legislation, Attorney General Mitchell wrote Senator Norris that, ". . . The machinery now provided by the Federal Government for the prosecution and punishment of crime is overtaxed.

"Earnest efforts are being made to devise methods for the relief of those Federal courts which are congested and to increase the capacity of our prisons to satisfy present requirements. Until we have dealt adequately with the troubles which now confront us we ought not to be adding to the burden of the law-enforcement machinery by enacting legislation of this kind." 72 Cong. Rec. 6214. Along this line, it has been said that, "It will be a long time before the few hundred agents of the Department of Justice can expand enough to do the work now given to 130,000 peace officers in the United States . . . ." Broad Program Needed for Crime Control, 20 J. Am. Jud. Soc. 196, 200.

[2] In 1950 and 1951, the Senate Crime Committee conducted investigations of organized crime. In its Third Interim Report the Committee stated, "Any program for controlling organized crime must take into account the fundamental nature of our governmental system. The enforcement of the criminal law is primarily a State and local responsibility." S. Rep. No. 307, 82d Cong., 1st Sess. 5.

[3] Commenting on this fact, Attorney General Mitchell said, "Experience has shown that when Congress enacts criminal legislation of this type the tendency is for the State authorities to cease their efforts toward punishing the offenders and to leave it to the Federal authorities and the Federal courts. That has been the experience

to play their traditional role in the field of law enforcement, the overriding federal authority forces them to surrender control over the manner and policy of construing and applying their own laws. State courts not only lose control over the interpretation of their own laws,[4] but also are deprived of the chance to use the discretion vested in them by state legislatures to impose sentences in accordance with local ideas. Moreover, state prosecutors are deprived of the all-important function of deciding what local offenders should be prosecuted. Final authority to make these important decisions becomes located in the distant city of Washington, D. C. Here, as elsewhere, too many cooks may spoil the broth.

Moreover, I doubt if this expansion of federal criminal jurisdiction can be carried on in a manner consistent with our traditional ideas of what constitutes a fair trial in criminal cases. There is the question of the wisdom and fairness of subjecting a person to double and even triple prosecutions for the same conduct, since the nation, state and municipality might make this one mistake or wrong punishable as a crime. "That consideration gives additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute."

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under the Dyer Act." 72 Cong. Rec. 6214. See also Boudin, The Place of the Anti-Racketeering Act in our Constitutional-Legal System, 28 Cornell L. Q. 261, 270 *et seq.*

*United States* v. *Lanza,* 260 U. S. 377, held that a defendant could be subjected to federal prosecution for violation of federal prohibition laws despite the fact that he had already been convicted under New York law for the same conduct. New York's repeal of her prohibition laws six months later highlights the loss of state responsibility for enforcing the criminal law after the Federal Government has entered the field. N. Y. Laws 1923, c. 871.

[4] See n. 5, *infra.*

*Jerome* v. *United States, supra,* 105. Of course, looked at technically, multiple prosecutions for the same conduct could be avoided by national prosecution of one part of the conduct, state prosecution of another part, and municipal prosecution of a third part. This would still leave a defendant faced with the burden of defending three separate prosecutions.

Expansion of federal criminal jurisdiction entails many other unfair and complicating factors. Criminal rules of substance and of procedure vary widely among the jurisdictions.[5] Punishment is frequently different. In fact, the same kind of conduct may be ignored as not worth criminal punishment by one jurisdiction while considered a serious criminal offense by another. For example, under the Federal White Slave Law men can be imprisoned five years for conduct which many states would not hold criminal at all. Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretion, 13 Law and Contemporary Problems 64, 72. When faced with specific federal legislation, such differences in treatment may be inevitable, but I do not think the tax laws should be judicially extended for the purpose of taking from local officials the responsibility for prosecuting local offenses.

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[5] Enforcement of all or some of these rules in the federal courts injects an element of uncertainty into criminal trials. Questions arise as to how much law of what state applies. Then the federal court must attempt to decide what the state law actually is and how it applies to the particular conduct alleged to be criminal. Moreover, an opportunity to obtain an authoritative decision on a matter of state law from the highest state court is denied. Thus all the uncertain problems involved in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, are thrust upon those accused of crime in the federal courts. "And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Const. Co.,* 269 U. S. 385, 391.

When the Government takes over a case like the one before us, the resulting confusion of issues is manifestly prejudicial to the defendant. Here for instance it can hardly be said that Rutkin was tried for tax evasion. Most of the 900 printed pages of oral testimony in the two weeks' trial are devoted to proof of things other than an attempt to evade the tax. Four pages deal with Rutkin's allegedly false 1943 tax return; three pages deal with the amount of tax Rutkin would have owed if he had received $250,000 more income than he actually reported; six pages contain testimony of Rutkin tending to show willful evasion of the tax laws so as to bring the case within *Spies* v. *United States,* 317 U. S. 492. A mere reference to the contents of the remaining 887 pages shows what a great threat there was that Rutkin would be convicted because he was a "bad man" ("scoundrel" to use the trial court's title) regardless of whether he was guilty or innocent of the tax evasion charged.

Most of the evidence dealt with the following aspects of Rutkin's past life and associations: Back in prohibition days Rutkin had joined one Reinfeld and others in a bootlegging scheme called the "High seas venture." The organization made millions. About 1940, some time after prohibition ended, Reinfeld, apparently acting for the group, sold the business establishment for about $7,500,000 net. Reinfeld's accounting methods and management of the proceeds were not satisfactory to his associates. They claimed that Reinfeld held back more than his share of the millions. Reinfeld claimed that some of his former associates, including Rutkin, were "overdrawn" and entitled to nothing out of the $7,500,000. This quarrel went on for several years during which time Reinfeld was required to pay hundreds of thousands of dollars to former partners as a result of their claims that he had swindled them. Rutkin was one of them. Rutkin's $250,000 was paid to him by lawyers whose reputa-

tions seem to have been above reproach. It was paid openly. And it was some eight years later when Rutkin sued Reinfeld for more millions that Reinfeld, apparently for the first time, charged that Rutkin had extorted the $250,000 under threats of death. Yet he has been convicted here of federal tax evasion on the theory that he was guilty of the crime of "extortion." [6]

From the beginning to the end the evidence in this case was devoted to showing the lawless life Rutkin, Reinfeld and their associates led from the 1920's to 1950, ranging from bootlegging to bribery to gambling. The charge of the court largely emphasized and reemphasized the iniquity of the criminal conduct shown by the testimony. Early in his charge the trial court told the jury:

> "You are not deciding which is the bigger scoundrel, Reinfeld or Rutkin; they have both blandly admitted on the stand that they prostituted justice in this country; that they paid public servants to close their eyes to law violation, and that is a canker which eats away at the body public. But you are not passing upon respective degrees of scoundrelism between any two people. The bland way in which we were told that the Reinfelds and the Rutkins and the Zwillmans and all of the others prostituted justice should give us cause for pause, but we are not passing on that question now."

In concluding his charge the trial court told the jury:

> "The Government of the United States doesn't ask you to sacrifice anybody to prove its might. It asks you to do justice. That's all that Rutkin has a right to ask you to do, and that's what the government of the United States asks you to do. It asks you to

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[6] The majority leave me in doubt as to whether the "extortion" was a state or federal crime. See n. 5, *supra*.

> remember its rights too, remembering that unpunished crime, undetected crime, are threats to the majesty and dignity of our government; and that unpunished crime undermines our government. We all of us must do that which is our duty and do it without fear or favor."

My study of this record leads me to believe that the fantastic story of supposed extortion told here would probably never have been accepted by a jury if presented in a trial uncolored by the manifold other inflammatory matters which took up 887 of the 900 pages in this "tax evasion" case.

If we are going to depart from the *Wilcox* holding, I think this is a poor case in which to do so. I would reverse this judgment.

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## UNITED STATES *v.* HOOD ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 426. Argued March 4, 1952.—Decided March 31, 1952.

Appellees were indicted for violating 18 U. S. C. § 215, which makes it a misdemeanor for anyone to solicit or receive contributions in consideration of the promise of support or use of influence in obtaining for any person "any appointive office or place under the United States." The trial court dismissed certain counts of the indictment which alleged the solicitation of contributions in return for promises to use influence to obtain offices which were not in existence at the time of the solicitation or the return of the indictment but which the President had been authorized to create under the Defense Production Act of 1950. *Held:* These counts should not have been dismissed. Pp. 149–152.

(a) Section 215 is broad enough to cover the sale of influence in connection with an office which had been authorized by law and which, at the time of the sale, might reasonably be expected to be established. Pp. 150–151.

(b) The doctrine that criminal statutes are to be strictly construed does not mean that they must be construed by some artificial and conventional rule; nor should there be read out of such statutes what as a matter of ordinary English speech is in them. P. 151.

(c) The construction here given 18 U. S. C. § 215 does not offend the requirement of definiteness. Pp. 151–152.

Reversed.

In a prosecution of the appellees for violation of 18 U. S. C. § 215 and conspiracy, the District Court dismissed some counts of the indictment. The Government appealed directly to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731. *Reversed and remanded,* p. 152.

*Philip Elman* argued the cause for the United States. *Solicitor General Perlman, Assistant Attorney General*

*McInerney* and *Beatrice Rosenberg* filed a brief for the United States.

*Ben F. Cameron* argued the cause for appellees. With him on a brief were *W. S. Henley, Robert W. Thompson, Jr.* and *Albert Sidney Johnston* for Brashier et al., appellees.

Opinion of the Court by MR. JUSTICE FRANKFURTER, announced by THE CHIEF JUSTICE.

The defendants were charged in the District Court for the Southern District of Mississippi with a conspiracy to violate 18 U. S. C. (Supp. IV) § 215 and numerous substantive violations of the same section. The law provides:

> "Whoever solicits or receives, either as a political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both." [1]

The indictment charged a conspiracy to solicit contributions to the Mississippi Democratic Committee and to the defendants personally in return for promises to use influence to obtain for the contributors appointments in the Post Office Department and in the Office of Price Stabilization. Other counts of the indictment charged substantive violations. Material here are counts 31, 32, and 33 charging the solicitation by two of the defendants of three $300 political contributions from named individuals in return for the promise of support and influence on behalf of the contributors to secure for them appointments as Chairmen of the County Ration Boards of Pike, Amite

[1] The statute was revised and amended in 1951 in respects not material here. 65 Stat. 320.

and Lawrence Counties, respectively. It is stipulated that no such offices were in existence at the time of the solicitation or at any time thereafter up to the return of the indictment. Authority to create such offices, however, had been granted to the President, well before the violations charged, by the Defense Production Act of 1950, 64 Stat. 798, 807, 50 U. S. C. App. (Supp. IV) § 2103.

Defendants successfully moved to dismiss these portions of the indictment on the ground that the statute did not make criminal the sale of non-existent offices or of influence in connection with appointments to them. The District Court also ordered stricken the references in the conspiracy count to the offices of Chairmen of County Ration Boards. The order of dismissal was appealed by the Government under the Criminal Appeals Act, 18 U. S. C. (Supp. IV) § 3731. Our jurisdiction in such cases is limited to the construction of the statute involved.

We think the District Court was wrong. The statute is plainly broad enough on its face to cover the sale of influence in connection with an office which had been authorized by law and which, at the time of the sale, might reasonably be expected to be established. That was the situation here and we do not have to go further to say whether the words will cover the sale of an office which is purely the creature of the seller's fancy.

The evil at which the statute is directed is the operation of purchased, and thus improper, influence in determining the occupants of federal office. But in attacking that evil, Congress outlawed not the use of such influence, but the solicitation of its purchase, the peddling of the forbidden wares. As is not uncommon in criminal legislation, Congress, in order to strike at the root, made the scope of the statute wider than the immediate evil. Even judges need not be blind to the fact of political life that it helps in influencing political appointments to be fore-

handed with a recommendation before an office is formally created. Certainly it was not unreal for Congress to believe that the sale of influence in anticipation of jobs was equally damaging to the proper operation of the federal service and to take steps to prevent it. It did so in this Act. Nothing has been suggested, either by the sparse legislative history or by prior judicial construction,[2] to restrain us from giving effect to the obvious, ordinary reading of the statute. It is pressed upon us that criminal statutes are to be strictly construed. But this does not mean that such legislation "must be construed by some artificial and conventional rule." *United States* v. *Union Supply Co.*, 215 U. S. 50, 55. We should not read such laws so as to put in what is not readily found there. But equally we should not read out what as a matter of ordinary English speech is in.

This Act penalized corruption. It is no less corrupt to sell an office one may never be able to deliver than to sell one he can. Dealing in futures also discredits the processes of government. There is no indication that this statute punishes delivery of the fruit of the forbidden transaction—it forbids the sale. The sale is what is here alleged. Whether the corrupt transaction would or could ever be performed is immaterial. We find no basis for allowing a breach of warranty to be a defense to corruption.

Our construction of the statute does not offend the requirement of definiteness. The picture of the unsuspecting influence merchant, steering a careful course between violation of the statute on the one hand and obtaining money by false pretenses on the other by confining himself to the sale of non-existent but plausible offices, entrapped

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[2] Only one reported case has construed the statute. *Hoeppel* v. *United States*, 66 App. D. C. 71, 85 F. 2d 237. It dealt with a question unrelated to this case.

by the dubieties of this statute, is not one to commend itself to reason.

The judgment below is reversed and the case remanded for further proceedings.

*Reversed.*

MR. JUSTICE BLACK, with whom MR. JUSTICE REED, MR. JUSTICE DOUGLAS and MR. JUSTICE MINTON concur, dissenting.

18 U. S. C. § 215 makes it a crime to solicit or receive political contributions on the basis of a promise to help "any person" obtain "any appointive office or place under the United States . . . ." The Government argues that this statute makes it criminal to promise to help someone get an "office or place" even though there is no such office or place in existence. Apparently sensing that such an extraordinary expansion of this criminal statute might not be accepted, the Government argues for a lesser expansion sufficient to include an "office or place" if there is a "substantial possibility" that it may be "set up in the near future." The Court's construction is apparently the same although there are slight verbal variations. It reads the statute as punishing promises made to use "influence in connection with an office which had been authorized by law and which, at the time of the sale, might reasonably be expected to be established." The words used in this statute convey no such meaning to me. I think that any person reading the words "office or place" would immediately think of them as applying to an actual, existing "office or place." This surely would be a fair construction of the language used, and I think it is the construction that should be compelled in connection with this criminal statute. It requires considerable straining to say that Congress "plainly and unmistakably," *United States* v. *Gradwell*, 243 U. S. 476, 485, made it a crime to use influence in connection with an "office or place" that did

not exist. See *United States* v. *Halseth,* 342 U. S. 277. As a matter of fact, the "reasonably to be expected" office or place here talked about was not only nonexistent at the time the alleged promise was made—it has not been "set up" yet. We should not stretch this statute to cover conduct which is not prohibited on the theory that Congress would have done so had it thought about it. *United States* v. *Weitzel,* 246 U. S. 533, 543; *McBoyle* v. *United States,* 283 U. S. 25, 27; *Pierce* v. *United States,* 314 U. S. 306.

# RAY, CHAIRMAN OF THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA, *v.* BLAIR.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 649. Argued March 31, 1952.—Decided April 3, 1952.

Article II, § 1, and the Twelfth Amendment of the Constitution do not compel issuance of the order entered by an Alabama state court in this mandamus proceeding directing petitioner, as Chairman of the State Democratic Executive Committee of Alabama, to certify to the Secretary of State of Alabama the name of respondent as a candidate for nomination for Presidential and Vice-Presidential elector in the primary election of the Democratic Party to be held on May 6, 1952. Pp. 154–155.

257 Ala. —, 57 So. 2d 395, reversed.

*Marx Leva* and *Harold M. Cook* argued the cause for petitioner. With them on the brief were *James J. Mayfield, George A. LeMaistre* and *Louis F. Oberdorfer.*

*Horace C. Wilkinson* argued the cause and filed a brief for respondent.

PER CURIAM.

In this proceeding, an Alabama circuit court entered an order directing petitioner to certify to the Secretary of State of Alabama the name of respondent as a candidate for nomination for Presidential and Vice-Presidential elector in the primary election of the Democratic Party to be held on May 6, 1952. The Alabama Supreme Court affirmed on the single ground that the order was compelled by Article II, Section 1 and the Twelfth Amendment of the United States Constitution.

Petitioner applied to this Court for a stay of the judgments and mandates of the Alabama courts and filed a petition for writ of certiorari to review the judgment of

the Alabama Supreme Court. On March 24, 1952, we granted certiorari and ordered the judgments and mandates of the courts below stayed pending further consideration and disposition of the case by this Court. The case was assigned for argument on the stay as well as the merits on March 31, 1952. 343 U. S. 901.

The question raised in this case has been thoroughly briefed and argued. The Court has fully considered the question and has reached its conclusion. It now announces its decision and enters its judgment in advance of the preparation of a full opinion which, when prepared, will be filed with the Clerk. [See *post*, p. 214.]

The Court holds that Article II, Section 1 and the Twelfth Amendment of the Constitution do not compel issuance of the order and judgment entered below.

The judgment below is reversed. The mandate of this Court is directed to issue forthwith.

*Reversed.*

MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON dissent.

MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

# KAUFMAN ET AL. *v.* SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ET AL.

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

No. 172. Argued January 2, 1952.—Decided April 7, 1952.

1. When the Alien Property Custodian, under § 5 (b) of the Trading with the Enemy Act, as amended by the First War Powers Act of 1941, seizes American assets of a corporation organized under the laws of a neutral country but dominated and controlled by enemy aliens, the rights of innocent nonenemy stockholders to an interest in the assets proportionate to their stockholdings must be fully protected. Pp. 158–160.
2. Under Rule 24 (a)(2) of the Federal Rules of Civil Procedure, innocent nonenemy stockholders are entitled to intervene in a suit brought under § 9 (a) of the Trading with the Enemy Act by a corporation, organized under the laws of a neutral country but dominated and controlled by enemy aliens, to recover American assets seized by the Alien Property Custodian under § 5 (b), as amended by the First War Powers Act of 1941, when there is a showing that the rights of such innocent nonenemy stockholders will not be adequately protected by the corporation in such suit and they may be bound by the judgment in such suit. Pp. 160–162.

88 U. S. App. D. C. 296, 188 F. 2d 1017, reversed.

The District Court denied petitioners' motion to intervene in a suit brought by a corporation under § 9 (a) of the Trading with the Enemy Act to recover assets seized by the Alien Property Custodian under § 5 (b), as amended by the First War Powers Act of 1941. 90 F. Supp. 1011. The Court of Appeals affirmed. 88 U. S. App. D. C. 296, 188 F. 2d 1017. This Court granted certiorari. 342 U. S. 847. *Reversed,* p. 162.

*Irving Moskovitz* argued the cause for petitioners. With him on the brief were *William Radner, Henry G.*

*Fischer, Seymour Graubard, Odell Kominers, Peter N. Schiller* and *Beryl Harold Levy.*

*David Schwartz* argued the cause for McGrath, Attorney General, et al., respondents. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Baynton, James D. Hill, George B. Searls* and *Sidney B. Jacoby.*

*John J. Wilson* argued the cause for the Societe Internationale Pour Participations Industrielles et Commerciales, S. A., respondent. With him on the brief was *Roger J. Whiteford.*

*William P. MacCracken, Jr., Urban A. Lavery* and *William W. Barron* submitted on brief for Remington Rand, Inc., respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Acting under § 5 (b) of the Trading with the Enemy Act,[1] the Alien Property Custodian vested in himself the American assets of Interhandel, a Swiss corporation.[2] Interhandel sued in the District Court to recover the assets. The Custodian [3] answered alleging that the Swiss corporation was dominated and controlled by officers, agents, and stockholders who were engaged in a conspiracy with German nationals and with the German Government to

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[1] 40 Stat. 411, 50 U. S. C. App. § 1, as amended by the First War Powers Act, 1941, 55 Stat. 839, 50 U. S. C. App. § 5 (b).

[2] Although the corporation is commonly called "Interhandel," its full legal name is Societe Internationale Pour Participations Industrielles et Commerciales S. A., etc. The American assets consisted of bank accounts and over 90% of the capital stock in the General Aniline & Film Corporation of Delaware, all of the assets apparently being valued at more than $100,000,000.

[3] In 1946, the Attorney General succeeded to the powers and duties of the Alien Property Custodian. Exec. Order No. 9788, 11 Fed. Reg. 11981.

operate the company's business in their interests while we were at war with Germany. Petitioners, United States citizens who own stock in Interhandel, filed a motion to intervene. They admitted the Custodian's charge that Interhandel was dominated by officers and stockholders who had been engaged in such a conspiracy. They also admitted the right of the Custodian to retain an interest in the seized assets proportional to the stock ownership of enemy stockholders. But petitioners contended that they and other nonenemy stockholders had claims in the corporate assets which it was the corporation's duty to protect. Alleging that the dominant enemy group which had charge of the suit would not press the corporate claim in a manner that would adequately protect the claims of innocent shareholders, petitioners asserted a right to intervene under Rule 24 (a) of the Federal Rules of Civil Procedure. The District Court denied the motion to intervene, 90 F. Supp. 1011, and the Court of Appeals affirmed, 88 U. S. App. D. C. 296, 188 F. 2d 1017. Underlying the claimed right of petitioners to intervene is an important question of the power of the Alien Property Custodian under the Trading with the Enemy Act, namely: What part of the assets of a corporation organized under the laws of a neutral country may the Custodian retain where part of the corporate stock is owned by enemies, part by American citizens, and part by nonenemy aliens? This question was reserved in *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, 489–490. To consider it we granted certiorari in this case. 342 U. S. 847.

*First.* Interhandel is a neutral corporation organized in Switzerland. Prior to 1941, even ownership of its stock and domination by enemy nationals would not have justified seizure of its assets. In order to reach the enemy interests in such neutral corporations, Congress amended the controlling Act in 1941. The background, scope and

consequences of that amendment were discussed in *Clark* v. *Uebersee Finanz-Korp., supra.* We there held that the 1941 amendment authorized the Custodian to seize and vest in himself all property of any foreign country or national, even that of friendly or neutral nations. At the same time we refused to hold that the 1941 amendment deprived friendly or neutral nations or nationals of a right to have their assets returned if they could prove that they were free of any open or concealed enemy taint. The purpose of the amendment, we found, was "not to appropriate friendly or neutral assets but to reach enemy interests which masqueraded under those innocent fronts." *Clark* v. *Uebersee Finanz-Korp., supra,* at 485.

Thus, under the 1941 amendment the nonenemy character of a foreign corporation because it was organized in a friendly or neutral nation no longer conclusively determines that all interests in the corporation must be treated as friendly or neutral. The corporate veil can now be pierced. Enemy taint can be found if there are enemy officers or stockholders; even the presence of some nonenemy stockholders does not prevent seizure of all the corporate assets. But such a governmental seizure requires consideration of the plight of innocent stockholders. For as stated in the *Uebersee* case, the amendment does not contemplate appropriation of friendly or neutral assets. While Congress has clearly provided for forfeiture of enemy assets, it has used no language requiring us to hold that innocent interests must be confiscated because of the guilt of other stockholders. Nor does any legislative history pointed out persuade us that Congress intended to inflict such harsh consequences upon the innocent. We decline to read such a congressional purpose into the Act.

Our holding is that when the Government seizes assets of a corporation organized under the laws of a neutral

country, the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected. This holding is not based on any technical concept of derivative rights appropriate to the law of corporations. It is based on the Act which enables one not an enemy as defined in § 2 to recover any interest, right or title which he has in the property vested. The innocent stockholder may not have title to corporate assets, but he does have an interest which Congress has indicated should not be confiscated merely because some others who have like interests are enemies.

*Second.* Section 9 (a) of the Trading with the Enemy Act authorizes Interhandel to maintain this action for the recovery of all its assets because it has alleged that it is not enemy dominated. Alleging that they and others are nonenemy stockholders, petitioners charge that it is Interhandel's corporate duty to assert a claim for the return of their proportionate interests in the assets even though other stockholders who dominate the corporation are found to be enemies. Petitioners further allege that the corporate management refuses to assert such a claim, but continues to claim only a return of all assets on the theory that whatever return is obtained must be divided among enemy and nonenemy shareholders in proportion to their stock holdings. This position is taken, petitioners charge, because the suit is being controlled by the very stockholders on whose account the Custodian seized the property and whose interests will be worthless if they are found to be enemies. Petitioners allege that this enemy corporate management, fearing confiscation of its enemy-tainted interests, is about to settle the corporate claim with the Custodian for an amount less than the value of the nonenemy part of the assets. Should this be done, it is said the enemy management contemplates dividing the proceeds proportionately among enemy and

nonenemy stockholders, thus violating the Act in two ways: (1) by depriving nonenemy stockholders of part of their property, and (2) by returning assets to foreign enemy stockholders.

A mere narration of the allegations shows that petitioners' fears are by no means fanciful. Indeed, the Government agrees with the dominant corporate management that the interests of enemy and nonenemy stockholders should be treated alike. The United States wishes to sell the entire assets of Interhandel. And it is argued that if nonenemy stockholders are to be given a chance in court (which right is challenged), they should be limited to individual suits for money judgments against the Custodian. Petitioners claim a proportional right or interest in the specific assets of Interhandel and that they may not be driven to accept their share of whatever price the Government may happen to get from a sale of these valuable assets. In order to play safe, petitioners have filed a separate suit in a Federal District Court. But we think the questions involved in disputes like this can be more appropriately resolved in the corporate actions authorized by § 9 (a) than by resort to a multiplicity of separate actions. In such suits the nonenemy stockholder in his own right may assert his nonenemy character in order to protect his own interest from the enemy taint caused by other stockholders. Courts trying such corporate actions have adequate equitable power and procedural flexibility to protect all interests, even when the corporate recovery is not for the benefit of all stockholders but only for those who are nonenemies.

In view of our holding that Congress has recognized that nonenemy stockholders of nonenemy foreign corporations have a severable interest in corporate assets seized by the Custodian, it follows that the allegations of these petitioners entitle them to intervene. These allegations, if true, show that petitioners' interests may

be inadequately represented and that they may be bound by a judgment in this corporate action. This brings the claim of intervention squarely within Rule 24 (a)(2) of the Federal Rules of Civil Procedure.[4]

*Reversed.*

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

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

The Court holds that "when the Government seizes assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected." Such a holding opens wide one door of escape from war damage claims of the United States and its citizens against foreign corporations, organized and controlled by enemies in neutral territory. As the opinion does not indicate whether the alleged nonenemy stockholder must bear the burden of proving his character, we assume that this burden rests on the claimant stockholder in an enemy-tainted corporation. Even so, the difficulty of rebutting an individual's self-serving evidence as to his neutrality is obvious. The war and prewar activities and connections of the many American and neutral residents, stockholders of neutral corporations engaged in world-wide dealings, are known largely only to the interested individual. The definition of "enemy" in the Trading with the Enemy Act leaves innumerable paths for stockholders sheltered by the Court's decision to escape responsibility for the acts of

[4] "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; . . . ." See *Sutphen Estates, Inc.* v. *United States,* 342 U. S. 19.

the corporate agency that their investments have made powerful and efficient to undermine our security.[1]

Thus a national of an enemy nation, under *Guessefeldt* v. *McGrath,* 342 U. S. 308, may now recover, on his showing of his own nonenemy character, all his interest in the assets of vested enemy-dominated neutral corporations. Every dollar that may be drawn by nonenemies from the assets of an enemy-dominated corporation reduces the sums available for national and individual indemnification for war damage.[2] As the objective of the Trading with the Enemy Act is not only the sterilization of funds against enemy use during war but also the

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[1] 50 U. S. C. App. § 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."

[2] It is alleged by the United States that the conspiracy of which the respondent Societe was a part had for its objective "to conceal, camouflage and cloak the ownership, control, and domination by I. G. Farben of properties and interests in many countries of the world, including the United States, other than Germany. Among the various purposes and objectives of the said conspiracy were to assist I. G. Farben:

. . . . . .

"(e) To conceal, camouflage and cloak the ownership, control and domination by I. G. Farben of properties and interests located in countries, including the United States, other than Germany, in order to avoid seizure and confiscation in the event of war between such countries and Germany."

The Societe alleges that it "is the owner of 2,050,000 shares of the Common B stock, and 455,448 shares of the Common A stock, of *General Aniline & Film Corporation,* of a value in excess of One Hundred Million Dollars ($100,000,000)," now at stake.

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creation of a reparation pool of enemy and enemy-tainted assets for indemnification of war injuries, such diminutions imperil the purposes of the Act. Cf. *Propper* v. *Clark*, 337 U. S. 472, 484.

II.

The Court's holding permits foreign sympathizers, residents of the United States or neutral territory, not covered by the definition of enemies, to avoid sacrifice in war of their financial interests through the trite scheme of investment in neutral corporations, controlled and used by our enemies for our defeat. If the question of the rights of a nonenemy stockholder were at issue in *Uebersee Finanz-Korporation* v. *McGrath*, 343 U. S. 205, decided today, that nonenemy stockholder, under the Court's opinion in this case, would recover his proportion of the corporation assets, despite the fact that *Uebersee*

> "owned all the stock of a subsidiary Hungarian corporation engaged in the mining of bauxite in Hungary, and in 1939 and 1940 guaranteed a loan by a Swiss bank to this corporation for its operations. The loan was repaid in November 1942. The United States was at war with Hungary from December 13, 1941. During October, November, and December 1941, the Hungarian corporation shipped bauxite to Germany and had a contract to do so until the end of 1942." 343 U. S. 205, 209–210.

At one time this Nation allowed such easy escape from the penalties of war, relying upon the ownership of corporate stock for protection.[3] *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457, demonstrated the futility of such a method of protection. It was to plug this loophole that the Congress enacted in 1941 the existing § 5 (b) of the Trading with the Enemy Act, authorizing the President to vest "any property or interest of any foreign country

[3] *Hamburg-American Co.* v. *United States*, 277 U. S. 138, 140.

or national thereof." [4] It surely was not the purpose of Congress to leave the door halfway open.

## III.

The Court's holding disregards the normal incidents of corporate responsibility and frustrates the purpose of Congress to repair the gap in our defense policy toward alien property pointed out by our *Behn-Meyer* decision. The *Uebersee* case did not decide the issue here presented. It left open the effect of enemy ownership of minor interest in a foreign corporation but it would hardly have been thought until today that *Uebersee* left open the fate of the property of an enemy-dominated corporation, which corporation was part of a scheme, as shown in n. 2, "to avoid seizure and confiscation in the event of war." [5] Congress has indicated its attitude quite clearly.[6] To-

[4] *Clark* v. *Uebersee Finanz-Korporation,* 332 U. S. 480, 483. See note 3, p. 485, describing the maze of corporate schemes for enemy control of war economy.

[5] 332 U. S. at 489–490:

"It is suggested, however, that this approach may produce results which are both absurd and uncertain. It is said that the entire property of a corporation would be jeopardized merely because a negligible stock interest, perhaps a single share, was directly or indirectly owned or controlled by an enemy or ally of an enemy. It is also pointed out that securities or interests other than stock might be held by an enemy or ally of an enemy and used effectively in economic warfare against this country. But what these interests are, the extent of holdings necessary to constitute an enemy taint, what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears, are left undecided. Since we assume from the allegations of the complaint that respondent is free of enemy taint and therefore is not within the definition of enemy or ally of an enemy, those problems are not now before us. We recognize their importance; but they must await legislative or judicial clarification."

[6] 50 U. S. C. App. § 32:

"The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien

day's ruling cuts deeply into the congressional purpose to hold the property of enemy-tainted foreign corporations for satisfaction of war claims.

The result reached by the Court is brought about by a disregard of the ordinary incidents of the relation of a stockholder to a corporation. A stockholder has no present interest in the physical property of an unliquidated corporation. The corporation is responsible for the acts of the corporation.[7] The stockholder normally is not. By his contribution to capital and his participation in profits, he puts his investment at risk, according to the conduct of the corporation. He may have claims against management but those claims have nothing to do with corporate assets subject to the demands of creditors or governments. Those corporate assets grow or diminish because of corporate, not shareholder, conduct.[8] Surely, if a corporation violated the Sherman Act, its assets would be subject to the triple-damage claims of wronged competitors, even to its last cent and to the detriment of stockholders who may have protested vehemently but ineffectively against the illegal course of conduct. Surely

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Property Custodian . . . whenever the President or such officer or agency shall determine—

. . . . . .

"(2) that such owner, and legal representative or successor in interest, if any, are not—

. . . . . .

"(E) a foreign corporation or association which at any time after December 7, 1941, was controlled or 50 per centum or more of the stock of which was owned by any person or persons ineligible to receive a return under subdivisions (A), (B), (C), or (D) hereof: . . . ."

(A), (B), (C) and (D) refer substantially to national, corporate or individual enemies.

[7] Cook, Corporations (8th ed.), vol. I, § 11; vol. III, §§ 663, 664.

[8] *Christopher* v. *Brusselback*, 302 U. S. 500, 503:

"A stockholder is so far an integral part of the corporation of which he is a member, that he may be bound and his rights foreclosed by

a corporate deed of the corporation's "interest, right, or title" to a piece of property would not leave in a stockholder any interest adverse to the grantee.

The Court finds justification for allowing a stockholder to sue in the language of § 9; the Court says the holding "is based on the Act which enables one not an enemy as defined in § 2 to recover any interest, right or title which he has in the property vested." No authority is cited for the proposition that a stockholder has an "interest," within the meaning of the Act, in the physical assets of the corporation, separate from the interest of the corporation. Corporations may recover on showing their nonenemy character, just as individuals may, but the corporate entity should not be disregarded without some evidence of such congressional intention. The language of § 9, "interest . . . in [the] property . . . seized," could not normally be taken to mean a stockholder's interest in the administration and profits of the corporation; [9] in our opinion it means an interest in the assets actually

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authorized corporate action taken without his knowledge or participation. . . ."

See *Pink* v. *A. A. A. Highway Express*, 314 U. S. 201, 207.

*Anderson* v. *Abbott*, 321 U. S. 349, 361:

"Some shareholders of Banco claim the right to rescind their purchases of its shares on the ground of misrepresentations in the sale. But whether or not such relief might be granted in some instances, it seems clear that Banco's stockholders are bound by the decisions of the directors which determined, within the scope of the corporate charter, the kind and quality of the corporate undertaking."

[9] In the analogous law of prize, it is settled that the nonenemy stockholders of an enemy corporation have no right to recover any portion of seized property which was owned by the corporation. *The Polzeath*, [1916] P. 241, 256 (C. A.), affirming [1916] P. 117: ". . . the British shareholders are not entitled to intervene. It is suggested that the ship should be appraised, and that payment should be made to the British shareholders in proportion to their holdings. The Court has no such power; it cannot administer the affairs of the company. If any hardship is caused to innocent shareholders by the

seized. There is no indication that Congress intended that the mere vesting of the corporate assets by the Attorney General should confer upon each stockholder an enforceable interest in those assets.

Where the corporation subjects its assets to forfeiture by aiding our enemies, the corporation should pay the penalty. The friendly stockholder should not be permitted by strained statutory interpretation to withdraw his contribution to the funds that were used to our injury and so reduce the assets available for war claimants. We see no real difference, as to liability to have assets vested under the Trading with the Enemy Act, between a corporation enemy-dominated as this is alleged to be and an enemy-domiciled corporation producing munitions of war for use against the United States. The Court's opinion refers only to enemy-dominated neutral corporations but

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declaration of forfeiture their position is that they can only appeal to the merciful consideration of the Crown."

*Steamship "Marie Glaeser,"* 1 Lloyd's Prize Cases 56, 111 (1914):

"Now, with regard to the shareholders in the vessel, it is quite clear that if they are enemy shareholders their property must go with the capture of the vessel in which they have put their money—a vessel sailing under the flag of the enemy. Not only is that so with regard to shareholders who might be citizens of the German Empire, but it is equally so if some of those shareholders happen to be, as they may be—I do not know—persons who are citizens of this country. If a shareholder invests his money by taking shares in a vessel which is liable to capture, he takes that risk.

"If in the case of a British shareholder he likes to present his case to the Crown as one which ought to be leniently dealt with, that is another matter. I have nothing to do with that. I am here only to administer the law, and I must hold that no shareholders have any right whatsoever to be protected from the results of the capture of this vessel."

*Standard Oil Tankers Case,* Arbitration Award, Aug. 5, 1926, II Foreign Relations of the United States (1926), p. 166. Cf. *The Pedro,* 175 U. S. 354, 367–368.

the theory of recovery for friendly stockholders appears to be equally applicable to friendly stockholders of enemy corporations.

The Court of Appeals should be affirmed.

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## UNITED STATES *v.* SPECTOR.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 443. Argued March 6, 1952.—Decided April 7, 1952.

1. Section 20 (c) of the Immigration Act of 1917, as amended, 8 U. S. C. § 156 (c), which makes it a felony for an alien against whom a specified order of deportation is outstanding to "willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure" is not, on its face, void for vagueness. Pp. 170–172.
2. The question whether the statute is unconstitutional because it affords a defendant no opportunity to have the court which tries him pass on the validity of the order of deportation is reserved, because it is not properly before the Court in this case. Pp. 172–173.

99 F. Supp. 778, reversed.

The District Court dismissed two counts of an indictment against respondent on the ground that § 20 (c) of the Immigration Act of 1917, as amended, 8 U. S. C. § 156 (c), on which they were based, was void for vagueness. 99 F. Supp. 778. On appeal to this Court under 18 U. S. C. § 3731, *reversed,* p. 173.

*Robert L. Stern* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Kenneth C. Shelver.*

*John W. Porter* and *A. L. Wirin* argued the cause and filed a brief for appellee.

Mr. Justice Douglas delivered the opinion of the Court.

Section 20 of the Immigration Act of 1917, as amended, 39 Stat. 890, 57 Stat. 553, 64 Stat. 1010, 8 U. S. C. (Supp. IV) § 156, contains provisions designed to expedite the deportation of aliens. Section 20 (a) provides that the Attorney General shall direct the deportation "to the country specified by the alien, if it is willing to accept him into its territory." Otherwise the Attorney General shall direct the deportation to any one of a series of specified countries or if deportation to any of them is impracticable, inadvisable, or impossible, then to any country which is willing to accept the alien. Section 20 (b) grants the Attorney General powers of supervision over aliens against whom deportation orders have been outstanding for more than six months and fixes penalties for violations of the regulations which the Attorney General has prescribed. Section 20 (c) provides that any alien against whom a specified order of deportation is outstanding "who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of the Subversive Activities Control Act of 1950, whichever is the later, or *shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure,* . . . shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years . . . ." (Italics added.)

The latter (the italicized) provision of § 20 (c) is involved here. Appellee is an alien who came to this country from Russia in 1913. An order of deportation was entered against him in 1930 by reason of his advocacy of the overthrow of the Government by force and violence. An indictment was returned against him, two counts of which charged him with willfully failing and refusing to

make timely application in good faith for travel or other documents necessary to his departure from the United States. The District Court sustained a motion to dismiss these two counts. It held that the statute in question was unconstitutionally vague and indefinite, because it did not specify the nature of the travel documents necessary for departure nor indicate to which country or to how many countries the alien should make application. 99 F. Supp. 778. The case is here on appeal. 18 U. S. C. (Supp. IV) § 3731.

While a statute, plain and unambiguous on its face, may be given an application that violates due process of law, we are not concerned with that problem in the present case. The question here is whether the statute on its face meets the constitutional test of certainty and definiteness. We think it does when viewed in its statutory setting.

The statutory scheme seems clear and unambiguous. The choice of a country willing to receive the alien is left first to the alien himself and then to the Attorney General. Once the country willing to receive the alien is identified, the mechanism for effecting his departure remains. The six-month period specified in § 20 (c) makes clear what a "timely" application is. The statutory words "travel or other documents necessary to his departure" will, of course, have different meanings in reference to various countries. The forms to be filled out, the deposits to be made, the number of photographs to be furnished, and the information to be supplied will vary from country to country. But when the country to which the alien is to be deported is known, any mystery concerning the documents necessary to his departure vanishes. The words "necessary to his departure" when applied to deportations would normally refer to a lawful departure from this

country and a lawful entrance into another. The alien satisfies the statute by making timely application for such documents as the country in question requires for his admission.

The statute might well be a trap if, for example, it required the alien to know the visa requirements of one or more countries. But the emphasis of the present statute is on a "timely application in good faith" for such documents as the country in question may require. Though the visa requirements for entrance into a particular country are in constant change, the command of the statute remains simple and intelligible. We conclude that the warning contained in the statute is sufficiently definite to free it of any constitutional infirmity of vagueness. Cf. *United States* v. *Petrillo,* 332 U. S. 1; *Jordan* v. *De George,* 341 U. S. 223.

Another question of constitutional law is pressed upon us. It is that the statute must be declared unconstitutional because it affords a defendant no opportunity to have the court which tries him pass on the validity of the order of deportation. That question was neither raised by the appellee nor briefed nor argued here. If it had been, we might consider it. See *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 330. But when a single, naked question of constitutionality is presented, we do not search for new and different constitutional questions. Rather we refrain from passing on the constitutionality of a phase of a statute until a stage has been reached where the decision of the precise constitutional issue is necessary. See *United States* v. *Petrillo, supra.*

It will be time to consider whether the validity of the order of deportation may be tried in the criminal trial either by the court or by the jury (cf. *Yakus* v. *United*

*States,* 321 U. S. 414; *Cox* v. *United States,* 332 U. S. 442) when and if the appellee seeks to have it tried. That question is not foreclosed by this opinion. We reserve decision on it.

*Reversed.*

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

MR. JUSTICE BLACK, dissenting.

The only thing certain about § 20 (c) of the Immigration Act of 1917, as amended, is that violation of its terms is a felony punishable by ten years' imprisonment. An alien ordered deported by the Bureau of Immigration is subject to this ten-year penalty if he "willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure." To avoid punishment an alien must guess with unerring accuracy what answers a judge or jury[1] might someday give to the following questions: (1) When is an application "timely"? (2) What constitutes a "good faith" application? (3) What kind of "documents" are "necessary to his departure"? (4) To *whom* must he apply for these documents?

Aliens living in this country are not necessarily sophisticated world travelers familiar with the present-day red

[1] "In earlier times, some Rulers placed their criminal laws where the common man could not see them, in order that he might be entrapped into their violation. Others imposed standards of conduct impossible of achievement to the end that those obnoxious to the ruling powers might be convicted under the forms of law. No one of them ever provided a more certain entrapment, than a statute which prescribes a penitentiary punishment for nothing more than a layman's failure to prophesy what a judge or jury will do. . . ." *Williams* v. *North Carolina,* 325 U. S. 226, 278 (dissenting opinion). Cf. *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 89.

tape that must be unwound to get from one country to another. Congress should at least indicate when, to whom, and for what the alien should apply. If, for example, the statute merely required an alien to report at a certain time and place to sign "documents" collected by the American Department of State, the affirmative conduct demanded would at least be clear and specific. But the present statute, in my judgment, entangles aliens in a snare of vagueness from which few can escape. I think the Constitution requires more than a "bad" guess to make a criminal.[2]

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

I think this Act to punish an alien's unlawful presence in the United States is unconstitutional for reasons apparent on its face.[1] It differs in subtlety but not in substance from one held unconstitutional more than half a century ago in a decision repeatedly and recently cited with approval. *Wong Wing* v. *United States,* 163 U. S.

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[2] My belief that the statute is void for vagueness makes it unnecessary for me to reach the constitutional question discussed by MR. JUSTICE JACKSON, although I have not yet seen a satisfactory reason for rejecting his view. See my opinion in *Maggio* v. *Zeitz,* 333 U. S. 56, 78–81.

[1] The pertinent portion of § 20 (c) of the Immigration Act of 1917 (as rewritten in § 23 of the Internal Security Act of 1950, 64 Stat. 1010, 8 U. S. C. (Supp. IV) § 156 (c)) reads as follows:

"Any alien against whom an order of deportation is outstanding under [various named statutes] . . . who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from September 23, 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure . . . shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years . . . ."

228.[2] The Act there stricken down was simple and direct. It provided that any Chinese person or person of Chinese descent adjudged by any justice, judge or commissioner of the United States not lawfully entitled to be or to remain in the United States should first be imprisoned at hard labor and thereafter removed from the United States. The Court conceded that it would be competent for Congress to declare that an alien remaining unlawfully in the United States could be criminally punished "if such offence were to be established by a judicial trial." 163 U. S. at 235. However, it said:

> "But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.
>
> "No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offence as an in-

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[2] *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 586; *Li Sing* v. *United States,* 180 U. S. 486, 495; *Downes* v. *Bidwell,* 182 U. S. 244, 283; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489.

famous crime, find the fact of guilt and adjudge the punishment by one of its own agents." 163 U. S. at 237.[3]

Thus the Court held that the Constitution prohibited *for criminal purposes* a judicial determination without a jury that the alien was illegally present in the United States. It held that the facts which made his presence illegal must be established to the satisfaction of a jury, although the actual case before it seems to have presented

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[3] In *Li Sing* v. *United States, supra,* at 494–495, the Court quoted *Fong Yue Ting* v. *United States,* 149 U. S. 698, 730, as follows:

"[An] order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application."

The *Li Sing* Court then went on, however, to say that:

"It may be proper here to mention that this court has held that, while the United States can forbid aliens from coming within their borders, and expel them from the country, and can devolve the power and duty of identifying and arresting such persons upon executive or subordinate officials, yet, when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused. *Wong Wing* v. *United States,* 163 U. S. 228."

That Court thereby made it clear that there is a great distinction between deportation itself and a deportation order that may be made the basis of subsequent criminal punishment. It is that distinction which we press for here. See Fraenkel, Can the Administrative Process Evade the Sixth Amendment? 1 Syracuse L. Rev. 173.

only the narrowest and simplest issues, namely, whether the alien was a Chinaman and whether he was here. If so, his entry and his presence at any time were illegal. In contrast, this Act incriminates those whose presence here is entirely legal but for guilt of some forbidden conduct since entry. Certainly illegal presence under present laws involves a much more trialworthy issue than in *Wong Wing's* case.

This Act creates a crime also based on unlawful residence in the United States. The crime consists of two elements: one, an outstanding order for deportation of an alien; the other, the alien's willful failure to leave the country or take specified steps toward departure. The Act does not permit the court which tries him for this crime to pass on the illegality of his presence. Production of an outstanding administrative order for his deportation becomes conclusive evidence of his unlawful presence and a consequent duty to take himself out of the country, and no inquiry into the correctness or validity of the order is permitted.

The subtlety of the present Act consists of severing the issue of unlawful presence for administrative determination which then becomes conclusive upon the criminal trial court. We must not forget that, while the alien is not constitutionally protected against deportation by administrative process, he stands on an equal constitutional footing with the citizen when he is charged with crime.[4] If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion

[4] *Harisiades* v. *Shaughnessy, supra,* at 586.

of what we have thought to be one of the most effective constitutional safeguards of all men's freedom.

Administrative determinations of liability to deportation have been sustained as constitutional only by considering them to be exclusively civil in nature, with no criminal consequences or connotations. That doctrine, early adopted against sharp dissent has been adhered to with increasing logical difficulty as new causes for deportation, based not on illegal entry but on conduct after admittance, have been added, and the period within which deportation proceedings may be instituted has been extended.[5] By this Act a deportation order is made to carry potential criminal consequences.

If the administrative adjudication that one is liable to deportation and the resulting orders are not exhausted when they have served as warrant for the authorities to eject the alien but become conclusive adjudications of his unlawful presence for the purpose of his criminal prosecution, quite different principles come into play.

The adjudication that an alien has been guilty of conduct subjecting him to deportation is not made by procedures constitutional for judgment of crime. It is not made either by a jury trial or a court decision. All that is required by statute is a hearing before an administrative officer and that may be before one who acts both as the alien's judge and prosecutor.[6] The finding that the alien is guilty of conduct subjecting him to deportation does not require proof beyond reasonable doubt but may be made on mere preponderance of evidence. If the deter-

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[5] *Harisiades* v. *Shaughnessy, supra,* at 587.

[6] *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, holding that the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. § 1001 *et seq.*, required separation of judging and prosecuting functions, was subsequently set aside by Congress which specifically exempted deportation proceedings from 5 U. S. C. §§ 1004, 1006, and 1007. 64 Stat. 1048, 8 U. S. C. (Supp. IV) § 155a.

mination of deportability is subject to review under § 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009, a question expressly reserved in *McGrath* v. *Kristensen,* 340 U. S. 162, 169, and not decided here, any evidentiary attack raises only the question whether on the record as a whole there is substantial evidence in support of the order. *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474. No statute of limitations applies in some cases and the offense which renders the alien deportable may have occurred, but ceased, many years ago,[7] while under statutes applicable to crimes, the same act, if a crime, long would have ceased to be subject to prosecution.

Having thus dispensed with important constitutional safeguards in obtaining an administrative adjudication that the alien is guilty of conduct making him deportable on the ground it is only a civil proceeding, the Government seeks to turn around and use the result as a conclusive determination of that fact in a criminal proceeding. We think it cannot make that use of such an order.

It must be remembered that the deportation proceeding is an exercise of adjudicative, not rule-making, power. The issue on which evidence is heard is whether the alien has committed acts which are grounds for deportation. The decision is whether he is guilty of such past conduct, and, if so, the legal result is liability to deportation. This is not the type of administrative proceeding which results in a rule or order prescribing rates or otherwise guiding future conduct.

Experience in the Executive Department with the immigration laws made me aware of a serious weakness in the deportation program which Congress by this Act was trying to overcome. A deportation policy can be successful only to the extent that some other state is will-

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[7] *Harisiades* v. *Shaughnessy, supra.*

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ing to receive those we expel. But, except selected individuals who can do us more harm abroad than here, what Communist power will cooperate with our deportation policy by receiving our expelled Communist aliens? And what non-Communist power feels such confidence in its own domestic security that it can risk taking in persons this stable and powerful Republic finds dangerous to its security? World conditions seem to frustrate the policy of deportation of subversives. Once they gain admission here, they are our problem and one that cannot be shipped off to some other part of the world.

While we would not join in a strained construction of the Constitution to create captious or trivial obstacles or delays to solution of this problem, we cannot sanction sending aliens to prison except upon compliance with constitutional procedures. We can afford no liberties with liberty itself.

The Court intimates that it might be compelled to agree with this constitutional objection to the statute were the reasoning advanced by counsel. I abstain from comment on this new squeamishness whereby the Court imprisons itself within counsel's argument. Cf. *Terminiello* v. *Chicago,* 337 U. S. 1. It is our duty before reversing a judgment to examine any ground upon which it can be sustained, even a ground which the court below may have overlooked or expressly rejected. See *Langnes* v. *Green,* 282 U. S. 531, and *Watts, Watts & Co.* v. *Unione Austriaca,* 248 U. S. 9, 21. But this Court is reversing the lower court which held this statute unconstitutional and is sending the Act forth limping with a potential infirmity, because the Court has become too shy to take up a point not sponsored by counsel, though, if well taken, it would support the judgment here being overturned. The least that could be done would be to order the case reargued.

# STROBLE *v.* CALIFORNIA.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 373. Argued March 6, 1952.—Decided April 7, 1952.

Petitioner's conviction of first degree murder was affirmed by the Supreme Court of California. Petitioner here challenged the validity of his conviction under the Fourteenth Amendment, on the grounds (1) that it was based in part on a coerced confession; (2) that a fair trial was impossible because of inflammatory newspaper reports inspired by the District Attorney; and (3) that he was in effect deprived of counsel in the course of his sanity hearing. He urged that each of these grounds independently was a denial of due process; and that the combination of them with other circumstances denied due process. *Held:* The judgment of conviction is affirmed. Pp. 183–198.

1. If the confession which petitioner made in the District Attorney's office shortly after his arrest was in fact involuntary, the conviction cannot stand, even though the evidence apart from that confession might have been sufficient to sustain the jury's verdict. P. 190.

2. When the question on review of a state court conviction is whether there has been a violation of the Due Process Clause of the Fourteenth Amendment by the introduction of an involuntary confession, this Court must make an independent determination on the undisputed facts. P. 190.

3. In the light of all the circumstances of this case, this Court cannot say that petitioner's confession in the District Attorney's office was the result of coercion, either physical or psychological. Pp. 184–189, 190–191.

4. Petitioner's contention that the newspaper accounts of his arrest and confession were so inflammatory as to make a fair trial in the Los Angeles area impossible—even though a period of six weeks intervened between the day of his arrest and confession and the beginning of his trial—is not sustained by the record in this case. Pp. 191–195.

5. Petitioner's contention that he was deprived of the effective assistance of counsel when he waived trial by jury on the issue

of insanity is not substantiated, since it appears that he had the full assistance of competent counsel on that question. Pp. 195–196.

6. The combination of the above grounds with the alleged unwarranted delay in arraignment and the refusal to permit counsel to consult petitioner during the making of the confession, do not amount to such unfairness as to deny due process. Pp. 196–198.

7. Upon review by this Court of a state court conviction challenged as wanting in due process, illegal acts of state officials prior to trial are relevant only as they bear upon the defendant's contention that he was deprived of a fair trial, either through the use of a coerced confession or otherwise. P. 197.

8. Upon the facts of this case, this Court cannot hold that the illegal conduct of the law enforcement officers in not taking petitioner promptly before a committing magistrate coerced the confession which he made in the District Attorney's office or in any other way deprived him of a fair and impartial trial. P. 197.

9. Upon the record in this case, there is no showing of prejudice resulting from the refusal of the prosecutors to admit counsel during their interrogation of petitioner. Pp. 197–198.

10. The burden of showing essential unfairness in a state court trial is upon him who claims such injustice and seeks to have the result set aside, and must be sustained not as a matter of speculation but as a demonstrable reality. P. 198.

36 Cal. 2d 615, 226 P. 2d 330, affirmed.

Petitioner's conviction of first degree murder, challenged as violating the Due Process Clause of the Fourteenth Amendment, was affirmed by the Supreme Court of California. 36 Cal. 2d 615, 226 P. 2d 330. This Court granted certiorari. 342 U. S. 811. *Affirmed,* p. 198.

*John D. Gray* and *A. L. Wirin* argued the cause for petitioner. With them on the brief were *Fred Okrand, Clore Warne* and *Loren Miller.*

*Adolph Alexander* argued the cause for respondent. With him on the brief were *Edmund G. Brown,* Attorney General of California, *William V. O'Connor,* Chief Deputy Attorney General, and *Frank W. Richards,* Deputy Attorney General.

MR. JUSTICE CLARK delivered the opinion of the Court.

Petitioner has been convicted of first degree murder and sentenced to death. He asks this Court to reverse his conviction as wanting in that due process of law guaranteed against state encroachment by the Fourteenth Amendment. Petitioner claims (1) that his conviction was based in part on a coerced confession; (2) that a fair trial was impossible because of inflammatory newspaper reports inspired by the District Attorney; (3) that he was in effect deprived of counsel in the course of his sanity hearing; (4) that there was an unwarranted delay in his arraignment; and (5) that the prosecuting officers unjustifiably refused to permit an attorney to consult petitioner shortly after petitioner's arrest. Petitioner urges that each of the first three circumstances is independently a deprivation of due process; and that, in any event, the combination of all five circumstances operated to deprive him of a fair trial.

The murder of which petitioner has been convicted occurred on Monday, November 14, 1949; the victim was a girl, aged 6. Petitioner was arrested around noon on Thursday, November 17, 1949. He was arraigned in the Los Angeles Municipal Court at 10 o'clock the following morning, and the City Public Defender was appointed to represent him. A preliminary hearing was held on Monday, November 21, and petitioner was bound over for trial in the Superior Court of Los Angeles County. On November 25, petitioner was arraigned in the Superior Court and the County Public Defender was appointed as his counsel. From that point until the conclusion of his trial, petitioner was vigorously defended by two deputies of the County Public Defender's office. On December 2, 1949, petitioner pleaded both "not guilty" and "not guilty by reason of insanity." The case came on for trial on January 3, 1950. The issue of guilt was tried to a

jury, which, on January 19, returned a verdict of guilty of first degree murder, without recommendation; under California law, this automatically fixed the penalty at death. On January 20, 1950, petitioner waived jury trial on the issue of insanity, and the court found that petitioner was sane at the time of committing the offense. On January 27, 1950, on petitioner's motion, a private attorney was substituted as petitioner's counsel. On February 6, 1950, the trial court, after a hearing, denied petitioner's motion for a new trial, motion in arrest of judgment, and motion to set aside the waiver of jury trial on the issue of insanity.

On appeal the Supreme Court of California unanimously affirmed the conviction. 36 Cal. 2d 615, 226 P. 2d 330. We granted certiorari because of the seriousness of petitioner's allegations under the Due Process Clause. 342 U. S. 811.

The facts leading to petitioner's arrest may be summarized as follows:

In the early morning of November 15, 1949, the victim's body was found behind the incinerator in the back yard of the home of petitioner's daughter and son-in-law. It was wrapped in a blanket and covered with boxes. A necktie was wound twice around the child's neck. An axe, knife, and hammer were found in the vicinity of the body. An autopsy revealed that the immediate cause of death was asphyxia due to strangulation. It also revealed numerous lacerations on the top and sides of the head, six skull fractures, a deep laceration in the back of the neck, abrasions and discolorations on the child's back, irritation of the external genitalia, and three puncture wounds in the chest.

Suspicion immediately focused on petitioner, who had been visiting his daughter and son-in-law until the day before, when he had disappeared. Some six months before, petitioner had jumped bail on a charge of molesting a

small girl and had never since been apprehended. At approximately 11:50 a. m. on November 17, as petitioner entered the bar of a restaurant in downtown Los Angeles, a civilian recognized him as the man whom the police were seeking in connection with the murder. The civilian summoned a police officer, Carlson, who thereupon arrested petitioner.

From this point on there are some conflicts in the testimony, as noted below. Carlson, accompanied by the civilian, took petitioner to the park foreman's office in nearby Pershing Square, where Carlson called headquarters to report his arrest of petitioner and to request that a police car be sent. Then Carlson, in the presence of the civilian and the park foreman, proceeded to search petitioner. Carlson had petitioner stand facing the wall with his hands raised against it and his feet away from it. While being searched in this position, petitioner pulled his feet closer to the wall and then Carlson, with the side of his shoe, kicked petitioner's shoes at the toes in order to push petitioner's feet back into position. The civilian testified that "possibly" Carlson's foot slipped and hit petitioner's shin "once or twice." Carlson testified that at no time did he "strike" petitioner or "inflict any kind of physical injury on him." [1] No marks were found on petitioner when he was examined by a physician a few hours later. It also appears that after searching petitioner, Carlson took out his blackjack, held it under petitioner's nose, and said either, "Do you know what this is for?" or "Have you seen this?" Petitioner makes no claim that Carlson used the blackjack on him. While waiting for the police car to arrive the civilian asked petitioner whether he was guilty of the murder, and petitioner "mumbled something under his breath that sounded like 'I guess I am.'" Thereupon, according to the civilian,

[1] Petitioner himself did not testify at the trial.

the park foreman slapped petitioner with his open hand and knocked off petitioner's glasses.

Without undue delay the police car arrived and petitioner was driven to the District Attorney's office in the Hall of Justice Building. While en route one of the police officers in the car began a conversation with petitioner by asking him where he had been. Petitioner replied, "Well, after that terrible thing happened, I went down to the beach, down to Ocean Park. I was going to do away with myself." The officer said, "What do you mean by that terrible thing?" to which petitioner replied, "When the little girl got killed." The officer then interposed, "Do you mean when you killed the little girl?" and petitioner answered, "Yes. I was going down to the beach. I was going to jump in the ocean and commit suicide but I decided that I would have to pay on the other side so I might as well come back and pay on this side." The officer testified that he did not promise petitioner any reward or extend to him any hope of immunity, and that he did not use force or threats of any kind. The officer's entire testimony regarding this conversation is uncontradicted, and, insofar as it contains a confession by petitioner, no objection was made at the trial on the ground that such confession was involuntary.

Petitioner did object at the trial, however, to the introduction in evidence of a confession which he made after his arrival in the District Attorney's office. Petitioner was brought to the District Attorney's office at approximately 1 p. m., and an assistant district attorney began questioning petitioner in the presence of some nineteen persons, attaches of the District Attorney and the police department. The entire proceeding was recorded on a recording machine which had been set in operation before petitioner's arrival. Petitioner stated that on the afternoon of November 14, his victim came to the home of petitioner's daughter, where petitioner was visiting; he

took his victim into the bedroom and made advances upon her; when she began to scream, he became frightened, got hold of her throat, and squeezed it until she became quiet; she started to squirm again, so he took a necktie from the dresser and tied it around her neck; when she continued to move, he took her off the bed, wrapped her in a blanket, and hit her on the temple with a hammer which he had obtained from the kitchen drawer; he then dragged her across the back yard to the incinerator, returned to the kitchen to get an ice pick, and pushed the pick into her three times in an effort to reach her heart; next he got an axe from the garage and hit her on the head and backbone; finally he got a knife from the kitchen and stabbed her in the back of the neck, covered her body with boxes, and left for Ocean Park, a beach resort within the city of Los Angeles, where he remained for the three nights before his apprehension.

Towards the end of the recording petitioner stated that the officers had not threatened or abused him in any way, either in the park foreman's office or the District Attorney's office. The recording disclosed no mistreatment at the time of the making of the confession.

The questioning of petitioner in the District Attorney's office lasted approximately two hours. About 45 minutes after petitioner had begun his confession, an attorney, Mr. Gray, called at the waiting room of the District Attorney's office and asked for the assistants handling the case. Upon being advised that they were busy he then asked for the District Attorney. Upon being told that the District Attorney was also in conference and could not be disturbed, Mr. Gray asked to see petitioner. It is uncontradicted that at that point Mr. Gray stated to a police department inspector who was present in the waiting room that he "just wanted to hear from [petitioner's] lips whether or not" petitioner had committed the murder, "so that [he] could report back" to petitioner's son-in-

law.[2] Mr. Gray was denied admission to the room in which petitioner was being questioned, but talked to an assistant district attorney after the confession had been completed. Mr. Gray was permitted to see petitioner that evening. Mr. Gray did not represent petitioner during the trial, but on the motion for new trial was substituted, at petitioner's request, for the Public Defender.

Shortly after 3 p. m., petitioner was taken from the District Attorney's office to Dr. Marcus Crahan, a physician in charge of the hospital of the county jail, for a physical and mental examination. Dr. Crahan, when called by petitioner as a witness at the trial, testified that he examined petitioner carefully, including his feet and shins, but found no bruises or abrasions of any kind. According to Dr. Crahan, during the examination petitioner stated that since his arrest the police officers had been very kind to him and that he had not been "mistreated" and had been given "every consideration." Petitioner related to Dr. Crahan the details of the killing.

Petitioner was lodged in the county jail for the night and was arraigned in the Municipal Court at 10 o'clock the following morning, November 18.

Thereafter, in the six weeks' period between the date of his arraignment and the beginning of his trial, petitioner was examined by four psychiatrists [3] and one clinical psychologist. To each of these persons he stated that he had killed his victim and recounted, in greater or lesser detail, just how he had gone about the killing. These experts, when testifying at the trial (two having been called by the prosecution and three by the petitioner), related to the jury what petitioner had told them. Petitioner did

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[2] R. 287–288 (testimony of John D. Gray); see also R. 210 (testimony of Inspector J. A. Donahoe).

[3] Three of these psychiatrists had been appointed by the trial court pursuant to Cal. Penal Code, 1951, § 1027.

not object at the time, and makes no objection now, to the admission of these confessions on the ground that they were involuntary.

The trial court charged the jury that it could not consider a confession unless it was voluntary; that the jury was the sole judge of voluntariness; and that a confession was not voluntary when obtained by any kind of violence, abuse, or threat, or by "any coaxing, cajoling, or menacing influence which induces in the mind of the defendant the belief or hope that he will gain some advantage by making a confession." The court further charged that the fact that a confession is made while an accused is under arrest and being detained, or when he is not represented by counsel, or without his having been told that any statement he makes may be used against him, does not in itself make the confession involuntary, but is one circumstance to be considered in determining the voluntariness of the confession. The court admonished the jury to view with caution the testimony of any witness which purports to relate an oral confession by a defendant.

The California Supreme Court stated: "We may assume that, as a matter of law under the circumstances shown," petitioner's confession in the District Attorney's office was involuntary.[4] The court felt, however, that the use of that confession "could not have affected the fairness of [petitioner's] trial," because petitioner "thereafter made at least five confessions, of materially similar substance and unquestioned admissibility, which were put in evidence," and because "[i]t does not appear that the outcome of the trial would have differed" if that confession had been excluded.[5] Therefore the court concluded that use of the confession had not deprived petitioner of due process.

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[4] 36 Cal. 2d at 623, 226 P. 2d at 335.

[5] 36 Cal. 2d at 623, 226 P. 2d at 336.

We take a somewhat different view. If the confession which petitioner made in the District Attorney's office was in fact involuntary, the conviction cannot stand, even though the evidence apart from that confession might have been sufficient to sustain the jury's verdict. *Malinski* v. *New York,* 324 U. S. 401, 402, 404 (1945); *Lyons* v. *Oklahoma,* 322 U. S. 596, 597, n. 1 (1944). That confession was a prominent feature of the trial. First a stenographic transcript of the confession was read, and then a wire recording of it was played to the jury. Under these circumstances we cannot say that the jury's verdict could not have been based, at least in part, on the confession made in the District Attorney's office. Since we take this view, we cannot merely "assume," as did the state supreme court, that that confession was involuntary, but must go on to determine the question of voluntariness.

Petitioner does not so much as suggest that the action of any officer during the taking of the confession was accompanied by force or threats. His sole contention is that the incidents in the park foreman's office, coupled with the presence of nineteen officers in the District Attorney's office, render the confession which he made in the latter office involuntary.

This Court has frequently stated that, when faced with the question whether there has been a violation of the Due Process Clause of the Fourteenth Amendment by the introduction of an involuntary confession, it must make an independent determination on the undisputed facts. *Malinski* v. *New York, supra,* at 404, and cases cited; *id.,* at 438 (dissenting opinion). We adhere to that rule. In the present case, however, we need not confine ourselves to the undisputed facts; for, even if we give petitioner the benefit of every doubt as to the alleged coercion, we do not think it can fairly be said that his confession in the District Attorney's office was coercion's product.

Whatever occurred in the park foreman's office occurred at least an hour before he began his confession in the District Attorney's office, and was not accompanied by any demand that petitioner implicate himself. Likewise his statement to the officer while on the way to the District Attorney's office was admittedly voluntary. In the District Attorney's office, petitioner answered questions readily; there was none of the "pressure of unrelenting interrogation" which this Court condemned in *Watts* v. *Indiana,* 338 U. S. 49, 54 (1949). Indeed, the record shows that from the time of his arrest until the time of his trial, petitioner was anxious to confess to anybody who would listen—and as much so after he had consulted with counsel as before. His willingness to confess to the doctors who examined him, after he had been arraigned and counsel had been appointed, and in circumstances free of coercion, suggests strongly that petitioner had concluded, quite independently of any duress by the police, "that it was wise to make a clean breast of his guilt." See *Lyons* v. *Oklahoma, supra,* at 604. In the light of all these circumstances, we are unable to say that petitioner's confession in the District Attorney's office was the result of coercion, either physical or psychological.

We turn now to petitioner's contention that the newspaper accounts of his arrest and confession were so inflammatory as to make a fair trial in the Los Angeles area impossible—even though a period of six weeks intervened between the day of his arrest and confession and the beginning of his trial. Here we are not faced with any question as to the permissible scope of newspaper comment regarding pending litigation, see *Bridges* v. *California,* 314 U. S. 252 (1941); *Pennekamp* v. *Florida,* 328 U. S. 331 (1946); *Craig* v. *Harney,* 331 U. S. 367 (1947); but with the question whether newspaper accounts aroused such prejudice in the community that petitioner's trial was "fatally infected" with an absence of "that

fundamental fairness essential to the very concept of justice." *Lisenba* v. *California,* 314 U. S. 219, 236 (1941).

The search for and apprehension of petitioner was attended by much newspaper publicity. Between the time of the murder and the time of petitioner's arrest, newspapers of general circulation in the Los Angeles area featured in banner headlines the "manhunt" which the police were conducting for petitioner. On the day of petitioner's arrest these newspapers printed extensive excerpts from his confession in the District Attorney's office, the details of the confession having been released to the press by the District Attorney at periodic intervals while petitioner was giving the confession. On the following Monday, four days later, Los Angeles newspapers reprinted the full text of that confession as it was read into the record at the preliminary hearing. Most of these events were given top billing on the front page of the papers, and were accompanied by large headlines. Petitioner was variously described, both in headlines and in the text of news stories, as a "werewolf," a "fiend," a "sex-mad killer," and the like. The District Attorney announced to the press his belief that petitioner was guilty and sane.

The spate of newspaper publicity accompanying petitioner's arrest and confession soon abated, however. During the month of December, 1949, petitioner made the headlines of Los Angeles newspapers only infrequently, such as when he entered a plea of "not guilty" on December 2. Petitioner points to certain other events which occurred during that month. The Governor of the State called a special session of the legislature to consider, among other things, the problem of "sex crimes"; the Governor called a one-day conference of law enforcement officers to consider the same subject; a committee of the state legislature investigating sex crimes held hearings in Los Angeles, at which the District Attorney stated that he did not see why sex offenders "shouldn't be disposed of

the same way" as mad dogs; and various citizens' groups made proposals for studying and dealing with sex crimes. Los Angeles newspapers published accounts of each of these events, and the accounts at times made reference to the murder with which petitioner was charged.

Petitioner's trial itself was reported by Los Angeles newspapers, usually on inside pages. Petitioner makes no objection to this phase of the newspaper coverage except for the newspapers' occasional reference to petitioner as a "werewolf."

While we may deprecate the action of the District Attorney in releasing to the press, on the day of petitioner's arrest, certain details of the confession which petitioner made, we find that the transcript of that confession was read into the record at the preliminary hearing in the Municipal Court on November 21, four days later. Thus in any event the confession would have become available to the press at that time, for "[w]hat transpires in the court room is public property." *Craig* v. *Harney, supra,* at 374. Petitioner has not shown how the publication of a portion of that confession four days earlier prejudiced the jury in arriving at their verdict two months thereafter.

We agree with the California Supreme Court that petitioner has failed to show that the newspaper accounts aroused against him such prejudice in the community as to "necessarily prevent a fair trial," *Lisenba* v. *California, supra,* at 236. At the outset, it should be noted that at no point did petitioner move for a change of venue, although the California Penal Code explicitly provides that whenever "a fair and impartial trial cannot be had in the county" in which a criminal action is pending, the action may, upon motion of the defendant, be removed to "the proper court of some convenient county free from a like objection." [6] Of course petitioner's failure to make such

[6] Cal. Penal Code, 1951, §§ 1033, 1035.

a motion is not dispositive of the issue here, since the state court did not decide against petitioner on this ground but rather rejected on the merits his federal constitutional claim.[7] But, in an effort to determine whether there was public hysteria or widespread community prejudice against petitioner at the time of his trial, we think it significant that two deputy public defenders who were vigorous in petitioner's defense throughout the trial, saw no occasion to seek a transfer of the action to another county on the ground that prejudicial newspaper accounts had made it impossible for petitioner to obtain a fair trial in the Superior Court of Los Angeles County.

The matter of prejudicial newspaper accounts was first brought to the trial court's attention after petitioner's conviction, as one of the grounds in support of a motion for a new trial. At that time petitioner's present attorney urged that petitioner had been "deprived of the presumption of innocence by the premature release by the District Attorney's office of the details of the confession," and offered in support of that allegation certain Los Angeles newspapers published at the time of petitioner's arrest. The trial court replied as follows:

> "[T]he jurors were all thoroughly examined and all definitely stated that they would give to the defendant the benefit of the presumption of innocence. . . . There is nothing to show those jurors ever saw those papers or ever read those papers. They were fully examined so far as defense counsel desired as to any knowledge or information they might have of the case." [8]

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[7] See *Grayson* v. *Harris*, 267 U. S. 352, 358 (1925); *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657, 665–666 (1936); *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 98 (1938); *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 414, n. 4 (1948).

[8] R. 361–362.

Petitioner does not challenge this statement of the court. Indeed, at no stage of the proceedings has petitioner offered so much as an affidavit to prove that any juror was in fact prejudiced by the newspaper stories. He asks this Court simply to read those stories and then to declare, over the contrary finding of two state courts, that they necessarily deprived him of due process. That we cannot do, at least where, as here, the inflammatory newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury. It is also significant that in this case the confession which was one of the most prominent features of the newspaper accounts was made voluntarily and was introduced in evidence at the trial itself.

We find no substance in petitioner's contention that he was deprived of effective counsel at a critical point in the case, namely, when he waived trial by jury on the issue of insanity. The attorney who consulted with petitioner as to whether he should make such a waiver was the Public Defender himself, although prior to that time two deputy public defenders had handled the case in court. The Public Defender took this action because the trial court, at the conclusion of the trial on the issue of guilt, had requested that he personally attend the trial on the insanity issue.[9] We fail to see how this action harmed petitioner. As the California Supreme Court found, the Public Defender "was familiar with the case, having read the daily transcript and consulted with and advised [his two deputies] and interviewed witnesses during the trial";[10] moreover, before consulting with petitioner on the waiver question,

[9] The trial court made this request as a result of certain conduct on the part of one of the deputy public defenders, set forth in the opinion below at 36 Cal. 2d 628, 226 P. 2d 338–339.

[10] 36 Cal. 2d at 628, 226 P. 2d at 338.

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he discussed the matter with his two deputies. Thereafter, petitioner twice stated in open court, in reply to inquiries by the trial judge, that he wished to waive a jury trial on the issue of insanity. Furthermore, there was no real question as to petitioner's sanity. He introduced no additional evidence at the sanity hearing; instead the parties stipulated that the sole evidence would be that adduced at the trial on the issue of guilt, plus the complete reports of the psychiatrists who had testified at that trial.[11] Every psychiatrist who had testified, whether on behalf of petitioner or on behalf of the prosecution, had reached the conclusion that petitioner was sane. On the motion for new trial, when petitioner's present attorney sought to set aside the waiver of jury trial on the issue of insanity, he offered no new evidence relating to petitioner's mental state and did not indicate that any such evidence was available. We conclude that petitioner received the full assistance of competent counsel in deciding that he wanted the insanity issue tried to the court. On that question, as on all others, he has been afforded "the assistance of zealous and earnest counsel from arraignment to final argument in this Court." *Avery* v. *Alabama,* 308 U. S. 444, 450 (1940).[12]

Nor can we agree with petitioner that a combination of these grounds with other circumstances, namely, unwarranted delay in arraignment and refusal to permit counsel

[11] At no point has petitioner challenged that stipulation. Indeed, the stipulation had been entered into by one of the deputy public defenders, in whom petitioner states he had complete confidence, prior to the time the court asked the Public Defender to be personally present at the insanity trial.

[12] In *People* v. *Adamson,* 34 Cal. 2d 320, 333, 210 P. 2d 13, 19 (1949), the Supreme Court of California had this to say about this same Public Defender and his office: "This court can take judicial notice, too, that it would be difficult to find in California any lawyers more experienced or better qualified in defending criminal cases than the Public Defender of Los Angeles County and his staff."

to consult petitioner during the making of the confession, amounts to such unfairness as to deny due process. The arraignment was had within less than twenty-four hours after the arrest. The officials questioned petitioner only during the two-hour period in the District Attorney's office, described above. The remainder of that afternoon was devoted to a physical and mental examination, to which petitioner makes no objection. Counsel called on petitioner at the county jail at 9:30 p. m. the evening of the arrest; presumably petitioner remained alone from then until the time of his arraignment the following morning. Although the California Supreme Court found that the failure promptly to arraign petitioner before a committing magistrate was a violation of state law,[13] that is not determinative of the issue before us. When this Court is asked to reverse a state court conviction as wanting in due process, illegal acts of state officials prior to trial are relevant only as they bear on petitioner's contention that he has been deprived of a fair trial, either through the use of a coerced confession or otherwise. *Lisenba* v. *California, supra,* at 234, 235, 240; *Lyons* v. *Oklahoma, supra,* at 597, n. 2; *Gallegos* v. *Nebraska,* 342 U. S. 55, 59, 65 (1951). Upon the facts of this case, we cannot hold that the illegal conduct of the law enforcement officers in not taking petitioner promptly before a committing magistrate, coerced the confession which he made in the District Attorney's office or in any other way deprived him of a fair and impartial trial.

As to the refusal of the prosecutors to admit counsel during their interrogation of petitioner, counsel stated that he had come to the District Attorney's office at the request of petitioner's son-in-law merely to inquire of petitioner as to his guilt. At no point did petitioner himself ask for counsel. In light of these facts, the Dis-

[13] Cal. Const., Art. I, § 8.

trict Attorney's refusal to interrupt the examination of petitioner, which had been proceeding for almost an hour, so that counsel could make inquiry for petitioner's son-in-law, does not constitute a deprivation of due process, either independently or in conjunction with all other circumstances in this case. While district attorneys should always honor a request of counsel for an interview with a client, upon the record before us there is no showing of prejudice. As was said in *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 281 (1942):

> "If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."

The judgment of the Supreme Court of California is

*Affirmed.*

MR. JUSTICE FRANKFURTER, dissenting.

One of the petitioner's grounds for attacking his conviction is that the trial lacked fundamental fairness because the district attorney himself initiated the intrusion of the press into the process of the trial. Such misconduct, the petitioner contends, subverted the adjudicatory process by which guilt is determined in Anglo-Saxon countries, so as to offend what the Due Process Clause of the Fourteenth Amendment protects. The issue was raised after verdict, and the Supreme Court of California might have disposed of the claim by ruling that it had not been made at the stage of the proceeding required by State law. That court, however, chose not to do so. It permitted the petitioner to invoke the Due Process Clause and thereby tendered a federal constitutional issue, as this Court recognizes, for our disposition.

The Supreme Court of California thus formulated the issue and indicated its conception of the allowable standards of fairness under the Due Process Clause:

> "Defendant claims that he was deprived of a fair trial because the trial court did not protect him from, and the district attorney fostered, 'public pressure.' The killing and the subsequent search for defendant received much publicity. Immediately after defendant's arrest he was taken to the office of the district attorney, interrogated, and confessed. The district attorney, even before defendant completed his statement, released to the press details of the statement (including defendant's admissions of sex play with his victim and other children on occasions prior to the killing) and also announced his belief that defendant was guilty and sane. At the time of defendant's arrest and at the time of his trial (which began some seven weeks later) there was notorious widespread public excitement, sensationally exploited by newspaper, radio and television, concerning crimes against children and defendant's crime in particular. In these circumstances, defendant urges, it was impossible for him to obtain an unbiased jury, and due process requires a new trial even though there is no showing that any juror was actually influenced by the sensational publicity and the popular hysteria.
>
> "In connection with his claim of 'public pressure' defendant also calls attention to the following statement by one of his counsel (veteran Deputy Public Defender John J. Hill; defendant was not then represented by his present private counsel) made during his closing argument: 'I wish to make this commentary with reference to just what has occurred before the Court took the Bench. I refer to the televising

> and the pictures taken of the jury entering the box, and with counsel. . . . I don't like this added publicity in the case; and yet we conform, we cooperate with the men, our fellow human beings in the vocation, and therefore we accept it as part of what we have to expect in a case that has attracted so much attention, that has been so widely publicized, and concerning which there have been utterances over the radio, in the public press, which have unduly accentuated the importance of this case . . . [W]e shall not be influenced in the slightest degree in that calm deliberation, dispassionate discussion, and arriving at a verdict under the institutions under which we live, and concerning which we are proud: the American way of the conduct of a trial.'
>
> "It seems that the traditional concept of the 'American way of the conduct of a trial,' particularly a trial for a sordid criminal offense such as that of defendant, includes both the aspects mentioned so understandingly by Mr. Hill: on the one hand overstimulation, by mass media of communication, of the usual public interest in that which is gruesome; on the other hand a trial by a judge and jury immune from the public passion." *People* v. *Stroble,* 36 Cal. 2d 615, 620–621, 226 P. 2d 330, 333–334.

Thus, on the California court's own reading of the record, circumstances tending to establish guilt and adduced outside the courtroom before the trial had even begun were avidly exploited by press and other media, actively promoted by the prosecutor. The State court sanctioned this as not only permissible but as an inevitable ingredient of American criminal justice. That sanction contradicts all our professions as to the establishment of guilt on the basis of what takes place in the courtroom, subject to judicial restrictions in producing proof and in the gen-

eral conduct of the proceedings. Jurors are of course human beings and even with the best of intentions in the world they are, in the well-known phrase of Holmes and Hughes, JJ., "extremely likely to be impregnated by the environing atmosphere." *Frank* v. *Mangum,* 237 U. S. 309, 345, 349. Precisely because the feeling of the outside world cannot, with the utmost care, be kept wholly outside the courtroom every endeavor must be taken in a civilized trial to keep it outside. To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial is to make the State itself through the prosecutor, who wields its power, a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice. Science with all its advances has not given us instruments for determining when the impact of such newspaper exploitation has spent itself or whether the powerful impression bound to be made by such inflaming articles as here preceded the trial can be dissipated in the mind of the average juror by the tame and often pedestrian proceedings in court. Moreover, the Supreme Court of California found that at the time of the petitioner's trial "there was notorious widespread public excitement, sensationally exploited by newspaper, radio and television, concerning crimes against children and defendant's crime in particular."

And so I cannot agree to uphold a conviction which affirmatively treats newspaper participation instigated by the prosecutor as part of "the traditional concept of the 'American way of the conduct of a trial.' " Such passion as the newspapers stirred in this case can be explained (apart from mere commercial exploitation of revolting crime) only as want of confidence in the orderly course of justice. To allow such use of the press by the prosecution as the California court here left undisciplined, im-

plies either that the ascertainment of guilt cannot be left to the established processes of law or impatience with those calmer aspects of the judicial process which may not satisfy the natural, primitive, popular revulsion against horrible crime but do vindicate the sober second thoughts of a community. If guilt here is clear, the dignity of the law would be best enhanced by establishing that guilt wholly through the processes of law unaided by the infusion of extraneous passion. The moral health of the community is strengthened by according even the most miserable and pathetic criminal those rights which the Constitution has designed for all.

As to one other branch of the Court's opinion I must enter a *caveat*. This concerns the legal significance of petitioner's first confession, the one made to the district attorney. The California Supreme Court disposed of the claim that this was a coerced confession by assuming that it was, but finding that the fact was immaterial because of later, so-called voluntary confessions. I agree with my brethren that this view disregards our decision in *Malinski* v. *New York*, 324 U. S. 401. But I cannot agree that, despite the refusal of the California Supreme Court to determine affirmatively the legal character of this first confession, this Court may do so here on its own independent interpretation of the facts. That conclusion does not at all follow from the fact that we make such a determination, at least upon the undisputed evidence, when the State court finds the confession to be free of constitutional defect. The question whether or not a confession is coerced involves a complex judgment upon facts inevitably entangled with assumptions and standards which are part and parcel of the ultimate issue of constitutionality. See *Baumgartner* v. *United States*, 322 U. S. 665, 670–671. The finding of "fact" that a confession is voluntary may involve the application of improper standards to the evidence, and thus the denial of a con-

stitutional right of the accused. But a wholly different situation is presented when a State court concludes that coercion entered into the inevitably complicated factors included in the totality of circumstances that constitutes a confession.

Moreover, items of evidence may be undisputed, but not their meaning. "Facts," except the most rudimentary, are not like members of a lodge who identify themselves by badges. When a State court has denied an asserted constitutional right, the State court cannot foreclose this Court from considering the federal claim merely by labelling absence of coercion a "fact." But if a State court, reading the record in the light of its intimate knowledge of local police and prosecutorial methods, should conclude that a confession was coerced, I cannot believe that this Court would set aside that appraisal and decide independently that the confession was wholly free and self-willed. It is not fortuitous that all the cases in which this Court has indicated that it was not foreclosed by the determination of the State court have been cases in which the State rejected the federal constitutional claim by finding the confession voluntary.

Since, as I believe, an affirmative determination of the California Supreme Court that the confession was coerced would not and should not be reexamined here, I would, on this aspect of the case, remand for that court to say whether or not, in its judgment and not as an assumption, the first confession was involuntary.

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

My views on the illegality of confessions obtained between the time of arrest and arraignment are contained in *Watts* v. *Indiana,* 338 U. S. 49, 56–57; *Turner* v. *Pennsylvania,* 338 U. S. 62, 66–67; *Harris* v. *South Carolina,* 338 U. S. 68, 71–73. The practice of obtaining confes-

sions prior to arraignment breeds the third-degree and the inquisition. As long as it remains lawful for the police to hold persons incommunicado, coerced confessions will infect criminal trials in violation of the commands of due process of law.

The facts of this case illustrate the evils of this police practice. While the defendant was being held by the police prior to his arraignment, a lawyer tried to see him. The police refused the lawyer's repeated requests. It was only after a confession was obtained that the lawyer was allowed to talk with the prisoner. This was lawless conduct, condemned by the Supreme Court of California. It was not only lawless conduct; it was conduct that produced a confession.

This confession as well as subsequently obtained confessions were used at the trial. The fact that the later confessions may have been lawfully obtained or used is immaterial. For once an illegal confession infects the trial, the verdict of guilty must be set aside no matter how free of taint the other evidence may be. *Malinski* v. *New York,* 324 U. S. 401.

Moreover, the fact that the accused started talking shortly after he was arrested and prior to the time he was taken before the District Attorney does not save the case. That talk was accompanied or preceded by blows and kicks of the police; and the Supreme Court of California assumed that it was part and parcel of the first confession obtained through "physical abuse or psychological torture or a combination of the two."

Syllabus.

# UEBERSEE FINANZ-KORPORATION, A. G., *v.* McGRATH, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN.

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

No. 178. Argued January 2, 1952.—Decided April 7, 1952.

1. Petitioner, a Swiss corporation, sued in the District Court for the return of certain of its property vested in 1942 by the Alien Property Custodian under the Trading with the Enemy Act of 1917, as amended by the First War Powers Act of 1941. Petitioner was largely owned and controlled by a national of Germany, through a son with whom he had a usufruct agreement. Petitioner had been acquired with usufruct property for the purpose of enabling the father to control and use his property as he saw fit. The father had and used the substance, while the son had the bare legal title except for a 20% interest in the income of the usufruct property. Such right as the son had he exercised or failed to exercise in complete subordination to the will of the father. *Held:* Because of direct and indirect control and domination by an enemy national, petitioner was affected with an "enemy taint" and cannot recover under § 9 (a). Pp. 206–212.

   (a) Under § 9 (a) of the Act, one not an "enemy," as defined in § 2, can recover any interest, right, or title which he has in property so vested; but corporations affected with an "enemy taint" are included in the word "enemy." *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480. Pp. 211–212.

   (b) Actual use by an enemy-tainted corporation of its power in economic warfare against the United States is not the crucial fact in determining whether vested property may be retained by the Custodian under the Act. It is the existence of that power that is controlling and against which the Government may move. P. 212.

2. At the end of the litigation in the District Court, petitioner sought to have the case reopened for the purpose of asserting and establishing the nonenemy status of the son of the enemy national. Because of failure to diligently and timely assert the interest of the son, the District Court refused to reopen the case for further consideration of such separate interest. *Held:* In view of the holding in *Kaufman* v. *Societe Internationale,* decided today, *ante,* p. 156, the cause is remanded to the District Court for consideration, in

the light of that holding and this opinion, of any application that may be made on behalf of the son within 30 days from the date of remand. *Hormel* v. *Helvering*, 312 U. S. 552, applied. Pp. 212–213.

88 U. S. App. D. C. 182, 191 F. 2d 327, affirmed in part.

In a suit brought by petitioner to recover property vested by the Alien Property Custodian under the Trading with the Enemy Act, as amended, the District Court entered judgment for the Custodian. 82 F. Supp. 602. The Court of Appeals affirmed. 88 U. S. App. D. C. 182, 191 F. 2d 327. This Court granted certiorari. 342 U. S. 847. *Affirmed in part and vacated and remanded in part,* p. 213.

*Thurman Arnold* argued the cause for petitioner. With him on the brief were *Edward J. Ennis* and *Harry M. Plotkin.*

*James L. Morrisson* argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Baynton, Myron C. Baum* and *Joseph Laufer.*

Mr. Justice Minton delivered the opinion of the Court.

Petitioner sued in the District Court for the District of Columbia for the return of certain of its property vested by the Alien Property Custodian in 1942 under the Trading with the Enemy Act of 1917, 40 Stat. 411, as amended by the First War Powers Act, 1941, 55 Stat. 839. The District Court found for the Custodian, 82 F. Supp. 602, and the Court of Appeals affirmed, 88 U. S. App. D. C. 182, 191 F. 2d 327. We granted certiorari, 342 U. S. 847.

The following facts were found by the District Court and confirmed by the Court of Appeals upon an abundance of evidence in the record. In 1931, Wilhelm von Opel, a citizen and resident national of Germany, owned

certain shares of stock in the Adam Opel Works, a German corporation largely owned by General Motors Corporation. Wilhelm had an agreement with General Motors to sell his shares at a price. In 1931, he became alarmed at business conditions in Germany and desired to get his stock out of the country to save his investment for himself and his family from the economic and governmental influences there prevailing. In that year, he and his wife entered into what was known under German law as a usufruct agreement with their only son, Fritz, who had not lived in Germany since 1929 and for that reason was not subject to the German restrictions upon the handling of this property. By this agreement, Wilhelm's title to the shares in the Adam Opel Works was transferred to Fritz. The instrument provided as follows:

> "The usufruct in the shares is not assigned to Fritz von Opel. It remains with Wilhelm von Opel and his wife . . . until the death of the survivor of them. However, 20% of all dividends and interest received will accrue to Fritz von Opel."

The instrument provided further that if Fritz died before his parents and without issue, the transfer was to be void and was to revert to his parents, the transferors. If the parents died before Fritz, he was to have the property as an advancement, to be deducted from his share in his parents' estate. The usufruct income not drawn by the parents was also to be accounted for by Fritz as an advancement.

After much expert testimony, the District Court found the law of Germany pertaining to such usufruct agreement to be as follows:

> "52. A right of usufruct, once established, is under German law an *in rem* right in property. A person having a usufruct in property has a right:

"(a) to the enjoyment of the property or, in the case of money or securities, to the income from the securities;

"(b) to co-possession of the property together with the person holding legal title to the property;

"(c) to a voice in the management of the property insofar as the maintenance and preservation of the usufructuary's rights under subsection (a) above are concerned;

"(d) to prevent the sale or disposition of the property as a result of his right to co-possession;

"(e) the German Civil Code does not mention whether the usufructuary, for the protection of his income, has any voting rights. In the absence of a decided case the legal commentaries speculate in three different directions. One position is that the title owner has all voting rights and the usufructuary no voting rights whatsoever. The second position is that the title owner has a voting right for all measures which have nothing to do with income while the usufructuary can vote in regard to income. The third position is that the usufructuary has all the voting rights." R. 60–61; 82 F. Supp. 602, 605.

Under this agreement, Wilhelm and his wife had a usufruct in the Adam Opel stock transferred to Fritz. The latter, on October 17, 1931, sold the usufruct property to General Motors, in accordance with the contract which Wilhelm had with that company. In order to protect the several interests involved, the proceeds of the sale were transferred to petitioner, a Swiss corporation acquired by Fritz for this purpose. Eventually these funds were used to purchase stocks, later transferred to petitioner, in corporations organized under the various states of the United States, from which derived the stocks vested by the Alien Property Custodian. Fritz owned 97% of

the stock of petitioner. Under the German law, as found by the District Court, a usufructuary may follow the ascertainable proceeds of the original property subject to the usufruct. Therefore, the stocks purchased by petitioner with the proceeds of the sale of the usufruct property were subject to and were treated as subject to the usufruct agreement.

On June 7, 1935, Fritz placed all but three shares of the capital stock of petitioner in a safety deposit box in Zurich, Switzerland, and gave the key thereto to Hans Frankenberg, who received it as agent of Wilhelm von Opel. Frankenberg had become the managing director of petitioner at Wilhelm's request in 1932, and exercised control over petitioner's investments until the vesting of the property herein involved. By the delivery to Wilhelm's agent of the key to the box containing petitioner's stock, there was thus transferred to Wilhelm possession of the *res,* subject to the usufruct; and the usufruct agreement was thereby consummated. Fritz also engaged in activities on behalf of petitioner concerning its investments, but under the guidance of Wilhelm or his agent, Frankenberg.

Neither Wilhelm nor his wife ever drew any income from the usufruct. An oil lease owned by one of the American corporations whose stock was purchased with proceeds from the sale of the Adam Opel shares to General Motors, was sold, and the proceeds of that sale used to pay a fine of Wilhelm in Germany. Expenses of a trip by Wilhelm to South America and one to Hungary were paid by petitioner and charged against the income account of Fritz.

Petitioner owned all the stock of a subsidiary Hungarian corporation engaged in the mining of bauxite in Hungary, and in 1939 and 1940 guaranteed a loan by a Swiss bank to this corporation for its operations. The loan was repaid in November 1942. The United States

was at war with Hungary from December 13, 1941. During October, November, and December 1941, the Hungarian corporation shipped bauxite to Germany and had a contract to do so until the end of 1942.

In 1942, the Alien Property Custodian vested the stocks held by petitioner in several American corporations and all the right, title, and interest of petitioner in and to a certain contract with another American corporation. All of the stocks had been acquired from the proceeds of the original usufruct property.

From October 5, 1931, the date of the usufruct agreement, the usufruct property was controlled, used, and in all ways handled and directed by Wilhelm and his managing agents. The interest of Fritz in petitioner was wholly subordinated to that of Wilhelm. Fritz had the bare legal title and the right to 20% of the income from the property. Wilhelm is now dead. His wife, a daughter, and the son, Fritz, still survive.

Petitioner was in this Court on the pleadings in this case in *Clark* v. *Uebersee Finanz-Korp., A. G.,* 332 U. S. 480. There, it was alleged in the complaint that petitioner was not an enemy or ally of an enemy, and that at no time specified in the complaint had the property in question been owned or controlled, directly or indirectly, in whole or in part, by an enemy, an ally of an enemy, or a national of a designated enemy country; that none of the property had been owing or belonging to or held on account of or for the benefit of any such person or interest. This Court construed these allegations "to mean that the property is free of all enemy taint and particularly that the corporations whose shares have been seized, the corporations which have a contract in which respondent has an interest, and respondent itself, are companies in which no enemy, ally of an enemy, nor any national of either has any interest of any kind whatsoever, and that respondent has not done business in the territory of the

enemy or any ally of an enemy." P. 482. The complaint alleging such facts was held to be sufficient as against a motion to dismiss, and the case was sent back for trial. Upon the trial, the facts were found as above stated.

However, from the facts found, it is clear that petitioner for all practical purposes was, to the extent of 97%, largely owned, managed, used, and controlled by Wilhelm von Opel, a national of Germany. The findings demonstrate that petitioner was a corporate holding company acquired for the purpose of enabling Wilhelm to control and use his property as he saw fit. His interest was paramount and controlling. The interest of Fritz was wholly and in reality subordinated to Wilhelm's, except as to the right of Fritz to receive 20% of the income from the usufruct property. Petitioner was neutral in name only. Its enemy taint was all but complete because of the predominant influence and control of Wilhelm. Wilhelm had and used the substance, while Fritz had the bare legal title; and such right as this gave Fritz, he exercised or failed to exercise in complete subordination to the will of his father. We agree with the Court of Appeals when it said:

> "This case does not involve a diluted 'taint'; it involves the ownership by enemy nationals of the economic benefits of American business." 88 U. S. App. D. C. at 183, 191 F. 2d at 328.

Before 1941 the property here involved could not have been vested, because this petitioner was a corporation of a neutral country, Switzerland, unless such corporation was shown to be doing business in an enemy country or in the country of an ally of an enemy. *Behn, Meyer & Co.* v. *Miller,* 266 U. S. 457; *Clark* v. *Uebersee Finanz-Korp., A. G., supra.* But on December 18, 1941, Congress amended the Trading with the Enemy Act by the pas-

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sage of the First War Powers Act, 1941, 55 Stat. 839, and gave respondent power to vest any property or interest of any foreign country or national thereof in said property. However, under § 9 (a) of the Trading with the Enemy Act, one not an enemy, as defined in § 2 of said Act, can recover any interest, right, or title which he has in the property so vested. As construed by this Court in *Clark* v. *Uebersee Finanz-Korp., A. G., supra,* § 2 included in the word "enemy" all corporations affected with an "enemy taint." Since we find petitioner to be so affected because of the direct and indirect control and domination by an enemy national, Wilhelm von Opel, petitioner cannot recover under § 9 (a).

It is suggested that vested property must be returned unless there is proof of actual use of the property for economic warfare against the United States. The crucial fact is not the actual use by an enemy-tainted corporation of its power in economic warfare against the United States. It is the existence of that power that is controlling and against which the Government of the United States may move. The Government does not have to wait for the enemy to do its worst before it acts. Cf. *Miller* v. *United States,* 11 Wall. 268 at 306.

As the District Court said, it would be difficult "to find a stronger case of enemy taint in vested property short of full ownership by an enemy than exists in this case. The neutral aspect of ownership in the property is insignificant . . . ." 82 F. Supp. at 606.

In view of the decision today in *Kaufman* v. *Societe Internationale, ante,* p. 156, consideration must be given to an effort of petitioner to open the case for the assertion of the rights of Fritz von Opel.

Petitioner attempted at the end of the litigation in the District Court to have the case reopened for the purpose of asserting and establishing the nonenemy status of Fritz von Opel. Because of the failure to diligently and timely

assert the interest of Fritz, the District Court refused to reopen the case for further consideration of such separate interest.

The judgment of the Court of Appeals is affirmed as to petitioner, but in view of the novel holding in *Kaufman,* the Court is of the opinion that its decision in *Hormel* v. *Helvering,* 312 U. S. 552, is applicable. We accordingly vacate the judgment of the court below and remand the cause to the District Court for consideration, in the light of *Kaufman* and this opinion, of any application that may be made on behalf of Fritz von Opel within 30 days from the date of remand, and in all other respects the judgment is affirmed.

*It is so ordered.*

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

# RAY, CHAIRMAN OF THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA, *v.* BLAIR.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 649. Argued March 31, 1952.—Decided April 3, 1952.—Opinions filed April 15, 1952.

Where a state authorizes a political party to choose its nominees for Presidential Electors in a state-controlled party primary election and to fix the qualifications for the candidates, it is not violative of the Federal Constitution for the party to require the candidates for the office of Presidential Elector to take a pledge to support the nominees of the party's National Convention for President and Vice-President or for the party's officers to refuse to certify as a candidate for Presidential Elector a person otherwise qualified who refuses to take such a pledge. Pp. 215–231.

1. Presidential Electors exercise a federal function in balloting for President and Vice-President, but they are not federal officers. They act by authority of the state which in turn receives its authority from the Federal Constitution. Pp. 224–225.

2. Exclusion of a candidate in a party primary by a state or political party because such candidate will not pledge to support the party's nominees is a method of securing party candidates in the general election who are pledged to the philosophy and leadership of that party; and it is an exercise of the state's right under Art. II, § 1, to appoint electors in such manner as it may choose. *United States* v. *Classic,* 313 U. S. 299, and *Smith* v. *Allwright,* 321 U. S. 649, distinguished. Pp. 225–227.

3 The Twelfth Amendment does not bar a political party from requiring of a candidate for Presidential Elector in its primary a pledge to support the nominees of its National Convention. Pp. 228–231.

4. The requirement of such a pledge does not deny equal protection or due process under the Fourteenth Amendment. *Nixon* v. *Herndon,* 273 U. S. 536, distinguished. P. 226, n. 14.

257 Ala. ——, 57 So. 2d 395, reversed.

The Alabama Supreme Court upheld, on federal constitutional grounds, a peremptory writ of mandamus requiring petitioner, the Chairman of the State Executive

Committee of the Democratic Party, to certify respondent as a candidate for Presidential Elector in a Democratic Primary which was to be held on May 6, 1952. 257 Ala. ——, 57 So. 2d 395. This Court granted certiorari. 343 U. S. 901. In a *per curiam* decision announced on April 3, 1952, in advance of the preparation of this opinion, this Court *reversed* that judgment. 343 U. S. 154. This opinion states the reasons for that decision.

*Marx Leva* and *Harold M. Cook* argued the cause for petitioner. With them on the brief were *James J. Mayfield, George A. LeMaistre* and *Louis F. Oberdorfer.*

*Horace C. Wilkinson* argued the cause and filed a brief for respondent.

Mr. Justice Reed delivered the opinion of the Court.

The Supreme Court of Alabama upheld a peremptory writ of mandamus requiring the petitioner, the chairman of that state's Executive Committee of the Democratic Party, to certify respondent Edmund Blair, a member of that party, to the Secretary of State of Alabama as a candidate for Presidential Elector in the Democratic Primary to be held May 6, 1952. Respondent Blair was admittedly qualified as a candidate except that he refused to include the following quoted words in the pledge required of party candidates—a pledge to aid and support "the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States." The chairman's refusal of certification was based on that omission.

The mandamus was approved on the sole ground that the above requirement restricted the freedom of a federal elector to vote in his Electoral College for his choice for President. 257 Ala. ——, 57 So. 2d 395. The pledge was held void as unconstitutional under the Twelfth Amend-

ment of the Constitution of the United States.[1] Because the mandamus was based on this federal right specially claimed by respondent, we granted certiorari. 28 U. S. C. § 1257 (3); 343 U. S. 901.

On account of the limited time before the primary election date, this Court ordered prompt argument on March 31, 1952, after granting certiorari and handed down a *per curiam* decision on April 3, 343 U. S. 154, stating summarily our conclusion on the federal constitutional issue that determined the Alabama judgment. This opinion is to supplement that statement. Our mandate issued forthwith.

The controversy arose under the Alabama laws permitting party primaries. Title 17 of the Code of Alabama, 1940, as amended, provides for regular optional primary elections in that state on the first Tuesday in May of even years by any political party, as defined in the

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[1] U. S. Const., Amend. XII:

"The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. . . ."

chapter, at state cost. §§ 336, 337, 340, 343. They are subject to the same penalties and punishment provisions as regular state elections. § 339. Parties may select their own committee in such manner as the governing authority of the party may desire. § 341. Section 344 provides that the chairman of the state executive committee shall certify the candidates other than those who are candidates for county offices to the Secretary of State of Alabama. That official, within not less than 30 days prior to the time of holding the primary elections, shall certify these names to the probate judge of any county holding an election.

Every state executive committee is given the power to fix political or other qualifications of its own members. It may determine who shall be entitled and qualified to vote in the primary election or to be a candidate therein. The qualifications of voters and candidates may vary.[2]

Section 348 requires a candidate to file his declaration of candidacy with the executive committee in the form prescribed by the governing body of the party. There is a provision, § 350, which reads as follows: "At the bottom of the ballot and after the name of the last candidate shall

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[2] Ala. Code, 1940, Tit. 17, § 347:

"All persons who are qualified electors under the general laws of the State of Alabama, and who are also members of a political party entitled to participate in such primary election, shall be entitled to vote therein and shall receive the official primary ballot of that political party, and no other; but every state executive committee of a party shall have the right, power and authority to fix and prescribe the political or other qualifications of its own members, and shall, in its own way, declare and determine who shall be entitled and qualified to vote in such primary election, or to be candidates therein, or to otherwise participate in such political parties and primaries; and the qualifications of electors entitled to vote in such primary election shall not necessarily be the same as the qualifications for electors entitled to become candidates therein; . . . ."

be printed the following, viz: 'By casting this ballot I do pledge myself to abide by the result of this primary election and to aid and support all the nominees thereof in the ensuing general election.' "

On consideration of these sections in other cases the Supreme Court of Alabama has reached conclusions generally conformable to the current of authority. Section 347 has been said by the Supreme Court of Alabama in *Ray* v. *Garner,* 257 Ala. ——, 57 So. 2d 824, 826, decided March 27, 1952, to give full power to the state executive committee to determine "who shall be entitled and qualified to vote in primary elections or be candidates or otherwise participate therein . . . just so such Committee action does not run afoul of some statutory or constitutional provision."

The *Garner* case involved a pledge adopted by the State Democratic Executive Committee for printing on the primary ballot, reading as follows:

> "By casting this ballot I do pledge myself to abide by the result of this Primary Election and to aid and support all the nominees thereof in the ensuing General Elections. I do further pledge myself to aid and support the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States." 257 Ala., at ——, 57 So. 2d, at 825.

This is substantially the same pledge that created the controversy in this present case. The court also called attention approvingly to *Lett* v. *Dennis,* 221 Ala. 432, 433, 129 So. 33, 34, a case that required a candidate in the primary to follow a party requirement and make a public oath as to his vote in the past general election, where it was declared "a test by a political organization of party affiliation and party fealty is reasonable and proper to be prescribed for those participating in its primary elections

for nomination of candidates for office." [3] As to the power to prescribe tests for participation in primary elections, it was added in the *Garner* case that "in Alabama this prerogative is vested in the State Party Executive Committee, acting through its duly elected or chosen members. *Smith* v. *McQueen,* [232 Ala. 90, 166 So. 788]." [4] 257 Ala., at ——, 57 So. 2d, at 826. The *McQueen* case involved the

[3] See Merriam and Overacker, Primary Elections (1928), pp. 69–73, 124, 125. Cf. *State ex rel. Curyea* v. *Wells,* 92 Neb. 337, 138 N. W. 165; *Francis* v. *Sturgill,* 163 Ky. 650, 174 S. W. 753.

[4] This was not a unique delegation. In 1928 Merriam and Overacker cited ten other states which delegate to the party authorities the right to prescribe such qualifications, with or without a statutory statement of minimum qualifications; these ten were Delaware, Idaho, and the remainder of the "solid South," except North Carolina. See Merriam and Overacker, *supra,* note 3, at pp. 72–73. In 1948 Penniman reports the continued existence of these delegations in all these states except Idaho, which now apparently requires only that the candidate "represent the principles" of the party and be duly registered in the appropriate precinct. 6 Idaho Code (Bobbs-Merrill, 1948) §§ 34–605, 34–606, 34–614. See Penniman, Sait's American Parties and Elections (4th ed., 1948), p. 431. However, the situation has changed in several of those states: the South Carolina legislature apparently no longer regulates the conduct of primaries at all, see S. C. Acts 1944, No. 810, p. 2323; and Texas and Florida have repealed their election codes and enacted new ones which appear to lack any comparable provision, see The New Election Code, Vernon's Annotated Texas Statutes Service (1951), effective January 1, 1952; Fla. Laws 1951, c. 26870. In both Texas and Florida, the primary is open to party "members"; the extent to which the party itself may prescribe membership qualifications is not explicitly set forth. But cf. §§ 103.111 (3) and 103.121, Fla. Laws 1951, c. 26870.

For provisions in the remaining states bearing on this delegation, see 2 Ark. Stat. Ann. (Bobbs-Merrill, 1948) § 3–205; 12 Ga. Code Ann. (Harrison, 1936) § 34–3218.2; Va. Code, 1950 (Michie, 1949), §§ 24–367, 24–369; 3 Miss. Code Ann., 1942 (Harrison, 1943), § 3129; Del. Laws 1944–1945, c. 150, amending Del. Rev. Code, 1935, c. 58, 1782, § 14; La. Rev. Stat., 1950, Tit. 18, §§ 306, 309; La. Const. Ann. (Bobbs-Merrill, 1932), Art. 8, § 4.

selection of delegates to a national political convention. It was also said in *Ray* v. *Garner* concerning the voter's pledge that:

> "Primarily, the pledge must be germane to party membership and party elections and, while the last clause of the pledge pertains to the national party, the party in Alabama will be a part of it by sending delegates to participate in the national convention, the Executive Committee having ordered their election and the party thereby having signified its intention to become a member of the national party. Therefore, it was within the competency of the Committee to adopt the resolution so binding the voters in the primary." [5] 257 Ala., at ——, 57 So. 2d, at 826.

As is well known, political parties in the modern sense were not born with the Republic. They were created by necessity, by the need to organize the rapidly increasing

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[5] Such a holding integrates the state and national party. See Cannon's Democratic Manual (1948):

"The Democratic National Committee is the permanent agency authorized to act in behalf of the Party during intervals between Conventions. It is the creature of the National Convention and therefore subordinate to its control and direction. Between Conventions the Committee exercises such powers and authority as have been delegated specifically to it and is subject to the directions and instructions imposed by the Convention which created it." P. 4.

"Duties and Powers of the Committee

"The duties and powers of the National Committee are derived from the Convention creating it, and while subject to variation as the Convention may provide, ordinarily include:

. . . . . .

"8. Provision for the National Convention, involving:

. . . . . .

"b. Authorization of call and determination within authority granted by last National Convention of representation from States, Territories and Districts; . . . ." Pp. 7–8.

population, scattered over our Land, so as to coordinate efforts to secure needed legislation and oppose that deemed undesirable. Compare Bryce, Modern Democracies, p. 546. The party conventions of locally chosen delegates, from the county to the national level, succeeded the caucuses of self-appointed legislators or other interested individuals. Dissatisfaction with the manipulation of conventions caused that system to be largely superseded by the direct primary. This was particularly true in the South because, with the predominance of the Democratic Party in that section, the nomination was more important than the election. There primaries are generally, as in Alabama, optional.[6] Various tests of party allegiance for candidates in direct primaries are found in a number of states.[7] The requirement of a pledge from the candidate participating in primaries to support the nominee is not unusual.[8] Such a provision protects a party from in-

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[6] See Penniman, *supra*, n. 4, cc. XIII, XVIII, especially at pp. 300, 416; Merriam and Overacker, *supra*, n. 3, at pp. 92–93.

[7] Penniman, *supra*, pp. 425–426; Merriam and Overacker, *supra*, pp. 129–133.

[8] *E. g.*, § 4, c. 109, N. D. Laws 1907, pp. 151, 153, discussed in *State ex rel. McCue* v. *Blaisdell*, 18 N. D. 55, 118 N. W. 141. See 7 Fla. Stat. Ann. (Harrison, 1943) § 99.021 (pkt. pt.); Fla. Laws 1951, c. 26870, § 99.021, amending 7 Fla. Stat. Ann. (Harrison, 1943) § 102.29, discussed in *Mairs* v. *Peters*, 52 So. 2d 793. Cf. 3 Miss. Code Ann., 1942 (Harrison, 1943), § 3129; *Ruhr* v. *Cowan*, 146 Miss. 870, 112 So. 386. Cf. Va. Code, 1950 (Michie, 1949), §§ 24–367, 24–369. See *Westerman* v. *Mims*, 111 Tex. 29, 227 S. W. 178, discussing Art. 3096 of Tex. Rev. Stat. of 1911; cf. *Love* v. *Wilcox*, 119 Tex. 256, 28 S. W. 2d 515.

For an example of a pledge specifically directed toward primary candidates for the office of presidential elector, see the resolutions of the State Democratic Committee of Texas discussed in *Carter* v. *Tomlinson*, 149 Tex. 7, 227 S. W. 2d 795; see also *Love* v. *Taylor*, 8 S. W. 2d 795 (Tex. Civ. App.); *McDonald* v. *Calhoun*, 149 Tex. 232, 231 S. W. 2d 656; cf. *Seay* v. *Latham*, 143 Tex. 1, 182 S. W. 2d 251. See also the pledge required by the Democratic Party of

trusion by those with adverse political principles.[9] It was under the authority of § 347 of the Alabama Code, note 2, *supra,* that the State Democratic Executive Committee of Alabama adopted a resolution on January 26, 1952, requiring candidates in its primary to pledge support to the nominees of the National Convention of the Democratic Party for President and Vice-President. It is this provision in the qualifications required by the party under § 347 which the Supreme Court of Alabama held unconstitutional in this case.

The opinion of the Supreme Court of Alabama concluded that the Executive Committee requirement violated the Twelfth Amendment, note 1, *supra.* It said:

> "We appreciate the argument that from time immemorial, the electors selected to vote in the college have voted in accordance with the wishes of the party to which they belong. But in doing so, the effective compulsion has been party loyalty. That theory has

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Arkansas, discussed in *Fisher* v. *Taylor,* 210 Ark. 380, 196 S. W. 2d 217.

Similar pledges, of course, are frequently exacted of voters in the primaries. See, *e. g., State ex rel. Adair* v. *Drexel,* 74 Neb. 776, 105 N. W. 174; *Morrow* v. *Wipf,* 22 S. D. 146, 115 N. W. 1121; *Ladd* v. *Holmes,* 40 Ore. 167, 66 P. 714. See Penniman, *supra,* note 4, at p. 431; Merriam and Overacker, *supra,* note 4, at pp. 124–129.

[9] See *Seay* v. *Latham,* 143 Tex. 1, 182 S. W. 2d 251. This was a Texas case that allowed the Democratic Party of Texas to withdraw its nomination of presidential electors when they announced their determination to vote against the nominees of the party as made by the National Convention. The names of others were substituted. The court said:

"A political party is a voluntary association, instituted for political purposes. It is organized for the purpose of effectuating the will of those who constitute its members, and it has the inherent power of determining its own policies." 143 Tex., at p. 5, 182 S. W. 2d, at 253. See *Carter* v. *Tomlinson,* 149 Tex. 7, 13, 227 S. W. 2d 795, 798; 29 Tex. L. Rev. 378.

> generally been taken for granted, so that the voting for a president and vice-president has been usually formal merely. But the Twelfth Amendment does not make it so. The nominees of the party for president and vice-president may have become disqualified, or peculiarly offensive not only to the electors but their constituents also. They should be free to vote for another, as contemplated by the Twelfth Amendment." [10] 257 Ala., at ——, 57 So. 2d, at 398.

In urging a contrary view the dissenting Alabama justices, in supporting the right of the Committee to require this candidate to pledge support to the party nominees, said:

> "Any other view, it seems, would destroy effective party government and would privilege any candidate, regardless of his political persuasion, to enter a primary election as a candidate for elector and fix his

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[10] The court found support for its conclusion in the reasoning of an Opinion of the Justices in answer to questions propounded by the Governor of Alabama in 1948. 250 Ala. 399, 34 So. 2d 598. One question was "Would an elector chosen at the general election in November 1948 have a discretion as to the persons for whom he could cast his ballot for President and Vice President?" Alabama had amended § 226 of Title 17 of its Code, relating to the meeting and balloting of its electoral college, by adding "and shall cast their ballots for the nominee of the national convention of the party by which they were elected." That opinion said:

"The language of the Federal Constitution clearly shows that it was the intention of the framers of the Federal Constitution that the electors chosen for the several states would exercise their judgment and discretion in the performance of their duty in the election of the president and vice-president and in determining the individuals for whom they would cast the electoral votes of the states. History supports this interpretation without controversy." 250 Ala., at 400, 34 So. 2d, at 600. See *McPherson* v. *Blacker*, 146 U. S. 1, 36. See also Willbern, Discretion of Presidential Electors, 1 Ala. L. Rev. 40.

On this review the right to a place on the primary ballot only is in contest.

own qualifications for such candidacy. This is contrary to the traditional American political system." 257 Ala., at ——, 57 So. 2d, at 403.

The applicable constitutional provisions on their face furnish no definite answer to the query whether a state may permit a party to require party regularity from its primary candidates for national electors.[11] The presidential electors exercise a federal function in balloting for President and Vice-President but they are not federal officers or agents any more than the state elector who votes for congressmen. They act by authority of the state that

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[11] As both constitutional provisions long antedated the party primary system, it is not to be expected that they or their legislative history would illumine this issue. They do not. Discussion in the Constitutional Convention as to the manner of election of the President resulted in the arrangement by which presidential electors were chosen by the state as its legislature might direct. *McPherson* v. *Blacker,* 146 U. S. 1, 28.

The Twelfth Amendment was brought about as the result of the difficulties caused by the procedure set up under Art. II, § 1. Under that procedure, the electors of each state did not vote separately for President and Vice-President; each elector voted for two persons, without designating which office he wanted each person to fill. If all the electors of the predominant party voted for the same two men, the election would result in a tie, and be thrown into the House, which might or might not be sympathetic to that party. During the John Adams administration, we had a President and Vice-President of different parties, a situation which could not commend itself either to the Nation or to most political theorists.

The situation was manifestly intolerable. Accordingly the Twelfth Amendment was adopted, permitting the electors to vote separately for presidential and vice-presidential candidates. Under this procedure, the party electors could vote the regular party ticket without throwing the election into the House. Electors could be chosen to vote for the party candidates for both offices, and the electors could carry out the desires of the people, without confronting the obstacles which confounded the elections of 1796 and 1800. See 11 Annals of Congress 1289–1290, 7th Cong., 1st Sess. (1802).

in turn receives its authority from the Federal Constitution.[12] Neither the language of Art. II, § 1, nor that of the Twelfth Amendment forbids a party to require from candidates in its primary a pledge of political conformity with the aims of the party. Unless such a requirement is implicit, certainly neither provision of the Constitution requires a state political party, affiliated with a national party through acceptance of the national call to send state delegates to the national convention, to accept persons as candidates who refuse to agree to abide by the party's requirement.[13]

The argument against the party's power to exclude as candidates in the primary those unwilling to agree to aid and support the national nominees runs as follows: The constitutional method for the selection of the President and Vice-President is for states to appoint electors who shall in turn vote for our chief executives. The intention of the Founders was that those electors should exercise their judgment in voting for President and Vice-President. Therefore this requirement of a pledge is a restriction in substance, if not in form, that interferes with the performance of this constitutional duty to select the proper persons to head the Nation, according to the best judgment of the elector. This interference with the

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[12] U. S. Const., Art. II, § 1:

". . . Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector. . . ."

Twelfth Amendment, note 1, *supra; In re Green,* 134 U. S. 377, 379; *Burroughs* v. *United States,* 290 U. S. 534.

[13] The Supreme Court of Alabama has just said that the Democratic Party of that state was thus affiliated with the national organization. See the excerpt from *Ray* v. *Garner,* in the text at note 5, *supra.*

elector's freedom of balloting for President relates directly to the general election and is not confined to the primary, it is contended, because under *United States* v. *Classic,* 313 U. S. 299, and *Smith* v. *Allwright,* 321 U. S. 649, the Alabama primary is an integral part of the general election. See *Schnell* v. *Davis,* 336 U. S. 933. Although Alabama, it is pointed out, requires electors to be chosen at the general election by popular vote, Ala. Code, 1940, Tit. 17, § 222, the real election takes place in the primary. Limitation as to entering a primary controls the results of the general election.[14]

First we consider the impact of the *Classic* and *Allwright* cases on the present issues. In the former case, we dealt with the power of Congress to punish frauds in the primaries "[w]here the state law has made the primary an integral part of the procedure of choice." We held that Congress had such power because the primary was a necessary step in the choice of candidates for election as federal representatives. Therefore the sanctions of §§ 19 and 20 of the old Criminal Code, subsequently re-

[14] There is also a suggestion that, since the Alabama primary is an integral part of the general election, the Fourteenth Amendment, which among other prohibitions forbids a state to exclude voters on account of their color, also forbids a state to exclude candidates because they refuse to pledge their votes. The answer to this suggestion is that the requirement of this pledge, unlike the requirement of color, is reasonably related to a legitimate legislative objective—namely, to protect the party system by protecting the party from a fraudulent invasion by candidates who will not support the party. See note 9, *supra.* In facilitating the effective operation of democratic government, a state might reasonably classify voters or candidates according to party affiliations, but a requirement of color, as we have pointed out before, is not reasonably related to any legitimate legislative objective. *Nixon* v. *Herndon,* 273 U. S. 536. This requirement of a pledge does not deny equal protection or due process.

Furthermore, the Fifteenth Amendment directly forbids abridgment on account of color of the right to vote.

vised as 18 U. S. C. §§ 241 and 242, which forbade injury to constitutionally secured rights, applied to the right to vote in the primary. 313 U. S., at 317–321. In the latter, the problem was the constitutionality of the exclusion of citizens by a party as electors in a party primary because of race. We held, on consideration of state participation in the regulation of the primary, that the party exclusion was state action and such state action was unconstitutional because the primary and general election were a single instrumentality for choice of officers. The Fifteenth Amendment's prohibition of abridgment by a state of the right to vote on account of race made the exclusion unconstitutional. Consequently, under 8 U. S. C. §§ 31 and 43 an injured party might sue one injuring him. 321 U. S. 649, 660–664.

In Alabama, too, the primary and general elections are a part of the state-controlled elective process. The issue here, however, is quite different from the power of Congress to punish criminal conduct in a primary or to allow damages for wrongs to rights secured by the Constitution. A state's or a political party's exclusion of candidates from a party primary because they will not pledge to support the party's nominees is a method of securing party candidates in the general election, pledged to the philosophy and leadership of that party. It is an exercise of the state's right to appoint electors in such manner, subject to possible constitutional limitations, as it may choose. U. S. Const., Art. II, § 1. The fact that the primary is a part of the election machinery is immaterial unless the requirement of pledge violates some constitutional or statutory provision. It was the violation of a secured right that brought about the *Classic* and *Allwright* decisions. Here they do not apply unless there was a violation of the Twelfth Amendment by the requirement to support the nominees of the National Convention.

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Secondly, we consider the argument that the Twelfth Amendment demands absolute freedom for the elector to vote his own choice, uninhibited by a pledge. It is true that the Amendment says the electors shall vote by ballot. But it is also true that the Amendment does not prohibit an elector's announcing his choice beforehand, pledging himself. The suggestion that in the early elections candidates for electors—contemporaries of the Founders—would have hesitated, because of constitutional limitations, to pledge themselves to support party nominees in the event of their selection as electors is impossible to accept. History teaches that the electors were expected to support the party nominees.[15] Experts in the history of government recognize the long-

[15] 11 Annals of Congress 1289–1290, 7th Cong., 1st Sess. (1802):

"Under the Constitution electors are to vote for two persons, one of whom does not reside in the State of the electors; but it does not require a designation of the persons voted for. Wise and virtuous as were the members of the Convention, experience has shown that the mode therein adopted cannot be carried into operation; for the people do not elect a person for an elector who, they know, does not intend to vote for a particular person as President. Therefore, practically, the very thing is adopted, intended by this amendment."

S. Rep. No. 22, 19th Cong., 1st Sess. (1826), p. 4:

"In the first election held under the constitution, the people looked beyond these agents [electors], fixed upon their own candidates for President and Vice President, and took pledges from the electoral candidates to obey their will. In every subsequent election, the same thing has been done. Electors, therefore, have not answered the design of their institution. They are not the independent body and superior characters which they were intended to be. They are not left to the exercise of their own judgment; on the contrary, they give their vote, or bind themselves to give it, according to the will of their constituents. They have degenerated into mere agents, in a case which requires no agency, and where the agent must be useless, if he is faithful, and dangerous, if he is not." See 2 Story on the Constitution (5th ed., 1891) § 1463.

standing practice.[16] Indeed, more than twenty states do not print the names of the candidates for electors on the general election ballot. Instead, in one form or another, they allow a vote for the presidential candidate of the national conventions to be counted as a vote for his party's nominees for the electoral college.[17] This long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a can-

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[16] *McPherson* v. *Blacker,* 146 U. S. 1, 36:

"Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive, but experience soon demonstrated that, whether chosen by the legislatures or by popular suffrage on general ticket or in districts, they were so chosen simply to register the will of the appointing power in respect of a particular candidate."

III Cyclopedia of American Government (Appleton, 1914), Presidential Elections, by Albert Bushnell Hart, p. 8:

"In the three elections of 1788–89, 1792 and 1796 there was a liberal scattering of votes, 13 persons receiving votes in 1796; but in 1800 there were only five names voted on. As early as 1792 an understanding was established between the electors in some of the different states that they should combine on the same man; and from 1796 on there were always, with the exception of the two elections of 1820 and 1824, regular party candidates. In practice most of the members of the electoral colleges belonged to a party, and expected to support it; and after 1824 it became a fixed principle that the electors offered themselves for the choice of the voters or legislatures upon a pledge to vote for a predesignated candidate."

[17] *E. g.,* Massachusetts:

Annotated Laws of Massachusetts, c. 54:

"§ 43. Presidential Electors, Arrangement of Names of Candidates, etc.—The names of the candidates for presidential electors shall not be printed on the ballot, but in lieu thereof the surnames of the candidates of each party for president and vice president shall be printed thereon in one line under the designation 'Electors of president and vice president' and arranged in the alphabetical order of the surnames of the candidates for president, with the political designation of the party placed at the right of and in the same line with

didate for elector as to his vote in the electoral college weighs heavily in considering the constitutionality of a pledge, such as the one here required, in the primary.

However, even if such promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art. II, § 1, to vote as he may choose in the electoral college, it would not follow that the requirement of a pledge in the primary is unconstitutional. A candidacy in the primary is a voluntary act of the applicant. He is not barred, discriminatorily, from participating but must comply with the rules of the party. Surely one may voluntarily assume obligations to vote for a certain candidate. The state offers him opportunity to become a candidate for elector on his own terms, although he must file his declaration before the primary. Ala. Code, Tit. 17, § 145. Even though the victory of an independent candidate for elector in Alabama cannot be anticipated, the state does offer the opportunity for the development of other strong political organizations where the need is felt for them by a sizable block of voters. Such parties may leave their electors to their own choice.

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the surnames. A sufficient square in which each voter may designate by a cross (X) his choice for electors shall be left at the right of each political designation."

See S. Doc. No. 243, 78th Cong., 2d Sess. (1944), containing a summary of the state laws relating to nominations and election of presidential electors.

See Library of Congress, Legislative Reference Service, Proposed Reform of the Electoral College, 1950; Edward Stanwood, A History of the Presidency from 1788 to 1897 (1912), pp. 47, 48, 50, 51. The author shows the practice of an elector's announcing his preference and gives an alleged instance of violation.

See the comments on instruction of electors in State Law on the Nomination, Election, and Instruction of Presidential Electors, by Ruth C. Silva, 42 Am. Pol. Sci. Rev. 523.

We conclude that the Twelfth Amendment does not bar a political party from requiring the pledge to support the nominees of the National Convention. Where a state authorizes a party to choose its nominees for elector in a party primary and to fix the qualifications for the candidates, we see no federal constitutional objection to the requirement of this pledge.

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

MR. JUSTICE FRANKFURTER, not having heard the argument, owing to illness, took no part in the disposition of the case.

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

The Constitution and its Twelfth Amendment allow each State, in its own way, to name electors with such personal qualifications, apart from stated disqualifications, as the State prescribes. Their number, the time that they shall be named, the manner in which the State must certify their ascertainment and the determination of any contest are prescribed by federal law. U. S. Const., Art. II, § 1, 3 U. S. C. §§ 1–7. When chosen, they perform a federal function of balloting for President and Vice President, federal law prescribing the time of meeting, the manner of certifying "all the votes given by them," and in detail how such certificates shall be transmitted and counted. U. S. Const., Amend. XII, 3 U. S. C. §§ 9–20. But federal statute undertakes no control of their votes beyond providing "The electors shall vote for President and Vice President, respectively, in the manner di-

rected by the Constitution," 3 U. S. C. § 8, and the Constitution requires only that they "vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves." U. S. Const., Amend. XII. No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices.* Certainly under that plan no state law could control the elector in performance of his federal duty, any more than it could a United States Senator who also is chosen by, and represents, the State.

This arrangement miscarried. Electors, although often personally eminent, independent, and respectable, officially became voluntary party lackeys and intellectual nonentities to whose memory we might justly paraphrase a tuneful satire:

> They always voted at their Party's call
> And never thought of thinking for themselves at all.

As an institution the Electoral College suffered atrophy almost indistinguishable from *rigor mortis*.

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*See The Federalist, No. 68 (Earle ed., 1937), pp. 441–442:

"It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any preëstablished body, but to men chosen by the people for the special purpose, and at the particular conjuncture.

"It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations."

However, in 1948, Alabama's Democratic Party Electors refused to vote for the nominee of the Democratic National Convention. To put an end to such party unreliability the party organization, exercising state-delegated authority, closed the official primary to any candidate for elector unless he would pledge himself, under oath, to support any candidate named by the Democratic National Convention. It is conceded that under long-prevailing conditions this effectively forecloses any chance of the State being represented by an unpledged elector. In effect, before one can become an elector for Alabama, its law requires that he must pawn his ballot to a candidate not yet named, by a convention not yet held, of delegates not yet chosen. Even if the nominee repudiates the platform adopted by the same convention, as Democratic nominees have twice done in my lifetime (1904, 1928), the elector is bound to vote for him. It will be seen that the State has sought to achieve control of the electors' ballots. But the balloting cannot be constitutionally subjected to any such control because it was intended to be free, an act performed after all functions of the electoral process left to the States have been completed. The Alabama Supreme Court held that such a requirement violates the Federal Constitution, and I agree.

It may be admitted that this law does no more than to make a legal obligation of what has been a voluntary general practice. If custom were sufficient authority for amendment of the Constitution by Court decree, the decision in this matter would be warranted. Usage may sometimes impart changed content to constitutional generalities, such as "due process of law," "equal protection," or "commerce among the states." But I do not think powers or discretions granted to federal officials by the Federal Constitution can be forfeited by the Court for disuse. A political practice which has its origin in custom must rely upon custom for its sanctions.

The demise of the whole electoral system would not impress me as a disaster. At its best it is a mystifying and distorting factor in presidential elections which may resolve a popular defeat into an electoral victory. At its worst it is open to local corruption and manipulation, once so flagrant as to threaten the stability of the country. To abolish it and substitute direct election of the President, so that every vote wherever cast would have equal weight in calculating the result, would seem to me a gain for simplicity and integrity of our governmental processes.

But the Court's decision does not even move in that direction. What it is doing is to entrench the worst features of the system in constitutional law and to elevate the perversion of the forefathers' plan into a constitutional principle. This judicial overturn of the theory that has come down to us cannot plead the excuse that it is a practical remedy for the evils or weaknesses of the system.

The Court is sanctioning a new instrument of power in the hands of any faction that can get control of the Democratic National Convention to make it sure of Alabama's electoral vote. When the party is in power this will likely be the administration faction and when not in power no one knows what group it will be. This device of prepledged and oath-bound electors imposes upon the party within the State an oath-bound regularity and loyalty to the controlling element in the national party. It centralizes party control and, instead of securing for the locality a share in the central management, it secures the central management in dominance of the local vote in the Electoral College. If we desire free elections, we should not add to the leverage over local party representatives always possessed by those who enjoy the prestige and dispense the patronage of a national administration.

The view of many that it is the progressive or liberal element of the party that will presently advantage from this device does not prove that the device itself has any

proper place in a truly liberal or progressive scheme of government. Who will come to possess this weapon and to whose advantage it will prove in the long run I am not foresighted enough to predict. But party control entrenched by disfranchisement and exclusion of nonconforming party members is a means which to my mind cannot be justified by any end. In the interest of free government, we should foster the power and the will to be independent even on the part of those we may think to be independently wrong.

Candidates for elector, like those for Senator, of course, may announce to their constituents their policies and preferences, and assume a moral duty to carry them out if they are chosen. Competition in the primary between those of different views would forward the representative principle. But this plan effects a complete suppression of competition between different views within the party. All who are not ready to follow blindly anyone chosen by the national convention are excluded from the primary, and that, in practice, means also from the election.

It is not for me, as a judge, to pass upon the wisdom or righteousness of the political revolt this measure was designed to suppress. For me it is enough that, be it ever so benevolent and virtuous, the end cannot justify these means.

I would affirm the decision of the Supreme Court of Alabama.

# UNITED STATES *v.* ATLANTIC MUTUAL INSURANCE CO. ET AL.

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

No. 450. Argued March 7, 1952.—Decided April 21, 1952.

1. A "Both-to-Blame" clause of an ocean bill of lading, which, in the case of a collision due to the negligent navigation of both ships, requires the cargo owner to indemnify the carrier for such amount as the carrier may lose by reason of a recovery by the cargo owner from the noncarrier for cargo damages which are included in the aggregate damages to be divided between the two ships, *held* invalid. Pp. 237–242.

   (a) It is a general rule of law that common carriers cannot stipulate for immunity from their own or their agents' negligence. P. 239.

   (b) The language of the Harter Act, 46 U. S. C. § 192, substantially reenacted by the Carriage of Goods by Sea Act, 46 U. S. C. § 1304 (2), did not carve out a special statutory exception to the general rule so as to permit a carrier to deprive its cargo owners of a part of the fruits of any judgment they obtain in a direct action against a noncarrying vessel that contributes to a collision. Pp. 239–241.
2. Neither the Harter Act nor the Carriage of Goods by Sea Act altered the long-established rule that the full burden of the losses sustained by both ships in a both-to-blame collision is to be shared equally. Pp. 241–242.
3. If the rule that, without congressional authority, ocean common carriers cannot stipulate against their own negligence (or that of their agents or servants) is to be changed, the change should be made by Congress, not by the shipowners. P. 242.
4. *The Jason*, 225 U. S. 32, distinguished. P. 242, n. 10.

191 F. 2d 370, affirmed.

In a suit brought in the District Court to determine liability arising out of a collision in which both vessels were at fault, the District Court held valid a "Both-to-

Blame" clause of an ocean bill of lading. 90 F. Supp. 836. The Court of Appeals reversed. 191 F. 2d 370. This Court granted certiorari. 342 U. S. 913. *Affirmed,* p. 242.

*James L. Morrisson* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Baldridge, Samuel D. Slade, Roscoe H. Hupper* and *Ray Rood Allen.*

*Leonard J. Matteson* argued the cause for the Farr Sugar Corporation et al., respondents. With him on the brief were *Oscar R. Houston* and *Richard F. Shaw.*

*Cletus Keating, Edwin S. Murphy* and *Louis J. Gusmano* submitted on brief for the Belgian Overseas Transport, S. A., respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Respondents are cargo owners[1] who shipped goods on the steamship *Nathaniel Bacon* owned by petitioner, the United States, and operated as a common carrier of goods for hire. It collided with the *Esso Belgium* and respondents' cargo was damaged. The ships were also damaged. This litigation was brought in the District Court to determine liability for the damages suffered by the cargo owners and for the physical damage caused the ships. It was agreed in the District Court that:

> (a) The collision was due to negligent navigation by employees of both ships. The cargo owners were in no way at fault.
>
> (b) The *Belgium,* as one of two joint tortfeasors, must pay "100%" of damages suffered by the *Bacon's* cargo owners.

[1] Certain insurance companies are parties to this suit as subrogees of their insured cargo owners. Some cargo owners were not insured.

(c) Because of § 3 of the Harter Act [2] and § 4 (2) of the Carriage of Goods by Sea Act,[3] the cargo owners are barred from directly suing the *Bacon* for cargo damages.

(d) Since the two ships were mutually at fault, the aggregate of all damages to both should be shared by both.[4]

(e) In computing the aggregate damages caused both ships, account should be taken of the cargo damages recovered from the *Belgium* by the cargo owners.

(f) The bill of lading issued by the *Bacon* to the cargo owners contained a "Both-to-Blame" clause.[5] This clause, if valid, requires the cargo owners to indemnify the carrier *Bacon* for any amounts the

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[2] 27 Stat. 445, 46 U. S. C. § 192. This section provides that if due diligence is exercised by the shipowner in making the ship seaworthy and properly manned, equipped, and supplied, then "neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel . . . ."

[3] 49 Stat. 1210, 46 U. S. C. § 1304 (2). This section provides that "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship; . . . ."

[4] The shipowners have stipulated that in this case the *Esso Belgium* is to bear two-thirds and the *Nathaniel Bacon* one-third of the total damages, although the normal admiralty rule requires an equal division of damages. *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, 284.

[5] The clause reads as follows:

"If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim what-

> *Bacon* loses because damages recovered by the cargo owners from the *Belgium* are included in the aggregate damages divided between the two ships.

The only question presented to us is whether the "Both-to-Blame" clause is valid. Respondent cargo owners contend that it is void and unenforceable as a violation of the long-standing rule of law which forbids common carriers from stipulating against the consequences of their own or their employees' negligence. Petitioner, the United States, contends that § 3 of the Harter Act, as substantially reenacted in § 4 (2) of the Carriage of Goods by Sea Act, provides special statutory authorization permitting ocean carriers to deviate from the general rule and to stipulate against their negligence as they did here. The District Court held the clause valid. 90 F. Supp. 836. The Court of Appeals reversed. 191 F. 2d 370. Deeming the question decided of sufficient importance to justify our review, this Court granted certiorari. 342 U. S. 913.

There is a general rule of law that common carriers cannot stipulate for immunity from their own or their agents' negligence. While this general rule was fashioned by the courts, it has been continuously accepted as a guide to common-carrier relationships for more than a century [6] and has acquired the force and precision of a legislative enactment. Considering the relationship of the rule to the Harter Act, this Court said in 1901 that "in view

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soever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier."

[6] See, *e. g.*, *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 438–444 (1889); *Knott* v. *Botany Mills*, 179 U. S. 69, 71 (1900); *Railroad Co.* v. *Lockwood*, 17 Wall. 357 (1873); *Boston & Maine R. Co.* v. *Piper*, 246 U. S. 439, 445 (1918); *San Giorgio I* v. *Rheinstrom Co.*, 294 U. S. 494, 496 (1935). And see cases collected in 9 Am. Jur. 874–877.

of the well-settled nature of the general rule at the time the statute was adopted, it must result that legislative approval was by clear implication given to the general rule as then existing in all cases where it was not changed." *The Kensington,* 183 U. S. 263, 268–269. Our question therefore is whether the language of the Harter Act, substantially reenacted in the Carriage of Goods by Sea Act, has carved out a special statutory exception to the general rule so as to permit a carrier to deprive its cargo owners of a part of the fruits of any judgment they obtain in a direct action against a noncarrying vessel that contributes to a collision.

Prior to the passage of the Harter Act in 1893, cargo damages incurred in a both-to-blame collision could be recovered in full from either ship. *The Atlas,* 93 U. S. 302. The Harter Act, under some circumstances, took away the right of the cargo owner to sue his own carrier for cargo damages caused by the negligent navigation of the carrier's servants or agents. It did not deprive the cargo owner of his tort action against the noncarrying ship. *The Chattahoochee,* 173 U. S. 540, 549–550. Nor did the Harter Act go so far as to insulate the carrier from responsibility to another vessel for physical damages caused to the ship by negligent navigation of the carrier's servants or agents. In *The Delaware,* 161 U. S. 459, 471, 474, this Court declined to give the Harter Act such a broad interpretation even though the language itself, if "broadly construed" and considered alone, would have justified such an interpretation. In addition, the Harter Act does not exonerate the carrier from its obligation to share with the noncarrier one-half the damages paid by the noncarrier to the cargo owners. *The Chattahoochee, supra,* at pp. 551–552; see also *Aktslsk. Cuzco* v. *The Sucarseco,* 294 U. S. 394, 401–402.

Apparently it was not until about forty years after the passage of the Harter Act that shipowners first attempted

by stipulation to deprive cargo owners of a part of their recovery against noncarrying ships. See *The W. W. Bruce,* 14 F. Supp. 894, rev'd on other grounds, 94 F. 2d 834. The present effort of shipowners appears to date from 1937 when the North Atlantic Freight Conference adopted the "Both-to-Blame" clause.[7] So far as appears, this is the first test of the legality of the clause that has appeared in the courts. When Congress passed the Carriage of Goods by Sea Act in 1936, it indicated no purpose to bring about a change in the long-existing relationships and obligations between carriers and shippers which would be relevant to the validity of the "Both-to-Blame" clause. At that time all interested groups such as cargo owners, shipowners, and the representatives of interested insurance companies were before the congressional committees.[8] Although petitioner and respondents both appear to find comfort in the language and the hearings of the 1936 Act, nothing in either persuades us that Congress intended to alter the Harter Act in any respect material to this controversy.

Petitioner argues that the clause does nothing more than remove an "anomaly" which arises from this Court's construction of the Harter Act. It is said to be "anomalous" to hold a carrier not liable at all if it alone is guilty of negligent navigation but at the same time to hold it indirectly liable for one-half the cargo damages if another ship is jointly negligent with it. Assuming for the moment that all rules of law must be symmetrical, we think it would be "anomalous" to hold that a cargo owner, who has an unquestioned right under the law to recover full damages from a noncarrying vessel, can be compelled to

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[7] Robinson, Admiralty, 872, 873; Knauth, Ocean Bills of Lading (3d ed. 1947), 95, 136, 175.

[8] Hearings before Senate Committee on Commerce on S. 1152, 74th Cong., 1st Sess.

give up a portion of that recovery to his carrier because of a stipulation exacted in a bill of lading. Moreover, there is no indication that either the Harter Act or the Carriage of Goods by Sea Act was designed to alter the long-established rule that the full burden of the losses sustained by both ships in a both-to-blame collision is to be shared equally. Yet the very purpose of exacting this bill of lading stipulation is to enable one ship to escape its equal share of such losses by shifting a part of its burden to its cargo owners.

Here, once more, "we think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests" [9] of the varied groups who would be affected by permitting carriers to deviate from the controlling rule that without congressional authority they cannot stipulate against their own negligence or that of their agents or servants. If that rule is to be changed, the Congress, not the shipowners, should change it.[10]

*Affirmed.*

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BURTON joins, dissenting.

Only a few weeks ago this Court reversed a unanimous opinion of the Court of Appeals for the Fourth Circuit which had held opposed to public policy, agreements whereby retailers of eyeglasses turned over a portion of

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[9] *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, 286.

[10] We have not overlooked the argument that this bill of lading stipulation should be upheld because of this Court's holding and opinion in *The Jason*, 225 U. S. 32. The *Jason* case upheld a stipulation that both shipowner and cargo owner should contribute in general average on account of sacrifices and expenses necessarily incurred by the master of the ship in order to preserve the cargo as a whole. Moreover, this general average clause "was sustained because it admitted the shipowner to share in general average only in circum-

the purchase price to the oculist who referred the customer to them. In so doing, "we voice[d] no approval of the business ethics or public policy involved" in the agreements. *Lilly* v. *Commissioner,* 343 U. S. 90, 97. This refusal to make our private views of right into the legal standards for the activities of men of affairs has increasingly characterized our decisions in the vague and shifting area of agreements challenged as unenforceable because offensive to what must be deemed to be legally controlling policy. "In the absence of a plain indication of that [dominant public] policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, this Court should not assume to declare contracts of the War Department contrary to public policy." *Muschany* v. *United States,* 324 U. S. 49, 66–67. No more unrestrained justification warrants courts to strike down private business agreements. Judged by such a standard, the agreements before us should be enforced.

Before 1893, when the Harter Act [1] was passed, the obligations of seagoing carriers with respect to passengers and cargo were defined by this Court in the exercise of its admiralty and maritime jurisdiction from case to case. Toward cargo the ocean carrier stood in the relation of an insurer, liable for any damage save that caused by act of God; and to passengers it owed the duty of highest care. Only by holding carriers to this mark was it thought that

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stances where by the Harter Act he was relieved from responsibility." *Aktslsk. Cuzco* v. *The Sucarseco,* 294 U. S. 394, 403. Here the shipowner attempted to relieve itself from responsibility for negligence of its employees in connection with damages inflicted on another ship—"circumstances where by the Harter Act he was [*not*] relieved from responsibility."

[1] Act of Feb. 13, 1893, 27 Stat. 445. The Act has now been superseded by the Carriage of Goods by Sea Act of 1936, 49 Stat. 1207, 46 U. S. C. § 1300 *et seq.*, but any changes are not relevant to the issues here involved.

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safety in operation could be achieved and undue imposition by carriers eliminated.

The carriers sought to avoid these obligations by special contracts or stipulations in bills of lading, relieving them of liabilities which they would incur under the rules laid down by the courts in the absence of such agreements. Although the courts upheld some such efforts, they reserved the right to refuse to enforce contractual exemptions from liability which trenched upon judicial notions of public policy.[2] The most important limit thus set to the power of the carrier to contract out of his common-law liability was the rule that courts would strike down any stipulation which relieved the carrier for hire from liability for damage caused by its own negligence. Applied first by this Court to the railroads, *Railroad Co.* v. *Lockwood,* 17 Wall. 357, the doctrine was extended to carriers by sea a few years later in *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397. Underlying the decision was the premise that such an agreement, if enforced, would tend to relax the vigilance and care in seamanship which the threat of liability encouraged. See *Railroad Co.* v. *Lockwood, supra,* at 371, 377–378.

The process by which this body of rules and exceptions was developed is typical of the growth of judge-made law in our system. Without legislative guidance, judges in deciding cases are necessarily thrown upon their own resources in ascertaining the public policy applicable to particular situations.

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[2] The courts based this reservation upon the observation that such contracts were not in fact consensual agreements. The shipper had little choice but to accept the carriers' terms. See, *e. g., Railroad Co.* v. *Lockwood,* 17 Wall. 357, 379; *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, 441. This circumstance did not necessarily void the agreement, since many stipulations were upheld. But it provided justification for refusing to enforce those which offended judicially pronounced public policy.

The judge's function and responsibility become otherwise once the legislature has formulated public policy. Courts are then no longer at large. They must carry out the defined policy and disregard their own determination of what the public good demands. See *Twin City Co.* v. *Harding Glass Co.*, 283 U. S. 353, 357. By the Harter Act, Congress supplanted the judicial view of public policy with its own ideas. The legislation, as is so often the case, represents a compromise among competing interests. The carriers were relieved of their judicially imposed insurers' liability. In return they were required to forego the possibility of avoiding by contract certain specified obligations. Finally, if those obligations were in fact performed,[3] recovery against the carrier for damages to cargo due to faulty navigation was altogether disallowed. This provision, embodied in § 3 of the Harter Act,[4] necessarily expressed a rejection of the judicially conceived premise as to public policy which was the foundation of the decisions which antedated legislation, namely, that liability for negligent navigation was a necessary spur to the carrier's exercise of care. Since that premise has been discarded by Congress, no justification remains for us to revive it as a basis for striking down the agreement here in question. "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *John-*

[3] This proviso was eliminated by the Carriage of Goods by Sea Act of 1936, 49 Stat. 1207, 1210, 46 U. S. C. § 1304.

[4] 27 Stat. 445.

*son* v. *United States,* 163 F. 30, 32 (per Holmes, J.); see Landis, Statutes and the Sources of Law, in Harvard Legal Essays, 213.

To be sure, the Harter Act did not in terms prescribe that the carrier should have recovery over against cargo for the amount of its liability to a non-carrying ship, attributable to payments made by the non-carrier for damage to cargo in a collision for which both vessels were to blame. Hence we held in *The Chattahoochee,* 173 U. S. 540, that no such recovery was available to a carrier by mere force of the Act. Similarly, and in the same period shortly after the passage of the Harter Act, we held that, since the Act did not specify that the carrier should participate in a general average [5] when the peril to which it related was the result of the carrier's faulty navigation, no such participation could be had if the carrier had not stipulated for it. *The Irrawaddy,* 171 U. S. 187. But when a carrier did contract for such participation, the force of the Harter Act required this Court to sustain the stipulation. *The Jason,* 225 U. S. 32.

> "Instead of merely sanctioning covenants and agreements limiting [the shipowner's] liability, Congress went further and rendered such agreements unnecessary by repealing the liability itself, declaring that if the shipowner should exercise due diligence to make the vessel in all respects seaworthy, and properly manned, equipped and supplied, neither the ves-

[5] The general average is a doctrine of maritime law which provides that where a portion of ship or cargo is sacrificed to save the residue from peril of shipwreck, each owner of property saved contributes in proportion to the value of that property to make up the loss of those whose property has been sacrificed for the common benefit. It was characteristic of Dean James Barr Ames's power of fertile generalization to find in the maritime doctrine of general average manifestation of the more comprehensive quasi-contractual principle against unjust enrichment.

> sel, her owner or owners, etc., should be responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel, etc., etc. The antithesis is worth noting. Congress says to the shipowner—'In certain respects you shall not be relieved from the responsibilities incident to your public occupation as a common carrier, although the cargo owners agree that you shall be relieved; in certain other respects (provided you fulfill conditions specified) you shall be relieved from responsibility, even without a stipulation from the owners of cargo.'" *The Jason, supra,* at 50–51.
>
> "In our opinion, so far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him to contract with the cargo-owners for a participation in general average contribution growing out of such negligence; . . . ." *Id.,* at 55.

The present case bears exactly the same relation to *The Chattahoochee* that *The Jason* bore to *The Irrawaddy.* To revive notions of public policy which Congress rejected in 1893, disregards the appropriate considerations that governed application of the Harter Act in the earlier decisions.[6] To derive from a statute, which relieves a

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[6] Reliance by the Court on *The Kensington,* 183 U. S. 263, is surely misplaced, and the quotation from it must be put in its setting. That was a case in which recovery was sought for damage to a passenger's baggage, although the ticket contained a stipulation against the carrier's liability. The Court noted that the Harter Act immunity from liability for negligence applied only to vessels "when engaged in the classes of carriage coming within the terms of the statute." *Id.,* at 268. Without deciding whether passengers' baggage was such a class of carriage, the Court struck down the stipulation on the ground that, if the Harter Act applied, the agreement was void as violative of the Act in that it sought immunity for negligent

ship entirely of liability to cargo when the ship is wholly to blame for the loss, an implied restriction against a voluntary arrangement for relief from liability when the ship is only half to blame, is surely an odd use to which to put such a statute. When this Court does fashion a rule of public policy it ought to be less perverse and illogical than that in its operation.

It is suggested, however, that the real meaning of the Harter Act is that carriers are remitted to Congress for whatever immunities they were to be granted. That is a most doctrinaire view to take of the legislation, and *The Jason, supra,* disposes of the notion.[7] What Congress did was to legislate generally about the relations between carrier and cargo in seagoing commerce. Generally, but not comprehensively as though it formulated a maritime code excluding all consensual arrangements within the

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stowage, specifically forbidden by the Act; if the carriage of passengers' baggage was not among the classes exempted from liability by the Act, then of course, the cases voiding such stipulations with respect to baggage retained their force. Certainly a decision affirming the continued applicability of these cases as to baggage, goods for which Congress has not withdrawn carrier liability for negligence, and in any event not for negligent stowage, is totally inapposite to the question whether pre-existing case law should be applied to cargo, where Congress has granted the carrier immunity from such liability.

[7] But even if it did not, the argument appears to be drawn from the blue. It would have basis in reality if Congress had, by the Harter Act, carved an exception from a pre-existing rule outlawing all agreements between shipper and carrier regarding liability. The general prohibition would continue in force because the Harter Act would have been a defined, limited qualification. But there was no such rule, either judge-made or statutory. Congress had taken no action. And this Court did not outlaw such agreements generally. It struck down specific agreements for specific reasons grounded in its view of public policy. That premise of policy was denied validity by the Harter Act. It smacks of the fanciful to suggest that what Congress really did was to raise a proviso to an existing absolute rule based on that premise.

industry. That legislation "indicate[s] or require[s] as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind." *Johnson* v. *United States, supra,* at 32. We should heed the admonition of Mr. Justice Holmes "that courts in dealing with statutes sometimes have been too slow to recognize that statutes even when in terms covering only particular cases may imply a policy different from that of the common law, and therefore may exclude a reference to the common law for the purpose of limiting their scope." *Panama R. Co.* v. *Rock,* 266 U. S. 209, 215–216 (Holmes, J., with Taft, C. J., McKenna and Brandeis, JJ., dissenting). This is such a statute. I would recognize that the Congressional pronouncement of public policy—when it exempted carriers from liability for faulty navigation—precludes our striking down the clause here in issue.

# BEAUHARNAIS *v.* ILLINOIS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 118. Argued November 28, 1951.—Decided April 28, 1952.

Over his claim that the statute violated the liberty of speech and of the press guaranteed as against the States by the Due Process Clause of the Fourteenth Amendment and was void for vagueness, petitioner was convicted in a state court for distributing on the streets of Chicago anti-Negro leaflets in violation of Ill. Rev. Stat., 1949, c. 38, § 471, which makes it a crime to exhibit in any public place any publication which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" which "exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy." *Held:*

1. As construed and applied in this case, the statute does not violate the liberty of speech and of the press guaranteed as against the States by the Due Process Clause of the Fourteenth Amendment. Pp. 251–264.

2. As construed and applied in this case, the statute is not void for vagueness. *Winters* v. *New York,* 333 U. S. 507; *Stromberg* v. *California,* 283 U. S. 359; *Thornhill* v. *Alabama,* 310 U. S. 88; and *Terminiello* v. *Chicago,* 337 U. S. 1, distinguished. P. 264.

3. Since petitioner did not, by appropriate steps in the trial court, seek to justify his utterance as "fair comment" or as privileged as a means for redressing grievances, those hypothetical defenses cannot be considered by this Court. Pp. 264–265.

4. Since the Illinois Supreme Court construed this statute as a form of criminal libel law, and truth of the utterance is not a defense to a charge of criminal libel under Illinois law unless the publication is also made "with good motives and for justifiable ends," petitioner was not denied due process by the trial court's rejection of a proffer of proof which did not satisfy this requirement. Pp. 253–254, 265–266.

5. Since libelous utterances are not within the area of constitutionally protected speech, it is not necessary for this Court to consider the issues raised by the denial of petitioner's request that the jury be instructed that, in order to convict, they must find that the publication complained of was likely to produce a "clear and present danger" of a substantial evil. Pp. 253, 266.

408 Ill. 512, 97 N. E. 2d 343, affirmed.

The Supreme Court of Illinois sustained petitioner's conviction of a violation of Ill. Rev. Stat., 1949, c. 38 § 471, over his objection that the statute was invalid under the Fourteenth Amendment. 408 Ill. 512, 97 N. E. 2d 343. This Court granted certiorari. 342 U. S. 809. *Affirmed,* p. 267.

*Alfred A. Albert* argued the cause for petitioner. With him on the brief was *Herbert Monte Levy.*

*William C. Wines,* Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *Ivan A. Elliott,* Attorney General, *John T. Coburn,* Assistant Attorney General, and *Albert I. Zemel.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The petitioner was convicted upon information in the Municipal Court of Chicago of violating § 224a of the Illinois Criminal Code, Ill. Rev. Stat., 1949, c. 38, Div. 1, § 471. He was fined $200. The section provides:

> "It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . . ."

Beauharnais challenged the statute as violating the liberty of speech and of the press guaranteed as against the States by the Due Process Clause of the Fourteenth Amendment, and as too vague, under the restrictions implicit in the

same Clause, to support conviction for crime. The Illinois courts rejected these contentions and sustained defendant's conviction. 408 Ill. 512, 97 N. E. 2d 343. We granted certiorari in view of the serious questions raised concerning the limitations imposed by the Fourteenth Amendment on the power of a State to punish utterances promoting friction among racial and religious groups. 342 U. S. 809.

The information, cast generally in the terms of the statute, charged that Beauharnais "did unlawfully . . . exhibit in public places lithographs, which publications portray depravity, criminality, unchastity or lack of virtue of citizens of Negro race and color and which exposes [*sic*] citizens of Illinois of the Negro race and color to contempt, derision, or obloquy . . . ." The lithograph complained of was a leaflet setting forth a petition calling on the Mayor and City Council of Chicago "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro . . . ." Below was a call for "One million self respecting white people in Chicago to unite . . . ." with the statement added that "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will." This, with more language, similar if not so violent, concluded with an attached application for membership in the White Circle League of America, Inc.

The testimony at the trial was substantially undisputed. From it the jury could find that Beauharnais was president of the White Circle League; that, at a meeting on January 6, 1950, he passed out bundles of the lithographs in question, together with other literature, to volunteers for distribution on downtown Chicago street corners the following day; that he carefully organized that distribution, giving detailed instructions for it; and that

the leaflets were in fact distributed on January 7 in accordance with his plan and instructions. The court, together with other charges on burden of proof and the like, told the jury "if you find . . . that the defendant, Joseph Beauharnais, did . . . manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place the lithograph . . . then you are to find the defendant guilty . . . ." He refused to charge the jury, as requested by the defendant, that in order to convict they must find "that the article complained of was likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." Upon this evidence and these instructions, the jury brought in the conviction here for review.

The statute before us is not a catchall enactment left at large by the State court which applied it. Cf. *Thornhill* v. *Alabama,* 310 U. S. 88; *Cantwell* v. *Connecticut,* 310 U. S. 296, 307. It is a law specifically directed at a defined evil, its language drawing from history and practice in Illinois and in more than a score of other jurisdictions a meaning confirmed by the Supreme Court of that State in upholding this conviction. We do not, therefore, parse the statute as grammarians or treat it as an abstract exercise in lexicography. We read it in the animating context of well-defined usage, *Nash* v. *United States,* 229 U. S. 373, and State court construction which determines its meaning for us. *Cox* v. *New Hampshire,* 312 U. S. 569; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568.

The Illinois Supreme Court tells us that § 224a "is a form of criminal libel law." 408 Ill. 512, 517, 97 N. E. 2d 343, 346. The defendant, the trial court and the Supreme Court consistently treated it as such. The defendant offered evidence tending to prove the truth of parts of the utterance, and the courts below considered and disposed of

this offer in terms of ordinary criminal libel precedents.[1] Section 224a does not deal with the defense of truth, but by the Illinois Constitution, Art. II, § 4, "in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." See also Ill. Rev. Stat., 1949, c. 38, § 404. Similarly, the action of the trial court in deciding as a matter of law the libelous character of the utterance, leaving to the jury only the question of publication, follows the settled rule in prosecutions for libel in Illinois and other States.[2] Moreover, the Supreme Court's characterization of the words prohibited by the statute as those "liable to cause violence and disorder" paraphrases the traditional justification for punishing libels criminally, namely their "tendency to cause breach of the peace." [3]

Libel of an individual was a common-law crime, and thus criminal in the colonies. Indeed, at common law, truth or good motives was no defense. In the first decades after the adoption of the Constitution, this was changed by judicial decision, statute or constitution in most States, but nowhere was there any suggestion that

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[1] 408 Ill. 512, 518, 97 N. E. 2d 343, 346–347. Illinois law requires that for the defense to prevail, the truth of all facts in the utterance must be shown together with good motive for publication. *People* v. *Strauch*, 247 Ill. 220, 93 N. E. 126; *People* v. *Fuller*, 238 Ill. 116, 87 N. E. 336; cf. *Ogren* v. *Rockford Star Printing Co.*, 288 Ill. 405, 123 N. E. 587.

[2] See, *e. g.*, *State* v. *Sterman*, 199 Iowa 569, 202 N. W. 222; *State* v. *Howard*, 169 N. C. 312, 313, 84 S. E. 807–808; cf. *Ogren* v. *Rockford Star Printing Co.*, *supra*.

[3] See, *e. g.*, *People* v. *Spielman*, 318 Ill. 482, 489, 149 N. E. 466, 469; Odgers, Libel and Slander (6th ed.), 368; 19 A. L. R. 1470. Some States hold, however, that injury to reputation, as in civil libel, and not tendency to breach of the peace, is the gravamen of the offense. See Tanenhaus, Group Libel, 35 Cornell L. Q. 261, 273 and n. 67.

the crime of libel be abolished.[4] Today, every American jurisdiction—the forty-eight States, the District of Columbia, Alaska, Hawaii and Puerto Rico—punish libels directed at individuals.[5] "There are certain well-defined

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[4] For a brief account of this development see Warren, History of the American Bar, 236–239. See also correspondence between Chief Justice Cushing of Massachusetts and John Adams, published in 27 Mass. L. Q. 11–16 (Oct. 1942). Jefferson explained in a letter to Abigail Adams, dated September 11, 1804, that to strike down the Alien and Sedition Act would not "remove all restraint from the overwhelming torrent of slander which is confounding all vice and virtue, all truth and falsehood in the US. The power to do that is fully possessed by the several state legislatures." See *Dennis* v. *United States,* 341 U. S. 494, 522, n. 4. See Miller, Crisis in Freedom, 168–169, 231–232. See also provisions as to criminal libel in Edward Livingston's famous draft System of Penal Law for Louisiana, 2 Works of Edward Livingston 100–108.

[5] In eight States the offense is punished as at common law, without legislative enactment. *State* v. *Roberts,* 2 Marv. (Del.) 450, 43 A. 252; *Cole* v. *Commonwealth,* 222 Ky. 350, 300 S. W. 907; *Robinson* v. *State,* 108 Md. 644, 71 A. 433; *Commonwealth* v. *Canter,* 269 Mass. 359, 168 N. E. 790; *State* v. *Burnham,* 9 N. H. 34; *State* v. *Spear,* 13 R. I. 324; *State* v. *Sutton,* 74 Vt. 12, 52 A. 116; *State* v. *Payne,* 87 W. Va. 102, 104 S. E. 288. Twelve other jurisdictions make "libel" a crime by statute, without defining the term. Ala. Code, 1940, Tit. 14, § 347; Alaska Comp. Laws Ann., 1949, § 65–4–28; D. C. Code, 1940, § 22–2301; Fla. Stat. Ann., 1944, § 836.01; Burns Ind. Stat., 1933, § 10–3201; Miss. Code, 1942, § 2268; Neb. Rev. Stat., 1943, § 28–440; N. J. Stat. Ann., 1939, § 2:146–1; N. C. Gen. Stat., 1943, § 14–47; Page's Ohio Gen. Code, 1939, § 13383; Wis. Stat., 1949, § 348.41; Wyo. Comp. Stat., 1945, § 9–1601. Thus, twenty American jurisdictions punish "libel" as defined by the case-by-case common-law development.

The remaining jurisdictions have sought to cast the common-law definition in a statutory form of words. Two formulas have been popular. Eleven jurisdictions, Illinois among them, have accepted with minor variations the following:

"A libel is a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one

and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utter-

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who is dead, or to impeach the honesty, integrity, virtue or reputation or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or financial injury." Smith-Hurd Ill. Ann. Stat., 1936, c. 38, § 402. Ariz. Code Ann., 1939, § 43.3501; Ark. Stat., 1947, § 41–2401; Deering's Cal. Penal Code, 1949, § 248; Colo. Stat. Ann., 1935, c. 48, § 199; Ga. Code Ann., 1936, § 26–2101; Idaho Code, 1947, § 18–4801; Smith-Hurd Ill. Ann. Stat., 1936, c. 38, § 402; Mont. Rev. Codes, 1947, § 94–2801; Nev. Comp. Laws, 1929, § 10110; P. R. Codigo Penal, 1937, § 243; Utah Code Ann., 1943, § 103–38–1; cf. Virgin Islands Code, 1921, Tit. IV, c. 5, § 36.

The other version, again with minor variations, has found favor in twelve jurisdictions.

"A libel is a malicious defamation of a person, made public by any printing, writing, sign, picture, representation or effigy, tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any malicious defamation, made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives or friends."

Iowa Code Ann., 1949, § 737.1; Kan. Gen. Stat., 1935, § 21–2401; Dart's La. Crim. Code, 1943, Art. 740–47; Me. Rev. Stat., 1944, c. 117, § 30; Minn. Stat., 1949, § 619.51; Mo. Rev. Stat., 1949, § 559.410; McKinney's N. Y. Laws, Penal Code, § 1340; N. D. Rev. Code, 1943, § 12–2801; Okla. Stat. Ann., 1936, Tit. 21, § 771; Purdon's Pa. Stat. Ann., 1945, Tit. 18, § 4412; Williams Tenn. Code, 1934, §§ 11021, 11022; Remington's Wash. Rev. Stat., 1932, § 2424.

The remaining nine jurisdictions have definitions of criminal libel which fall into no common pattern. See Conn. Gen. Stat., 1949, § 8518; Hawaii Rev. Laws, 1945, § 11450; Mich. Comp. Laws, 1948, § 750–370; N. M. Stat., 1941, §§ 41–2701, 41–2708; Ore. Comp. Laws, 1940, § 23–437; S. C. Code, 1942, § 1395; S. D. Code, 1939,

ances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell* v. *Connecticut,* 310 U. S. 296, 309–310." Such were the views of a unanimous Court in *Chaplinsky* v. *New Hampshire, supra,* at 571–572.[6]

No one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and

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§ 13.3401; Vernon's Tex. Stat., 1948, Arts. 1269, 1275; Va. Code, 1950, § 18–133.

Our examination of the homogeneity of these statutory definitions of criminal libel might well begin and end with the words "virtue" and "ridicule." Of thirty-two jurisdictions, twelve outlaw statements impeaching the "virtue" of another; eleven of these, and fifteen more—twenty-six in all—prohibit utterances tending to bring another into "public ridicule."

For the common-law definition, applicable in the twenty jurisdictions first noted above, see L. Hand, J., in *Grant* v. *Reader's Digest Assn.,* 151 F. 2d 733, 735, where he speaks of defining libel "in accordance with the usual rubric, as consisting of utterances which arouse 'hatred, contempt, scorn, obloquy or shame,' and the like." Cf. Restatement, Torts, § 559, *comment* (b); Odgers, Libel and Slander (6th ed.), 16–17; Newell, Slander and Libel (4th ed.), 1–2.

Even a cursory examination of these enactments and common-law pronouncements demonstrates that Illinois, in § 224a, was using a form of words which invoked the familiar common law of libel to define the prohibited utterances. The defendant and the Illinois courts, as we have seen, understood this and acted upon it.

[6] In all but five States, the constitutional guarantee of free speech to every person is explicitly qualified by holding him "responsible for the abuse of that right." See *Pennekamp* v. *Florida,* 328 U. S. 331, 356, n. 5. See Jefferson in Kentucky Resolutions of 1798 and 1799, 4 Elliot's Debates 540–541, and in an undated draft prepared, but not used, for his December 8, 1801, Message to Congress, Library of

guns, and user of marijuana. The precise question before us, then, is whether the protection of "liberty" in the Due Process Clause of the Fourteenth Amendment prevents a State from punishing such libels—as criminal libel has been defined, limited and constitutionally recognized time out of mind—directed at designated collectivities and flagrantly disseminated. There is even authority, however dubious, that such utterances were also crimes at common law.[7] It is certainly clear that some American jurisdictions have sanctioned their punishment under ordinary criminal libel statutes.[8] We cannot say, however, that the question is concluded by history and practice. But if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State.

Illinois did not have to look beyond her own borders or await the tragic experience of the last three dec-

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Congress Jefferson Papers, Vol. 119, Leaf 20569. In *Carlson* v. *California*, 310 U. S. 106, 112, we noted that the statute there invalidated made "no exceptions with respect to the truthfulness and restraint of the information conveyed . . . ."

[7] Compare reports of *King* v. *Osborne* in 2 Barn. K. B. 138, 166, 94 Eng. Rep. 406, 425; 2 Swans. 503, n. (*c*), 36 Eng. Rep. 705, 717; W. Kel. *230, 25 Eng. Rep. 584 (1732). The present Attorney General of England asserted that this case obviated the need of special group libel legislation for Great Britain. See The [London] Times, March 26, 1952, p. 2, col. 4. See also Odgers, Libel and Slander (6th ed.), 369; Tanenhaus, Group Libel, 35 Cornell L. Q. 261, 267–269.

[8] One of the leading cases arose in Illinois. *People* v. *Spielman*, 318 Ill. 482, 149 N. E. 466 (1925), sustaining a conviction for libel on the members of the American Legion. The authorities are collected and discussed in Tanenhaus, Group Libel, 35 Cornell L. Q. 261, 269–276.

ades [9] to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community. From the murder of the abolitionist Lovejoy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction.[10] In many of these outbreaks, utterances of the character here in question, so the Illinois legislature could conclude, played a significant part.[11] The law was passed on June 29, 1917, at a time when the State was struggling to assimilate vast numbers of new inhabitants, as yet concentrated in discrete racial or national or religious groups—foreign-born brought to it by the crest of the great wave of immigration, and Negroes attracted by jobs in war plants and the allure-

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[9] See, *e. g.*, Loewenstein, Legislative Control of Political Extremism in European Democracies, 38 Col. L. Rev. 591 and 725; Riesman, Democracy and Defamation, 42 Col. L. Rev. 727, 1085 and 1282; Public Order Act, 1936, 1 Edw. VIII and 1 Geo. VI, c. 6, and 317 H. C. Deb. 1349–1473 (5th ser. 1936); 318 H. C. Deb. 49–193, 581–710, 1659–1785, 2781–2784 (5th ser. 1936); 103 H. L. Deb. 741–773, 961–972 (5th ser. 1936).

[10] See generally The Chicago Commission on Race Relations, The Negro in Chicago, 1–78, and *passim* (University of Chicago Press, 1922); Research Memorandum No. 5, First Annual Rep. Ill. Inter-Racial Comm'n (1944).

[11] The May 28, 1917, riot in East St. Louis, Illinois, was preceded by a violently inflammatory speech to unemployed workmen by a prominent lawyer of the town. Report of the Special Committee Authorized by Congress to Investigate the East St. Louis Riots, H. R. Doc. No. 1231, 65th Cong., 2d Sess. 11; Chicago Commission on Race Relations, The Negro in Chicago, 75. And see *id.*, at 118–122 for literature circulated by real estate associations and other groups during the series of bombings leading up to the Chicago riots of 1919. For the Commission's comments on the role of propaganda in promoting race frictions, see *id.*, at 589, 638–639.

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ments of northern claims.[12] Nine years earlier, in the very city where the legislature sat, what is said to be the first northern race riot had cost the lives of six people, left hundreds of Negroes homeless and shocked citizens into action far beyond the borders of the State.[13] Less than a month before the bill was enacted, East St. Louis had seen a day's rioting, prelude to an outbreak, only four days after the bill became law, so bloody that it led to Congressional investigation.[14] A series of bombings had begun which was to culminate two years later in the awful race riot which held Chicago in its grip for seven days in

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[12] Tables in Drake and Cayton, Black Metropolis, 8, show that between 1900 and 1920 the number of foreign-born in Chicago increased by over ⅓ and the Negro population trebled. United States census figures show the following population growth for the State as a whole and selected counties:

| | Illinois | | Cook County (Chicago) | | St. Clair County (East St. Louis) | |
|---|---|---|---|---|---|---|
| | Total | Negro | Total | Negro | Total | Negro |
| 1900..... | 4,821,550 | 85,078 | 1,838,735 | 31,838 | 86,685 | 3,987 |
| 1910..... | 5,638,591 | 109,049 | 2,405,233 | 46,627 | 119,870 | 8,110 |
| 1920..... | 6,485,280 | 182,274 | 3,053,017 | 115,238 | 136,520 | 10,136 |
| 1930..... | 7,630,654 | 328,972 | 3,982,123 | 246,992 | 157,775 | 15,550 |
| 1940..... | 7,897,241 | 387,446 | 4,063,342 | 249,157 | 166,899 | 21,567 |
| 1950..... | 8,712,176 | 645,989 | 4,508,792 | 521,007 | 205,995 | 34,566 |

For an account of these vast population movements entailing great social maladjustments, see Drake and Cayton, Black Metropolis, 8–18, 31–65; Chicago Commission on Race Relations, The Negro in Chicago, 79–105; Carl Sandburg, The Chicago Race Riots, 9–30.

[13] See Walling, Race War in the North, 65 The Independent 529 (1908). This article apparently led to the founding of the National Association for the Advancement of Colored People. Ovington, How the National Association for the Advancement of Colored People Began, 8 Crisis 184 (1914). See also Chicago Commission on Race Relations, The Negro in Chicago, 67–71.

[14] Report of the Special Committee Authorized by Congress to Investigate the East St. Louis Riots, H. R. Doc. No. 1231, 65th Cong., 2d Sess. See also The Massacre of East St. Louis, 14 Crisis 219 (1917).

the summer of 1919.[15] Nor has tension and violence between the groups defined in the statute been limited in Illinois to clashes between whites and Negroes.

In the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented. "There are limits to the exercise of these liberties [of speech and of the press]. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish." [16] This was the conclusion, again of a unanimous Court, in 1940. *Cantwell* v. *Connecticut, supra,* at 310.

It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion

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[15] Chicago Commission on Race Relations, The Negro in Chicago, 122–133.

[16] The utterances here in question "are not," as a detached student of the problem has noted, "the daily grist of vituperative political debate. Nor do they represent the frothy imaginings of lunatics, or the 'idle' gossip of a country town. Rather, they indicate the systematic avalanche of falsehoods which are circulated concerning the various groups, classes and races which make up the countries of the western world." Riesman, Democracy and Defamation: Control of Group Libel, 42 Col. L. Rev., at 727. Professor Riesman continues: "Such purposeful attacks are nothing new, of course. . . . What is new, however, is the existence of a mobile public opinion as the controlling force in politics, and the systematic manipulation of that opinion by the use of calculated falsehood and vilification." *Id.,* at 728.

violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-Nothings.[17] Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues. "The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment." *Anderson* v. *Dunn,* 6 Wheat. 204, 226. Certainly the Due Process Clause does not require the legislature to be in the vanguard of science—especially sciences as young as human ecology and cultural anthropology. See *Tigner* v. *Texas,* 310 U. S. 141, 148.

Long ago this Court recognized that the economic rights of an individual may depend for the effectiveness of their enforcement on rights in the group, even though not formally corporate, to which he belongs. *American Foundries* v. *Tri-City Council,* 257 U. S. 184. Such group-protection on behalf of the individual may, for all we know, be a need not confined to the part that a trade union plays in effectuating rights abstractly recognized as belonging

[17] See, *e. g.*, L. Hand, J., in a symposium in The Saturday Review of Literature, Mar. 15, 1947, pp. 23–24; Report of the Committee on the Law of Defamation, Cmd. 7536, 11 (1948).

to its members. It is not within our competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community. It would, however, be arrant dogmatism, quite outside the scope of our authority in passing on the powers of a State, for us to deny that the Illinois legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits. This being so, we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved.

We are warned that the choice open to the Illinois legislature here may be abused, that the law may be discriminatorily enforced; prohibiting libel of a creed or of a racial group, we are told, is but a step from prohibiting libel of a political party.[18] Every power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law. "While this Court sits" it retains and exercises authority to nullify action which encroaches on freedom of utter-

[18] It deserves emphasis that there is no such attempt in this statute. The rubric "race, color, creed or religion" which describes the type of group libel of which is punishable, has attained too fixed a meaning to permit political groups to be brought within it. If a statute sought to outlaw libels of political parties, quite different problems not now before us would be raised. For one thing, the whole doctrine of fair comment as indispensable to the democratic political process would come into play. See *People* v. *Fuller, supra,* at 125, 87 N. E., at 338–339; *Commonwealth* v. *Pratt,* 208 Mass. 553, 559, 95 N. E. 105, 106. Political parties, like public men, are, as it were, public property.

ance under the guise of punishing libel. Of course discussion cannot be denied and the right, as well as the duty, of criticism must not be be stifled.

The scope of the statute before us, as construed by the Illinois court, disposes of the contention that the conduct prohibited by the law is so ill-defined that judges and juries in applying the statute and men in acting cannot draw from it adequate standards to guide them. The clarifying construction and fixed usage which govern the meaning of the enactment before us were not present, so the Court found, in the New York law held invalid in *Winters* v. *New York,* 333 U. S. 507. Nor, thus construed and limited, is the act so broad that the general verdict of guilty on an indictment drawn in the statutory language might have been predicated on constitutionally protected conduct. On this score, the conviction here reviewed differs from those upset in *Stromberg* v. *California,* 283 U. S. 359, *Thornhill* v. *Alabama,* 310 U. S. 88, and *Terminiello* v. *Chicago,* 337 U. S. 1. Even the latter case did not hold that the unconstitutionality of a statute is established *because* the speech prohibited by it raises a ruckus.

It is suggested that while it was clearly within the constitutional power of Illinois to punish this utterance if the proceeding were properly safeguarded, in this particular case Illinois denied the defendant rights which the Due Process Clause commands. Specifically, it is argued that the defendant was not permitted to raise at the trial defenses constitutionally guaranteed in a criminal libel prosecution: (1) the defense of truth; (2) justification of the utterance as "fair comment"; and (3) its privilege as a means for redressing grievances.

Neither by proffer of evidence, requests for instructions, nor motion before or after verdict did the defendant seek to justify his utterance as "fair comment" or as privileged. Nor has the defendant urged as a ground for reversing his

conviction in this Court that his opportunity to make those defenses was denied below. And so, whether a prosecution for libel of a racial or religious group is unconstitutionally invalid where the State did deny the defendant such opportunities is not before us.[19] Certainly the State may cast the burden of justifying what is patent defamation upon the defamer. The benefits of hypothetical defenses, never raised below or pressed upon us, are not to be invoked in the abstract.

As to the defense of truth, Illinois in common with many States requires a showing not only that the utterance state the facts, but also that the publication be made "with good motives and for justifiable ends." Ill. Const., Art. II, § 4.[20] Both elements are necessary if the defense is to prevail. What has been called "the common sense of American criminal law," as formulated, with regard to necessary safeguards in criminal libel prosecutions, in the New York Constitution of 1821, Art. VII, § 8, has been adopted in terms by Illinois. The teaching of a century and a half of criminal libel prosecutions in this country

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[19] Indeed, such defenses are evidently protected by Illinois law. See Ill. Const., Art. II, § 17, guaranteeing the right of the people to apply for redress of grievances. And see *People* v. *Fuller*, 238 Ill. 116, 125, 87 N. E. 336, 338–339, on the defense of "fair comment" in criminal libel prosecutions.

[20] The present constitution, adopted in 1870, is Illinois' third. The first two preserved the defense of truth in certain types of libel prosecutions: "In prosecutions for the publication of papers investigating the official conduct of officers, or of men acting in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels the jury shall have the right of determining both the law and the fact under the direction of the court as in other cases." Ill. Const., 1818, Art. VIII, § 23; Ill. Const., 1848, Art. XIII, § 24. The combined requirement of truth and good motives and justifiable ends, available as a defense in all libel suits, was adopted with the Constitution of 1870.

would go by the board if we were to hold that Illinois was not within her rights in making this combined requirement. Assuming that defendant's offer of proof directed to a part of the defense was adequate,[21] it did not satisfy the entire requirement which Illinois could exact.[22]

Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.

We find no warrant in the Constitution for denying to Illinois the power to pass the law here under attack.[23] But

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[21] Defendant offered to show (1) that crimes were more frequent in districts heavily populated by Negroes than in those where whites predominated; (2) three specific crimes allegedly committed by Negroes; and (3) that property values declined when Negroes moved into a neighborhood. It is doubtful whether such a showing is as extensive as the defamatory allegations in the lithograph circulated by the defendant.

[22] The defense attorney put a few questions to the defendant on the witness stand which tended toward elaborating his motives in circulating the lithograph complained of. When objections to these questions were sustained, no offer of proof was made, in contrast to the rather elaborate offer which followed the refusal to permit questioning tending to show the truth of the matter. Indeed, in that offer itself, despite its considerable detail, no mention was made of the necessary element of good motive or justifiable ends. In any event, the question of exclusion of this testimony going to motive was not raised by motion in the trial court, on appeal in Illinois, or before us.

[23] The law struck down by the New Jersey court in *New Jersey* v. *Klapprott,* 127 N. J. L. 395, 22 A. 2d 877, was quite different than the one before us and was not limited, as is the Illinois statute, by construction or usage. Indeed, in that case the court emphasized that "It is not a case of libel," and contrasted the history at common law of criminal prosecutions for written and spoken defamation.

it bears repeating—although it should not—that our finding that the law is not constitutionally objectionable carries no implication of approval of the wisdom of the legislation or of its efficacy. These questions may raise doubts in our minds as well as in others. It is not for us, however, to make the legislative judgment. We are not at liberty to erect those doubts into fundamental law.

*Affirmed.*

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

This case is here because Illinois inflicted criminal punishment on Beauharnais for causing the distribution of leaflets in the city of Chicago. The conviction rests on the leaflet's contents, not on the time, manner or place of distribution. Beauharnais is head of an organization that opposes amalgamation and favors segregation of white and colored people. After discussion, an assembly of his group decided to petition the mayor and council of Chicago to pass laws for segregation. Volunteer members of the group agreed to stand on street corners, solicit signers to petitions addressed to the city authorities, and distribute leaflets giving information about the group, its beliefs and its plans. In carrying out this program a solicitor handed out a leaflet which was the basis of this prosecution. Since the Court opinion quotes only parts of the leaflet, I am including all of it as an appendix to this dissent, *post,* p. 276.

## I.

That Beauharnais and his group were making a genuine effort to petition their elected representatives is not disputed. Even as far back as 1689, the Bill of Rights exacted of William & Mary said: "It is the Right of the Subjects to petition the King, and all Commitments and

Prosecutions for such petitioning are illegal." [1] And 178 years ago the Declaration of Rights of the Continental Congress proclaimed to the monarch of that day that his American subjects had "a right peaceably to assemble, consider of their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal." [2] After independence was won, Americans stated as the first unequivocal command of their Bill of Rights: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Without distortion, this First Amendment could not possibly be read so as to hold that Congress has power to punish Beauharnais and others for petitioning Congress as they have here sought to petition the Chicago authorities. See *e. g., Bridges* v. *California,* 314 U. S. 252, 277. And we have held in a number of prior cases that the Fourteenth Amendment makes the specific prohibitions of the First Amendment equally applicable to the states.[3]

In view of these prior holdings, how does the Court justify its holding today that states can punish people for exercising the vital freedoms intended to be safeguarded from suppression by the First Amendment? The prior holdings are not referred to; the Court simply acts on the bland assumption that the First Amendment is wholly irrelevant. It is not even accorded the respect of a passing mention. This follows logically, I suppose,

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[1] 1 William & Mary, Sess. 2, c. 2 (1689).

[2] Eighth Resolution of the Continental Congress of 1774.

[3] *E. g., Grosjean* v. *American Press Co.,* 297 U. S. 233, 244, 245, 249; *Lovell* v. *Griffin,* 303 U. S. 444, 450; *Schneider* v. *State,* 308 U. S. 147, 160; *Thornhill* v. *Alabama,* 310 U. S. 88, 95; *Minersville District* v. *Gobitis,* 310 U. S. 586, 593; *Board of Education* v. *Barnette,* 319 U. S. 624, 639; *Thomas* v. *Collins,* 323 U. S. 516, 529–530, concurring opinion, 545; *Pennekamp* v. *Florida,* 328 U. S. 331, 349.

from recent constitutional doctrine which appears to measure state laws solely by this Court's notions of civilized "canons of decency," reasonableness, etc. See, *e. g.*, *Rochin* v. *California,* 342 U. S. 165, 169. Under this "reasonableness" test, state laws abridging First Amendment freedoms are sustained if found to have a "rational basis." But in *Board of Education* v. *Barnette,* 319 U. S. 624, 639, we said:

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds."

Today's case degrades First Amendment freedoms to the "rational basis" level. It is now a certainty that the new "due process" coverall offers far less protection to liberty than would adherence to our former cases compelling states to abide by the unequivocal First Amendment command that its defined freedoms shall not be abridged.

The Court's holding here and the constitutional doctrine behind it leave the rights of assembly, petition,

speech and press almost completely at the mercy of state legislative, executive, and judicial agencies. I say "almost" because state curtailment of these freedoms may still be invalidated if a majority of this Court conclude that a particular infringement is "without reason," or is "a wilful and purposeless restriction unrelated to the peace and well being of the State." But lest this encouragement should give too much hope as to how and when this Court might protect these basic freedoms from state invasion, we are cautioned that state legislatures must be left free to "experiment" and to make "legislative" judgments. We are told that mistakes may be made during the legislative process of curbing public opinion. In such event the Court fortunately does not leave those mistakenly curbed, or any of us for that matter, unadvised. Consolation can be sought and must be found in the philosophical reflection that state legislative error in stifling speech and press "is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues." My own belief is that no legislature is charged with the duty or vested with the power to decide what public issues Americans can discuss. In a free country that is the individual's choice, not the state's. State experimentation in curbing freedom of expression is startling and frightening doctrine in a country dedicated to self-government by its people. I reject the holding that either state or nation can punish people for having their say in matters of public concern.

## II.

The Illinois statute upheld by the Court makes it a crime:

1. for "any person, firm or corporation,"
2. to "manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place,"

3. any "lithograph [construed to include any printed matter], moving picture, play, drama or sketch,"

4. which portrays "depravity, criminality, unchastity, or lack of virtue,"

5. of "a class of citizens, of any race, color, creed or religion,"

6. and exposes such a class to "contempt, derision, or obloquy,"

7. *or* "is productive of breach of the peace or riots."

This statute imposes state censorship over the theater, moving pictures, radio, television, leaflets, magazines, books and newspapers. No doubt the statute is broad enough to make criminal the "publication, sale, presentation or exhibition" of many of the world's great classics, both secular and religious.

The Court condones this expansive state censorship by painstakingly analogizing it to the law of criminal libel. As a result of this refined analysis, the Illinois statute emerges labeled a "group libel law." This label may make the Court's holding more palatable for those who sustain it, but the sugar-coating does not make the censorship less deadly. However tagged, the Illinois law is not that criminal libel which has been "defined, limited and constitutionally recognized time out of mind." [4] For as

[4] The Court's finding of a close kinship between "criminal libel" and "group libel" because both contain the word "libel" and have some factors in common is reminiscent of what Earl Stanhope said in 1792 in discussing Mr. Fox's Libel Bill. He was arguing that a jury of laymen might more likely protect liberty than judges, because judges were prone to rely too heavily on word books. "He put the case, that an action for a libel was brought for using a modern word, not to be found in any grammar or glossary, viz. for saying that a man was 'a great bore;' a jury would laugh at such a ground of prosecution, but the judges would turn to their grammars and glossaries, and

"constitutionally recognized" that crime has provided for punishment of false, malicious, scurrilous charges against individuals, not against huge groups. This limited scope of the law of criminal libel is of no small importance. It has confined state punishment of speech and expression to the narrowest of areas involving nothing more than purely private feuds. Every expansion of the law of criminal libel so as to punish discussions of matters of public concern means a corresponding invasion of the area dedicated to free expression by the First Amendment.

Prior efforts to expand the scope of criminal libel beyond its traditional boundaries have not usually met with widespread popular acclaim. "Seditious libel" was such an expansion and it did have its day, particularly in the English Court of Star Chamber. But the First Amendment repudiated seditious libel for this country. And one need only glance through the parliamentary discussion of Fox's Libel Law passed in England in 1792, to sense the bad odor of criminal libel in that country even when confined to charges against individuals only.

The Court's reliance on *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, is also misplaced. New Hampshire had a state law making it an offense to direct insulting words at an *individual* on a public street. Chaplinsky had violated that law by calling a man vile names "face-to-face." We pointed out in that context that the use of such "fighting" words was not an essential part of exposition of ideas. Whether the words used in their context here are "fighting" words in the same sense is doubtful, but whether so or

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not being able to meet with it, would say they could not find such a phrase as 'a great bore,' but they had found a wild boar, which no doubt it meant; and yet it could not be, as a wild boar had four legs, and a man was a two legged animal; then it must mean, that the plaintiff was like a wild boar in disposition, which was a wicked libel, and therefore let the defendant be hanged." 29 Hansard, Parliamentary History of England, p. 1412.

not they are not addressed to or about *individuals*. Moreover, the leaflet used here was also the means adopted by an assembled group to enlist interest in their efforts to have legislation enacted. And the fighting words were but a part of arguments on questions of wide public interest and importance. Freedom of petition, assembly, speech and press could be greatly abridged by a practice of meticulously scrutinizing every editorial, speech, sermon or other printed matter to extract two or three naughty words on which to hang charges of "group libel." The *Chaplinsky* case makes no such broad inroads on First Amendment freedoms. Nothing Mr. Justice Murphy wrote for the Court in that case or in any other case justifies any such inference.

Unless I misread history the majority is giving libel a more expansive scope and more respectable status than it was ever accorded even in the Star Chamber. For here it is held to be punishable to give publicity to any picture, moving picture, play, drama or sketch, or any printed matter which a judge may find unduly offensive to any race, color, creed or religion. In other words, in arguing for or against the enactment of laws that may differently affect huge groups, it is now very dangerous indeed to say something critical of one of the groups. And any "person, firm or corporation" can be tried for this crime. "Person, firm or corporation" certainly includes a book publisher, newspaper, radio or television station, candidate or even a preacher.

It is easy enough to say that none of this latter group have been proceeded against under the Illinois Act. And they have not—yet. But emotions bubble and tempers flare in racial and religious controversies, the kind here involved. It would not be easy for any court, in good conscience, to narrow this Act so as to exclude from it any of those I have mentioned. Furthermore, persons tried under the Act could not even get a jury trial except

as to the bare fact of publication. Here, the court simply charged the jury that Beauharnais was guilty if he had caused distribution of the leaflet. Such trial by judge rather than by jury was outlawed in England in 1792 by Fox's Libel Law.

This Act sets up a system of state censorship which is at war with the kind of free government envisioned by those who forced adoption of our Bill of Rights. The motives behind the state law may have been to do good. But the same can be said about most laws making opinions punishable as crimes. History indicates that urges to do good have led to the burning of books and even to the burning of "witches."

No rationalization on a purely legal level can conceal the fact that state laws like this one present a constant overhanging threat to freedom of speech, press and religion. Today Beauharnais is punished for publicly expressing strong views in favor of segregation. Ironically enough, Beauharnais, convicted of crime in Chicago, would probably be given a hero's reception in many other localities, if not in some parts of Chicago itself. Moreover, the same kind of state law that makes Beauharnais a criminal for advocating segregation in Illinois can be utilized to send people to jail in other states for advocating equality and nonsegregation. What Beauharnais said in his leaflet is mild compared with usual arguments on both sides of racial controversies.

We are told that freedom of petition and discussion are in no danger "while this Court sits." This case raises considerable doubt. Since those who peacefully petition for changes in the law are not to be protected "while this Court sits," who is? I do not agree that the Constitution leaves freedom of petition, assembly, speech, press or worship at the mercy of a case-by-case, day-by-day majority of this Court. I had supposed that our people could rely for their freedom on the Constitution's commands, rather

than on the grace of this Court on an individual case basis. To say that a legislative body can, with this Court's approval, make it a crime to petition for and publicly discuss proposed legislation seems as farfetched to me as it would be to say that a valid law could be enacted to punish a candidate for President for telling the people his views. I think the First Amendment, with the Fourteenth, "absolutely" forbids such laws without any "ifs" or "buts" or "whereases." Whatever the danger, if any, in such public discussions, it is a danger the Founders deemed outweighed by the danger incident to the stifling of thought and speech. The Court does not act on this view of the Founders. It calculates what it deems to be the danger of public discussion, holds the scales are tipped on the side of state suppression, and upholds state censorship. This method of decision offers little protection to First Amendment liberties "while this Court sits."

If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark:

"Another such victory and I am undone."

[For appendix to opinion of MR. JUSTICE BLACK, see *post*, p. 276.]

[For dissenting opinion of MR. JUSTICE REED, see *post*, p. 277.]

[For dissenting opinion of MR. JUSTICE DOUGLAS, see *post*, p. 284.]

[For dissenting opinion of MR. JUSTICE JACKSON, see *post*, p. 287.]

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## APPENDIX TO OPINION OF MR. JUSTICE BLACK.

**PEOPLES EXHIBIT 3**

# PRESERVE and PROTECT WHITE NEIGHBORHOODS!

**FROM THE CONSTANT AND CONTINUOUS INVASION, HARASSMENT AND ENCROACHMENT BY THE NEGROES**

**(WE WANT TWO MILLION SIGNATURES OF WHITE MEN AND WOMEN)**

**PETITION**
**To The Honorable Martin H. Kennelly**
**and City Council of the City of Chicago.**

WHEREAS, the white population of the City of Chicago, particularly on the South Side of said city, are seething, nervous and agitated because of the constant and continuous invasion, harassment and encroachment by the Negroes upon them, their property and neighborhoods and —

WHEREAS, there have been disastrous incidents within the past year, all of which are fraught with grave consequences and great danger to the Peace and Security of the people, and

WHEREAS, there is great danger to the Government from communism which is rife among the Negroes, and
WHEREAS, we are not against the negro; we are for the white people and the white people are entitled to protection: —

We, the undersigned white citizens of the City of Chicago and the State of Illinois, hereby petition the Honorable Martin H. Kennelly, Mayor of the City of Chicago and the Alderman of the City of Chicago, to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro — through the exercise of the Police Power; of the Office of the Mayor of the City of Chicago, and the City Council.

**WANTED**

ONE MILLION SELF RESPECTING WHITE PEOPLE IN CHICAGO TO UNITE UNDER THE BANNER OF THE WHITE CIRCLE LEAGUE OF AMERICA to oppose the National Campaign now on and supported by TRUMAN'S INFAMOUS CIVIL RIGHTS PROGRAM and many Pro Negro Organizations to amalgamate the black and white races with the object of mongrelizing the white race!

THE WHITE CIRCLE LEAGUE OF AMERICA is the only articulate white voice in America being raised in protest against negro agressions and infiltrations into all white neighborhoods. The white people of Chicago MUST take advantage of this opportunity to become UNITED. If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, SURELY WILL.

The Negro has many national organizations working to push him into the midst of the white people on many fronts. The white race does not have a single organization to work on a NATIONAL SCALE to make its wishes articulate and to assert its natural rights to self-preservation. THE WHITE CIRCLE LEAGUE OF AMERICA proposes to do the job.
WE ARE NOT AGAINST THE NEGRO! WE ARE FOR THE WHITE PEOPLE!
We must awaken and protect our white families and neighborhoods before it is too late. Let us work unceasingly to conserve the white man's dignity and rights in America.

THE WHITE CIRCLE LEAGUE OF AMERICA, INC. - Joseph Beauharnais, Pres. - FR 2-8533, Suite 808, 82 W. Washington St.
VOLUNTEERS NEEDED TO GET 25 SIGNATURES ON PETITION! COME TO HEADQUARTERS!

I wish to be enrolled as a member in THE WHITE CIRCLE LEAGUE OF AMERICA and I will do my best to secure ten (10) or more members.

**THE FIRST LOYALTY OF EVERY WHITE PERSON IS TO HIS RACE. ALL THE COMBINED PRO NEGRO FORCES HAVE HURLED THEIR ULTIMATUM INTO THE FACES OF THE WHITE PEOPLE. WE ACCEPT THEIR CHALLENGE.**

**THEY CANNOT WIN!**

**IT WILL BE EASIER TO REVERSE THE CURRENT OF THE ATLANTIC OCEAN THAN TO DEGRADE THE WHITE RACE AND ITS NATURAL LAWS BY FORCED MONGRELIZATION.**

**THE HOUR HAS STRUCK FOR ALL NORMAL WHITE PEOPLE TO STAND UP AND FIGHT FOR OUR RIGHTS TO LIFE, LIBERTY AND THE PURSUIT OF HAPPINESS.**

**JOSEPH BEAUHARNAIS.**

**APPLICATION FOR 1950 MEMBERSHIP**
**THE WHITE CIRCLE LEAGUE OF AMERICA, INC.**
(Not For Profit)

Mail To —
THE WHITE CIRCLE LEAGUE OF AMERICA Inc.
82 W. Washington St.
Chicago 2, Illinois
Tel. FR 2-8533

DATE.....19.....

☐ Membership .....$1.00
☐ Subscripton to Monthly Magazine (WHITE CIRCLE NEWS) per year .....$3.00
☐ Voluntary Contribution $.....
☐ I can volunteer some of my time to aid the WHITE CIRCLE in getting under way.

(SIGNED) (Print Name) .....
NAME .....
ADDRESS ..... PHONE.....
CITY ..... STATE.....
**(Note: Tear Off and Mail to Headquarters wth Your Remittance)**

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

The Fourteenth Amendment of our Constitution forbids that any person be deprived by a state of liberty or property without due process of law. This Illinois conviction subjects petitioner to a fine of $200. The petitioner challenges the validity of the sentence on the ground that his conviction under § 224a, Division 1, of the Illinois Criminal Code [1] violates substantive due process. The petition for certiorari phrases the issue thus: "Is the Illinois statute . . . as construed . . . or applied . . . invalid . . . because it infringes upon the constitutional guarantee of free speech, press and of assemblage as guaranteed" by the Fourteenth Amendment?

The Supreme Court of Illinois upheld the conviction of petitioner under an information which charged:

> "that defendant on January 7, 1950, at the City of Chicago, did unlawfully publish, present and exhibit in public places, lithographs, which publications portray depravity, criminality, unchastity or lack of virtue of citizens of Negro race and color and which exposes citizens of Illinois of the Negro race and

[1] "It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. Any person, firm or corporation violating any of the provisions of this section, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars ($50.00), nor more than two hundred dollars ($200.00)."

> color to contempt, derision, or obloquy, which more fully appears in Exhibit A, which is attached hereto and made a part thereof." [2]

The evidence was sufficient to justify the jury in finding that Beauharnais caused the lithograph referred to in the information to be published and distributed in public places. The jury did so find under certain general instructions as to the proper attitude of jurors but essentially and specifically under the following instruction:

> "(1) The Court instructs the jury that if you find from the evidence that the defendant, Joseph Beauharnais, did on or about January 7, 1950 manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place the lithograph, which was allowed in evidence in this case as Peoples Exhibit Number 3, then you are to find the defendant guilty and fine him not less than $50.00 nor more than $200.00."

Thus, the judge did not leave to the jury but decided himself, doubtless as a matter of law, that the publication of the lithograph violated the statute. No complaint was made of this state method of trial.

At trial, petitioner filed a motion to quash the information and objected to the above specific instruction. He also moved for a peremptory instruction of "not guilty" and for judgment notwithstanding the verdict. All these contentions were overruled by the trial court, and, although the record does not show a precisely pleaded objection to the conviction on the ground that § 224a is unconstitutional, nonetheless the Supreme Court of Illinois treated petitioner's contention that the statute was

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[2] *People* v. *Beauharnais,* 408 Ill. 512, 514, 97 N. E. 2d 343, 344–345. The Exhibit A referred to in the information is the lithograph referred to in the instructions to the jury as People's Exhibit 3.

too vague and by virtue of that fact was so broad that it abridged free speech in violation of the Fourteenth Amendment.[3] The petition for certiorari brings these questions here.

In carrying out its obligation to conform state legal administration to the "fundamental principles of liberty and justice" imposed on the states by the Fourteenth Amendment,[4] this Court has steadily affirmed that the general principle against abridgment of free speech, protected by the First Amendment, is included in the command of the Fourteenth.[5] So important to a constitutional democracy is the right of discussion that any challenge to legislative abridgment of those privileges of a free people calls for careful judicial appraisal.[6] It is when speech becomes an incitement to crime that the right freely to exhort may be abridged. *American Communications Assn.* v. *Douds,* 339 U. S. 382, 395; *Herndon* v. *Lowry,* 301 U. S. 242, 255.

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[3] 408 Ill. 512, at 515–516 and 517, 97 N. E. 2d 343, at 345–346. If the highest court of the state treats the federal question as properly before it, and decides the question, the question is reviewable here, regardless of the manner in which it was raised in the inferior courts of the state. See *Whitney* v. *California,* 274 U. S. 357, 361, and cases there cited.

[4] *Hebert* v. *Louisiana,* 272 U. S. 312, 316; *Palko* v. *Connecticut,* 302 U. S. 319; *Adamson* v. *California,* 332 U. S. 46, 66.

[5] *Gitlow* v. *New York,* 268 U. S. 652, 666, 672; *Near* v. *Minnesota,* 283 U. S. 697, 707; *Pennekamp* v. *Florida,* 328 U. S. 331, 335.

[6] *De Jonge* v. *Oregon,* 299 U. S. 353, 365:

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

When a state conviction is challenged here on the ground that free speech has been abridged, this Court must first decide whether the portion of the statute upon which the charge is based is so broad "as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech." *Winters* v. *New York,* 333 U. S. 507, 509. In the *Winters* case we set aside the conviction because the indefinite character of the statutory language, as construed by the Court of Appeals of New York, was so broad that protected speech was prohibited. This Court reversed, even though it assumed that Winters' conduct could constitutionally be punished by a statute expressing its prohibitions in reasonably narrow and definite form.[7]

This requirement means that when the verdict and judgment flow, as here, from the information as a whole, each and every portion of the statute upon which the information was drawn must be constitutional. In *Stromberg* v. *California,* 283 U. S. 359, Stromberg had been convicted in the California courts for violating a statute of that state forbidding the display of a red flag.[8] On appeal, this Court did not consider whether Stromberg's conduct, as shown by the record, was protected by the Constitution. Instead, despite the fact that the second and third clauses of the California statute were unquestionably valid under the Federal Constitution, this Court

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[7] See 333 U. S., at 520. Cf. *Thornhill* v. *Alabama,* 310 U. S. 88; *Herndon* v. *Lowry,* 301 U. S. 242, 263–264.

[8] 283 U. S., at 361:

"Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony." Then § 403a of the Calif. Penal Code.

reversed the state court because its conviction of Stromberg might have been based upon the first clause, holding that "if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld." [9] The first clause, forbidding a display of a red flag as a symbol of opposition to organized government, was deemed invalid because it was so broad that it permitted "punishment of the fair use of [the] opportunity [for free political discussion, and was therefore] repugnant to the guaranty of liberty contained in the Fourteenth Amendment." *Id.* at 369.

The judgment in this present case followed from a determination of judge and jury that petitioner's publication of the lithograph violated the statute. From the general verdict of guilty, nothing appears to show what particular words of the statute the Illinois courts determined the lithograph offended. This conviction must stand or fall upon a determination whether all definitions of the acts proscribed by the statute and charged in the information may be banned under the principles of the First Amendment, for, as the foregoing discussion shows, it is impossible to tell upon what phrase of the statute petitioner's conviction was based. Our examination can begin and end with the inquiry as to what meaning lies in the act's declaration, as charged in the information, that it is unlawful to portray in a lithograph a "lack of virtue of a class of citizens . . . which . . . exposes [them to] derision, or obloquy."

The majority opinion asserts that Illinois has given sufficiently clear and narrow meaning to the words "virtue," "derision" and "obloquy" by characterizing § 224a as "a form of criminal libel law." But the mere description of this statute as a criminal libel law does not

[9] 283 U. S. at 368. See also *Williams* v. *North Carolina*, 317 U. S. 287, 291–292. Cf. *Thomas* v. *Collins*, 323 U. S. 516, 529; *Cramer* v. *United States*, 325 U. S. 1, 36, n. 45.

clarify the meaning of these vague words in the statute. To say that the mere presence of the word "virtue" in the individual libel statute [10] makes its meaning clear in the group libel statute is a *non sequitur*. No case is cited which defines and limits the meaning of these words. Reliance is also placed by the Court upon Illinois' unfortunate experience with clashes between races. How that experience gives content to the vague words is not explained. The opinion further relies upon "the *clarifying construction* and *fixed usage* which govern the meaning of the enactment before us." (Emphasis added.) No opinions containing such clarification are cited. In addition to the case before us, we find only two reported adjudications on § 224a in the Illinois courts.[11] Without caviling that one of these cases is so recent that it follows the instant case in the reports, certainly neither of them contains any words which give that "clarifying construction" claimed for Illinois law.

The majority certainly do not supply that construction by intimating that the publications prohibited by § 224a are only those "liable to cause violence and disorder." Moreover, that phrase was used by the Illinois court, not to limit the prohibition of § 224a, but to describe the lithograph published by Beauharnais. See 408 Ill., at 517, 97 N. E. 2d, at 346. The quoted language does not limit the statutory words "virtue," "derision" or "obloquy." [12]

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[10] Smith-Hurd Ill. Ann. Stat., 1936, c. 38, § 402, quoted in majority opinion at n. 5.

[11] *People* v. *Simcox*, 379 Ill. 347, 40 N. E. 2d 525; *People* v. *White Circle League*, 408 Ill. 564, 97 N. E. 2d 811 (1951). See also *Fox Film Corp.* v. *Collins*, 236 Ill. App. 281; *Bevins* v. *Prindable*, 39 F. Supp. 708, aff'd 314 U. S. 573.

[12] Indeed, if the Illinois courts had been inclined to interpret their statute as this Court now interprets it, they could have done so only by reading out of their statute the disjunctive clause "or which

The Court speaks at length of the constitutional power of a state to pass group libel laws to protect the public peace. This dissent assumes that power. What is under discussion is whether the conviction of Beauharnais on a general charge of violation of the statute can stand when the statute contains without statutory or judicial definition words of such ambiguous meaning and uncertain connotation as "virtue," "derision," or "obloquy." The Court does not attempt to speak specifically as to that contention.

The importance of a definite ruling on that point is manifest. Racial, religious, and political biases and prejudices lead to charge and countercharge, acrimony and bitterness. If words are to be punished criminally, the Constitution at least requires that only words or expressions or statements that can be reasonably well defined, or that have through long usage an accepted meaning, shall furnish a basis for conviction.[13]

These words—"virtue," "derision," and "obloquy"—have neither general nor special meanings well enough known to apprise those within their reach as to limita-

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is productive of breach of the peace or riots." (Quoted at p. 251 of majority opinion.) If the Illinois courts were inclined to read this disjunctive as a conjunctive, they would presumably have reversed Beauharnais' conviction, for the information in this case did not charge that publication of his lithograph would be productive of breach of the peace or riots.

[13] ". . . the constitution never intended to invest judges with a discretion which cannot be tried and measured by the plain and palpable standard of law . . . . On a special verdict for murder, the life of the prisoner does not depend upon the religious, moral, or philosophical ideas of the judges . . . . [I]f he is condemned . . . his conduct is brought to a precise, clear, intelligible standard, and cautiously measured by it: it is the law, therefore, and not the judge, which condemns him. . . ."

Argument in the King's Bench in the Dean of St. Asaph's case (1783–1784). 21 Howell's State Trials 847, 1006.

tions on speech. Compare *Connally* v. *General Construction Co.*, 269 U. S. 385, 391–392. Philosophers and poets, thinkers of high and low degree from every age and race have sought to expound the meaning of virtue, but each teaches his own conception of the moral excellence that satisfies standards of good conduct. Are the tests of the Puritan or the Cavalier to be applied, those of the city or the farm, the Christian or non-Christian, the old or the young? Does the Bill of Rights permit Illinois to forbid any reflection on the virtue of racial or religious classes which a jury or a judge may think exposes them to derision or obloquy, words themselves of quite uncertain meaning as used in the statute? I think not. A general and equal enforcement of this law would restrain the mildest expressions of opinion in all those areas where "virtue" may be thought to have a role. Since this judgment may rest upon these vague and undefined words, which permit within their scope the punishment of incidents secured by the guarantee of free speech, the conviction should be reversed.

MR. JUSTICE DOUGLAS, dissenting.

Hitler and his Nazis showed how evil a conspiracy could be which was aimed at destroying a race by exposing it to contempt, derision, and obloquy. I would be willing to concede that such conduct directed at a race or group in this country could be made an indictable offense. For such a project would be more than the exercise of free speech. Like picketing, it would be free speech plus.

I would also be willing to concede that even without the element of conspiracy there might be times and occasions when the legislative or executive branch might call a halt to inflammatory talk, such as the shouting of "fire" in a school or a theatre.

My view is that if in any case other public interests are to override the plain command of the First Amendment,

the peril of speech must be clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster.

The First Amendment is couched in absolute terms—freedom of speech shall not be abridged. Speech has therefore a preferred position [1] as contrasted to some other civil rights. For example, privacy, equally sacred to some, is protected by the Fourth Amendment only against unreasonable searches and seizures. There is room for regulation of the ways and means of invading privacy. No such leeway is granted the invasion of the right of free speech guaranteed by the First Amendment. Until recent years that had been the course and direction of constitutional law. Yet recently the Court in this and in other cases [2] has engrafted the right of regulation onto the First Amendment by placing in the hands of the legislative branch the right to regulate "within reasonable limits" the right of free speech. This to me is an ominous and alarming trend. The free trade in ideas which the Framers of the Constitution visualized disappears. In its place there is substituted a new orthodoxy—an orthodoxy that changes with the whims of the age or the day, an orthodoxy which the majority by solemn judgment proclaims to be essential to the safety, welfare, security, morality, or health of society. Free speech in the constitutional sense disappears. Limits are drawn—limits dictated by expediency, political opinion, prejudices or some other desideratum of legislative action.

An historic aspect of the issue of judicial supremacy was the extent to which legislative judgment would be

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[1] *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115; *Thomas* v. *Collins,* 323 U. S. 516, 530; *Saia* v. *New York,* 334 U. S. 558, 561.

[2] *Dennis* v. *United States,* 341 U. S. 494; *Feiner* v. *New York,* 340 U. S. 315. Cf. *Breard* v. *Alexandria,* 341 U. S. 622; *American Communications Assn.* v. *Douds,* 339 U. S. 382; *Osman* v. *Douds,* 339 U. S. 846.

supreme in the field of social legislation. The vague contours of the Due Process Clause were used to strike down laws deemed by the Court to be unwise and improvident.[3] That trend has been reversed. In matters relating to business, finance, industrial and labor conditions, health and the public welfare, great leeway is now granted the legislature,[4] for there is no guarantee in the Constitution that the *status quo* will be preserved against regulation by government. Freedom of speech, however, rests on a different constitutional basis. The First Amendment says that freedom of speech, freedom of press, and the free exercise of religion shall not be abridged. That is a negation of power on the part of each and every department of government. Free speech, free press, free exercise of religion are placed separate and apart; they are above and beyond the police power; they are not subject to regulation in the manner of factories, slums, apartment houses, production of oil, and the like.

The Court in this and in other cases places speech under an expanding legislative control. Today a white man stands convicted for protesting in unseemly language against our decisions invalidating restrictive covenants. Tomorrow a Negro will be haled before a court for denouncing lynch law in heated terms. Farm laborers in the West who compete with field hands drifting up from Mexico; whites who feel the pressure of orientals; a minority which finds employment going to members of the dominant religious group—all of these are caught in the mesh of today's decision. Debate and argument even in the courtroom are not always calm and dispassionate. Emotions sway speakers and audiences alike. Intem-

[3] *Lochner* v. *New York,* 198 U. S. 45; *Coppage* v. *Kansas,* 236 U. S. 1; *Ribnik* v. *McBride,* 277 U. S. 350.

[4] *Nebbia* v. *New York,* 291 U. S. 502; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *Lincoln Union* v. *Northwestern Co.,* 335 U. S. 525; *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421.

perate speech is a distinctive characteristic of man. Hotheads blow off and release destructive energy in the process. They shout and rave, exaggerating weaknesses, magnifying error, viewing with alarm. So it has been from the beginning; and so it will be throughout time. The Framers of the Constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardized thought. They weighed the compulsions for restrained speech and thought against the abuses of liberty. They chose liberty. That should be our choice today no matter how distasteful to us the pamphlet of Beauharnais may be. It is true that this is only one decision which may later be distinguished or confined to narrow limits. But it represents a philosophy at war with the First Amendment—a constitutional interpretation which puts free speech under the legislative thumb. It reflects an influence moving ever deeper into our society. It is notice to the legislatures that they have the power to control unpopular blocs. It is a warning to every minority that when the Constitution guarantees free speech it does not mean what it says.

MR. JUSTICE JACKSON, dissenting.

An Illinois Act, construed by its Supreme Court to be a "group libel" statute, has been used to punish criminally the author and distributor of an obnoxious leaflet attacking the Negro race. He answers that, as applied, the Act denies a liberty secured to him by the Due Process Clause of the Fourteenth Amendment. What is the liberty which that clause underwrites?

The spectrum of views expressed by my seniors shows that disagreement as to the scope and effect of this Amendment underlies this, as it has many another, division of the Court. All agree that the Fourteenth Amendment does confine the power of the State to make printed

words criminal. Whence we are to derive metes and bounds of the state power is a subject to the confusion of which, I regret to say, I have contributed—comforted in the acknowledgment, however, by recalling that this Amendment is so enigmatic and abstruse that judges more experienced than I have had to reverse themselves as to its effect on state power.

The assumption of other dissents is that the "liberty" which the Due Process Clause of the Fourteenth Amendment protects against denial by the States is the literal and identical "freedom of speech or of the press" which the First Amendment forbids only Congress to abridge. The history of criminal libel in America convinces me that the Fourteenth Amendment did not "incorporate" the First, that the powers of Congress and of the States over this subject are not of the same dimensions, and that because Congress probably could not enact this law it does not follow that the States may not.

## I.

As a limitation upon power to punish written or spoken words, Fourteenth Amendment "liberty" in its context of state powers and functions has meant and should mean something quite different from "freedom" in its context of federal powers and functions.[1]

This Court has never sustained a federal criminal libel Act. One section of the Sedition Act of 1798 was close to being a "group libel" Act.[2] While there were convictions

[1] First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." Fourteenth Amendment: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

[2] 1 Stat. 596 (1798) § 2: "*And be it further enacted,* That if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States,

under it, no attack on its validity reached this Court. I think today's better opinion regards the enactment as a breach of the First Amendment and certainly Mr. Justice Holmes and Mr. Justice Brandeis thought so.[3] But even in the absence of judicial condemnation, the political disapproval of the Sedition Act was so emphatic and sustained that federal prosecution of the press ceased for a century. It was resumed with indictment of The Indianapolis News and The New York World for disclosures and criticisms of the Panama Canal acquisition. Both were indicted in the District of Columbia and under the District Code, on the ground that some copies circulated there. That prosecution collapsed when Judge Anderson refused the Government's application to remove the Indiana defendants to the District of Columbia for trial.[4]

The World, circulated at West Point, was indicted in New York on the theory that an 1825 Act to pro-

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or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute . . . such person . . . shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years." Section 3: ". . . it shall be lawful for the defendant . . . to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases."

[3] *Abrams* v. *United States*, 250 U. S. 616, 630.

[4] *United States* v. *Smith*, 173 F. 227. In discharging the defendants, Judge Anderson said:

"To my mind that man has read the history of our institutions to little purpose who does not look with grave apprehension upon the possibility of the success of a proceeding such as this. If the history of liberty means anything, if constitutional guaranties are worth anything, this proceeding must fail.

"If the prosecuting officers have the authority to select the tribunal, if there be more than one tribunal to select from, if the

tect fortifications assimilated the New York State law punishing criminal libel. That venture likewise came to grief when Judge Hough rejected that construction of the federal statute and was upheld by this Court. *United States* v. *Press Publishing Co.*, 219 U. S. 1 (1911). While there has been a demand from official sources for a resumption of criminal libel prosecution, it has not been acceded to.[5] Thus, while the jeopardy of such federal prosecutions has never been removed by any decision of this Court, I should think the validity of a federal enactment such as this would be extremely doubtful, to say the least.

The effect of the First Amendment on congressional power to make seditious utterance criminal did receive consideration in the aftermath of the First World War. In such a case, Mr. Justice Holmes formulated for the Court as "the question in every case" the "clear and present danger" test. *Schenck* v. *United States*, 249 U. S. 47, 52. He and Mr. Justice Brandeis adhered to it as a "rule of reason," dissenting when they thought the rest of the Court apostate. *Abrams* v. *United States*, 250 U. S. 616, 627, 628; *Schaefer* v. *United States*, 251 U. S. 466, 482.

Only after research and deliberation in these cases had sharpened their perception did these Justices face the free-speech issue as to state power which Mr. Justice Holmes first adverted to, but left undecided, in *Patterson* v. *Colorado*, 205 U. S. 454. In 1922 they joined the Court's first decision on the subject, which declared that ". . . neither the Fourteenth Amendment nor any other provision of

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government has that power, and can drag citizens from distant states to the capital of the nation, there to be tried, then, as Judge Cooley says, this is a strange result of a revolution where one of the grievances complained of was the assertion of the right to send parties abroad for trial." 173 F., at 232.

[5] Riesman, Group Libel, 42 Col. L. Rev. 727, 748. See also 87 Cong. Rec. 5830–5841.

the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' . . . ." *Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530, 543.

However, these two Justices, who made the only original contribution to legal thought on the difficult problems bound up in these Amendments, soon reversed and took the view that the Fourteenth Amendment did impose some restrictions upon the States. But it was not premised upon the First Amendment nor upon any theory that it was incorporated in the Fourteenth. What they wrote, with care and circumspection, I accept as the wise and historically correct view of the Fourteenth Amendment. It was:

> "*The general principle of free speech,* it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, *although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress* by the sweeping language that governs or ought to govern the laws of the United States." (Emphasis supplied.) *Gitlow* v. *New York,* 268 U. S. 652, 672.

That reasoning was echoed so recently as 1937, when the Court explicitly rejected the theory of incorporation and, through Mr. Justice Cardozo, announced a view, unanimous except for Mr. Justice Butler, that the Fourteenth did not deflect against the States the literal language of amendments designed to circumscribe federal power but qualified state power only by such general restraints as are essential to "the concept of ordered liberty." *Palko* v. *Connecticut,* 302 U. S. 319, 324–325.

It is clear that these do not proscribe state criminal libel Acts. Justices Holmes and Brandeis in 1931 joined Chief Justice Hughes, who spoke for the Court, in striking down a state Act because it authorized restraint by injunction

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previous to publication. He said: "For whatever wrong the appellant has committed or may commit, by his publications, the State appropriately affords both public and private redress by its libel laws." This was amplified: "But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. . . . The law of criminal libel rests upon that secure foundation." *Near* v. *Minnesota,* 283 U. S. 697, 715.

So recently as 1942, a unanimous Court, speaking of state power, said that punishment of libelous words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" has never been thought to raise any constitutional problem. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572.

More than forty State Constitutions, while extending broad protections to speech and press, reserve a responsibility for their abuse and implicitly or explicitly recognize validity of criminal libel laws.[6] We are justified

[6] The following is a list of such state constitutional provisions, coupled with the year of the adoption of the Constitution in which they are contained: Alabama (1901), Art. I, §§ 4, 12; Arizona (1912), Art. II, § 6; Arkansas (1874), Art. II, § 6; California (1879), Art. I, § 9; Colorado (1876), Art. II, § 10; Delaware (1897), Art. I, § 5; Florida (1887), Decl. Rts., § 13; Georgia (1877), Art. I, § 1, par. 15; Idaho (1890), Art. I, § 9; Illinois (1870), Art. II, § 4; Indiana (1851), Art. I, § 9; Iowa (1857), Art. I, § 7; Kansas (1861), Bill Rts., § 11; Kentucky (1891), §§ 8, 9; Louisiana (1921), Art. I, § 3; Maine (1876), Art. I, § 4; Maryland (1867), Decl. Rts., Art. 40; Michigan (1909), Art. II, § 4; Minnesota (1857), Art. I, § 3; Mississippi (1890), Art. III, § 13; Missouri (1945), Art. I, § 8; Montana (1889), Art. III, § 10; Nebraska (1875), Art. I, § 5; Nevada (1864), Art. I, § 9; New Jersey (1947), Art. I, § 6; New Mexico (1912), Art. II, § 17; New York (1938), Art. I, § 8; North Carolina (1876), Art. I,

in assuming that the men who sponsored the Fourteenth Amendment in Congress, and those who ratified it in the State Legislatures, knew of such provisions then in many of their State Constitutions. Certainly they were not consciously canceling them or calling them into question, or we would have some evidence of it. Congresses, during the period while this Amendment was being considered or was but freshly adopted, approved Constitutions of "Reconstructed" States that expressly mentioned state libel laws,[7] and also approved similar Constitutions for States erected out of the federal domain.[8]

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§ 20; North Dakota (1889), Art. I, § 9; Ohio (1851), Art. I, § 11; Oklahoma (1907), Art. II, § 22; Oregon (1859), Art. I, § 8; Pennsylvania (1874), Art. I, § 7; Rhode Island (1843), Art. I, § 20; South Dakota (1889), Art. VI, § 5; Tennessee (1870), Art. I, § 19; Texas (1876), Art. I, § 8; Utah (1895), Art. I, § 15; Virginia (1902), Art. I, § 12; Washington (1889), Art. I, § 5; West Virginia (1872), Art. III, § 7; Wisconsin (1848), Art. I, § 3; Wyoming (1889), Art. I, § 20.

[7] Congress required that Reconstructed States approve State Constitutions consistent with the Federal Constitution, and also that each State ratify the Fourteenth Amendment. Examples of state constitutional provisions expressly referring to libel, but which Constitutions were nevertheless approved by Congress, follow: Arkansas: Const. 1868, Art. I, § 2 provides that truth coupled with good motives shall be a complete defense to a criminal libel prosecution; Arkansas readmitted by 15 Stat. 72 (1868); Florida: Const. 1868, Art. I, § 10 provides that truth coupled with good motives shall be a complete defense to a criminal libel prosecution; Florida readmitted by 15 Stat. 73 (1868); Mississippi: Const. 1868, Art. I, § 4 enacts Fox's Libel Act in substance; Mississippi readmitted by 16 Stat. 67 (1870); South Carolina: Const. 1868, Art. I, § 8 enacts Fox's Libel Act in substance, and provides that truth and good motives shall be a complete defense to a criminal libel prosecution; South Carolina readmitted by 15 Stat. 73 (1868); Texas: Const. 1868, Art. I, § 6 enacts Fox's Libel Act in substance; Texas readmitted by 16 Stat. 80 (1870).

[8] In the case of States erected out of the public domain, one of two procedures was generally followed. Either Congress would itself enact a statute admitting a particular State, stating therein that the

Certainly this tolerance of state libel laws by the very authors and partisans of the Fourteenth Amendment shows either that they were not intending to incorporate the First Amendment or that they believed it would not prevent federal libel laws. Adoption of the incorporation theory today would lead to the dilemma of either confining the States as closely as the Congress or giving the Federal Government the latitude appropriate to state governments. The treatment of libel powers corroborates the conclusions against the incorporationist theory reached by the most comprehensive and objective studies of the origin and adoption of the Fourteenth Amendment.[9]

The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms. Criminality of defamation is predicated upon power either to protect the private right to enjoy integrity of reputation or the public right to tranquillity. Neither of these are objects of federal cognizance except when necessary to the accomplishment of some delegated power, such as

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Constitution of the State in question was consistent with the Federal Constitution; or else the Congressional Act would provide that the State would be admitted upon its adoption of a Constitution consistent with the Federal Constitution. In the latter case the actual admission occurred by proclamation of the President.

Colorado: Art. II, § 10 enacts Fox's Libel Act in substance, and provides that truth and good motives shall constitute a complete defense in a libel prosecution; admitted by 18 Stat. 474 (1875), 19 Stat. 665 (1876); Montana: Art. III, § 10 enacts Fox's Libel Act in substance; admitted by 25 Stat. 676 (1889), 26 Stat. 1551 (1889); New Mexico: Art. II, § 17 provides that truth and good motives shall constitute a complete defense to a criminal libel prosecution; admitted by 36 Stat. 557 (1910), 37 Stat. 39 (1911); Utah: Art. I, § 15 like Colorado provisions; admitted by 28 Stat. 107 (1894), 29 Stat. 876 (1896); Wyoming: Art. I, § 20 like Colorado provisions; admitted by 26 Stat. 222 (1890).

[9] See Fairman and Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L. Rev. 5–173.

protection of interstate commerce. When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquillity to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with these conflicting social interests.

For these reasons I should not, unless clearly required, confirm to the Federal Government such latitude as I think a State reasonably may require for orderly government of its manifold concerns. The converse of the proposition is that I would not limit the power of the State with the severity appropriately prescribed for federal power.

As the principle by which to judge the constitutionality of this statute, I accept the dissent in *Gitlow* and the decision in *Palko*.

II.

What restraints upon state power to punish criminal libel are implied by the "concept of ordered liberty"? Experience by Anglo-Saxon peoples with defamation and laws to punish it extends over centuries and the statute and case books exhibit its teachings. If one can claim to announce the judgment of legal history on any subject, it is that criminal libel laws are consistent with the concept of ordered liberty only when applied with safeguards evolved to prevent their invasion of freedom of expression.

Oppressive application of the English libel laws was partially checked when Fox's Libel Act of 1792 allowed the jury to determine whether an accused publication was libelous in character and more completely when Lord Campbell's Libel Act of 1843 allowed truth to be proved as a defense.

American experience teaches similar lessons. The leading state case is *People* v. *Croswell*, 3 Johns. (N. Y.) 337.

Since, as the opinion of this Court now points out, the Jeffersonian's objection to federal sedition prosecutions was largely fear of federal usurpation of state powers over the subject, it was consistent for them to prosecute libels under state law. Croswell, publisher of the aptly named Wasp, was indicted for libeling Thomas Jefferson by representing him as unworthy of the confidence, respect, and attachment of the people. The trial judge pronounced his statements libelous as a matter of law and allowed the jury to decide no question except whether the accused had published them. The defendant was convicted and on his appeal, argued by Alexander Hamilton, the appellate court divided equally. Justice Kent, however, filed a characteristically learned and vigorous opinion that the trial court must submit the libelous character of the article and libelous intent of its printer to decision by the jury, which was entitled to determine both law and fact. The public response was such that an early session of the Legislature substantially enacted Kent's contentions. Inasmuch as no judgment had been entered upon the earlier equal division, the court at its August 1805 Term, "in consequence of this declaratory statute," unanimously awarded a new trial.[10]

The New York Constitution at that time contained no free speech provision but the case led to a provision included in the Constitution of 1821 which both followed Fox's Libel Act and anticipated Lord Campbell's Act and has remained in the several Constitutions of that State since:

> "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments

[10] 3 Johns. (N. Y.) 337, 413.

> for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact." [11]

It would not be an exaggeration to say that, basically, this provision of the New York Constitution states the common sense of American criminal libel law. Twenty-four States of the Union whose Constitutions were framed later substantially adopted it.[12] Twelve States provide that press and speech shall be free but there shall be responsibility for the abuse.[13] Five others provide substantially the same but add that truth may be given in evidence in a libel prosecution.[14] Only five States, whose Constitutions were framed earlier, were content with the generality about the free press similar to that of Massachusetts.[15] But all of these States, apart from consti-

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[11] Const. 1821, Art. VII, § 8; Const. 1846, Art. I, § 8; Const. 1894, Art. I, § 8; Const. 1938, Art. I, § 8.

[12] Arkansas, California, Colorado, Delaware, Florida, Iowa, Kansas, Maine, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Wisconsin, and Wyoming. For citations to article and section, see n. 6, *supra*.

[13] Arizona, Georgia, Idaho, Kentucky, Louisiana, Maryland, Michigan, Minnesota, North Carolina, Oregon, Virginia, and Washington. The Georgia provision (Const. 1877, Art. I, § 1, par. 15), representative of the rest, reads: ". . . any person may speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that liberty." For citations to article and section, see n. 6, *supra*.

[14] Alabama, Illinois, Indiana, Rhode Island, and West Virginia. For citations to article and section, see n. 6, *supra*.

[15] Connecticut, Const. 1818, Art. I, § 6; New Hampshire, Const. 1784, Part I, Art. 22; South Carolina, Const. 1895, Art. I, § 4; Vermont, Const. 1793, c. I, Art. 13. The Massachusetts provision (Const. 1780, Part I, Art. XVI) reads as follows: "The liberty of the press is essential to the security of freedom in a state it ought not, therefore, to be restricted in this commonwealth."

tutional provision, have by decisional law recognized the validity of criminal libel prosecutions.[16]

Because of these safeguards, state libel laws have presented no threat to a free press comparable to that from federal sources and have not proved inconsistent with fundamental liberties. Attacks on the press by States which were frustrated by this Court in *Near* v. *Minnesota, supra,* and *Grosjean* v. *American Press Co.,* 297 U. S. 233, were not by libel laws. For near a century and a half this Court's decisions left state criminal libel prosecutions entirely free of federal constitutional limitations. It is a matter of notoriety that the press often has provoked hostility, that editors have been mobbed and horsewhipped, but criminal libel prosecutions have not been frequent and, as safeguarded by state law, they have been so innocuous that chronicles of American journalism give them only passing mention.[17]

This Court, by construction of the Fourteenth Amendment, has imposed but one addition to the safeguards voluntarily taken upon the States by themselves. It is that where expression, oral or printed, is punished, although it has not actually caused injuries or disorders but is thought to have a tendency to do so, the likelihood of such consequence must not be remote or speculative. That is the "clear and present danger" test which Mr. Justice Holmes and Mr. Justice Brandeis, eventually with support of the Court, thought implied in both the First [18] and Fourteenth Amendments,[19] although the former was

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[16] *State* v. *Gardner,* 112 Conn. 121, 151 A. 349; *Commonwealth* v. *Szliakys,* 254 Mass. 424, 150 N. E. 190; *Noyes* v. *Thorpe,* 73 N. H. 481, 62 A. 787; *State* v. *Gurry,* 163 S. C. 1, 161 S. E. 191; *State* v. *Colby,* 98 Vt. 96, 126 A. 510. Decisional law of other States is collected in Note, 1 Bflo. L. Rev. 258.

[17] Lee, A History of American Journalism (Garden City, 1923).

[18] *Schenck* v. *United States,* 249 U. S. 47, 52.

[19] *Gitlow* v. *New York,* 268 U. S. 652, 672.

not bodily bound up in the latter. Any superficial inconsistency between applying the same standard but permitting a wider range of action to the States is resolved upon reference to the latter part of the statement of the formula: clear and present danger of *those substantive evils which the legislature has a right to prevent.* The evils at which Congress may aim, and in so doing come into conflict with free speech, will be relatively few since it is a government of limited powers. Because the States may reach more evils, they will have wider range to punish speech which presents clear and present danger of bringing about those evils.

In few subjects so much as libel does local law, in spite of varying historical influences, afford a consensus of American legal opinion as to what is reasonable and essential to the concept of ordered government. The boundaries are roughly outlined, to be sure, and cannot be stated or applied with mathematical precision, but those widely accepted state constitutional provisions on which is superimposed the "clear and present danger" test for "tendency" cases seem to be our best guide.

I agree with the Court that a State has power to bring classes "of any race, color, creed, or religion" within the protection of its libel laws, if indeed traditional forms do not already accomplish it.[20] But I am equally clear that in doing so it is essential to our concept of ordered liberty that the State also protect the accused by those safeguards the necessity for which is verified by legal history.

## III.

The Illinois statute, as applied in this case, seems to me to have dispensed with accepted safeguards for the accused. Trial of this case ominously parallels the trial of

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[20] It appears that group libel was not unknown to common law. See Scott, Publishing False News, 30 Can. B. Rev. 37, 42–43.

*People* v. *Croswell, supra,* in that the Illinois court here instructed the jury, in substance, that if it found that defendant published this leaflet he must be found guilty of criminal libel.

Rulings of the trial court precluded the effort to justify statements of fact by proving their truth. The majority opinion concedes the unvarying recognition by the States that truth plus good motives is a defense in a prosecution for criminal libel. But here the trial court repeatedly refused defendant's offer of proof as to the truth of the matter published. Where an offer to prove the dominant element of a defense is rejected as immaterial, we can hardly refuse to consider defendant's constitutional question because he did not go through the useless ceremony of offering proof of a subsidiary element of the defense. If the court would not let him try to prove he spoke truth, how could he show that he spoke truth for good ends? Furthermore, the record indicates that defendant was asked to state what he had meant by the use of certain phrases, and the reason for forming the White Circle League—statements which apparently bore on the issue of motive and ends. But the trial court sustained a sweeping objection "to this whole line of examination." The Supreme Court of Illinois noted the offer of proof of truth and its exclusion, and apparently went on to rule as a matter of law that the statement was not published for justifiable ends. At all events, it is clear that the defense was ruled out as matter of law and defendant was never allowed to present it for decision by either court or jury upon the facts, a practice which I think is contrary to the overwhelming verdict of Anglo-Saxon history and practice. I do not intimate that this defendant stood even a remote chance of justifying what impresses me, as it did the trial court, as reckless and vicious libel. But the point is that his evidence, proffered for that purpose, was excluded instead of being

received and evaluated. Society has an interest in preserving truth as a justification, however obnoxious the effort may be. A publication which diffuses its attack over unnamed and impersonal multitudes is likely to be harder to justify than one which concentrates its attack on named individuals, but the burden may properly be cast on an accused and punishment follow failure to carry it.

The same may be said of the right to comment upon matters of public interest insofar as the statement includes matters of opinion, a point, however, which the defense may have inadequately raised. When any naturally cohesive or artificially organized group possesses a racial or sectarian solidarity which is or may be exploited to influence public affairs, that group becomes a legitimate subject for public comment. Of course, one can only deplore the habitual intemperance and bitter disparagement which characterizes most such comment. While I support the right of a State to place decent bounds upon it, I am not ready to hold that group purposes, characteristics and histories are to be immunized from comment or may be discussed only at the risk of prosecution free of all usual safeguards.

Another defense almost universally recognized, which it seems the jury were not allowed to consider here, is that of privilege. Petition for redress of grievances is specifically privileged by many State Constitutions. I do not think we should hold this whole document to be constitutionally privileged just because, in part, it simulates a petition for redress of grievances. A court or jury could have found that its primary purpose was not to petition but to appeal for members and contributions to the White Circle League. If some part of it were privileged, that, so it has been held, does not extend constitutional protection to unprivileged matter. Cf. *Valentine* v. *Chrestensen,* 316 U. S. 52. But the question of privilege seems

not to have been specifically passed on by the court and certainly was not submitted for the jury's consideration.

In this case, neither the court nor jury found or were required to find any injury to any person, or group, or to the public peace, nor to find any probability, let alone any clear and present danger, of injury to any of these. Even though no individuals were named or described as targets of this pamphlet, if it resulted in a riot or caused injury to any individual Negro, such as being refused living quarters in a particular section, house or apartment, or being refused employment, certainly there would be no constitutional obstacle to imposing civil or criminal liability for actual results. But in this case no actual violence and no specific injury was charged or proved.

The leaflet was simply held punishable as criminal libel *per se* irrespective of its actual or probable consequences. No charge of conspiracy complicates this case. The words themselves do not advocate the commission of any crime. The conviction rests on judicial attribution of a likelihood of evil results. The trial court, however, refused to charge the jury that it must find some "clear and present danger," and the Supreme Court of Illinois sustained conviction because, in its opinion, the words used had a tendency to cause a breach of the peace.

Referring to the clear and present danger doctrine in *Dennis* v. *United States,* 341 U. S. 494, 568, I said:

"I would save it, unmodified, for application as a 'rule of reason' in the kind of case for which it was devised. When the issue is criminality of a hot-headed speech on a street corner, or circulation of a few incendiary pamphlets, or parading by some zealots behind a red flag, or refusal of a handful of school children to salute our flag, it is not beyond the capacity of the judicial process to gather, comprehend, and weigh the necessary materials for decision whether it is a clear and present danger of

substantive evil or a harmless letting off of steam. It is not a prophecy, for the danger in such cases has matured by the time of trial or it was never present. The test applies and has meaning where a conviction is sought to be based on a speech or writing which does not directly or explicitly advocate a crime but to which such tendency is sought to be attributed by construction or by implication from external circumstances. The formula in such cases favors freedoms that are vital to our society, and, even if sometimes applied too generously, the consequences cannot be grave. . . ."

Not the least of the virtues of this formula in such tendency cases is that it compels the prosecution to make up its mind what particular evil it sought or is seeking to prevent. It must relate its interference with speech or press to some identifiable evil to be prevented. Words on their own account are not to be punished in such cases but are reachable only as the root of punishable evils.

Punishment of printed words, based on their *tendency* either to cause breach of the peace or injury to persons or groups, in my opinion, is justifiable only if the prosecution survives the "clear and present danger" test. It is the most just and workable standard yet evolved for determining criminality of words whose injurious or inciting tendencies are not demonstrated by the event but are ascribed to them on the basis of probabilities.

Its application is important in this case because it takes account of the particular form, time, place, and manner of communication in question. "The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself . . . ." *Kovacs* v. *Cooper,* 336 U. S. 77, 97. It would consider whether a leaflet is so emotionally exciting to immediate action as the spoken word, especially

the incendiary street or public speech. *Terminiello* v. *Chicago,* 337 U. S. 1, 13; *Kunz* v. *New York,* 340 U. S. 290, 295. It will inquire whether this publication was obviously so foul and extreme as to defeat its own ends, whether its appeals for money—which has a cooling effect on many persons—would not negative its inflammatory effect, whether it would not impress the passer-by as the work of an irresponsible who needed mental examination.

One of the merits of the clear and present danger test is that the triers of fact would take into account the realities of race relations and any smouldering fires to be fanned into holocausts. Such consideration might well warrant a conviction here when it would not in another and different environment.

Group libel statutes represent a commendable desire to reduce sinister abuses of our freedoms of expression—abuses which I have had occasion to learn can tear apart a society, brutalize its dominant elements, and persecute, even to extermination, its minorities. While laws or prosecutions might not alleviate racial or sectarian hatreds and may even invest scoundrels with a specious martyrdom, I should be loath to foreclose the States from a considerable latitude of experimentation in this field. Such efforts, if properly applied, do not justify frenetic forebodings of crushed liberty. But these acts present most difficult policy and technical problems, as thoughtful writers who have canvassed the problem more comprehensively than is appropriate in a judicial opinion have well pointed out.[21]

No group interest in any particular prosecution should forget that the shoe may be on the other foot in some prosecution tomorrow. In these, as in other matters, our

[21] Tanenhaus, Group Libel, 35 Cornell L. Q. 261; Riesman, Democracy and Defamation: Control of Group Libel, 42 Col. L. Rev. 727; see also Note, 1 Bflo. L. Rev. 258.

guiding spirit should be that each freedom is balanced with a responsibility, and every power of the State must be checked with safeguards. Such is the spirit of our American law of criminal libel, which concedes the power to the State, but only as a power restrained by recognition of individual rights. I cannot escape the conclusion that as the Act has been applied in this case it lost sight of the rights.

# ZORACH ET AL. *v.* CLAUSON ET AL., CONSTITUTING THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 431. Argued January 31–February 1, 1952.—Decided April 28, 1952.

Under § 3210 of the New York Education Law and the regulations thereunder, New York City permits its public schools to release students during school hours, on written requests of their parents, so that they may leave the school buildings and grounds and go to religious centers for religious instruction or devotional exercises. The same section makes school attendance compulsory; students not released stay in the classrooms; and the churches report to the schools the names of children released from public schools who fail to report for religious instruction. The program involves neither religious instruction in public schools nor the expenditure of public funds. *Held:* This program does not violate the First Amendment, made applicable to the States by the Fourteenth Amendment. *McCollum* v. *Board of Education*, 333 U. S. 203, distinguished. Pp. 308–315.

(a) By this system, New York has neither prohibited the "free exercise" of religion nor made a law "respecting an establishment of religion" within the meaning of the First Amendment. Pp. 310–315.

(b) There is no evidence in the record in this case to support a conclusion that the system involves the use of coercion to get public school students into religious classrooms. Pp. 311–312.

303 N. Y. 161, 100 N. E. 2d 463, affirmed.

The New York Court of Appeals sustained N. Y. Education Law § 3210 and the regulations thereunder permitting absence of students from the public schools for religious observance and education, against the claim that the program thereunder violated the Federal Constitution. 303 N. Y. 161, 100 N. E. 2d 463. On appeal to this Court, *affirmed,* p. 315.

*Kenneth W. Greenawalt* argued the cause for appellants. With him on the brief were *Leo Pfeffer* and *Edwin J. Lukas.*

*Wendell P. Brown,* Solicitor General, argued the cause for the Commissioner of Education of the State of New York, appellee. With him on the brief were *Nathaniel L. Goldstein,* Attorney General, and *Ruth Kessler Toch* and *John P. Powers,* Assistant Attorneys General.

*Michael A. Castaldi* argued the cause for the Board of Education of the City of New York, appellee. With him on the brief were *Denis M. Hurley, Seymour B. Quel, Daniel T. Scannell* and *Arthur H. Kahn.*

*Charles H. Tuttle* argued the cause for the Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, appellee. With him on the brief was *Porter R. Chandler.*

Briefs of *amici curiae* supporting appellees were filed on behalf of the States of California, by *Edmund G. Brown,* Attorney General, *William V. O'Connor,* Chief Deputy Attorney General, and *Howard S. Goldin,* Deputy Attorney General; Indiana, by *J. Emmett McManamon,* Attorney General; Kentucky, by *J. D. Buckman, Jr.,* Attorney General, and *M. B. Holifield,* Assistant Attorney General; Maine, by *Alexander A. LaFleur,* Attorney General; Massachusetts, by *Francis E. Kelly,* Attorney General, *Charles H. Walters,* Assistant Attorney General, and *William F. Marcella;* Oregon, by *George Neuner,* Attorney General, *Robert F. Maguire* and *William E. Dougherty;* Pennsylvania, by *Robert E. Woodside,* Attorney General, and *Harry F. Stambaugh;* and West Virginia, by *William C. Marland,* Attorney General, and *Thomas J. Gillooly, T. D. Kauffelt* and *Eston B. Stephenson,* Assistant Attorneys General.

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MR. JUSTICE DOUGLAS delivered the opinion of the Court.

New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises. A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have not reported for religious instruction.[1]

This "released time" program involves neither religious instruction in public school classrooms nor the expendi-

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[1] The New York City released time program is embodied in the following provisions:

(a) N. Y. Education Law, § 3210, subdiv. 1 (b), which provides that "Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

(b) Regulations of the Commissioner of Education of the State of New York, Art. 17, § 154 (1 N. Y. Official Code Comp. 683), which provide for absence during school hours for religious observance and education outside the school grounds [par. 1], where conducted by or under the control of a duly constituted religious body [par. 2]. Students must obtain written requests from their parents or guardians to be excused for such training [par. 1], and must register for the training and have a copy of their registration filed with the public school authorities [par. 3]. Weekly reports of their attendance at such religious schools must be filed with their principal or teacher [par. 4]. Only one hour a week is to be allowed for such training, at the end of a class session [par. 5], and where more than one religious school is conducted, the hour of release shall be the same for all religious schools [par. 6].

(c) Regulations of the Board of Education of the City of New York, which provide similar rules supplementing the State Commissioner's regulations, with the following significant amplifications: No announcement of any kind will be made in the public schools relative to the program [rule 1]. The religious organizations and

ture of public funds. All costs, including the application blanks, are paid by the religious organizations. The case is therefore unlike *McCollum* v. *Board of Education,* 333 U. S. 203, which involved a "released time" program from Illinois. In that case the classrooms were turned over to religious instructors. We accordingly held that the program violated the First Amendment [2] which (by reason of the Fourteenth Amendment)[3] prohibits the states from establishing religion or prohibiting its free exercise.

Appellants, who are taxpayers and residents of New York City and whose children attend its public schools,[4] challenge the present law, contending it is in essence not different from the one involved in the *McCollum* case. Their argument, stated elaborately in various ways, reduces itself to this: the weight and influence of the school is put behind a program for religious instruction; public school teachers police it, keeping tab on students who are released; the classroom activities come to a halt while the students who are released for religious instruction are on leave; the school is a crutch on which the churches are leaning for support in their religious training; without the cooperation of the schools this "released time" program,

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parents will assume full responsibility for attendance at the religious schools and will explain any failures to attend on the weekly attendance reports [rule 3]. Students who are released will be dismissed from school in the usual way [rule 5]. There shall be no comment by any principal or teacher on attendance or nonattendance of any pupil upon religious instruction [rule 6].

[2] The First Amendment reads in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

[3] See *Stromberg* v. *California,* 283 U. S. 359; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Murdock* v. *Pennsylvania,* 319 U. S. 105.

[4] No problem of this Court's jurisdiction is posed in this case since, unlike the appellants in *Doremus* v. *Board of Education,* 342 U. S. 429, appellants here are parents of children currently attending schools subject to the released time program.

like the one in the *McCollum* case, would be futile and ineffective. The New York Court of Appeals sustained the law against this claim of unconstitutionality. 303 N. Y. 161, 100 N. E. 2d 463. The case is here on appeal. 28 U. S. C. § 1257 (2).

The briefs and arguments are replete with data bearing on the merits of this type of "released time" program. Views *pro* and *con* are expressed, based on practical experience with these programs and with their implications.[5] We do not stop to summarize these materials nor to burden the opinion with an analysis of them. For they involve considerations not germane to the narrow constitutional issue presented. They largely concern the wisdom of the system, its efficiency from an educational point of view, and the political considerations which have motivated its adoption or rejection in some communities. Those matters are of no concern here, since our problem reduces itself to whether New York by this system has either prohibited the "free exercise" of religion or has made a law "respecting an establishment of religion" within the meaning of the First Amendment.

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[5] See, *e. g.*, Beckes, Weekday Religious Education (National Conference of Christians and Jews, Human Relations Pamphlet No. 6); Butts, American Tradition in Religion and Education, pp. 188, 199; Moehlman, The Wall of Separation between Church and State, pp. 123, 155 ff.; Moehlman, The Church as Educator, pp. 103 ff.; Moral and Spiritual Values in the Public Schools (Educational Policies Commission, 1951); Newman, The Sectarian Invasion of Our Public Schools; Public School Time for Religious Education, 12 Jewish Education 130 (January, 1941); Religious Instruction On School Time, 7 Frontiers of Democracy 72 (1940); Released Time for Religious Education in New York City's Schools (Public Education Association, June 30, 1943); Released Time for Religious Education in New York City's Schools (Public Education Association, June 30, 1945); Released Time for Religious Education in New York City Schools (Public Education Association, 1949); 2 Stokes, Church and State in the United States, pp. 523–548; The Status Of Religious Education In The Public Schools (National Education Association).

It takes obtuse reasoning to inject any issue of the "free exercise" of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any.

There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion.[6] The present record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose parents so request. If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented.[7] Hence we put aside that claim of coercion

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[6] Nor is there any indication that the public schools enforce attendance at religious schools by punishing absentees from the released time programs for truancy.

[7] Appellants contend that they should have been allowed to prove that the system is in fact administered in a coercive manner. The New York Court of Appeals declined to grant a trial on this issue, noting, *inter alia*, that appellants had not properly raised their claim in the manner required by state practice. 303 N. Y. 161, 174, 100 N. E. 2d 463, 469. This independent state ground for decision precludes appellants from raising the issue of maladministration in this proceeding. See *Louisville & Nashville R. Co.* v. *Woodford*, 234 U. S. 46, 51; *Atlantic Coast Line R. Co.* v. *Mims*, 242 U. S. 532, 535; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 169.

The only allegation in the complaint that bears on the issue is that the operation of the program "has resulted and inevitably results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction." But this charge does not even implicate the school authorities. The New York Court of Appeals was therefore generous in labeling it a "conclusory" allegation. 303 N. Y., at 174, 100 N. E. 2d, at 469. Since

both as respects the "free exercise" of religion and "an establishment of religion" within the meaning of the First Amendment.

Moreover, apart from that claim of coercion, we do not see how New York by this type of "released time" program has made a law respecting an establishment of religion within the meaning of the First Amendment. There is much talk of the separation of Church and State in the history of the Bill of Rights and in the decisions clustering around the First Amendment. See *Everson* v. *Board of Education,* 330 U. S. 1; *McCollum* v. *Board of Education, supra.* There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the ap-

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the allegation did not implicate the school authorities in the use of coercion, there is no basis for holding that the New York Court of Appeals under the guise of local practice defeated a federal right in the manner condemned by *Brown* v. *Western R. of Alabama,* 338 U. S. 294, and related cases.

peals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds. The nullification of this law would have wide and profound effects. A Catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher requires parental consent in writing. In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act.

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state

encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.

This program may be unwise and improvident from an educational or a community viewpoint. That appeal is made to us on a theory, previously advanced, that each case must be decided on the basis of "our own prepossessions." See *McCollum* v. *Board of Education, supra,* p. 238. Our individual preferences, however, are not the constitutional standard. The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree. See *McCollum* v. *Board of Education, supra,* p. 231.

In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the *McCollum* case.[8] But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.

*Affirmed.*

MR. JUSTICE BLACK, dissenting.

*Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203, held invalid as an "establishment of religion" an Illinois system under which school children, compelled by law to go to public schools, were freed from some hours of required school work on condition that they attend special religious classes held in the school buildings. Although the classes were taught by sectarian

[8] Three of us—THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE BURTON—who join this opinion agreed that the "released time" program involved in the *McCollum* case was unconstitutional. It was our view at the time that the present type of "released time" program was not prejudged by the *McCollum* case, a conclusion emphasized by the reservation of the question in the separate opinion by MR. JUSTICE FRANKFURTER in which MR. JUSTICE BURTON joined. See 333 U. S., at 225 where it was said, "Of course, 'released time' as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication. Local programs differ from each other in many and crucial respects. . . . It is only when challenge is made to the share that the public schools have in the execution of a particular 'released time' program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the Court."

teachers neither employed nor paid by the state, the state did use its power to further the program by releasing some of the children from regular class work, insisting that those released attend the religious classes, and requiring that those who remained behind do some kind of academic work while the others received their religious training. We said this about the Illinois system:

> "Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment . . . ." *McCollum* v. *Board of Education, supra,* at pp. 209–210.

I see no significant difference between the invalid Illinois system and that of New York here sustained. Except for the use of the school buildings in Illinois, there is no difference between the systems which I consider even worthy of mention. In the New York program, as in that of Illinois, the school authorities release some of the children on the condition that they attend the religious classes, get reports on whether they attend, and hold the other children in the school building until the religious hour is over. As we attempted to make categorically clear, the *McCollum* decision would have been the same if the religious classes had not been held in the school buildings. We said:

> "Here *not only* are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State *also* affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. *This* is

not separation of Church and State." (Emphasis supplied.) *McCollum* v. *Board of Education, supra,* at p. 212.

*McCollum* thus held that Illinois could not constitutionally manipulate the compelled classroom hours of its compulsory school machinery so as to channel children into sectarian classes. Yet that is exactly what the Court holds New York can do.

I am aware that our *McCollum* decision on separation of Church and State has been subjected to a most searching examination throughout the country. Probably few opinions from this Court in recent years have attracted more attention or stirred wider debate. Our insistence on "a wall between Church and State which must be kept high and impregnable" has seemed to some a correct exposition of the philosophy and a true interpretation of the language of the First Amendment to which we should strictly adhere.[1] With equal conviction and sincerity, others have thought the *McCollum* decision fundamentally wrong [2] and have pledged continuous warfare against it.[3] The opinions in the court below and the briefs here reflect these diverse viewpoints. In dissenting today, I mean to do more than give routine approval to our *McCollum* decision. I mean also to reaffirm my faith in the

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[1] See, *e. g.*, Newman, The Sectarian Invasion of Our Public Schools; Moehlman, The Wall of Separation between Church and State; Thayer, The Attack upon the American Secular School, pp. 179–199; Butts, The American Tradition in Religion and Education, pp. 201–208. See also Symposium on Religion and the State, 14 Law & Contemp. Prob. 1–159.

[2] See, *e. g.*, O'Neill, Religion and Education Under the Constitution, pp. 219–253; Parsons, The First Freedom, pp. 158–178; Van Dusen, God in Education. See also Symposium on Religion and the State, *supra.*

[3] See Moehlman, *supra,* n. 1, at p. 42. O'Neill, *supra,* n. 2, at pp. 254–272.

fundamental philosophy expressed in *McCollum* and *Everson* v. *Board of Education,* 330 U. S. 1. That reaffirmance can be brief because of the exhaustive opinions in those recent cases.

Difficulty of decision in the hypothetical situations mentioned by the Court, but not now before us, should not confuse the issues in this case. Here the sole question is whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery. That this is the plan, purpose, design and consequence of the New York program cannot be denied. The state thus makes religious sects beneficiaries of its power to compel children to attend secular schools. Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over nonbelievers or vice versa is just what I think the First Amendment forbids. In considering whether a state has entered this forbidden field the question is not whether it has entered too far but whether it has entered at all. New York is manipulating its compulsory education laws to help religious sects get pupils. This is not separation but combination of Church and State.

The Court's validation of the New York system rests in part on its statement that Americans are "a religious people whose institutions presuppose a Supreme Being." This was at least as true when the First Amendment was adopted; and it was just as true when eight Justices of this Court invalidated the released time system in *McCollum* on the premise that a state can no more "aid all religions" than it can aid one.[4] It was precisely because Eighteenth

[4] A state policy of aiding "all religions" necessarily requires a governmental decision as to what constitutes "a religion." Thus is created a governmental power to hinder certain religious beliefs by denying their character as such. See, *e. g.*, the Regulations of the New York Commissioner of Education providing that, "The

Century Americans were a religious people divided into many fighting sects that we were given the constitutional mandate to keep Church and State completely separate. Colonial history had already shown that, here as elsewhere zealous sectarians entrusted with governmental power to further their causes would sometimes torture, maim and kill those they branded "heretics," "atheists" or "agnostics." [5] The First Amendment was therefore to insure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters whom they could not convert to their faith. Now as then, it is only by wholly isolating the state from the religious sphere and compelling it to be completely neutral, that the freedom of each and every denomination and of all nonbelievers can be maintained. It is this neutrality the Court abandons today when it treats New York's coercive system as a program which *merely* "encourages religious instruction or cooperates with religious authorities." The abandonment is all the more dangerous to liberty because of the Court's legal exaltation of the orthodox and its derogation of unbelievers.

Under our system of religious freedom, people have gone to their religious sanctuaries not because they feared the law but because they loved their God. The choice of all has been as free as the choice of those who answered the call to worship moved only by the music of the old Sunday morning church bells. The spiritual mind of man has thus been free to believe, disbelieve, or doubt, without repression, great or small, by the heavy

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courses in religious observance and education must be maintained and operated by or under the control of *duly constituted* religious bodies." (Emphasis added.) Art. 17, § 154, 1 N. Y. Official Code Comp. 683. This provides precisely the kind of censorship which we have said the Constitution forbids. *Cantwell* v. *Connecticut*, 310 U. S. 296, 305.

[5] Wertenbaker, The Puritan Oligarchy, 213–214.

hand of government. Statutes authorizing such repression have been stricken. Before today, our judicial opinions have refrained from drawing invidious distinctions between those who believe in no religion and those who do believe. The First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under law.

State help to religion injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persecution for persuasion. Government should not be allowed, under cover of the soft euphemism of "co-operation," to steal into the sacred area of religious choice.

MR. JUSTICE FRANKFURTER, dissenting.

By way of emphasizing my agreement with MR. JUSTICE JACKSON'S dissent, I add a few words.

The Court tells us that in the maintenance of its public schools, "[The State government] can close its doors or suspend its operations" so that its citizens may be free for religious devotions or instruction. If that were the issue, it would not rise to the dignity of a constitutional controversy. Of course, a State may provide that the classes in its schools shall be dismissed, for any reason, or no reason, on fixed days, or for special occasions. The essence of this case is that the school system did not "close its doors" and did not "suspend its operations." There is all the difference in the world between letting the children out of school and letting some of them out of school into religious classes. If every one is free to make what use he will of time wholly unconnected from schooling required by law—those who wish sectarian instruction devoting it to that purpose, those who have ethical instruction at home, to that, those who study music, to that—then of course there is no conflict with the Fourteenth Amendment.

The pith of the case is that formalized religious instruction is substituted for other school activity which those who do not participate in the released-time program are compelled to attend. The school system is very much in operation during this kind of released time. If its doors are closed, they are closed upon those students who do not attend the religious instruction, in order to keep them within the school. That is the very thing which raises the constitutional issue. It is not met by disregarding it. Failure to discuss this issue does not take it out of the case.

Again, the Court relies upon the absence from the record of evidence of coercion in the operation of the system. "If in fact coercion were used," according to the Court, "if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented." Thus, "coercion" in the abstract is acknowledged to be fatal. But the Court disregards the fact that as the case comes to us, there could be no proof of coercion, for the appellants were not allowed to make proof of it. Appellants alleged that "The operation of the released time program has resulted and inevitably results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction." This allegation—that coercion was in fact present and is inherent in the system, no matter what disavowals might be made in the operating regulations—was denied by appellees. Thus were drawn issues of fact which cannot be determined, on any conceivable view of judicial notice, by judges out of their own knowledge or experience. Appellants sought an opportunity to adduce evidence in support of these allegations at an appropriate trial. And though the courts below cited the concurring opinion in *McCollum* v. *Board of Education,* 333 U. S. 203, 226, to "emphasize the importance of de-

tailed analysis of the facts to which the Constitutional test of Separation is to be applied," they denied that opportunity on the ground that such proof was irrelevant to the issue of constitutionality. See 198 Misc. 631, 641, 99 N. Y. S. 2d 339, 348–349; 303 N. Y. 161, 174–175, 100 N. E. 2d 463, 469.[1]

When constitutional issues turn on facts, it is a strange procedure indeed not to permit the facts to be established. When such is the case, there are weighty considerations for us to require the State court to make its determination only after a thorough canvass of all the circumstances and not to bar them from consideration. Cf. *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543; *Hammond* v. *Schappi Bus Line,* 275 U. S. 164. If we are to decide this case on the present record, however, a strict adherence to the usage of courts in ruling on the sufficiency of pleadings would require us to take as admitted the facts pleaded in the appellants' complaint, including the fact of coercion, actual and inherent. See Judge Fuld, dissenting below, 303 N. Y., at 185, 100 N. E. 2d, at 475. Even on a more latitudinarian view, I cannot see how a finding that coercion was absent, deemed critical by this Court in sustaining the practice, can be made here, when appellants were prevented from making a timely showing of coercion because the courts below thought it irrelevant.

The result in the *McCollum* case, 333 U. S. 203, was based on principles that received unanimous acceptance by this Court, barring only a single vote. I agree with MR. JUSTICE BLACK that those principles are disregarded

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[1] Issues that raise federal claims cannot be foreclosed by the State court treating the allegations as "conclusory in character." 303 N. Y. 161, 174, 100 N. E. 2d 463, 469. This is so even when a federal statute is involved. *Brown* v. *Western R. of Alabama,* 338 U. S. 294. *A fortiori* when the appeal is to the Constitution of the United States.

in reaching the result in this case.[2] Happily they are not disavowed by the Court. From this I draw the hope that in future variations of the problem which are bound to come here, these principles may again be honored in the observance.

The deeply divisive controversy aroused by the attempts to secure public school pupils for sectarian instruction would promptly end if the advocates of such instruction were content to have the school "close its doors or suspend its operations"—that is, dismiss classes in their entirety, without discrimination—instead of seeking to use the public schools as the instrument for securing attendance at denominational classes. The unwillingness of the promoters of this movement to dispense with such use of the public schools betrays a surprising want of confidence in the inherent power of the various faiths to draw children to outside sectarian classes—an attitude that hardly reflects the faith of the greatest religious spirits.

MR. JUSTICE JACKSON, dissenting.

This released time program is founded upon a use of the State's power of coercion, which, for me, determines its unconstitutionality. Stripped to its essentials, the plan has two stages: first, that the State compel each student to yield a large part of his time for public secu-

[2] The reservation made by four of the Justices in the *McCollum* case did not, of course, refer to the New York situation any more than it referred to that form of "released time" under which the whole student body is dismissed. This was the reservation:

"We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time,' present situations differing in aspects that may well be constitutionally crucial. Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable." 333 U. S., at 231.

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lar education; and, second, that some of it be "released" to him on condition that he devote it to sectarian religious purposes.

No one suggests that the Constitution would permit the State directly to require this "released" time to be spent "under the control of a duly constituted religious body." This program accomplishes that forbidden result by indirection. If public education were taking so much of the pupils' time as to injure the public or the students' welfare by encroaching upon their religious opportunity, simply shortening everyone's school day would facilitate voluntary and optional attendance at Church classes. But that suggestion is rejected upon the ground that if they are made free many students will not go to the Church. Hence, they must be deprived of freedom for this period, with Church attendance put to them as one of the two permissible ways of using it.

The greater effectiveness of this system over voluntary attendance after school hours is due to the truant officer who, if the youngster fails to go to the Church school, dogs him back to the public schoolroom. Here schooling is more or less suspended during the "released time" so the nonreligious attendants will not forge ahead of the churchgoing absentees. But it serves as a temporary jail for a pupil who will not go to Church. It takes more subtlety of mind than I possess to deny that this is governmental constraint in support of religion. It is as unconstitutional, in my view, when exerted by indirection as when exercised forthrightly.

As one whose children, as a matter of free choice, have been sent to privately supported Church schools, I may challenge the Court's suggestion that opposition to this plan can only be antireligious, atheistic, or agnostic. My evangelistic brethren confuse an objection to compulsion with an objection to religion. It is possible to hold a faith with enough confidence to believe that what should be

rendered to God does not need to be decided and collected by Caesar.

The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power. The same epithetical jurisprudence used by the Court today to beat down those who oppose pressuring children into some religion can devise as good epithets tomorrow against those who object to pressuring them into a favored religion. And, after all, if we concede to the State power and wisdom to single out "duly constituted religious" bodies as exclusive alternatives for compulsory secular instruction, it would be logical to also uphold the power and wisdom to choose the true faith among those "duly constituted." We start down a rough road when we begin to mix compulsory public education with compulsory godliness.

A number of Justices just short of a majority of the majority that promulgates today's passionate dialectics joined in answering them in *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203. The distinction attempted between that case and this is trivial, almost to the point of cynicism, magnifying its nonessential details and disparaging compulsion which was the underlying reason for invalidity. A reading of the Court's opinion in that case along with its opinion in this case will show such difference of overtones and undertones as to make clear that the *McCollum* case has passed like a storm in a teacup. The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected. Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law.

# UNITED STATES *v.* OREGON STATE MEDICAL SOCIETY ET AL.

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

No. 19. Argued January 4, 7, 1952.—Decided April 28, 1952.

Seeking to restrain alleged violations of §§ 1 and 2 of the Sherman Act, the United States brought this suit against the Oregon State Medical Society, eight county medical societies, a doctor-sponsored corporation engaged in the sale of prepaid medical care, and eight doctors who were officers in those organizations. The complaint charged that they conspired to restrain and monopolize the business of providing prepaid medical care in Oregon and conspired to restrain competition between doctor-sponsored prepaid medical plans within the State. After a trial, the District Court dismissed the complaint on the ground that the Government had failed to prove its charges. *Held:* The judgment is affirmed. Pp. 328–340.

1. On review, it is not the function of this Court to try the case *de novo* on the record. *United States* v. *Yellow Cab Co.*, 338 U. S. 338. Pp. 331–332.

2. Rule 52 (a) of the Federal Rules of Civil Procedure, which provides that, where an action is tried by a court without a jury, "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses," is peculiarly applicable in a case, such as this, where the complaining party creates a vast record of cumulative evidence as to long-past transactions, motives and purposes, the effect of which depends largely on credibility of witnesses. P. 332.

3. In an action under the Sherman Act for an injunction, the sole function of which is to forestall future violations, an examination of evidence relating to long-past transactions is justified only when it illuminates or explains the present and predicts the shape of things to come. Pp. 332–333.

4. Conduct which had been discontinued seven years previously, in the absence of a threat or likelihood of its resumption, does not warrant the issuance of an injunction. Pp. 332–334.

5. The Government having failed to prove a concerted refusal by the defendant doctors to deal with private health associations, it is unnecessary here to decide whether that would violate the antitrust laws. Pp. 334–336.

(a) Where the historic direct relationship between physician and patient is involved, there are ethical considerations which are quite different from the usual considerations prevailing in ordinary commercial matters. P. 336.

6. The trial court's refusal to find that the defendants had conspired to restrain or monopolize the business of prepaid medical care was not clearly erroneous. Pp. 336–337.

7. The trial court's finding that the sale of medical services by the doctor-sponsored organizations, as conducted in Oregon, did not constitute interstate commerce was not clearly erroneous; and the agreement between them not to compete did not fall within the prohibitions of the Sherman Act. *American Medical Assn.* v. *United States*, 317 U. S. 519, distinguished. Pp. 337–339.

8. A finding which, in the light of the record, does not leave the reviewing court with any "definite and firm conviction that a mistake has been committed," is not "clearly erroneous." P. 339.

95 F. Supp. 103, affirmed.

In a suit by the United States to restrain alleged violations of §§ 1 and 2 of the Sherman Antitrust Act, the District Court, after a trial, dismissed the complaint on the ground that the Government had failed to prove its charges. 95 F. Supp. 103. The United States appealed directly to this Court under the Expediting Act. *Affirmed*, p. 340.

*Stanley M. Silverberg* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, J. Roger Wollenberg* and *Daniel M. Friedman.*

*Nicholas Jaureguy* argued the cause for appellees. With him on the brief were *Clarence D. Phillips* and *John J. Coughlin.*

Mr. Justice Jackson delivered the opinion of the Court.

This is a direct appeal by the United States [1] from dismissal by the District Court [2] of its complaint seeking an injunction to prevent and restrain violations of §§ 1 and 2 of the Sherman Act. 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2.[3]

Appellees are the Oregon State Medical Society, eight county medical societies, Oregon Physicians' Service (an Oregon corporation engaged in the sale of prepaid medical care), and eight doctors who are or have been at some time responsible officers in those organizations.

This controversy centers about two forms of "contract practice" of medicine. In one, private corporations organized for profit sell what amounts to a policy of insurance by which small periodic payments purchase the right to certain hospital facilities and medical attention. In the other, railroad and large industrial employers of labor contract with one or more doctors to treat their ailing or injured employees. Both forms of "contract practice," for rendering the promised medical and surgical service, depend upon doctors or panels of doctors who cooperate on a fee basis or who associate themselves with the plan on a full- or part-time employment basis.

Objections of the organized medical profession to contract practice are both monetary and ethical. Such

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[1] Pursuant to § 2 of the Expediting Act of 1903, 32 Stat. 823, as amended, 15 U. S. C. § 29.

[2] 95 F. Supp. 103.

[3] 26 Stat. 209, 15 U. S. C. § 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ."

15 U. S. C. § 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 States . . . shall be deemed guilty of a misdemeanor . . . ."

practice diverts patients from independent practitioners to contract doctors. It tends to standardize fees. The ethical objection has been that intervention by employer or insurance company makes a tripartite matter of the doctor-patient relation. Since the contract doctor owes his employment and looks for his pay to the employer or the insurance company rather than to the patient, he serves two masters with conflicting interests. In many cases companies assumed liability for medical or surgical service only if they approved the treatment in advance. There was evidence of instances where promptly needed treatment was delayed while obtaining company approval, and where a lay insurance official disapproved treatment advised by a doctor.

In 1936, five private associations were selling prepaid medical certificates in Oregon, and doctors of that State, alarmed at the extent to which private practice was being invaded and superseded by contract practice, commenced a crusade to stamp it out. A tooth-and-claw struggle ensued between the organized medical profession, on the one hand, and the organizations employing contract doctors on the other. The campaign was bitter on both sides. State and county medical societies adopted resolutions and policy statements condemning contract practice and physicians who engaged in it. They brought pressure on individual doctors to decline or abandon it. They threatened expulsion from medical societies, and one society did expel several doctors for refusal to terminate contract practices.

However, in 1941, seven years before this action was commenced, there was an abrupt about-face on the part of the organized medical profession in Oregon. It was apparently convinced that the public demanded and was entitled to purchase protection against unexpected costs of disease and accident, which are catastrophic to persons without reserves. The organized doctors completely re-

versed their strategy, and, instead of trying to discourage prepaid medical service, decided to render it on a nonprofit basis themselves.

In that year, Oregon Physicians' Service, one of the defendants in this action, was formed. It is a nonprofit Oregon corporation, furnishing prepaid medical, surgical, and hospital care on a contract basis. As charged in the complaint, "It is sponsored and approved by the Oregon State Medical Society and is controlled and operated by members of that society. It sponsors, approves, and cooperates with component county societies and organizations controlled by the latter which offer prepaid medical plans." 95 F. Supp., at 121. After seven years of successful operation, the Government brought this suit against the doctors, their professional organizations and their prepaid medical care company, asserting two basic charges: first, that they conspired to restrain and monopolize the business of providing prepaid medical care in the State of Oregon, and, second, that they conspired to restrain competition between doctor-sponsored prepaid medical plans within the State of Oregon in that Oregon Physicians' Service would not furnish prepaid medical care in an area serviced by a local society plan.

The District Judge, after a long trial, dismissed the complaint on the ground that the Government had proved none of its charges by a preponderance of evidence. The direct appeal procedure does not give us the benefit of review by a Court of Appeals of findings of fact.

The appeal brings to us no important questions of law or unsettled problems of statutory construction. It is much like *United States* v. *Yellow Cab Co.*, 338 U. S. 338. Its issues are solely ones of fact. The record is long, replete with conflicts in testimony, and includes quantities of documentary material taken from the appellees' files and letters written by doctors, employers, and employees. The Government and the appellees each put more than

two score of witnesses on the stand. At the close of the trial the judge stated that his work "does not permit the preparation of a formal opinion in so complex a case. I will state my conclusions on the main issues and then will append some notes made at various stages throughout the trial. These may be of aid to counsel in the preparation of Findings of Fact and Conclusions of Law to be submitted as a basis for final judgment." 95 F. Supp., at 104. These notes indicated his disposition of the issues, but the Government predicates a suggestion of bias on irrelevant soliloquies on socialized medicine, socialized law, and the like, which they contained. Admitting that these do not add strength or persuasiveness to his opinion, they do not becloud his clear disposition of the main issues of the case, in all of which he ruled against the Government. Counsel for the doctors submitted detailed findings in accordance therewith. The Government did not submit requests to find, but by letter raised objections to various proposals of the appellees.

The trial judge found that appellees did not conspire to restrain or attempt to monopolize prepaid medical care in Oregon in the period 1936–1941, and that, even if such conspiracy during that time was proved, it was abandoned in 1941 with the formation of Oregon Physicians' Service marking the entry of appellees into the prepaid medical care business. He ruled that what restraints were proved could be justified as reasonable to maintain proper standards of medical ethics. He found that supplying prepaid medical care within the State of Oregon by doctor-sponsored organizations does not constitute trade or commerce within the meaning of the Sherman Act, but he declined to rule on the question whether supplying prepaid medical care by the private associations is interstate commerce.

The Government asks us to overrule each of these findings as contrary to the evidence, and to find that the busi-

ness of providing prepaid medical care is interstate commerce. We are asked to review the facts and reverse and remand the case "for entry of a decree granting appropriate relief." We are asked in substance to try the case *de novo* on the record, make findings and determine the nature and form of relief. We have heretofore declined to give such scope to our review. *United States* v. *Yellow Cab Co., supra.*

While Congress has provided direct appeal to this Court, it also has provided that where an action is tried by a court without a jury "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Rule 52 (a), Fed. Rules Civ. Proc. There is no case more appropriate for adherence to this rule than one in which the complaining party creates a vast record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses.

The trial court rejected a grouping by the Government of its evidentiary facts into four periods, 1930–1936, the year 1936, 1936–1941, and 1941 to trial. That proposal projected the inquiry over an eighteen-year period before the action was instituted. The court accepted only the period since the organization of Oregon Physicians' Service as significant and rejected the earlier years as "ancient history" of a time "when the Doctors were trying to find themselves. . . . It was a period of groping for the correct position to take to accord with changing times." 95 F. Supp., at 105. Of course, present events have roots in the past, and it is quite proper to trace currently questioned conduct backwards to illuminate its connections and meanings. But we think the trial judge was quite right in rejecting pre-1941 events as establishing the cause of action the Government was trying to

maintain, and adopt his division of the time involved into two periods, 1936–1941, and 1941 to trial.

It will simplify consideration of such cases as this to keep in sight the target at which relief is aimed. The sole function of an action for injunction is to forestall future violations. It is so unrelated to punishment or reparations for those past that its pendency or decision does not prevent concurrent or later remedy for past violations by indictment or action for damages by those injured. All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or recur. This established, it adds nothing that the calendar of years gone by might have been filled with transgressions. Even where relief is mandatory in form, it is to undo existing conditions, because otherwise they are likely to continue. In a forward-looking action such as this, an examination of "a great amount of archeology" [4] is justified only when it illuminates or explains the present and predicts the shape of things to come.

When defendants are shown to have settled into a continuing practice or entered into a conspiracy violative of antitrust laws, courts will not assume that it has been abandoned without clear proof. *Local 167* v. *United States,* 291 U. S. 293, 298. It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption. Cf. *United States* v. *United States Steel Corp.,* 251 U. S. 417, 445.

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[4] Judge Augustus Hand, "Trial Efficiency," dealing with antitrust cases, Business Practices Under Federal Antitrust Laws, Symposium, New York State Bar Assn. (C. C. H. 1951) 31–32. See also Sec. VIII, Procedure in Anti-Trust and Other Protracted Cases, a Report adopted September 26, 1951, by the Judicial Conference of the United States.

But we find not the slightest reason to doubt the genuineness, good faith or permanence of the changed attitude and strategy of these defendant-appellees which took place in 1941. It occurred seven years before this suit was commenced and, so far as we are informed, before it was predictable. It did not consist merely of pretensions or promises but was an overt and visible reversal of policy, carried out by extensive operations which have every appearance of being permanent because wise and advantageous for the doctors. The record discloses no threat or probability of resumption of the abandoned warfare against prepaid medical service and the contract practice it entails. We agree with the trial court that conduct discontinued in 1941 does not warrant the issuance of an injunction in 1949. *Industrial Assn.* v. *United States,* 268 U. S. 64, 84.

Appellees, in providing prepaid medical care, may engage in activities which violate the antitrust laws. They are now competitors in the field and restraints, if any are to be expected, will be in their methods of promotion and operation of their own prepaid plan. Our duty is to inquire whether any restraints have been proved of a character likely to continue if not enjoined.

Striking the events prior to 1941 out of the Government's case, except for purposes of illustration or background information, little of substance is left. The case derived its coloration and support almost entirely from the abandoned practices. It would prolong this opinion beyond useful length, to review evidentiary details peculiar to this case. We mention what appear to be some highlights.

Only the Multnomah County Medical Society resorted to expulsions of doctors because of contract-practice activities, and there have been no expulsions for such cause since 1941. There were hints in the testimony that Multnomah was reviving the expulsion threat a short

time before this action was commenced, but nothing came of it, and what that Society might do within the limits of its own membership does not necessarily indicate a joint venture or conspiracy with other appellees.

Some emphasis is placed on a report of a meeting of the House of Delegates of the State Society at which it was voted that the "private patient status" policy theretofore applied to private commercial hospital association contracts be extended to the industrial and railroad type of contracts. Any significance of this provision seems neutralized by another paragraph in the same report, which reads: "A receipt should be furnished each patient at the time of each visit, as it is understood the [industrial and railroad plan] companies concerned will probably establish a program of reimbursement to the affected employees." That does not strike us as a threat to restrict the practice of industrial and railroad companies of reimbursing employees for medical expenses and we cannot say that any ambiguity was not properly resolved in appellees' favor by the trial court.

The record contains a number of letters from doctors to private associations refusing to accept checks directly from them. Some base refusal on a policy of their local medical society, others are silent as to reasons. Some may be attributed to the writers' personal resistance to dealing directly with the private health associations, for it is clear that many doctors objected to filling out the company forms and supplying details required by the associations, and preferred to confine themselves to direct dealing with the patient and leaving the patient to deal with the associations. Some writers may have mistaken or misunderstood the policy of local associations. Others may have avoided disclosure of personal opposition by the handy and impersonal excuse of association "policy." The letters have some evidentiary value, but it is not compelling and, weighed against the other post-1941 evi-

dence, does not satisfy us that the trial court's findings are "clearly erroneous."

Since no concerted refusal to deal with private health associations has been proved, we need not decide whether it would violate the antitrust laws. We might observe in passing, however, that there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters. This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession. *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608.

Appellees' evidence to disprove conspiracy is not conclusive, is necessarily largely negative, but is too persuasive for us to say it was clear error to accept it. In 1948, 1,210 of the 1,660 licensed physicians in Oregon were members of the Oregon State Medical Society, and between January 1, 1947, and June 30, 1948, 1,085 Oregon doctors billed and received payment directly from the Industrial Hospital Association, only one of the several private plans operating in the State. Surely there was no effective boycott, and ineffectiveness, in view of the power over its members which the Government attributes to the Society, strongly suggests the lack of an attempt to boycott these private associations. A parade of local medical society members from all parts of the State, apparently reputable, credible, and informed professional men, testified that their societies now have no policy of discrimination against private health associations, and that no attempts are made to prevent individual doctors from cooperating with them. Members of the governing councils of the State and Multnomah County Societies testified that since 1940 there have been no suggestions in their meetings of attempts to prevent individual doctors from serving private associations. The manager of Ore-

gon Physicians' Service testified that at none of the many meetings and conferences of local societies attended by him did he hear any proposal to prevent doctors from cooperation with private plans.

If the testimony of these many responsible witnesses is given credit, no finding of conspiracy to restrain or monopolize this business could be sustained. Certainly we cannot say that the trial court's refusal to find such a conspiracy was clearly erroneous.

The other charge is that appellees conspired to restrain competition between the several doctor-sponsored organizations within the State of Oregon. The charge here, as we understand it from paragraph 33 (i) of the complaint, 95 F. Supp., at 124, is that Oregon Physicians' Service, the state-wide organization, and the county-medical-society-sponsored plans agreed not to compete with one another. Apparently if a county was provided with prepaid medical care by a local society, the state society would stay out, or if the county society wanted to inaugurate a local plan, the state society would withdraw from the area.

This is not a situation where suppliers of commercial commodities divide territories and make reciprocal agreements to exploit only the allotted market, thereby depriving allocated communities of competition. This prepaid plan does not supply to, and its allocation does not withhold from, any community medical service or facilities of any description. No matter what organization issues the certificate, it will be performed, in the main, by the local doctors. The certificate serves only to prepay their fees. The result, if the state association should enter into local competition with the county association, would be that the inhabitants could prepay medical services through either one of two medical society channels. There is not the least proof that duplicating sources of the prepaid certificates would make them cheaper, more available or

would result in an improved service or have any beneficial effect on anybody. Through these nonprofit organizations the doctors of each locality, in practical effect, offer their services and hospitalization on a prepaid basis instead of on the usual cash fee or credit basis. To hold it illegal because they do not offer their services simultaneously and in the same locality through both a state and a county organization would be to require them to compete with themselves in sale of certificates. Under the circumstances proved here, we cannot regard the agreement by these nonprofit organizations not to compete as an unreasonable restraint of trade in violation of the Sherman Act.

With regard to this charge, the court found, "The sale of medical services, by Doctor Sponsored Organizations, as conducted within the State of Oregon, is not trade or commerce within the meaning of Section 1 of the Sherman Anti-Trust Law, nor is it commerce within the meaning of the constitutional grant of power to Congress 'To regulate Commerce . . . among the several States.' " 95 F. Supp., at 118. If that finding in both aspects is not to be overturned as clearly erroneous, it, of course, disposes of this charge, for if there was no restraint of interstate commerce, the conduct charged does not fall within the prohibitions of the Sherman Act.

Almost everything pointed to in the record by the Government as evidence that interstate commerce is involved in this case relates to across-state-line activities of the private associations. It is not proven, however, to be adversely affected by any allocation of territories by doctor-sponsored plans. So far as any evidence brought to our attention discloses, the activities of the latter are wholly intrastate. The Government did show that Oregon Physicians' Service made a number of payments to out-of-state doctors and hospitals, presumably for treatment of policyholders who happened to remove or temporarily to

be away from Oregon when need for service arose. These were, however, few, sporadic and incidental. Cf. *Industrial Assn.* v. *United States, supra,* at 84.

*American Medical Assn.* v. *United States,* 317 U. S. 519, does not stand for the proposition that furnishing of prepaid medical care on a local plane is interstate commerce. That was a prosecution under § 3 of the Sherman Act of a conspiracy to restrain trade or commerce in the District of Columbia. Interstate commerce was not necessary to the operation of the statute there.

We conclude that the Government has not clearly proved its charges. Certainly the court's findings are not clearly erroneous. "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.,* 333 U. S. 364, 395. The Government's contentions have been plausibly and earnestly argued but the record does not leave us with any "definite and firm conviction that a mistake has been committed."

As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: "Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal." *Boyd* v. *Boyd,* 252 N. Y. 422, 429, 169 N. E. 632, 634.

Affirmance is, of course, without prejudice to future suit if practices in conduct of the Oregon Physicians' Service or the county services, whether or not involved

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in the present action, shall threaten or constitute violation of the antitrust laws. Cf. *United States* v. *Reading Co.*, 226 U. S. 324, 373.

*Judgment affirmed.*

MR. JUSTICE BLACK is of opinion that the judgment below is clearly erroneous and should be reversed.

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

Syllabus.

# MADSEN *v.* KINSELLA, WARDEN.

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

No. 411. Argued January 8, 1952.—Decided April 28, 1952.

The United States Court of the Allied High Commission for Germany had jurisdiction, in 1950, to try petitioner, a civilian citizen of the United States who was the dependent wife of a member of the United States Armed Forces, on a charge of murdering her husband, in October 1949, within the United States Area of Control in Germany, in violation of § 211 of the German Criminal Code. Pp. 342–362.

1. Both United States courts-martial and United States Military Commissions or tribunals in the nature of such commissions had jurisdiction in Germany in 1949–1950 to try persons in the status of petitioner on the charge against her. Pp. 345–355.

(a) The jurisdiction of United States courts-martial over this case was concurrent with, not exclusive of, that of the occupation courts. Pp. 345–355.

(b) The provisions added in 1916 by Articles 2 and 12 of the Articles of War, extending the jurisdiction of courts-martial over civilian offenders and over certain nonmilitary offenses, did not deprive military commissions and other military tribunals of whatever jurisdiction they then had over such offenders and offenses, since that concurrent jurisdiction was preserved to such commissions and tribunals by Article 15. Pp. 350–355.

2. The United States Courts of the Allied High Commission for Germany were, at the time of the trial of petitioner's case, tribunals in the nature of military commissions conforming to the Constitution and laws of the United States. Pp. 356–360.

(a) The fact that the occupation statute took effect prior to the date of the crime did not vitiate the constitutional authority for petitioner's trial by military commission. P. 360.

3. Petitioner and the offense charged against her came within the jurisdiction assigned to the court which tried her. Pp. 360–362.

(a) Military Government Ordinance No. 31 expressly gave to the occupation courts jurisdiction over civilian men and women who were subject to military law, and petitioner was a "person subject to military law" within the definition of Article of War 2 (d). Pp. 360–361.

(b) The requirement of Article 7 of Military Government Ordinance No. 31, that no person subject to military law shall be

brought to trial for any offense "except upon authorization of the Commander-in-Chief, European Command," was satisfied in this case. P. 361.

(c) The German Criminal Code was applicable to petitioner's offense by virtue of its express adoption by the United States Military Government. Pp. 361–362.

(d) The United States expressly required that its civilians be tried by its occupation courts rather than by the German courts. P. 362.

4. The jurisdiction of the United States Courts of the Allied High Commission for Germany to try petitioner being established, the judgment of the Court of Appeals affirming the discharge of the writ of habeas corpus for petitioner's release from custody is affirmed. P. 362.

188 F. 2d 272, affirmed.

In a habeas corpus proceeding seeking petitioner's release from federal custody, the District Court discharged the writ and remanded petitioner to the custody of respondent. 93 F. Supp. 319. The Court of Appeals affirmed. 188 F. 2d 272. This Court granted certiorari. 342 U. S. 865. *Affirmed,* p. 362.

*Joseph S. Robinson* argued the cause for petitioner. With him on the brief were *Dayton M. Harrington* and *James D. Graham, Jr.*

*Robert W. Ginnane* argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg, J. F. Bishop* and *John M. Raymond.*

Mr. Justice Burton delivered the opinion of the Court.

The principal question here is whether a United States Court of the Allied High Commission for Germany had jurisdiction, in 1950, to try a civilian citizen of the United States, who was the dependent wife of a member of the United States Armed Forces, on a charge of murdering her husband in violation of § 211 of the German Criminal

Code. The homicide occurred in October, 1949, within the United States Area of Control in Germany. For the reasons hereafter stated, we hold that such court had that jurisdiction.

The present proceeding originates with a petition for a writ of habeas corpus filed by petitioner, Yvette J. Madsen, in the United States District Court for the Southern District of West Virginia, seeking her release from the Federal Reformatory for Women in West Virginia where she is serving a sentence imposed by a United States Court of the Allied High Commission for Germany. She contends that her confinement is invalid because the court which convicted and sentenced her had no jurisdiction to do so. The District Court, after a hearing based on exhibits and agreed facts, discharged the writ and remanded petitioner to the custody of the respondent warden of the reformatory. 93 F. Supp. 319. The Court of Appeals affirmed. 188 F. 2d 272. Because of the importance and novelty of the jurisdictional issues raised, we granted certiorari. 342 U. S. 865.

I. *Petitioner's status in Germany.*—Petitioner is a native-born citizen of the United States who lawfully entered the American Zone of Occupied Germany in 1947 with her husband, Lieutenant Madsen of the United States Air Force. In 1949, she resided there, with him, in a house requisitioned for military use, furnished and maintained by military authority. She was permitted to use the facilities of the United States Army maintained there for persons in its service and for those serving with or accompanying the United States Armed Forces. In brief, her status was that of a civilian dependent wife of a member of the United States Armed Forces which were then occupying the United States Area of Control in Germany.

October 20, 1949, following her fatal shooting of her husband at their residence at Buchschleg, Kreis Frankfurt, Germany, she was arrested there by the United

States Air Force Military Police. On the following day, before a "United States Military Government Court," [1] she was charged with the murder of her husband in violation of § 211 of the German Criminal Code.[2] In February, 1950, she was tried by "The United States Court of the Allied High Commission for Germany, Fourth Judicial District." [3] That court was composed of three United States civilians, two of whom had been appointed as district judges and one as a magistrate by or under the authority of the Military Governor of the United States Area of Control.[4] The court adjudged her guilty and sen-

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[1] See United States Military Government Ordinance No. 31, August 18, 1948, 14 Fed. Reg. 124–128. See Appendix, *infra,* p. 365.

[2] The agreed statement of facts states:

"4. Section 211 of the German Criminal Code reads as follows in English translation:

" '*Murder—Mord*

" '211. (*As in force prior to 4 September 1941*). Whoever intentionally kills a human being is guilty of murder if the killing was accomplished with premeditation, and shall be punished by death.

" '211. (*As amended 4 September 1941, RGBI I, 549*). The murderer shall be punished by death.

" 'A murderer is hereby defined as one who kills a human being out of the morbid desire to kill (Mordlust);

" 'For the satisfaction of sexual desire;

" 'For cupidity (Habgier) or any other base motives;

" 'In a treacherous or cruel manner or by means causing common danger, or

" 'In order to make possible or to conceal another offense.

" 'If, in especially exceptional cases, the death penalty is not suitable (angemessen), punishment of confinement for life in a penitentiary shall be imposed.' "

The agreed statement also contains a translation of §§ 44 and 51 of the German Criminal Code providing for reduction of sentence under circumstances which were deemed applicable to petitioner by the trial court.

[3] See Allied High Commission, Law No. 1, Art. 1, December 28, 1949, 15 Fed. Reg. 2086, Appendix, *infra,* pp. 370–371.

[4] See United States Military Government Ordinance No. 31, Art. 13, August 18, 1948, 14 Fed. Reg. 127.

tenced her to 15 years in the Federal Reformatory for Women at Alderson, West Virginia, or elsewhere as the Secretary of the Army might direct. In May, the "Court of Appeals of the United States Courts of the Allied High Commission for Germany," composed of five United States civilians appointed by the Military Governor of the Area,[5] affirmed the judgment but committed her to the custody of the Attorney General of the United States or his authorized representative. The Director of the United States Bureau of Prisons designated the Federal Reformatory for Women at Alderson, West Virginia, as the place for her confinement.[6]

II. *Both United States courts-martial, and United States Military Commissions or tribunals in the nature of such commissions, had jurisdiction in Germany in 1949–1950 to try persons in the status of petitioner on the charge against her.*—Petitioner does not here attack the merits of her conviction nor does she claim that any nonmilitary court of the United States or Germany had jurisdiction to try her.[7] It is agreed by the parties to this proceeding that a regularly convened United States general court-martial would have had jurisdiction to try her. The United States, however, contends, and petitioner denies, that the United States Court of the Allied High Commission for Germany, which tried her, also had jurisdiction

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[5] See notes 1, 3 and 4, *supra*.

[6] See 38 Stat. 1084–1085, 10 U. S. C. § 1452, and, since May 31, 1951, see Art. 58 of the Uniform Code of Military Justice, 64 Stat. 126, 50 U. S. C. (Supp. IV) § 639.

[7] There was no nonmilitary court of the United States in Germany. She enjoyed the immunity from the jurisdiction of all German courts which had been granted to nationals of the United Nations and to families of members of the occupation forces. United States Military Government Law No. 2, Art. VI (1), 12 Fed. Reg. 2191, 2192, Appendix, *infra*, p. 364; Allied High Commission, Law No. 2, Art. 1, 14 Fed. Reg. 7457, Appendix, *infra*, p. 369; Allied High Commission, Law No. 13, Art. 1, 15 Fed. Reg. 1056–1057, see Appendix, *infra*, p. 370.

to do so. In other words, the United States contends that its courts-martial's jurisdiction was concurrent with that of its occupation courts, whereas petitioner contends that it was exclusive of that of its occupation courts.

The key to the issue is to be found in the history of United States military commissions [8] and of United States occupation courts in the nature of such commissions. Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war.[9] They have been called our common-law war

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[8] "By a practice dating from 1847 and renewed and firmly established during the Civil War, military commissions have become adopted as authorized tribunals in this country in time of war. They are simply criminal war courts, resorted to for the reason that the jurisdiction of courts-martial, creatures as they are of statute, is restricted by law, and can not be extended to include certain classes of offenses which in war would go unpunished in the absence of a provisional forum for the trial of the offenders. . . . There [Their] competency has been recognized not only in acts of Congress, but in executive proclamations, in rulings of the courts, and in the opinions of the Attorneys General. During the Civil War they were employed in several thousand cases; . . . ." Howland, Digest of Opinions of the Judge-Advocates General of the Army (1912), 1066–1067.

[9] In speaking of the authority and occasion for the use of a military commission, Colonel William Winthrop, in his authoritative work on Military Law and Precedents (2d ed. 1920 reprint), says at 831: ". . . it is those provisions of the Constitution which empower Congress to 'declare war' and 'raise armies,' and which, in authorizing the initiation of *war*, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction. Its authority is thus the same as the authority for the making and waging of war and for the exercise of military government and martial law. The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war. In some instances . . . Congress has specifically recognized the military commission as the proper war-court, and in terms provided for the trial thereby of certain offences. In

courts.[10] They have taken many forms and borne many names.[11] Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in

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general, however, it has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war and other offences not cognizable by court-martial.

"The *occasion* for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offences defined in a written code. It does not extend to many criminal acts, especially of civilians, peculiar to time of war; and for the trial of these a different tribunal is required. . . . Hence, in our military law, the distinctive name of *military commission* has been adopted for the exclusively war-court, which . . . is essentially a distinct tribunal from the court-martial of the Articles of war."

For text of General Scott's General Order No. 20, as amended by General Order No. 287, September 17, 1847, authorizing the appointment of military commissions in Mexico, see Birkhimer, Military Government and Martial Law (2d ed. rev. 1904), App. I, 581–582. See also, *Duncan* v. *Kahanamoku*, 327 U. S. 304; *In re Yamashita*, 327 U. S. 1; *Santiago* v. *Nogueras*, 214 U. S. 260; *Neely* v. *Henkel*, 180 U. S. 109; *Mechanics' & Traders' Bank* v. *Union Bank*, 22 Wall. 276, 279 note; *The Grapeshot*, 9 Wall. 129, 132; *Cross* v. *Harrison*, 16 How. 164, 190; II Halleck, International Law (3d ed. 1893), 444–445. For an example of the exercise of jurisdiction in a murder case by a Provisional Court established in Louisiana, in 1862, by executive order of the President of the United States and an opinion by the Provisional Judge reviewing the constitutional authority for the establishment of his court, see *United States* v. *Reiter*, 27 Fed. Cas. No. 16,146.

[10] While explaining a proposed reference to military commissions in Article of War 15, Judge Advocate General Crowder, in 1916, said, "A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law." S. Rep. No. 130, 64th Cong., 1st Sess. 40.

[11] Such as Military Commission, Council of War, Military Tribunal, Military Government Court, Provisional Court, Provost Court, Court of Conciliation, Arbitrator, Superior Court, and Appellate Court. And see Winthrop, *op. cit.* 803–804.

each instance to the need that called it forth. See *In re Yamashita,* 327 U. S. 1, 18–23.

In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States. His authority to do this sometimes survives cessation of hostilities.[12] The President has the urgent and infinite responsibility not only of combating the enemy but of governing any territory occupied by the United States by force of arms.[13] The policy of Congress to refrain from legislating in this

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[12] It has been recognized, even after peace has been declared, pending complete establishment of civil government. See *Duncan* v. *Kahanamoku,* 327 U. S. 304; *In re Yamashita,* 327 U. S. 1, 12–13; *Santiago* v. *Nogueras,* 214 U. S. 260; *Neely* v. *Henkel,* 180 U. S. 109; *Burke* v. *Miltenberger,* 19 Wall. 519; *Leitensdorfer* v. *Webb,* 20 How. 176; *Cross* v. *Harrison,* 16 How. 164.

[13] See Article 43 of The Hague Regulations respecting the laws and customs of war on land with special relation to military authority over the territory of a hostile state (1907):

"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." 36 Stat. 2306.

"Military government . . . is an exercise of sovereignty, and as such dominates the country which is its theatre in all the branches of administration. Whether administered by officers of the army of the belligerent, or by civilians left in office or appointed by him for the purpose, it is the government of and for all the inhabitants, native or foreign, wholly superseding the local law and civil authority except in so far as the same may be permitted by him to subsist. . . . The local laws and ordinances may be left in force, and in general should be, subject however to their being in whole or in part suspended and others substituted in their stead—in the discretion of the governing authority." Winthrop, *op. cit.* 800.

uncharted area does not imply its lack of power to legislate. That evident restraint contrasts with its traditional readiness to "make Rules for the Government and Regulation of the land and naval Forces; . . . ." [14] Under that clause Congress has enacted and repeatedly revised the Articles of War which have prescribed, with particularity, the jurisdiction and procedure of United States courts-martial.

Originally Congress gave to courts-martial jurisdiction over only members of the Armed Forces and civilians rendering functional service to the Armed Forces in camp or in the field.[15] Similarly the Articles of War at first dealt with nonmilitary crimes only by surrendering the accused to the civil authorities. Art. 33, American Articles of War of 1806, Winthrop's Military Law and Precedents (2d ed. 1920 reprint) 979. However, in 1863, this latter jurisdiction was enlarged to include many crimes "committed by persons who are in the military service of the United States . . . ." [16] Still it did not cover crimes committed by civilians who, like petitioner, were merely accompanying a member of the Armed Forces.

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[14] U. S. Const., Art. I, § 8, cl. 14.

[15] Article XXXII of the American Articles of War of 1775 was taken from Article XXIII of Section XIV of the British Articles of War of 1765. It provided only that "All *suttlers and retailers* to a camp, and all persons whatsoever, *serving with the continental army in the field,* though not inlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army." (Emphasis supplied.) Winthrop's Military Law and Precedents (2d ed. 1920 reprint) 956, and see 941 and 950. Article 60 of the Articles of War of 1806 was similar. It substituted "retainers" for "retailers." *Id.,* at 981. Article 60 was slightly amended in 1874. By 1916, as Article 63, Congress still provided, as to civilians, merely that "*All retainers to the camp,* and all persons *serving with* the armies of the United States *in the field,* though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war." (Emphasis supplied.) *Id.,* at 991, and see 98–99.

[16] The Enrollment Act of 1863 conferred upon courts-martial jurisdiction over many nonmilitary crimes if committed by soldiers in

Finally, in 1916, when Congress did revise the Articles of War so as to extend the jurisdiction of courts-martial to include civilian offenders in the status of petitioner, it expressly preserved to "military commissions, provost courts, or other military tribunals" all of their existing concurrent jurisdiction by adding a new Article which read in part as follows:

"II. COURTS-MARTIAL.

. . . . . .

"C. JURISDICTION.

. . . . . .

"ART. 15. NOT EXCLUSIVE.—The provisions of these articles conferring jurisdiction upon courts-martial

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time of war. That Act incidentally recognized a concurrent jurisdiction over such crimes in military commissions:

"SEC. 30. . . . in time of war, insurrection, or rebellion, murder, assault and battery with an intent to kill, manslaughter . . . shall be *punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war;* and the punishments for such offences shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed." (Emphasis supplied.) 12 Stat. 736.

In the codification published as the Revised Statutes of 1874, the incidental reference to military commissions was omitted. Article of War 58 at 234. Petitioner attaches substantial significance to the omission. It seems clear, however, that regardless of what effect, if any, may attach to that omission in its relation to the jurisdiction of military commissions over persons *in* the military service, it has no effect on the jurisdiction of military commissions over *civilians not "in* the military service." This section of the Act of 1863 was enacted so as to place soldiers who committed certain nonmilitary crimes under the jurisdiction of military courts. See *Caldwell* v. *Parker,* 252 U. S. 376. The section did not relate to the jurisdiction of courts or commissions over civilians not *in* the military service. Cong. Globe, 37th Cong., 3d Sess. 988, 1256, 1377, 1384 (1863). For discussion of the phrase "in the military service" as used in Articles 58 and 60, see Gen. Crowder's testimony. S. Rep. No. 229, 63d Cong., 2d Sess. 104.

> shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals." 39 Stat. 651, 652, 653.[17]

Article 15 thus forestalled precisely the contention now being made by petitioner. That contention is that certain provisions, added in 1916 by Articles 2 and 12 extending the jurisdiction of courts-martial over civilian offenders and over certain nonmilitary offenses, auto-

[17] In 1920, Article of War 15 was reenacted with the addition of "by statute or" before the words "by the law of war." 41 Stat. 790, 10 U. S. C. § 1486. It was in that form in 1949 and 1950. It was again reenacted May 5, 1950, as the present Article 21 of the Uniform Code of Military Justice, effective May 31, 1951. 64 Stat. 115, 145, 50 U. S. C. (Supp. IV) § 581. The hearings, in 1949, on the latter legislation are of some significance here. They disclosed that the United States Military Government Courts in Germany were then exercising, in the occupied territory, criminal jurisdiction over United States civilians accompanying the Armed Forces. Attention even was called to the recent case of Wilma B. Ybarbo. Like petitioner in the instant case, she was a civilian dependent wife of a member of the United States Armed Forces in Germany, charged with the murder of her husband in violation of the German Criminal Code. She was convicted by the United States Military Government Court for the Third Judicial District. The Court of Appeals of the United States Military Government Courts, March 14, 1949, upheld her conviction, on a lesser charge, and sentenced her to five years' imprisonment. In its opinion, the latter court reviewed the basis for its jurisdiction. *United States Military Government* v. *Ybarbo,* 1 U. S. M. G. Court of Appeals 207. See also, Hearings before a Subcommittee of the House Committee on Armed Services on H. R. 2498, Uniform Code of Military Justice, 81st Cong., 1st Sess. 876, 975, 1061. With this practice before them, the Committees of both Houses of Congress recommended the reenactment of Article of War 15 as Article 21 of the new code. They said, "This article preserves existing Army and Air Force law which gives concurrent jurisdiction to military tribunals other than courts martial." S. Rep. No. 486, 81st Cong., 1st Sess. 13; H. R. Rep. No. 491, 81st Cong., 1st Sess. 17.

matically deprived military commissions and other military tribunals of whatever existing jurisdiction they then had over such offenders and offenses. Articles 2 and 12, together, extended the jurisdiction of courts-martial so as to include "all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States . . . ." [18] The 1916 Act also increased the nonmilitary offenses for which civilian offenders could be tried by courts-martial.[19] Article 15, however, completely disposes of that contention. It states unequivocally that Congress has not deprived such commissions or tribunals of the existing jurisdiction which they had over such offenders and offenses as of August 29, 1916. 39 Stat. 653, 670. See *In re Yamashita,* 327 U. S. 1, and *Ex parte Quirin,* 317 U. S. 1.

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[18] The 1916 Act substituted, for Article 63 (see note 15, *supra*), a new Article 12 which provided that *"General courts-martial shall have power to try any person subject to military law* for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: . . . ." (Emphasis supplied.) 39 Stat. 652, 41 Stat. 789, 62 Stat. 629, 10 U. S. C. (Supp. IV) § 1483. A new Article 2 then defined *"any person subject to military law"* so as to include—

"(d) All retainers to the camp and *all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States,* and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles; . . . ." (Emphasis supplied.) 39 Stat. 651, 41 Stat. 787, 10 U. S. C. § 1473 (d).

[19] In 1916, new Articles 92 and 93 expanded the jurisdiction of courts-martial over murder and certain other nonmilitary crimes so as to cover their commission by any "person subject to military law." That phrase, through Article 2, included civilians in the status of petitioner. See note 18, *supra.* For Articles 92 and 93, see 39 Stat. 664, 41 Stat. 805, 62 Stat. 640, 10 U. S. C. (Supp. IV) §§ 1564, 1565. See note 16, *supra,* for the substance of Article 30 of the Articles of War of 1863 and of Article 58 of the Articles of War of 1874.

The legislative history strengthens the Government's position. During the consideration by Congress of the proposed Articles of War, in 1916, Judge Advocate General of the Army Crowder sponsored Article 15 and the authoritative nature of his testimony has been recognized by this Court. *In re Yamashita, supra,* at 19 note, 67–71. Before the Senate Subcommittee on Military Affairs he said:

> "Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation 'persons subject to military law,' and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced: . . . ."
>
> "It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient." S. Rep. No. 130, 64th Cong., 1st Sess. 40.[20]

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[20] In explaining like provisions to the House Committee on Military Affairs in 1912, General Crowder previously had said:

"The next article, No. 15, is entirely new, and the reasons for its insertion in the code are these: In our War with Mexico two war courts were brought into existence by orders of Gen. Scott, viz, the military commission and the council of war. By the military commission Gen. Scott tried cases cognizable in time of peace by civil courts, and by the council of war he tried offenses against the laws of war. The council of war did not survive the Mexican War period, and in our subsequent wars its jurisdiction has been taken over by the

The concurrent jurisdiction thus preserved is that which "by statute or *by the law of war* may be triable by such military commissions, provost courts, or other military tribunals." (Emphasis supplied.) 39 Stat. 653, 41 Stat. 790, 10 U. S. C. § 1486. The "law of war" in that connection includes at least that part of the law of nations which defines the powers and duties of belligerent powers occupying enemy territory pending the establishment of

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military commission, which during the Civil War period tried more than 2,000 cases. While the military commission has not been formally authorized by statute, its jurisdiction as a war court has been upheld by the Supreme Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved. In the new code the jurisdiction of courts-martial has been somewhat amplified by the introduction of the phrase 'Persons subject to military law.' There will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of the war courts, and the question would arise whether Congress having vested jurisdiction by statute the common law of war jurisdiction was not ousted. I wish to make it perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent.

. . . . . .

". . . I was influenced to propose the article [15] largely, perhaps, by experience during our second intervention in Cuba. It was not very long after that intervention had been inaugurated until two soldiers were charged with homicide of some natives. There was no civil court of the United States having jurisdiction. Plainly the court-martial could not try them, as the condition was not war. There were two courses open: First, to surrender them for trial before a Cuban court . . . the second course was to utilize the extraordinary authority which inhered in the office of the provisional governor and which extended to the making of laws, to promulgate a special decree creating a provisional court for the trial of these men. This second course was followed, and the accused soldiers were tried by a court composed of officers of the Army, which administered the provisions of the Spanish criminal code. Should we be confronted again with the necessity of intervention, that situation is likely to repeat itself." S. Rep. No. 229, 63d Cong., 2d Sess. 53, 98–99.

civil government.[21] The jurisdiction exercised by our military commissions in the examples previously mentioned extended to nonmilitary crimes, such as murder and other crimes of violence, which the United States as the occupying power felt it necessary to suppress. In the case of *In re Yamashita,* 327 U. S. 1, 20, following a quotation from Article 15, this Court said, "By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in *Ex parte Quirin,* to any use of the military commission contemplated by the common law of war." [22] The enlarged jurisdiction of the courts-martial therefore did not exclude the concurrent jurisdiction of military commissions and of tribunals in the nature of such commissions.

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[21] See note 9, *supra.*

[22] In *Ex parte Quirin,* 317 U. S. 1, 28, this Court said:

"By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war."

In that case the military commission's conviction of saboteurs, including one citizen of the United States, was upheld on charges of violating the law of war as defined by statute. *Id.,* at 35–38.

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III. *The United States Courts of the Allied High Commission for Germany were, at the time of the trial of petitioner's case, tribunals in the nature of military commissions conforming to the Constitution and laws of the United States.*—Under the authority of the President as Commander-in-Chief of the United States Armed Forces occupying a certain area of Germany conquered by the allies, the system of occupation courts now before us developed gradually. The occupation courts in Germany are designed especially to meet the needs of law enforcement in that occupied territory in relation to civilians and to nonmilitary offenses. Those courts have been directed to apply the German Criminal Code largely as it was theretofore in force. (See Appendix, *infra,* pp. 362–371, entitled "Chronology of Establishment of United States Military Government Courts and Their Jurisdiction Over Civilians in the United States Area of Control in Germany 1945–1950.") The President, as Commander-in-Chief of the Army and Navy, in 1945 established, through the Commanding General of the United States Forces in the European Theater, a United States Military Government for Germany within the United States Area of Control. Military Government Courts, in the nature of military commissions, were then a part of the Military Government. By October 20, 1949, when petitioner was alleged to have committed the offense charged against her, those courts were known as United States Military Government Courts. They were vested with jurisdiction to enforce the German Criminal Code in relation to civilians in petitioner's status in the area where the homicide occurred.

September 21, 1949, the occupation statute had taken effect. Under it the President vested the authority of the United States Military Government in a civilian acting as the United States High Commissioner for Germany. He gave that Commissioner "authority, under the immediate supervision of the Secretary of State (sub-

ject, however, to consultation with and ultimate direction by the President), to exercise all of the governmental functions of the United States in Germany (other than the command of troops) . . . ." Executive Order 10062, June 6, 1949, 14 Fed. Reg. 2965, Appendix, *infra,* p. 367; Office of the United States High Commissioner for Germany, Staff Announcement No. 1, September 21, 1949, Appendix, *infra,* p. 368. Under the Transitional Provisions of Allied High Commission, Law No. 3, Article 5, 14 Fed. Reg. 7458, Appendix, *infra,* p. 369, preexisting legislation was applied to the appropriate new authorities. Finally by Allied High Commission, Law No. 1, Article 1, 15 Fed. Reg. 2086, Appendix, *infra,* p. 370, effective January 1, 1950, the name of the "United States Military Government Courts for Germany" was changed to "United States Courts of the Allied High Commission for Germany." They derived their authority from the President as occupation courts, or tribunals in the nature of military commissions, in areas still occupied by United States troops. Although the local government was no longer a "Military Government," it was a government prescribed by an occupying power and it depended upon the continuing military occupancy of the territory.

The government of the occupied area thus passed merely from the control of the United States Department of Defense to that of the United States Department of State. The military functions continued to be important and were administered under the direction of the Commander of the United States Armed Forces in Germany. He remained under orders to take the necessary measures, on request of the United States High Commissioner, for the maintenance of law and order and to take such other action as might be required to support the policy of the United States in Germany. Executive Order 10062, *supra.*

The judges who served on the occupation courts were civilians, appointed by the United States Military Governor for Germany, and thereafter continued in office or appointed by the United States High Commissioner for Germany. Their constitutional authority continued to stem from the President. The members of the trial court were designated by the Chief Presiding District Judge as a panel to try the case. The volume of business, the size of the area, the number of civilians affected, the duration of the occupation and the need for establishing confidence in civilian procedure emphasized the propriety of tribunals of a nonmilitary character.[23] With this purpose, the Military Government Courts for Germany, substantially from their establishment, have had a less military character than that of courts-martial.[24] In 1948, provi-

[23] The Government estimates that the United States Area of Control has a German population of about 17,000,000, plus United Nations nationals, including refugees. As of November 30, 1949, it estimates that there were in Germany about 34,000 dependents of members of United States Armed Forces, plus 4,700 civilian employees with 5,000 dependents. Other United States agencies had 4,100 employees in Germany. The occupation courts have been handling at least 1,000 criminal cases a month, including from 25 to 30 cases involving American civilians. See also, general account of the development of the Military Government Courts in Clay, Decision in Germany (1950), 246–248.

[24] United States Military Government Ordinance No. 2, in 1946, provided—

"(*e*) *Article V; rights of accused.* (1) Every person accused before a Military Government Court shall be entitled:

"(i) To have in advance of trial a copy of the charges upon which he is to be tried;

"(ii) To be present at his trial, to give evidence and to examine or cross-examine any witness; but the court may proceed in the absence of the accused if the accused has applied for and been granted permission to be absent, or if the accused is believed to be a fugitive from justice;

"(iii) To consult a lawyer before trial and to conduct his own defense or to be represented at the trial by a lawyer of his own

sion was made for the appointment of civilian judges with substantial legal experience. The rights of individuals were safeguarded by a code of criminal procedure dealing with warrants, summons, preliminary hearings, trials, evidence, witnesses, findings, sentences, contempt, review of cases and appeals.[25] This subjected German and United

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choice, subject to the right of the court to debar any person from appearing before the court;

"(iv) In any case in which a sentence of death may be imposed, to be represented by an officer of the Allied Forces, if he is not otherwise represented;

"(v) To bring with him to his trial such material witnesses in his defense as he may wish, or to have them summoned by the court at his request, if practicable;

"(vi) To apply to the court for an adjournment where necessary to enable him to prepare his defense;

"(vii) To have the proceedings translated, when he is otherwise unable to understand the language in which they are conducted; . . . ." 12 Fed. Reg. 2191.

[25] United States Military Government Ordinances 32 and 33, code of criminal procedure for United States Military Government Courts for Germany, 14 Fed. Reg. 128–133.

Field Manual 27–5 (1947), at page 66, provides:

"Military government tribunals are not governed by the provisions of the Manual for Courts-Martial nor by the limitations imposed on courts-martial by Articles of War. Experience has demonstrated that in administering justice in an occupied area, it is desirable to follow forms of judicial procedure which are generally similar to the forms of procedure to which the people are accustomed."

Cf. the order of President Lincoln of October 20, 1862, establishing a Provisional Court in New Orleans, Louisiana, as a "court of record for the State of Louisiana" with a civilian as—

"a provisional judge, to hold said court, with authority to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, and particularly all such powers and jurisdiction as belong to the District and Circuit courts of the United States, *conforming his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the courts of the United States in Louisiana;* his judgments to be final and conclusive. . . . These appointments [of prosecuting attorney, marshal

States civilians to the same procedures and exhibited confidence in the fairness of those procedures.[26]

It is suggested that, because the occupation statute took effect September 21, 1949, whereas the crime charged occurred October 20, 1949, the constitutional authority for petitioner's trial by military commission expired before the crime took place. Such is not the case. The authority for such commissions does not necessarily expire upon cessation of hostilities or even, for all purposes, with a treaty of peace. It may continue long enough to permit the occupying power to discharge its responsibilities fully. *Santiago* v. *Nogueras,* 214 U. S. 260; *Neely* v. *Henkel,* 180 U. S. 109, 124; *Burke* v. *Miltenberger,* 19 Wall. 519; *Leitensdorfer* v. *Webb,* 20 How. 176; *Cross* v. *Harrison,* 16 How. 164.[27]

IV. *Petitioner and the offense charged against her came within the jurisdiction assigned to the court which tried her.*—Under United States Military Government Ordi-

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and clerk of the court] are to continue during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and the State of Louisiana." (Emphasis supplied.) *Mechanics' & Traders' Bank* v. *Union Bank,* 22 Wall. 276, 279 note; and see *United States* v. *Reiter,* 27 Fed. Cas. No. 16,146.

[26] They did not provide for juries. The presentment or indictment of a grand jury required in a federal capital case by the Fifth Amendment to the Constitution of the United States, under the terms of that Amendment, has no application to "cases arising in the land or naval forces . . . ." The right of trial by jury required in federal criminal prosecutions by the Sixth Amendment is similarly limited. See *Ex parte Quirin,* 317 U. S. 1, 40, 43–45; *Ex parte Milligan,* 4 Wall. 2, 123, 138.

[27] ". . . The status of military government continues from the inception of the actual occupation till the invader is expelled by force of arms, or himself abandons his conquest, or till, under a treaty of peace, the country is restored to its original allegiance or becomes incorporated with the domain of the prevailing belligerent." Winthrop, *op. cit.* 801.

nance No. 31, August 18, 1948, Article 7, 14 Fed. Reg. 126, Appendix, *infra,* p. 365, the United States gave its Military Government District Courts "criminal jurisdiction over all persons in the United States Area of Control except persons, other than civilians, who are subject to military, naval or air force law and are serving with any forces of the United Nations." It thus excepted from the jurisdiction of those occupation courts military men and women who were subject to military law but expressly gave those courts jurisdiction over *civilian* men and women who were subject to military law. Article of War 2 (d) further defined "any person subject to military law" as including "all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States . . . ." [28] This included petitioner.

Article 7 of United States Military Government Ordinance No. 31 further provided, however, that "No person subject to military law of the United States shall be brought to trial for any offense except upon authorization of the Commander-in-Chief, European Command." 14 Fed. Reg. 126, Appendix, *infra,* p. 365. That authorization appears in the official correspondence relating to the case of Wilma B. Ybarbo. The correspondence includes a written endorsement from the proper authority, dated December 11, 1948, covering not only the *Ybarbo* case but also the case "of any dependent of a member of the United States Armed Forces . . . ." See Appendix, *infra,* p. 367.

The applicability of the German Criminal Code to petitioner's offense springs from its express adoption by the United States Military Government. The United States Commanding General, in his Proclamation No. 2, September 19, 1945, stated that, except as abrogated, suspended or modified by the Military Government or by the Control

[28] See note 18, *supra.*

Council for Germany, "the German law in force at the time of the occupation shall be applicable in each area of the United States Zone of Occupation . . . ." 12 Fed. Reg. 6997, Appendix, *infra,* p. 363.[29] Section 211 of the German Criminal Code accordingly was applicable to petitioner on October 20, 1949. The United States also expressly required that its civilians be tried by its occupation courts rather than by the German courts. United States Military Government Law No. 2, German courts, Art. VI (i)(c) and (d), 12 Fed. Reg. 2191, 2192, Appendix, *infra,* p. 364. United States Military Government Ordinance No. 2, Art. II (2)(iii), 12 Fed. Reg. 2190–2191, Appendix, *infra,* p. 363.

The jurisdiction of the United States Courts of the Allied High Commission for Germany to try petitioner being established, the judgment of the Court of Appeals affirming the discharge of the writ of habeas corpus for petitioner's release from custody is

*Affirmed.*

## APPENDIX TO OPINION OF THE COURT.

### Chronology of Establishment of United States Military Government Courts and Their Jurisdiction Over Civilians in the United States Area of Control in Germany 1945–1950.

(*Emphasis supplied throughout except in headings.*)

1. *June 5, 1945.*—Allied Powers assumed "supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated

[29] Cf. *Dow* v. *Johnson,* 100 U. S. 158, 166; *Ketchum* v. *Buckley,* 99 U. S. 188, as illustrations of the practice of recognizing the existing law of the occupied area; and Winthrop, *op. cit.* 800.

above, of the said authority and powers does not effect the annexation of Germany." Declaration by Commanding Generals representing the United States, the Soviet Union, Great Britain and the French Provisional Government, THE AXIS IN DEFEAT—A Collection of Documents on American Policy Toward Germany and Japan, published by the United States Department of State, p. 63.

2. *July 14, 1945.*—Commanding General, United States Armed Forces in Europe, established a Military Government under his authority in the United States Zone of Occupation—Military Government—United States Area of Control, Proclamation No. 1, 12 Fed. Reg. 6997.

3. *September 19, 1945.*—Commanding General, United States Forces, European Theater, proclaimed:

> "*Article II.* Except as heretofore abrogated, suspended or modified by Military Government or by the Control Council for Germany, the German law in force at the time of the occupation shall be applicable in each area of the United States Zone of Occupation, until repealed by, or superseded by a new law enacted by the Control Council for Germany, or by Military Government or the states hereby constituted or by other competent authority." Military Government—United States Area of Control, Proclamation No. 2, 12 Fed. Reg. 6997.

4. *1946.*—Military Government Courts, as distinguished from courts-martial, were given jurisdiction over all persons in the occupied territory, including *civilians subject to military law* and over offenses under the laws of the occupied territory.

> ". . . *Article II; jurisdiction.* (1) Military Government courts shall have jurisdiction *over all persons in the occupied territory except persons other than civilians who are subject to military, naval or air force law* and are serving under the command

of the Supreme Commander, Allied Expeditionary Force, or any other Commander of any forces of the United Nations.

"(2) *Military Government Courts shall have jurisdiction over:*

"(i) All offences against the laws and usages of war.

"(ii) All offences under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces.

"(iii) *All offences under the laws of the occupied territory or of any part thereof.*" United States Military Government Ordinance No. 2, Military Government Courts, 12 Fed. Reg. 2190–2191.

5. *1946.*—German courts were denied jurisdiction in certain criminal cases, including those involving any national of the United Nations or any dependent accompanying any of the Armed Forces of any of the United Nations.

". . . *Article VI; limitations on jurisdiction.* (1) Except when expressly authorized by Control Council or Military Government Law, ordinance or regulation, or by order of the Director of Military Government of the appropriate Land, no German court shall assert or exercise jurisdiction in the following cases or classes or [of] cases:

"(i) Criminal cases involving:

"(*a*) Any of the United Nations, or

"(*b*) The Armed Forces of any of the United Nations, or

"(*c*) *Any person serving with any such Forces or a dependent accompanying any of them,* or

"(*d*) *Any national of the United Nations,* or . . . ." United States Military Government, Law No. 2, German courts, 12 Fed. Reg. 2191, 2192.

6. *August 18, 1948.*—United States Military Government Courts for Germany established.

". . . *Ordinance No. 31; United States Military Government Courts for Germany; creation of the courts*—(a) *Article 1; judicial system.* A system of courts is hereby established for the United States Area of Control of Germany . . . .

. . . . . .

"(c) *Article 3; District Courts.* (1) A District Court is hereby established for each judicial district within the United States Area of Control.

. . . . . .

"(3) Each District Court shall consist of one or more District Judges and one or more Magistrates who shall sit singly except as provided in subparagraph (5) of this paragraph.

. . . . . .

"(5) A District Court composed of three District Judges or two District Judges and a Magistrate may hear and decide any civil or criminal case, and, in the latter, may impose any lawful sentence including death. A majority of such Court shall decide any case before it, provided that no sentence of death shall be imposed except by the unanimous decision of the Court.

. . . . . .

"(8) *Where an accused is charged with an offense under German law, the Court shall be limited to the sentence or other penal provision of such law.*

. . . . . .

"JURISDICTION OF THE COURTS

"(g) *Article 7, jurisdiction of District Courts in criminal cases.* (1) District Courts shall have crim-

inal jurisdiction over all persons in the United States Area of Control except persons, other than civilians, who are subject to military, naval or air force law and are serving with any forces of the United Nations. *No person subject to military law of the United States shall be brought to trial for any offense except upon authorization of the Commander-in-Chief, European Command.* No member of an Allied Mission, visiting governmental official, or person subject to the military law of any country other than the United States, shall be brought to trial for any offense except upon authorization of the Military Governor.

"(2) *District Courts shall have jurisdiction to hear and decide cases involving:*

"(i) Offenses under legislation issued by or under the authority of the Allied Control Council;

"(ii) Offenses under United States Military Government Legislation;

"(iii) *Offenses under German law in force in the Judicial District of the Court.*" 14 Fed. Reg. 124, 125, 126.

7. *December 11, 1948.*—The Commander-in-Chief of the United States European Command endorsement addressed to the Chief Attorney, United States Military Government Courts for Germany:

"Authorization is hereby given for trial of any dependent of a member of the United States Armed Forces or of any dependent of a civilian employee of the Department of the Army for any non-military offenses before the appropriate Military Government Court established by Military Government Ordinance No. 31 unless, in a particular case, this headquarters has directed trial by Court Martial." Resp. Ex. 4, R. 71.

8. *May 12, 1949.*—Occupation statute promulgated by Military Governors and Commanders-in-Chief of the Western Zones of Germany—to become effective at a later date. It declared that—

> "1. During the period in which it is necessary that the occupation continue . . . [the occupying powers] desire and intend that the German people shall enjoy self-government to the maximum possible degree consistent with such occupation. The Federal State and the participating Laender [states] shall have, subject only to the limitations in this Instrument, full legislative, executive and judicial powers in accordance with the Basic Law and with their respective constitutions.
>
> "2. In order to ensure the accomplishment of the basic purposes of the occupation, powers in the following fields are specifically reserved . . . .
>
> . . . . . .
>
> "(e) Protection, prestige, and security of Allied forces, dependents, employees and representatives, their immunities and satisfaction of occupation costs and their other requirements; . . . ." 14 Fed. Reg. 7457.

9. *June 6, 1949.*—Executive Order 10062 of the President Establishing the Position of United States High Commissioner for Germany:

> "2. The United States High Commissioner for Germany, hereinafter referred to as the High Commissioner, shall be the supreme United States authority in Germany. The High Commissioner shall have the authority, under the immediate supervision of the Secretary of State (subject, however, to consultation with and ultimate direction by the President), to exercise all of the governmental functions of the United States in Germany (other than the command

of troops), including representation of the United States on the Allied High Commission for Germany when established, and the exercise of appropriate functions of a Chief of Mission within the meaning of the Foreign Service Act of 1946.

. . . . . .

"4. In the event that the High Commissioner shall assume his duties in accordance with this Executive Order prior to the date that the Military Government of the United States Zone of Germany is terminated, he shall during such interval report to the Secretary of Defense, through the Secretary of the Army, and shall be the United States Military Governor with all the powers thereof including those vested in the United States Military Governor under all international agreements." 14 Fed. Reg. 2965.

10. *September 21, 1949.*—Council of Allied High Commission declared occupation statute to be in force as promulgated May 12, 1949. 14 Fed. Reg. 7456.

11. *September 21, 1949.*—United States High Commissioner for Germany, in accordance with Executive Order 10062, assumed the authority residing in the United States Military Governor and the Office of Military Government for Germany for the governmental functions of the United States in Germany:

"2. The Office of the U. S. High Commissioner for Germany is hereby established as the agency through which the authority vested in the U. S. High Commissioner shall be exercised. Its organization shall be as shown in the attached charts [including U. S. High Commission Courts, Court of Appeals, District Courts], and its functions shall be assigned among its constituent elements as set forth in separate issuances, effective this date." Office of the United States High Commissioner for Germany, Staff Announcement No. 1, Resp. Ex. 1, R. 67, 68.

12. *September 21, 1949.*—The United States High Commissioner for Germany announced that the United States Courts for Germany, as established by Staff Announcement No. 1 (and previously established as the "United States Military Government Courts for Germany," pursuant to United States Military Government Ordinance No. 31) "form an independent judicial unit responsible directly to the United States High Commissioner. The integrated system provides for district judges and magistrates at the district court level and for a Chief Judge and associate judges of the Court of Appeals." Office of the United States High Commissioner for Germany, Staff Announcement No. 5, Resp. Ex. 2, R. 69. Similar announcement was made as to the Office of General Counsel and of the Chief Attorney. Staff Announcement No. 6, Resp. Ex. 3, R. 70.

13. *September 21, 1949.*—"Allied Forces" defined by Allied High Commission:

> "In the absence of any indication to the contrary, in legislation of the Allied High Commission:
>
> . . . . .
>
> "3. The expression '*Allied Forces*' shall include—
>
> "(a) The Occupation Authorities.
>
> "(b) *The Occupation Forces and their members.*
>
> "(c) Non-German nationals, civilian or military, who are serving with the Occupation Authorities.
>
> "(d) *Members of the families* and non-German persons in the service *of the persons referred to in subparagraphs (a) (b) and (c) of this paragraph.*" Allied High Commission, Law No. 2, Art. 1, 14 Fed. Reg. 7457.

14. *September 21, 1949.*—Transitional Provisions proclaimed by Allied High Commission for Germany adapting existing legislation to the provisions of the occupation statute effective September 21, 1949.

"ARTICLE 5

"References in any legislation enacted before the entry into force of the Occupation Statute to the Control Council, the Supreme Commander Allied Expeditionary Force, the Commanding General, the Armed Forces, Military Government, the Military Governor and to other authorities shall, where the context so requires or admits, be deemed to refer to the appropriate authorities exercising the particular functions mentioned in such legislation." Allied High Commission, Law No. 3, 14 Fed. Reg. 7458.

15. *November 25, 1949.*—Judicial powers were reserved, from the German courts, as to members of families of members of the Occupation Forces, thus bringing them under the jurisdiction of the occupation courts.

"The Council of the Allied High Commission enacts as follows:

"ARTICLE 1

"Except when expressly authorized, either generally or in specific cases, by the High Commissioner of the Zone in which the Court is located, *German Courts shall not exercise criminal jurisdiction:*

"(a)(i) *Over the Allied Forces; . . .*" Allied High Commission, Law No. 13, 15 Fed. Reg. 1056.

16. *December 28, 1949 (Effective January 1, 1950).*—Occupation courts were changed.

"The United States High Commissioner for Germany enacts as follows:

"ARTICLE 1

"Article 1 of United States Military Government Ordinance No. 31, 'United States Military Government Courts for Germany', is hereby amended by

changing the last sentence of said Article to read as follows:

" 'The Courts so created shall be known as the *United States Courts of the Allied High Commission for Germany.*' "

"ARTICLE 2

"Article 4 of United States Military Government Ordinance No. 31, 'United States Military Government Courts for Germany', is hereby amended by changing the first sentence of Section 2 of said Article to read as follows:

" 'The Court of Appeals shall consist of a Chief Justice and eight Associate Justices.' "

"ARTICLE 3

"Wherever the term 'United States Military Government Courts for Germany' or the terms 'Chief Judge' or 'Associate Judge' or 'Associate Judges' of the Court of Appeals are used in any legislation and regulations now in force, such terms shall be deemed to refer to the *United States Courts of the Allied High Commission for Germany* and the Chief Justice and an Associate Justice or Associate Justices of the Court of Appeals of such Courts, respectively." Allied High Commission, Law No. 1, 15 Fed. Reg. 2086.

MR. JUSTICE BLACK, dissenting.

Petitioner, a United States citizen, is now serving a fifteen-year sentence for murdering her husband. At the time of the alleged crime, she was living in the United States Area of Control in Germany with her husband who was an Air Force lieutenant on active duty in Germany. It appears that the court that tried her and the law she was judged by were not established or authorized by the

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Congress. Executive officers acting under presidential authority created the system of courts that tried her, promulgated the edicts she was convicted of violating, and appointed the judges who took away her liberty.

The very first Article of the Constitution begins by saying that "All legislative Powers herein granted shall be vested in a Congress" and no part of the Constitution contains a provision specifically authorizing the President to create courts to try American citizens. Whatever may be the scope of the President's power as Commander in Chief of the fighting armed forces, I think that if American citizens in present-day Germany are to be tried by the American Government, they should be tried under laws passed by Congress and in courts created by Congress under its constitutional authority.

## SWIFT & COMPANY *v.* UNITED STATES ET AL.

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

No. 282. Argued March 5–6, 1952.—Decided May 5, 1952.

Appellant filed a complaint before the Interstate Commerce Commission against several railroads, alleging that the charges on direct carload shipments of livestock from out-of-state points to its proposed new plant in the Chicago Packingtown area, not on the line of any line-haul carrier, are (1) unreasonable, (2) unduly prejudicial to livestock as a commodity, and (3) unduly prejudicial to appellant as against its competitors, all in violation of the Interstate Commerce Act. Appellant asked for the establishment of reasonable joint through rates for the Chicago Junction railroad and line-haul carriers serving Chicago, to include delivery of livestock to appellant's industrial siding at its proposed plant, and not to exceed the line-haul rates then in effect at the Union Stock Yards and other points of delivery on line-haul railroads in the area. The tariff complained of involves a flat additional charge for switching carload freight to and from industrial sidings and team tracks. The Commission found that the switching charge was not unreasonable or otherwise unlawful as applied to livestock and that establishment of the joint rates was not in the public interest; and dismissed the complaint. *Held:* The order of the Commission is based on findings abundantly supported by the evidence on the whole record, and must be sustained on judicial review. Pp. 375–386.

1. Whether the 70-year-old system for the delivery of livestock into Chicago at line-haul rates should be displaced by another system which would further complicate operations in a highly congested area, and which would necessitate the use of properties and services not included when the present line-haul rates and terminals were fixed, is a question committed to the administrative judgment of the Commission. Pp. 381–382.

2. The burden of showing that the switching charges were unreasonable was upon appellant; and that burden was not sustained on this record. Pp. 382–383.

3. The fact that the rate is so high that appellant finds it uneconomical to use does not in and of itself establish unreasonableness of the rate. P. 383.

4. The contention that because "dead freight" is delivered to appellant's industrial siding at the line-haul rate, it is a discrimination against livestock as a commodity to impose a switching charge in addition to the line-haul rate for delivery of livestock to the same point, cannot be sustained, in view of the Commission's findings as to the different and more complex nature of the switching services required by livestock as compared with "dead freight." *United States* v. *Baltimore & O. R. Co.*, 333 U. S. 169, distinguished. Pp. 383–385.

5. Appellant failed to sustain its burden of showing prejudicial treatment of it as compared with its competitors in localities other than Chicago, since it receives the same rates and services as others similarly situated. P. 385.

6. It is unnecessary to pass upon the question of the legality of a covenant which is said to be involved in this case, since it is not shown to have been controlling in any manner nor to have been relied upon by the Commission. Pp. 385–386.

Affirmed.

On review of an order of the Interstate Commerce Commission dismissing appellant's complaint, 274 I. C. C. 557, a three-judge District Court sustained the Commission's order. Appellant appealed directly to this Court pursuant to 28 U. S. C. §§ 1253 and 2101 (b). *Affirmed*, p. 386.

*Frederick Bernays Wiener* argued the cause for appellant. With him on the brief were *Wm. N. Strack, Arthur C. O'Meara, John P. Staley* and *Ross Dean Rynder.*

*Daniel W. Knowlton* argued the cause for the United States and the Interstate Commerce Commission, appellees. With him on the brief was *Solicitor General Perlman. Samuel R. Howell* was also of counsel for the Interstate Commerce Commission.

*Douglas F. Smith* argued the cause for the Atchison, Topeka & Sante Fe Railroad Co. et al., appellees. With him on the brief were *Kenneth F. Burgess* and *Martin M. Lucente.*

*Lee J. Quasey* argued the cause and filed a brief for the National Live Stock Producers Assn. et al., appellees.

*Nuel D. Belnap* argued the cause for the Chicago Live Stock Exchange et al., appellees. With him on the brief were *Robert N. Burchmore* and *John S. Burchmore.*

*Guy A. Gladson* and *Bryce L. Hamilton* submitted on brief for the Union Stock Yard & Transit Company of Chicago, appellee.

Mr. Justice Minton delivered the opinion of the Court.

On July 28, 1947, the appellant, Swift and Company, filed a complaint, later amended, before the Interstate Commerce Commission against the Atchison, Topeka and Santa Fe and other railroads, alleging that the charges on direct carload shipments of livestock [1] from points outside Illinois to its proposed new plant in the Chicago Packingtown area are (1) unreasonable, (2) unduly prejudicial to livestock as a commodity, and (3) unduly prejudicial to Swift as against its competitors, all in violation of the Interstate Commerce Act.[2] Swift asked for the establishment of reasonable joint through rates for line-haul carriers serving Chicago and the Chicago Junction Railroad's lessee, the Chicago River and Indiana Railroad, hereafter called Junction,[3] such joint rates to

[1] The term "direct shipments" is used to denote shipments consigned directly to the packer for slaughter, as distinguished from those shipments consigned to commission men for sale in the public livestock market.

[2] 49 U. S. C. § 1 *et seq.* Sections 1 (4) and 1 (5) require the carriers to establish just and reasonable rates; § 3 (1) prohibits the carriers from giving any undue or unreasonable preference to any particular shipper or to any particular description of traffic.

[3] A line-haul carrier is a common carrier by railroad which transports livestock and other freight in interstate traffic, as distinguished from a carrier such as Junction, which performs services in a local switching area.

include delivery of livestock to Swift's industrial siding at its proposed plant and not to exceed the line-haul rates now in effect at the Union Stock Yards and other points of delivery on line-haul railroads in the area. Swift's proposed plant, near its present plant, will be located on Junction's rails and not on those of any line-haul carrier.

After Swift filed its complaint, Junction sought to file a new tariff cancelling the present one as it applies to livestock. The present tariff provides a flat charge for switching carload freight to and from industrial sidings and team tracks; under the new tariff, Junction would not have offered switching services for livestock under any circumstances. Swift and others objected, and the filing was suspended so that the Commission could hear Swift's complaint and Junction's request together on a consolidated record.

The Commission dismissed the complaint and refused to cancel the switching tariff as to livestock. *Swift & Co.* v. *Atchison, T. & S. F. R. Co.*, 274 I. C. C. 557. Swift then sought review of the Commission's order of dismissal by a statutory three-judge District Court. That court sustained the Commission's order, and this appeal followed pursuant to 28 U. S. C. §§ 1253 and 2101 (b). No question is raised as to the Commission's refusal to cancel the switching tariff.

All livestock shipments by rail to the Chicago area are handled solely by the line-haul carriers; delivery is direct to line-haul terminals at the line-haul rate. Such terminals are the Stock Yards and those unloading pens located on switches directly adjoining a line-haul carrier's rails. Swift is the one large packer in Chicago that has such a line-haul terminal and can receive all its direct shipments of livestock at line-haul rates. This terminal, the Omaha Packing Plant, a Swift subsidiary situated two and one-half miles northeast of Swift's present plant and outside the Stock Yards district, is located on the

rails of the Burlington Railroad, a line-haul carrier. Here Swift receives its direct livestock shipments, about 6,500 carloads annually, which it trucks to its plant in the Stock Yards area.[4] The balance of the livestock delivered in Chicago, whether direct or otherwise, is delivered to the Stock Yards, with some minor exceptions, by the line-haul carriers over certain Junction running tracks to the Stock Yards unloading pens. The carriers have trackage rights on these running tracks for which a charge is paid to Junction. On direct shipments to a packer delivered to the Stock Yards, the Yards' facilities, including a vast system of runways, overpasses and tunnels, are used to drive the livestock from the unloading pens to the packer's plant. The charges for these facilities are fixed by the Secretary of Agriculture. Junction has never switched or handled any livestock except in an emergency.

The delivery of livestock in the Stock Yards area is to be contrasted with that of "dead freight." [5] The line-haul carriers make no direct deliveries of dead freight; none of the approximately 500 industries in the area have plants located on line-haul rails and the line-haul carriers do not have trackage rights over the Junction rails which lead to the plants. Consequently, all dead freight is switched by Junction and delivered to the industrial sidings or team tracks alongside of and connecting with Junction's rails.

Since Junction provides only trackage rights for the livestock shipments to the Stock Yards, the line-haul rates on livestock do not include Junction as a participating carrier. Junction does participate, however, in joint

[4] The cost of this trucking to Swift is $50,000; it is much less than the cost of either consigning the livestock to the Stock Yards and paying for their yardage facilities or paying the switching charges here in issue and having the livestock delivered to the proposed plant.

[5] Dead freight is composed of commodities other than livestock.

rates for dead freight. For any switching operation not covered by line-haul rates in which Junction participates, Junction has a flat switching charge of $28.80 per car.[6] This charge would apply to any direct shipments at Swift's proposed plant in Packingtown which, as we have noted, is not located on any line-haul rails but rather on Junction's rails.

Trains for the Stock Yards are made up at the break-up yards of the line-haul carriers, located from a few to several miles from the Stock Yards. A train coming in from the west moves to the Ashland Yards of Junction, which are divided into the North and the South Yards. The North Yards are used for the receipt, separation, and distribution of cars of dead freight and empties outbound from the packers and other industries, while the South Yards are used for cars of dead freight inbound. This division is made by three parallel running tracks owned by Junction, numbered 1102, 1103 and 1104, over which the line-haul carriers are permitted to operate in and out of the Stock Yards. Sixty-three percent of the trains to the Stock Yards area are composed exclusively of livestock. The balance are consolidated trains, carrying both livestock and dead freight.

An all-livestock train moves by line-haul carrier, using its own crew and equipment, eastward over Track 1103 to the unloading pens in the Stock Yards and is there spotted for unloading. While the cars are being unloaded, the engine cuts off, passes around to the other end of the train and couples on; when the unloading is completed, the train returns westward over Track 1102 or 1104 through Junction's Ashland Yards and back to its break-up yards with the empties. This all-livestock train is

[6] This was the figure at the time this proceeding was heard by the Commission's examiner. Subsequent authorized increases have brought the charge to $39.24.

delivered to the Stock Yards in one movement by line-haul carriers for line-haul rates.

A consolidated train moves through the Ashland Yards from the break-up yards to a certain point on Track 1103, just as an all-livestock train. In this consolidated train, the dead-freight cars are hauled just behind the engine and the livestock cars in the rear. At a certain point on Track 1103 the dead-freight cars are cut out and switched into the South Yards upon one of the nine Junction receiving tracks, from which tracks Junction later moves the dead freight to the industrial sidings and team tracks of the packers and other industries located in the area. After the dead freight has been switched to the receiving tracks, the line-haul engine returns to Track 1103 to couple onto the livestock cars and move them to the unloading pens. While the dead freight is being switched to the South Yards, Track 1103, the only means of ingress to the Stock Yards from the west, is blocked by the livestock cars remaining on the track. Sometimes as many as four trains at a time are tied up by reason of the block on Track 1103.

An all-livestock train coming in from the east does not pass through the Ashland Yards but proceeds directly to the Stock Yards from the break-up yards. However, all dead freight moves through the Ashland Yards, as would all livestock to be delivered to Swift if its complaint were granted. The fact that most of the livestock shipments are handled by the western carriers makes this portion of the transportation operation unimportant for present purposes.

If this complaint were granted, livestock would move to Swift's proposed plant in the manner of dead freight. Instead of one movement, as the line-haul movement to the Stock Yards, there would be two movements—one to the receiving tracks in the South Ashland Yards made by the line-haul carriers, and the second movement by Junction

from its South Yards to Swift's plant, located on Junction's rails. The tie-up on Track 1103, described above, would be increased accordingly as trains consigned to the Stock Yards would have to place any of Swift's livestock cars on the Junction receiving tracks. The congestion and costs involved would be increased by the fact that livestock cannot be handled as easily as dead freight. Livestock cars cannot be "kicked" in switching operations as can dead-freight cars, which are stopped by collision with other cars. Livestock cars must be placed with a minimum of rough handling. Still further difficulties would be encountered because livestock must be unloaded, watered and fed every twenty-eight hours, in accordance with federal law. 45 U. S. C. § 71 *et seq.* When livestock arrives in Chicago, there are generally only a few hours remaining for delivery to unloading pens in order to comply with this law. Therefore, expeditious handling of the livestock is required, especially since there are no facilities along Junction's rails for such unloading, watering and feeding. Some 31 hours are required for a car of dead freight to clear Ashland Yards and be delivered. It is apparent that livestock must be handled in much less time.

If the complaint were granted, Swift would not pay for the second or switching movement by Junction. Although Junction has never moved livestock in the past except in an emergency, under existing tariffs it can charge Swift the switching rate of $28.80 per car now applied to other commodities. But if Swift is to obtain what it seeks, the line-haul carrier must establish as the line-haul rate a joint rate with Junction which is no higher than the present line-haul rate. This would mean that the line-haul carrier must absorb the switching charge, or that both the switching charge and the present line-haul rate must be decreased, with the line-haul carrier and Junction sharing in absorbing the amount of the decrease.

The delivery of livestock through this bottleneck of Ashland Yards must be geared to provide for the expeditious and special handling that livestock must receive. The huge quantities of dead freight which are handled [7] and the restricted facilities of Ashland Yards have resulted in the development, over a period of seventy years, of a complicated, intricate pattern of operation. For this reason, any attempt to change the pattern calls for the most expert consideration and administrative judgment—a task that courts are ill-fitted to perform. If the Commission gave weight to the relevant factors, its decision should not be overturned. We move then to the Commission's report.

The Commission found that in the circumstances presented the switching charge provided by the existing tariff would not be unreasonable or otherwise unlawful as applied to livestock, and secondly, that the establishment of joint rates for such transportation was not necessary or desirable in the public interest. It took account of the historical development of the Stock Yards and the delivery of livestock therein which together with the industrial development of the area have made further yard expansion impracticable. The Commission found that the switching yards are now highly congested and, as one witness put it, are "running bank full." While it is true that livestock shipments into the area have been decreasing, dead-freight shipments have increased severalfold, and the congestion will continue in the foreseeable future. The Commission gave careful consideration to the complication of operations through the additional and different switching movements required in the handling of livestock as contrasted with dead freight. Whether the

[7] During the years 1945, 1946 and 1947, an average of over 726,000 cars a year, loaded and empty, were funnelled through the Ashland Yards.

system for the delivery of livestock into Chicago which has existed for over seventy years at an established line-haul rate, and which has recognized definite terminals calling for a minimum of train movements in a highly congested area, should be displaced by another system which would further complicate the operations and would necessitate the use of properties and services not included when the present line-haul rates and terminals were fixed, is a question committed to the administrative judgment of the Commission. When that judgment is based on findings abundantly supported by the evidence on the whole record, as it is in this case, it is the duty of the courts to sustain it. *Ayrshire Corp.* v. *United States,* 335 U. S. 573, 593; *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, 522–523; *Swift & Co.* v. *United States,* 316 U. S. 216, 230–231; *Adams* v. *Mills,* 286 U. S. 397, 409–410; *Interstate Commerce Commission* v. *Union Pacific R. Co.,* 222 U. S. 541, 547–548.

The question of the reasonableness of the switching charge was posed to the Commission in the case of *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. R. Co.,* 195 I. C. C. 553. There, Hygrade sought to have the railroads absorb the switching charge of Junction, but the Commission found that it was a reasonable additional charge to the line-haul rate. On appeal to this Court that finding was not disturbed. *Atchison, T. & S. F. R. Co.* v. *United States,* 295 U. S. 193. At that time the charge was $12 per car. It is now considerably higher, but the charges for other commodities and services have risen also.

The burden of showing that the switching charges were unreasonable was upon Swift. *Louisville & N. R. Co.* v. *United States,* 238 U. S. 1, 11. On this record, that burden was not sustained; the charges having existed for years and having been approved as reasonable by the Commission and tacitly approved by this Court, *Atchison,*

*T. & S. F. R. Co.* v. *United States, supra,* their reasonableness is presumed to continue in the absence of a showing to the contrary.

The fact that the rate is so high that Swift finds it uneconomical to use does not in and of itself establish the unreasonableness of the rate. A revision of the switching charge on the ground of its unreasonableness and the establishment of a reasonable rate for switching was not asked. Any rate in excess of the line-haul rate to the Stock Yards was considered by Swift as unreasonable, as it was demanding a joint rate *not in excess* of the line-haul rate to the Stock Yards. Unreasonableness is not made out by mere assertion. *Federal Power Comm'n* v. *Hope Natural Gas Co.,* 320 U. S. 591, 602.

It is next argued that because dead freight is delivered to Swift's industrial siding at the line-haul rate, it is a discrimination against livestock as a commodity to impose a switching charge in addition to the line-haul rate for delivery of livestock to the same point. That argument is completely answered by the Commission's findings as to the different and more complex nature of the switching services required by livestock as compared with dead freight. The cost of the switching service performed by Junction in the delivery of dead freight is figured in the line-haul rate. The line-haul rate for livestock, the reasonableness of which is not in and of itself attacked here, has never contemplated such switching services because Junction has never performed them.

Reliance is placed by Swift upon the case of *United States* v. *Baltimore & O. R. Co.,* 333 U. S. 169. There, delivery to industrial sidings at line-haul rates had been the practice. The Cleveland Stock Yards sought to terminate such delivery because it owned a segment of the track used to serve Swift and wanted to prevent the use thereof unless livestock be routed through its yards and the charge therefor paid to the Stock Yards. In the al-

ternative, the Stock Yards wanted the carriers to pay the equivalent of such charge for the use of the Stock Yards' track leading to Swift's industrial siding. Such a plan would have discriminated against Swift because its competitors could get delivery without the use of the Stock Yards' track and hence would be unaffected by the Stock Yards' demands. This Court held that the Stock Yards could not use its track ownership to work a discrimination which Congress had said should not exist.

> "Here Congress under its constitutional authority has provided that no railroad shall engage in certain types of discriminatory conduct in violation of three provisions of the Act. The Commission found that discriminatory conduct here. The excuse offered by the railroads is that the owner of Track 1619 required them to do the prohibited things. But the command of Congress against discrimination cannot be subordinated to the command of a track owner that a railroad using the track practice discrimination." *Id.*, at p. 177.

Delivery to an industrial siding at line-haul rates was there allowed by the Commission and sustained by this Court for the reason that the Stock Yards sought by its discriminatory act to upset the usual delivery procedure, while here, in a vastly more complicated operational setting, Swift would complicate it further by obtaining for itself a service at line-haul rates different from the usual delivery procedure and not contemplated or considered when the present line-haul rates to Chicago were fixed. If Swift were granted the relief it seeks here, it would be obtaining something that no other packer in Chicago receives, and, instead of being discriminated against, a discrimination would be granted in its favor. Swift already enjoys a competitive advantage because it can obtain direct delivery of livestock at its Omaha plant at

line-haul rates. It can hardly be heard to say that the present system favors its competitors in the Stock Yards' area.

Swift also failed in its burden of showing prejudicial treatment to it as opposed to its competitors in localities other than Chicago, who do receive delivery on industrial sidings at line-haul rates. These competitors' plants are located for the most part on line-haul carriers' rails, and no complicated switching movements are involved. Swift receives at Chicago, as elsewhere, the same rates and services as other packers similarly situated.

Junction is a subsidiary of the New York Central Railroad Company. The latter had an agreement with the Stock Yards which contained a provision that New York Central would operate Junction for "the benefit, advantage, and behoof of the business and affairs" of the Stock Yards. When this proceeding was begun before the Commission, Junction did not intend to defend it. Attorneys for the Stock Yards wrote a letter to the general counsel of New York Central, calling attention to the failure of Junction to defend and to the covenant in the agreement. They pointed out that Junction possessed the evidence necessary to meet the issue in Swift's complaint, that such evidence should be adduced, and that under the agreement, Junction was obligated to defend in order to avoid irreparable injury to the Stock Yards. Thereafter, Junction defended.

It is Swift's contention that this covenant is illegal. We do not find it necessary to pass upon that matter. As far as Swift is concerned, it does not receive any direct shipments at the Stock Yards; hence any decision as to livestock shipments to Swift would not affect the Stock Yards. If other packers would demand industrial siding delivery in the event Swift's complaint were allowed, unquestionably the effect upon the Stock Yards would be very material.

It is true that the Commission did give consideration to the probability that if Swift were successful, other packers might demand the same service. The likelihood of such demand seemed to the Commission, as it does to us, obvious. However, if this demand by other packers, reasonably forecast by the Commission, received consideration in reaching the conclusions in this case, it was in the light of the additional burden on the overcrowded condition of the area, the complexity of the operations, and the necessity for extra care in the handling of livestock to move it through the bottleneck at the Ashland Yards. The Commission was not led to such conclusions by giving weight to this covenant. It was wholly unnecessary thereto. The covenant's impact may be consistent with such consideration, but it is not shown to have been controlling in any manner, or relied upon by the Commission.

We have given consideration to other arguments put forth by Swift and find them to be equally without merit; they do not require discussion in this opinion.

The judgment of the District Court is

*Affirmed.*

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

I am not able to accept the conclusion of the majority that the Interstate Commerce Commission can on this record deny the appellant's prayer for joint through rates between the line-haul defendants and the terminal defendant, the Chicago Junction Railroad. It is admitted here that every manner of freight save livestock is delivered to private industrial sidings in the Chicago switching district under tariffs embracing joint through rates. When the Court concludes that it is not a "discrimination against livestock as a commodity to impose a switching charge in addition to the line-haul rate for delivery of livestock to the same point," it violates the statutory re-

quirement of equality between commodities. To accord joint through rates for switching to private sidetracks to all commodities save livestock, constitutes such a preference to those commodities over livestock as is proscribed by 49 U. S. C. § 3 (1). See note 2 of the opinion of the Court.

It is the law under the Interstate Commerce Act, as set out in § 3 (1), that the public interest is best served when common carriers accord equally reasonable treatment to all their patrons. To be sure, the law might be that the public interest is best served by avoiding congestion in order to pass the maximum amounts of traffic through a transportation bottleneck. But Congress has decided, both for the Commission and this Court, that the commonweal shall be served by guaranteeing that there shall not be discrimination between commodities by carriers. The difficulties of congestion, limitations on facilities, or other shipping disadvantages are to be borne equally by all shippers, otherwise the Interstate Commerce Commission could unreasonably prefer commodities through transportation orders, and in effect would be authorized to prescribe the manner in which goods shall be marketed in the public interest. The inadequacy of transportation facilities may not, in my opinion, be cured by penalizing one commodity for the benefit of the others.

When, as here, the carriers while fixing joint through rates for commodities in general fail to furnish them to shippers of livestock, on application the Commission should fix such rate. That rate should be established, 49 U. S. C. § 15 (3), in the same manner as similar rates for other commodities, of course with proper consideration of the costs of handling the respective commodities. I consider it no answer on this record to say that the switching charge may be no more than the difference in cost of handling dead freight and livestock.

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The shipper is entitled to meet that problem when the Commission comes to determine the switching factor in the joint through rate. Joint through rates should be accorded to livestock shipments on Swift's siding. Then, and not until then, if the rate is attacked as unreasonable, may the Court properly rely on the fact, if supported by a finding of the Interstate Commerce Commission, that the "more complex nature of the switching services required by livestock as compared with dead freight" makes justifiable the difference in the rates. See majority opinion, p. 383. The reasonableness of any commission increase of livestock rates over other commodities should depend upon evidence and findings showing its necessity because of the extra cost of handling without regard to congestion.

I would reverse.

MR. JUSTICE FRANKFURTER, dissenting.

The conflicting views of my brethren imply serious differences in interpreting the meaning and scope of the report of the Interstate Commerce Commission. Plainly, therefore, that report does not speak with the needed clarity. Therein lies my difficulty with the case. If what the Commission has done is ambiguous, how can I decide whether it was authorized to do what it did? Dubiety in the administrative order precludes intelligible judicial review.

As the Court views the matter, the Commission had before it merely a rate-fixing controversy and more specifically whether relevant transportation considerations justified imposition of a local switching charge of 4.8 cents per 100 pounds* in combination with the line-haul charge as a fair rate for delivery of livestock to private sidings. And

*This rate, in effect when the hearing was held, was based on a minimum of 60,000 pounds.

the record, according to the Court, amply sustains the finding of the Commission that such a combination did not constitute an unreasonable rate. MR. JUSTICE REED and MR. JUSTICE DOUGLAS interpret the order not to be a rate-fixing order at all, but, in effect, a determination by the Interstate Commerce Commission that livestock, unlike all other commodities, may be excluded from private sidings in the stockyards area, although this is done not in terms but by a designedly preferential rate. The difficulty is, of course, intensified in that the rate is in fact prohibitive.

Where, as here, this Court can draw only conflicting strands of reason from the explanation given by the Interstate Commerce Commission, we have not been spoken to with sufficient clearness. "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 511. Therefore, I think the decision below should be reversed with direction to remand the case to the Interstate Commerce Commission for appropriate action.

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

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

Argued April 25, 1952.—Decided May 12, 1952.

Appellants contend that Okla. Stat., 1941 (Cum. Supp. 1949), Tit. 52, §§ 286.1–286.17, providing for unitized management of common sources of supply of oil and gas in Oklahoma, and an order of the Oklahoma Corporation Commission thereunder, violated Art. I, § 10 of the Federal Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Held:* In the light of *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, and other decisions of this Court cited in the opinion, appellants have failed to raise any substantial federal question, and the appeals are dismissed. Pp. 391–392.

204 Okla. 543, 231 P. 2d 997, appeals dismissed.

*Mark H. Adams* argued the cause for appellants in No. 301. With him on the brief were *Charles E. Jones* and *Coleman Hayes.*

*Reford Bond, Jr.* argued the cause and filed a brief for appellants in No. 302.

*R. M. Williams* argued the cause for appellees. On the brief were *Harry D. Page* and *Booth Kellough* for the Amerada Petroleum Corp., *W. H. Brown* for the Anderson-Prichard Oil Corp., *Gentry Lee* and *R. O. Mason* for the Cities Service Oil Co., *Villard Martin* for the Foster Petroleum Corp., *Archie D. Gray* and *James B. Diggs, Jr.* for the Gulf Oil Corp., *Earl A. Brown* and *Robert W. Richards* for the Magnolia Petroleum Co., *Rayburn L. Foster, Harry D. Turner* and *Mr. Williams* for the Phillips Petroleum Co., *V. P. Crowe* for the Stephens Petro-

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

leum Co. et al., *M. Darwin Kirk* for the Sunray Oil Corp. and *Ferrill H. Rogers* for the Corporation Commission of Oklahoma, appellees.

PER CURIAM.

These two appeals challenge the constitutionality of Okla. Stat., 1941 (Cum. Supp. 1949), Tit. 52, §§ 286.1–286.17, providing for unitized management of common sources of supply of oil and gas in Oklahoma. This statute was repealed by the Oklahoma Legislature on May 26, 1951, Okla. Laws 1951, c. 3a, § 16, p. 142, and we ordered the causes continued in order to determine the effect of this repeal on the matters raised in these appeals. 342 U. S. 35 (1951). After being advised by the Supreme Court of Oklahoma that this repeal had no effect on these causes, we noted probable jurisdiction and heard argument.

Appellants contend that this statute and an order issued thereunder by the Oklahoma Corporation Commission impair their contractual rights in violation of U. S. Const., Art. I, § 10, and amount to a denial of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Specifically, appellants argue that the statute is an unreasonable exercise of the State's police power and an unreasonable delegation of legislative and judicial power to private groups. In addition, appellants maintain that the statute is too vague and indefinite to furnish the Commission with any reasonable guide for the issuance of orders approving unitization plans, and that the evidence does not support the Commission's findings of fact.

In the light of our previous decisions, appellants have failed to raise any substantial federal questions and the appeals are therefore dismissed. *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179 (1950); *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 311

U. S. 570 (1941); *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, as amended, 311 U. S. 614, 615 (1940); *Patterson* v. *Stanolind Oil & Gas Co.*, 305 U. S. 376 (1939); *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 435, 436, 437 (1934); *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210 (1932).

*Dismissed.*

# DIXON *v.* DUFFY, WARDEN.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 79. Argued October 16, 1951.—Continued November 5, 1951.—Further continued May 12, 1952.

1. In the absence of advice whether the Supreme Court of California has conducted any further proceedings in this case or has so entered as to become a part of the record any order, opinion or certificate since this Court's earlier continuance of the cause, a letter, apparently not a part of the case record, received by the Clerk of this Court and signed by the Clerk of the Supreme Court of California is not regarded as a sufficient "determination" of the question whether the judgment below was intended to rest on an adequate independent state ground or whether decision of the federal claim was necessary thereto. P. 393.
2. This cause is further continued for such period as will enable counsel for petitioner to secure from the Supreme Court of California an official determination of that question. P. 394.

PER CURIAM.

On November 5, 1951, we ordered this cause "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." 342 U. S. 33, 34 (1951).

We have not yet been advised whether the Supreme Court of California has conducted any further proceedings in this case or has so entered as to become a part of the record, any order, opinion or certificate after November 5, 1951. We do not regard a letter, not apparently a part of the case record, received by the Clerk of this Court on March 31, 1952, signed by the Clerk of the Supreme Court of California as a sufficient "determination" of the question raised in our order of November 5, 1951.

Accordingly, the cause is ordered further continued for such period as will enable counsel for petitioner to secure from the Supreme Court of California its official determination as requested in our order of November 5, 1951.

*Cause continued.*

MR. JUSTICE DOUGLAS, being of the opinion that the federal question in the case has been fully exposed, dissents.

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

Syllabus.

# NATIONAL LABOR RELATIONS BOARD *v.* AMERICAN NATIONAL INSURANCE CO.

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

No. 126. Argued March 4, 1952.—Decided May 26, 1952.

1. Under the National Labor Relations Act, as amended, the National Labor Relations Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements. Pp. 401–404.
2. It is not *per se* an "unfair labor practice" under § 8 (a) (1) or (5) of the Act for an employer to bargain for the inclusion in a collective bargaining agreement of a "management functions clause" providing that the right to select, hire, promote, discharge, demote or discipline for cause and to determine the schedules of work, is a prerogative of management on which the employer's final decision shall not be subject to arbitration. Pp. 404–409.

   (a) The Act does not empower the Board to disrupt common collective bargaining practices by forbidding employers to bargain for flexible treatment of such matters and by requiring them to include in labor agreements provisions establishing fixed standards for work schedules or any other condition of employment. P. 408.

   (b) The duty to bargain collectively is to be enforced by application of the good-faith bargaining standards of § 8 (d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether. P. 409.
3. Congress has charged the Courts of Appeal, not this Court, with the normal and primary responsibility of reviewing the conclusions of the Board and deciding whether to grant or deny enforcement of the Board's orders; and it is not for this Court to review a conflict of the evidence nor to reverse a Court of Appeals because this Court might find the record tilting one way rather than the other—especially in cases involving a statutory standard such as "good faith," which can have meaning only in its application to the facts of a particular case. *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498. Pp. 409–410.

4. That a collective bargaining agreement between the union and the employer was negotiated and signed did not render this cause moot. P. 399, n. 4.

187 F. 2d 307, affirmed.

The Court of Appeals granted in part and denied in part enforcement of an order of the National Labor Relations Board, 89 N. L. R. B. 185, requiring an employer to bargain collectively with a union and, in effect, forbidding the employer to bargain for any "management functions clause" covering a condition of employment. 187 F. 2d 307. This Court granted certiorari. 342 U. S. 809. *Affirmed,* p. 410.

*Mozart G. Ratner* argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, George J. Bott, David P. Findling* and *Marcel Mallet-Prevost.*

*Louis J. Dibrell* argued the cause for respondent. With him on the brief were *M. L. Cook* and *Charles G. Dibrell, Jr.*

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

This case arises out of a complaint that respondent refused to bargain collectively with the representatives of its employees as required under the National Labor Relations Act, as amended.[1]

The Office Employees International Union, A. F. of L., Local No. 27, certified by the National Labor Relations Board as the exclusive bargaining representative of respondent's office employees, requested a meeting with respondent for the purpose of negotiating an agreement governing employment relations. At the first meetings,

[1] 49 Stat. 449 (1935), 29 U. S. C. § 151 *et seq.*, as amended, 61 Stat. 136 (1947), 29 U. S. C. (Supp. IV) § 151 *et seq.*

beginning on November 30, 1948, the Union submitted a proposed contract covering wages, hours, promotions, vacations and other provisions commonly found in collective bargaining agreements, including a clause establishing a procedure for settling grievances arising under the contract by successive appeals to management with ultimate resort to an arbitrator.

On January 10, 1949, following a recess for study of the Union's contract proposals, respondent objected to the provisions calling for unlimited arbitration. To meet this objection, respondent proposed a so-called management functions clause listing matters such as promotions, discipline and work scheduling as the responsibility of management and excluding such matters from arbitration.[2] The Union's representative took the position "as soon as [he] heard [the proposed clause]" that the Union would not agree to such a clause so long as it covered matters subject to the duty to bargain collectively under the Labor Act.

Several further bargaining sessions were held without reaching agreement on the Union's proposal or respondent's counterproposal to unlimited arbitration. As a result, the management functions clause was "by-passed" for bargaining on other terms of the Union's contract proposal. On January 17, 1949, respondent stated in writing its agreement with some of the terms proposed by the Union and, where there was disagreement, respondent offered counterproposals, including a clause entitled "Functions and Prerogatives of Management" along the

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[2] As drafted during the bargaining session, the proposed clause read:

"The right to select, hire, to promote, demote, discharge, discipline for cause, to maintain discipline and efficiency of employees, and to determine schedules of work is the sole prerogative of the Company and the Company's decision with respect to such matters shall never be the subject of arbitration." (R. I, p. 97.)

lines suggested at the meeting of January 10th. The Union objected to the portion of the clause providing:

> "The right to select and hire, to promote to a better position, to discharge, demote or discipline for cause, and to maintain discipline and efficiency of employees and to determine the schedules of work is recognized by both union and company as the proper responsibility and prerogative of management to be held and exercised by the company, and while it is agreed that an employee feeling himself to have been aggrieved by any decision of the company in respect to such matters, or the union in his behalf, shall have the right to have such decision reviewed by top management officials of the company under the grievance machinery hereinafter set forth, it is further agreed that the final decision of the company made by such top management officials shall not be further reviewable by arbitration."

At this stage of the negotiations, the National Labor Relations Board filed a complaint against respondent based on the Union's charge that respondent had refused to bargain as required by the Labor Act and was thereby guilty of interfering with the rights of its employees guaranteed by Section 7 of the Act and of unfair labor practices under Sections 8 (a)(1) and 8 (a)(5) of the Act.[3]

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[3] 61 Stat. 136, 140–143 (1947):

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, . . . .

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

. . . . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

. . . . . .

"(d) For the purposes of this section, to bargain collectively is the

While the proceeding was pending, negotiations between the Union and respondent continued with the management functions clause remaining an obstacle to agreement. During the negotiations, respondent established new night shifts and introduced a new system of lunch hours without consulting the Union.

On May 19, 1949, a Union representative offered a second contract proposal which included a management functions clause containing much of the language found in respondent's second counterproposal, quoted above, with the vital difference that questions arising under the Union's proposed clause would be subject to arbitration as in the case of other grievances. Finally, on January 13, 1950, after the Trial Examiner had issued his report but before decision by the Board, an agreement between the Union and respondent was signed.[4] The agreement contained a management functions clause that rendered nonarbitrable matters of discipline, work schedules and other matters covered by the clause. The subject of pro-

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performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . . .

. . . . . .

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . . ."

[4] Respondent's suggestion that negotiation of a contract rendered the case moot has been properly rejected below. See *Labor Board* v. *Mexia Textile Mills*, 339 U. S. 563 (1950); *Labor Board* v. *Pool Mfg. Co.*, 339 U. S. 577 (1950).

motions and demotions was deleted from the clause and made the subject of a special clause establishing a union-management committee to pass upon promotion matters.

While these negotiations were in progress, the Board's Trial Examiner conducted hearings on the Union's complaint. The Examiner held that respondent had a right to bargain for inclusion of a management functions clause in a contract. However, upon review of the entire negotiations, including respondent's unilateral action in changing working conditions during the bargaining, the Examiner found that from and after November 30, 1948, respondent had refused to bargain in a good faith effort to reach agreement. The Examiner recommended that respondent be ordered in general terms to bargain collectively with the Union.

The Board agreed with the Trial Examiner that respondent had not bargained in a good faith effort to reach an agreement with the Union. But the Board rejected the Examiner's views on an employer's right to bargain for a management functions clause and held that respondent's action in bargaining for inclusion of any such clause "constituted, quite [apart from] Respondent's demonstrated bad faith, per se violations of Section 8 (a)(5) and (1)." Accordingly, the Board not only ordered respondent in general terms to bargain collectively with the Union (par. 2 (a)), but also included in its order a paragraph designed to prohibit bargaining for any management functions clause covering a condition of employment. (Par. 1 (a)).[5] 89 N. L. R. B. 185.

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[5] The Board ordered that respondent:

"1. Cease and desist from:

"(a) Refusing to bargain collectively with Office Employees International Union, A. F. L., Local No. 27, as the exclusive representative of all of its employees at its Galveston, Texas, office, excluding guards, secretaries to department heads and executives, agents, building and maintenance employees, professional employees, department

On respondent's petition for review and the Board's cross-petition for enforcement, the Court of Appeals for the Fifth Circuit agreed with the Trial Examiner's view that the Act does not preclude an employer from bargaining for inclusion of any management functions clause in a labor agreement. The Court of Appeals further found that the evidence does not support the view that respondent failed to bargain collectively in good faith by reason of its bargaining for a management functions clause. As a result, enforcement of the portion of the Board's order directed to the management functions clause (par. 1 (a)) was denied. Other portions of the Board's order (pars. 1 (b) and 2 (a)) were enforced because respondent's unilateral action in changing working conditions during bargaining does support a finding that respondent had not bargained collectively in good faith as required by the Act. 187 F. 2d 307. We granted certiorari on petition of the Board for review of the denial of enforcement as to paragraph 1 (a) of the Board's order. 342 U. S. 809.

*First.* The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions

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heads, and all other supervisors as defined in the Act, by insisting as a condition of agreement, that the said Union agree to a provision whereby the Respondent reserves to itself the right to take unilateral action with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment;

[Paragraph (b) proscribes other conduct not pertinent to the issues before this Court.]

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

"(a) Upon request, bargain collectively with Office Employees International Union, A. F. L., Local No. 27, as the exclusive representative of all its employees in the appropriate unit described above with respect to rates of pay, wages, hours of employment, and other conditions of employment; . . . ."

and employers.[6] The Act does not compel any agreement whatsoever between employees and employers.[7] Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement.[8] The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively.

Enforcement of the obligation to bargain collectively is crucial to the statutory scheme. And, as has long been recognized, performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences. Before the enactment of the National Labor Relations Act, it was held that the duty of an employer to bargain collectively required the employer "to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counter-proposals; and to make every reasonable effort to reach an agreement."[9] The duty to bargain

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[6] 61 Stat. 136 ("Findings and Policies"); *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 236 (1938).

[7] *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 45 (1937).

[8] *Terminal Assn.* v. *Trainmen,* 318 U. S. 1, 6 (1943):

"The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. . . ."

[9] *Houde Engineering Corp.,* 1 N. L. R. B. (old) 35 (1934), decided by the National Labor Relations Board organized under 48 Stat. 1183 (1934).

collectively, implicit in the Wagner Act as introduced in Congress, was made express by the insertion of the fifth employer unfair labor practice accompanied by an explanation of the purpose and meaning of the phrase "bargain collectively in a good faith effort to reach an agreement." [10] This understanding of the duty to bargain collectively has been accepted and applied throughout the administration of the Wagner Act by the National Labor Relations Board and the Courts of Appeal.[11]

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[10] Before the addition of Section 8 (5), now Section 8 (a) (5), to the bill, Senator Wagner described the bill as imposing the duty to bargain in good faith, citing the *Houde Engineering* case, note 9, *supra*. Hearings before the Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess. 43 (1935). Section 8 (5) was inserted at the suggestion of the Chairman of the Board that decided *Houde*. *Id.*, at 79, 136–137. The insertion of Section 8 (5) was described by the Senate Committee as follows:

"The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.

"But, after deliberation, the committee has concluded that this fifth unfair labor practice should be inserted in the bill. It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives as they have been designated (whether as individuals or labor organizations) and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. . . ." S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935).

See *H. J. Heinz Co.* v. *Labor Board*, 311 U. S. 514 (1941).

[11] The Board applied the good faith test of bargaining from the outset. 1 N. L. R. B. Ann. Rep. 85–87 (1936). Cases in the Courts of Appeal approving and applying the good faith test of bargaining are collected in 29 U. S. C. A. § 158, note 265.

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In 1947, the fear was expressed in Congress that the Board "has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make." [12] Accordingly, the Hartley Bill, passed by the House, eliminated the good faith test and expressly provided that the duty to bargain collectively did not require submission of counterproposals.[13] As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining was retained and written into Section 8 (d) of the National Labor Relations Act. That Section contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession.[14]

Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.

*Second.* The Board offers in support of the portion of its order before this Court a theory quite apart from the

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[12] H. R. Rep. No. 245, 80th Cong., 1st Sess. 19 (1947).

[13] H. R. 3020, 80th Cong., 1st Sess., § 2 (11) (1947).

[14] Note 3, *supra*. The term "concession" was used in place of "counterproposal" at the suggestion of the Chairman of the Board that the statutory definition of collective bargaining should conform to the meaning of good faith bargaining as understood at the passage of the Wagner Act. S. Rep. No. 105, 80th Cong., 1st Sess. 24 (1947); Hearings before House Committee on Education and Labor on Amendment to the National Labor Relations Act, 80th Cong., 1st Sess. 3174–3175 (1947). See H. R. Rep. No. 510, 80th Cong., 1st Sess. 34 (1947).

test of good faith bargaining prescribed in Section 8 (d) of the Act, a theory that respondent's bargaining for a management functions clause as a counterproposal to the Union's demand for unlimited arbitration was, *"per se,"* a violation of the Act.

Counsel for the Board do not contend that a management functions clause covering some conditions of employment is an illegal contract term.[15] As a matter of fact, a review of typical contract clauses collected for convenience in drafting labor agreements shows that management functions clauses similar in essential detail to the clause proposed by respondent have been included in contracts negotiated by national unions with many employers.[16] The National War Labor Board, empow-

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[15] Thus we put aside such cases as *Labor Board* v. *National Maritime Union,* 175 F. 2d 686 (C. A. 2d Cir. 1949) (bargaining for discriminatory hiring hall clause), where a party bargained for a clause violative of an express provision of the Act.

[16] H. R. Doc. No. 125, 81st Cong., 1st Sess. 3–10 (1949) (U. S. Dept. of Labor Bull. No. 908–12); Collective Bargaining Contracts (B. N. A. 1941), 363–368; Classified Provisions of Thirty-Seven Collective Bargaining Agreements for Wage Earners in the Iron and Steel Industry (American Iron & Steel Inst. 1948), 68–73; Tested Clauses for Union Contracts (Labor Relations Inst. 1945), 11–16; Welty, Labor Contract Clauses (1945), 76–82; Hoebreckx, Management Handbook for Collective Bargaining (1947), 177–182; Smith, Labor Law Cases and Materials (1950), 1008–1011; Industrial Relations Research Service Study No. 1, Management's Prerogatives (1945), App.; Pace, Management Prerogatives Defined in Union Contracts (Calif. Inst. Tech. 1945); Teller, Management Functions under Collective Bargaining (1947), 427–437 (23 out of 53 collective bargaining agreements examined by the author contained management functions clauses).

Writers advocating inclusion of detailed management functions clauses in collective bargaining agreements urge the desirability of defining the respective functions of management and labor in matters such as work scheduling consistent with the needs of the particular industry. See Cox and Dunlop, Regulation of Collective Bargaining

ered during the last war "[t]o decide the dispute, and provide by order the wages and hours and all other terms and conditions (customarily included in collective-bargaining agreements)," [17] ordered management functions clauses included in a number of agreements.[18] Several such clauses ordered by the War Labor Board provided for arbitration in case of union dissatisfaction with the exercise of management functions, while others, as in the clause proposed by respondent in this case, provided that management decisions would be final.[19] Without intimating any opinion as to the form of management func-

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by the National Labor Relations Board, 63 Harv. L. Rev. 389 (1950); Hill and Hook, Management at the Bargaining Table (1945), 56–138; Teller, Management Functions under Collective Bargaining (1947), 114–116. Separate views on "Management's Right to Manage" were presented by the Labor and Management members of The President's National Labor-Management Conference, November 5–30, 1945, U. S. Dept. of Labor Bull. No. 77 (1946), 56–62.

[17] 57 Stat. 163, 166 (1943).

[18] *United Aircraft Corp.*, 18 War Lab. Rep. 9 (1944); *Mead Corp.*, 8 War Lab. Rep. 471 (1943); *Hospital Supply Co.*, 7 War Lab. Rep. 526 (1943). See also *McQuay-Norris Mfg. Co.*, 28 War Lab. Rep. 211 (1945); Teller, Management Functions under Collective Bargaining (1947), 29–49.

Disputes as to the content of management functions clauses have also been considered by the present Wage Stabilization Board, *Basic Steel Industry*, 18 Lab. Arb. Rep. 112 (1952) (recommendation that proposed changes in clause be rejected), and by a Presidential Emergency Board, *Northwest Airlines, Inc.*, 5 Lab. Arb. Rep. 71 (1946) (recommendation that clause be incorporated in agreement).

[19] Compare *East Alton Mfg. Co.*, 5 War Lab. Rep. 47 (1942) (arbitration provision ordered), with *Atlas Powder Co.*, 5 War Lab. Rep. 371 (1942) (arbitration provision denied).

Union objections to a management functions clause as covering matters subject to collective bargaining did not deter the War Labor Board from ordering such a clause where deemed appropriate in a particular case. *Curtiss-Wright Corp.*, 25 War Lab. Rep. 83, 114–115 (1945).

tions clause proposed by respondent in this case or the desirability of including any such clause in a labor agreement, it is manifest that bargaining for management functions clauses is common collective bargaining practice.

If the Board is correct, an employer violates the Act by bargaining for a management functions clause touching any condition of employment without regard to the traditions of bargaining in the particular industry or such other evidence of good faith as the fact in this case that respondent's clause was offered as a counterproposal to the Union's demand for unlimited arbitration. The Board's argument is a technical one for it is conceded that respondent would not be guilty of an unfair labor practice if, instead of proposing a clause that removed some matters from arbitration, it simply refused in good faith to agree to the Union proposal for unlimited arbitration. The argument starts with a finding, not challenged by the court below or by respondent,[20] that at least some of the matters covered by the management functions clause proposed by respondent are "conditions of employment" which are appropriate subjects of collective bargaining under Sections 8 (a)(5), 8 (d) and 9 (a) of the Act.[21] The Board considers that employer bargaining for a clause under which management retains initial responsibility for work scheduling, a "condition of employment," for the duration of the contract is an unfair labor practice because it is "in derogation of" employees' statu-

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[20] This is not the case of an employer refusing to bargain over an issue on the erroneous theory that, as a matter of law, such an issue did not involve a "condition of employment" within the meaning of the Act. Compare *Inland Steel Co.* v. *Labor Board,* 170 F. 2d 247 (C. A. 7th Cir. 1948) (pensions); *Labor Board* v. *J. H. Allison & Co.,* 165 F. 2d 766 (C. A. 6th Cir. 1948) (merit wage increases).

[21] Note 3, *supra.* See *Bus Employees* v. *Wisconsin Board,* 340 U. S. 383, 399 (1951).

tory rights to bargain collectively as to conditions of employment.[22]

Conceding that there is nothing unlawful in including a management functions clause in a labor agreement, the Board would permit an employer to "propose" such a clause. But the Board would forbid bargaining for any such clause when the Union declines to accept the proposal, even where the clause is offered as a counterproposal to a Union demand for unlimited arbitration. Ignoring the nature of the Union's demand in this case, the Board takes the position that employers subject to the Act must agree to include in any labor agreement provisions establishing fixed standards for work schedules or any other condition of employment. An employer would be permitted to bargain as to the content of the standard so long as he agrees to freeze a standard into a contract. Bargaining for more flexible treatment of such matters would be denied employers even though the result may be contrary to common collective bargaining practice in the industry. The Board was not empowered so to disrupt collective bargaining practices. On the contrary, the term "bargain collectively" as used in the Act "has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." *Telegraphers* v. *Railway Express Agency,* 321 U. S. 342, 346 (1944).

Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of

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[22] The Board's argument would seem to prevent an employer from bargaining for a "no-strike" clause, commonly found in labor agreements, requiring a union to forego for the duration of the contract the right to strike expressly granted by Section 7 of the Act. However, the Board has permitted an employer to bargain in good faith for such a clause. *Shell Oil Co.,* 77 N. L. R. B. 1306 (1948). This result is explained by referring to the "salutary objective" of such a clause. *Bethlehem Steel Co.,* 89 N. L. R. B. 341, 345 (1950).

labor agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining.

Accordingly, we reject the Board's holding that bargaining for the management functions clause proposed by respondent was, *per se,* an unfair labor practice. Any fears the Board may entertain that use of management functions clauses will lead to evasion of an employer's duty to bargain collectively as to "rates of pay, wages, hours and conditions of employment" do not justify condemning all bargaining for management functions clauses covering any "condition of employment" as *per se* violations of the Act. The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8 (d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether.

*Third.* The court below correctly applied the statutory standard of good faith bargaining to the facts of this case. It held that the evidence, viewed as a whole, does not show that respondent refused to bargain in good faith by reason of its bargaining for a management functions clause as a counterproposal to the Union's demand for unlimited arbitration. Respondent's unilateral action in changing working conditions during bargaining, now admitted to be a departure from good faith bargaining, is the subject of an enforcement order issued by the court below and not challenged in this Court.

Last term we made it plain that Congress charged the Courts of Appeals, not this Court, with the normal and primary responsibility for reviewing the conclusions of

the Board. We stated that this Court "is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way." *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 503 (1951). We repeat and reaffirm this rule, noting its special applicability to cases where, as here, a statutory standard such as "good faith" can have meaning only in its application to the particular facts of a particular case.

Accepting as we do the finding of the court below that respondent bargained in good faith for the management functions clause proposed by it, we hold that respondent was not in that respect guilty of refusing to bargain collectively as required by the National Labor Relations Act. Accordingly, enforcement of paragraph 1 (a) of the Board's order was properly denied.[23]

*Affirmed.*

MR. JUSTICE MINTON, with whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

I do not see how this case is solved by telling the National Labor Relations Board that since *some* "management functions" clauses are valid (which the Board freely admits), respondent was not guilty of an unfair labor practice *in this case*. The record is replete with evidence that respondent insisted on a clause which would classify the control over certain conditions of employment as a management prerogative, and that the insistence took the form of a refusal to reach a settlement unless the Union accepted the clause.[1] The Court of

[23] See *Labor Board* v. *Crompton Mills*, 337 U. S. 217, 226–227 (1949).

[1] A member of respondent's negotiating committee stated that the committee "had given considerable thought to the character of prerogative that, in our opinion, the Company was entitled to main-

Appeals agreed that respondent was "steadfast" in this demand. Therefore, *this case* is one where the employer came into the bargaining room with a demand that certain topics upon which it had a duty to bargain were to be removed from the agenda—that was the price the Union had to pay to gain a contract. There is all the difference between the hypothetical "management functions" clauses envisioned by the majority and this "management functions" clause as there is between waiver and coercion. No one suggests that an employer is guilty of an unfair labor practice when it proposes that it be given unilateral control over certain working conditions and the union accepts the proposal in return for various other benefits. But where, as here, the employer tells the union that the only way to obtain a contract as to wages is to agree not to bargain about certain other work-

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tain for its management, as well as considerable thought to the character of safeguard which would make the retention of such prerogatives . . . of value and worth to the Company, and invulnerable to attack. . . . [W]e orally stated to the Union that that was going to be the position of the Company . . . ." (R. II, p. 32.)

A Union negotiator testified as follows:

"Q. Now, as I understand your testimony, you have said that Company said you would have to agree . . . .

"A. It was the condition of a contract.

"Q. Now, how often, if it was more than once, did the Company state that or something similar to that . . . did they only say it once or did they state it more than once?

"A. I can't testify as to the number of times. I will say they said it several times.

. . . . . .

"A. To get a contract, an agreement must be reached and must be made by the Union to include Article II–A as the Company's prerogative clause." (R. III, pp. 60–61.)

The same Company negotiator told the Union that the clause in question was the "meat of the contract" and that if the Union accepted it a contract could be obtained in "short order." (R. III, p. 60.)

ing conditions, the employer has refused to bargain about those other working conditions. There is more than a semantic difference between a proposal that the union waive certain rights and a demand that the union give up those rights as a condition precedent to enjoying other rights.[2]

I need not and do not take issue with the Court of Appeals' conclusion that there was no absence of good faith. Where there is a refusal to bargain, the Act does not require an inquiry as to whether that refusal was in good faith or bad faith.[3] The duty to bargain about certain subjects is made absolute by the Act.[4] The majority seems to suggest that an employer could be found guilty of bad faith if it used a "management functions" clause to close off bargaining about all topics of discussion. Whether the employer closes off all bargaining or, as in this case, only a certain area of bargaining, he has refused to bargain as to whatever he has closed off, and any discussion of his good faith is pointless.

That portion of § 8 (d) of the Act which declares that an employer need not agree to a proposal or make concessions does not dispose of this case. Certainly the Board lacks power to compel concessions as to the substantive terms of labor agreements. But the Board in this case was seeking to compel the employer to bargain about subjects properly within the scope of collective

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[2] There is similarly a difference between a union voluntarily disbanding, and the employer insisting that it disband as a condition of granting a wage increase. Cf. *McQuay-Norris Mfg. Co.* v. *Labor Board,* 116 F. 2d 748.

[3] The only exception is that an employer in good faith can challenge the majority status of the bargaining representative and request proof that it does in fact have such status. Cf. *Joy Silk Mills, Inc.* v. *Labor Board,* 87 U. S. App. D. C. 360, 369, 185 F. 2d 732, 741.

[4] *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332; *H. J. Heinz Co.* v. *Labor Board,* 311 U. S. 514, 525.

bargaining.[5] That the employer has such a duty to bargain and that the Board is empowered to enforce the duty is clear.

An employer may not stake out an area which is a proper subject for bargaining and say, "As to this we will not bargain." To do so is a plain refusal to bargain in violation of § 8 (a)(5) of the Act. If employees' bargaining rights can be cut away so easily, they are indeed illusory. I would reverse.

[5] *National Licorice Co.* v. *Labor Board,* 309 U. S. 350, 360; *Inland Steel Co.* v. *Labor Board,* 170 F. 2d 247, 252; *Labor Board* v. *Bachelder,* 120 F. 2d 574, 577.

# PENNSYLVANIA WATER & POWER CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL.

NO. 428. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.*

Argued April 3–4, 1952.—Decided May 26, 1952.

1. Petitioner power company owns a hydroelectric plant on a navigable stream and holds a license from the Federal Power Commission under Part I of the Federal Power Act. It also sells power at wholesale in interstate commerce. The Commission found on substantial evidence that the states involved were "unable to agree" on services to be rendered and rates to be charged within the meaning of § 20 of Part I of the Act. *Held:*

   (a) The fact that petitioner is a licensee and subject to regulation as such under Part I does not preclude its regulation under Part II as a public utility engaged in interstate commerce. Pp. 418–419.

   (b) The Commission having found on substantial evidence that the states were "unable to agree" on the services to be rendered and rates to be charged, within the meaning of § 20, petitioner is also subject to regulation under Part I. P. 419.

2. Two power companies have hydroelectric plants on the Susquehanna River and a third operates steam-electric plants in Maryland. Under a contract between them, a complete integration and pooling of power producing and transmitting facilities has been achieved and power flows from Maryland into Pennsylvania and *vice versa*, depending upon the flow of water in the Susquehanna River. The Federal Power Commission found that the combined operations of the system are completely interstate in character, notwithstanding the fact that at some particular times transactions may involve energy never crossing a state boundary. *Held:* The Federal Power Commission has complete authority to regulate sales at wholesale of all of this commingled power. Pp. 419–420.

3. In private litigation, the entire contract was held unenforceable because certain of its provisions violated the federal antitrust laws and the corporation laws of Pennsylvania. Subsequently,

*Together with No. 429, *Pennsylvania Public Utility Commission* v. *Federal Power Commission*, also on certiorari to the same court.

the Federal Power Commission issued an order fixing petitioner's rates, which had the effect of requiring a continuation of the integration and pooling of the power producing and transmitting facilities of the three companies. *Held:* The order is valid. Pp. 421–424.

(a) Petitioner's duty to continue its coordinated operations with the Maryland company springs from the Commission's statutory authority, not from the law of private contracts. Pp. 421–422.

(b) The Act gives the Commission ample authority to order these companies to continue their long-existing operational "practice" of integrating their power output; and in so doing the Commission was furthering the expressly declared policy of the Act. Pp. 422–424.

4. Petitioner has presented nothing to show that the end result of the rate reduction ordered by the Commission is unjust or unreasonable. P. 424.

89 U. S. App. D. C. 235, 193 F. 2d 230, affirmed.

The Federal Power Commission found the rates charged by petitioner for the sale of electric power at wholesale in interstate commerce unreasonable and ordered a reduction. The Court of Appeals affirmed. 89 U. S. App. D. C. 235, 193 F. 2d 230. This Court granted certiorari. 342 U. S. 931. *Affirmed,* p. 424.

*Wilkie Bushby* argued the cause for the Pennsylvania Water & Power Co. et al., petitioners in No. 428. With him on the brief were *Randall J. LeBoeuf, Jr., James Piper* and *Raymond Sparks.*

*William J. Grove* argued the cause for the Pennsylvania Public Utility Commission, petitioner in No. 429. With him on the brief was *Thomas M. Kerrigan.*

*Solicitor General Perlman* argued the cause for the Federal Power Commission. With him on the brief were *Assistant Attorney General Baldridge, Robert L. Stern, Paul A. Sweeney, Melvin Richter, Bradford Ross, Howard E. Wahrenbrock, Reuben Goldberg* and *Theodore French.*

*Alfred P. Ramsey* argued the cause for the Consolidated Gas Electric Light & Power Co., respondent in No. 428. With him on the brief was *G. Kenneth Reiblich.*

*Charles D. Harris* argued the cause and filed a brief for the Public Service Commission of Maryland, respondent in No. 428.

Mr. Justice Black delivered the opinion of the Court.

In 1944 the Maryland Public Service Commission, the Mayor and Council of the City of Baltimore, the Baltimore County Commissioners, and several private purchasers of electric power decided to ask the Federal Power Commission for help. They requested the Commission to investigate allegedly "excessive rates" the Pennsylvania Water & Power Company (Penn Water) [1] was charging Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated). The Maryland interests wanted the Federal Power Commission to reduce these charges so that the state commission could lower Consolidated's rates to its Maryland customers. The federal Commission held many months of extensive hearings and found that Penn Water had charged its customers almost three times what it should have in 1946. In that year it had a net operating income of $3,477,408, as contrasted with $1,300,672 which the Commission found would have been a fair return (5¼%) on a fair rate base ($24,774,712), allowing Penn Water "about 8.64% for common stock and surplus, which is adequate." [2] The Commis-

[1] Penn Water, as used in this opinion, refers to both Pennsylvania Water & Power Company and its wholly owned affiliate, Susquehanna Transmission Company of Maryland.

[2] There was evidence before the Commission that from 1936 through 1945 Penn Water's dividends on its common stock had never been less than 25% of the cash paid in on the stock.

sion ordered Penn Water to file a new schedule of rates and charges to bring about the reductions required.

In subsequent orders the Commission denied Penn Water's applications for rehearing, rejected as insufficient new rate schedules filed by Penn Water, and itself prescribed the rate schedules which Penn Water here seeks to avoid. On review the Court of Appeals gave full consideration to Penn Water's multitudinous challenges and approved the Commission's action, one Judge dissenting. 89 U. S. App. D. C. 235, 193 F. 2d 230.

Most of the numerous questions presented and decided by the Commission and the Court of Appeals are not presented here by the petitions for certiorari which we granted.[3] We are not called on to review the adequacy of the evidence to support the Commission's findings as to a fair rate base, a fair rate of return, or any other findings except insofar as our decision of several rather general questions presented might indirectly undermine some of them. The questions we must decide are in general these:

> (1) Does the fact that Penn Water is a licensee under Part I of the Federal Power Act,[4] and therefore subject to regulation under that Part, preclude its regulation under Part II of the Act as a public utility engaged in interstate commerce?
>
> (2) Assuming that Penn Water can be subjected to regulation under both Parts of the Act, were the Commission and the Court of Appeals correct in holding that all of Penn Water's sales at wholesale were "in interstate commerce" within the meaning of Part II of the Act?
>
> (3) Does the Commission's rate reduction action compel the continuance of or is it improperly based

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[3] 342 U. S. 931.

[4] 41 Stat. 1063, 49 Stat. 838, 16 U. S. C. § 791a *et seq.*

upon contractual agreements between Penn Water and Consolidated which Penn Water cannot carry out without violating the federal antitrust laws or the laws of Pennsylvania forbidding surrender by Pennsylvania corporations of their corporate independence?

I.

Although Penn Water is the type of "public utility" subject to regulation under Part II of the Act, it argues that since it is subject to regulation under Part I as a licensee, it cannot be regulated under Part II as a public utility. We cannot agree. With some express exceptions not here relevant, the language of Part II of the Act makes all "public utilities" subject to the regulation it prescribes. No reason has been advanced which could possibly justify a judicial exception to this statutory command. A major purpose of the whole Act is to protect power consumers against excessive prices.[5] Part I leaves regulation to the states under some circumstances. But, under § 20 of Part I the Federal Government is to protect the consumer if a state regulatory body does not exist or the "States are unable to agree . . . on the services to be rendered or on the rates or charges of payment therefor . . . ." Part II proceeds on the assumption that regulation of public utilities transmitting and selling power at wholesale in interstate commerce is a matter which must be accomplished by the Federal Government. Part II therefore provides for a more expansive federal regulation than that authorized under Part I. It would hinder, not help, the Power Act's program if

[5] Section 20 of Part I provides that "the rates charged and the service rendered . . . shall be reasonable, nondiscriminatory, and just to the customer . . . ." Section 205 (a) of Part II provides that "All rates and charges . . . shall be just and reasonable . . . ."

we should impliedly exempt Part I licensees from the more expansive Part II regulation. It may be possible that some future cases will develop minor inconsistencies in the administration of the two Parts. Today's case, however, is not such a one. We hold that Penn Water is subject to regulation under Part II of the Act. It is also subject to Part I regulation since the Commission found on substantial evidence, as the court below held, that the States were "unable to agree" within the meaning of § 20 of Part I of the Act.

## II.

It is contended that some of Penn Water's sales at wholesale were not "in interstate commerce" and therefore were not subject to federal regulation under Part II. This contention refers to sales made by Penn Water in Pennsylvania to Pennsylvania customers. These are alleged to include about 83% of Pennsylvania generated power. Because of the following circumstances we agree with the Commission and the Court of Appeals that these sales were "in interstate commerce."

Penn Water and Safe Harbor Water Power Corporation (Safe Harbor) have hydroelectric plants on the Susquehanna River in Pennsylvania. Consolidated operates large steam-generating plants in Baltimore. The flow of the Susquehanna varies greatly even from day to day. During periods of low flow, Penn Water receives steam-generated energy from Baltimore in order to meet its power supply commitments. Conversely, during periods of high flow, Consolidated is able to receive the cheaper hydroelectric power from Penn Water and Safe Harbor. For many years Penn Water, Consolidated, and Safe Harbor have been operating under contracts for the coordinated sale and distribution of electric power in Maryland and Pennsylvania. A complete integration

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and pooling of the power producing and transmitting facilities of the three companies was thus achieved. With reference to this coordinated system of production and distribution, the Commission said:

> "The central fact disclosed by the record about Penn Water's sales in Pennsylvania is that they are not sales of the output of Penn Water's own plant, but sales of output of the integrated and coordinated interstate electric system of which Penn Water's facilities are an integral part. . . .
>
> "In this manner energy crossing the State boundary, with other system energy, is used to fulfill system requirements. There result times when system energy generated in Pennsylvania is used, mixed or unmixed, in meeting system requirements in Maryland. Similarly, there are occasions when system energy from Maryland is used, mixed or unmixed, in meeting system requirements in Pennsylvania. Energy flows in, across, and out of the system transmission network as the needs of the interconnected members develop from minute to minute and day to day.
>
> "It is accordingly evident that the operations of the unified system enterprise are completely interstate in character, notwithstanding the fact that system energy transactions at some particular times may involve energy never crossing the State boundary." 8 F. P. C. 1, 12, 15.

We hold that the Federal Power Commission has complete authority to regulate all of this commingled power flow.[6] The Commission's power does not vary with the rise and fall of the Susquehanna River.

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[6] See also *Safe Harbor Water Power Corp.* v. *Federal Power Commission,* 179 F. 2d 179, affirming 5 F. P. C. 221.

## III.

Penn Water contends that the Commission's orders improperly require it to continue performing an illegal contract and that continued performance of this contract is the basis for some of the Commission's findings. This contract allegedly requires Penn Water to subject the management of its business affairs to the domination of Consolidated and for this reason violates the federal antitrust laws and the corporation laws of Pennsylvania under which Penn Water is incorporated. In private litigation, the Court of Appeals for the Fourth Circuit has agreed with Penn Water that certain provisions of the contract are illegal for the reasons stated. Viewing these provisions as inseparable, that court held the entire contract unenforceable.[7]

We need not now decide the question much argued here concerning what, if any, power the Commission has to rely on or to compel parties to carry out private contracts which would otherwise be illegal; the Commission has not attempted to exercise such power in this case. It is true that Penn Water must continue to do some of the things it used to do in compliance with the Penn Water-Consolidated contract. For under the present schedules prescribed by the Commission's order Penn Water must continue to buy, sell, and transmit power in the same coordinated manner in which it and Consolidated have been functioning for more than twenty years. But the Commission's order, as construed by the Commission, by the Court of Appeals and by us, neither expressly nor impliedly requires Penn Water to yield to any contractual terms subjecting it to the control of Consolidated. In the highly unlikely event that Penn Water's man-

[7] *Pennsylvania W. & P. Co.* v. *Consolidated Gas, E. L. & P. Co.*, 184 F. 2d 552. See also *Consolidated Gas, E. L. & P. Co.* v. *Pennsylvania W. & P. Co.*, 194 F. 2d 89.

agerial freedom is ever threatened by such an order, it will be time enough to consider its validity. To the extent that Penn Water is being controlled, it is by the Commission, acting under statutory authority, not by Consolidated, acting under the authority of private contract terms "legalized" by the Commission. The duty of Penn Water to continue its coordinated operations with Consolidated springs from the Commission's authority, not from the law of private contracts.

Nor has the Commission premised any of its findings upon the assumed existence and continuation of this contract. Penn Water first made this contention to the Commission in seeking a rehearing of the Commission's order directing a reduction in its rates. At that time the Commission fully re-examined its former opinion, findings and orders, modified some and reaffirmed and strengthened others, and expressly stated that the validity of its order was not dependent upon the legality of the contract. It said: "If there are questions as to legality of the foundation contracts which are in litigation, as respondents' application for rehearing indicates, the validity of our order is not dependent upon the decision of those questions." 8 F. P. C. 170, 175. We agree with the Court of Appeals that neither the order nor the findings were premised on the continuation of the Penn Water-Consolidated contract.

The Act gives the Commission ample statutory power to order Penn Water and Consolidated to continue their long-existing operational "practice" of integrating their power output. Section 206 provides that "Whenever the Commission, after a hearing . . . shall find that any rate . . . is unjust, unreasonable . . . the Commission shall determine the just and reasonable rate, . . . practice, or contract to be thereafter observed and in force, and shall fix the same by order." In ordering such "practice" continued, the Commission was furthering the ex-

pressly declared policy of the Act. Moreover, the Commission found here ready-made by prior contractual arrangements a regional coordination of power facilities of precisely the type which the Commission is authorized to require under § 202. Section 202 (a) declares:

> "For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, . . . ."

The Commission was further directed in that section to "promote and encourage" such interconnection and coordination. Under certain circumstances § 202 (b) authorizes the Commission to compel interconnection and coordination in the public interest, and to "prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them."

If Penn Water wishes to discontinue some or all of the services it has rendered for the past twenty years, the Act, as the Commission pointed out, opens up a way provided Penn Water can prove that its wishes are consistent with the public interest. Shortly after Part II of the Power Act was passed in 1935, Penn Water, as required by § 205 (c), filed with the Commission the contract here attacked and then designated by the Commission as "Penn Water's Federal Power Commission Rate Schedule No. 1." Section 205 (d) provides that "no change shall be made by any public utility in any such . . . serv-

ice . . . or contract relating thereto, except after thirty days' notice to the Commission and to the public." Here instead of following the procedure for changing existing services and practices—a procedure which the Congress has authorized and which the Commission has supplemented by rules of its own—the company has rather tried to utilize a violation of the Sherman Act so as to nullify a rate-reduction order.

Nothing whatever has been presented by Penn Water to show that the end result of this rate reduction is unjust or unreasonable. Cf. *Power Comm'n* v. *Hope Gas Co.*, 320 U. S. 591, 603.

*Affirmed.*

MR. JUSTICE FRANKFURTER, not having heard the argument, owing to illness, took no part in the disposition of these cases.

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

There is more to these cases than meets the eye. On the surface they seem to be only an illustration of the exploitation of the public by a utility through the charging of excessive rates. But far greater issues lurk in the record. There is lawless conduct that overshadows the evils of extortionate rates. It is lawless conduct that violates the Sherman Act. It implicates not only the utilities but the regulatory agency as well. The desire to reduce excessive rates should not blind us to the greater evil. It is far better that one public utility win one more legal skirmish in its struggle against regulation, than that we abandon legal standards and let the regulatory agency run riot.

We start here with the exploitation of the public through an unholy alliance between two public utility companies—Penn Water and Consolidated. That alli-

ance has been condemned by the Court of Appeals for the Fourth Circuit. See 184 F. 2d 552; 194 F. 2d 89. The alliance was illegal because it violated the Sherman Act. It was an arrangement that permitted Penn Water to be operated as though it were a department of Consolidated. All competition between the two companies was destroyed, as evidenced by the fact that in 1948 Consolidated vetoed a steam electric generating plant to be built by Penn Water at Holtwood, Pennsylvania. What Penn Water may do, the revenues it receives, the costs it will incur are largely determined by Consolidated under these illegal contracts.

The Commission in its opinion on rehearing said, "If there are questions as to the legality of the foundation contracts which are in litigation, as respondents' application for rehearing indicates, the validity of our order is not dependent upon the decision of those questions. In our opinion and order we took care to leave the continuation of the operation of the integrated and interconnected system *in full effect,* merely changing the rates, . . . ." (Italics added.) 8 F. P. C. 170, 175. The Commission has accordingly approved the unholy alliance. It has allowed Consolidated to continue to manage Penn Water as though the latter were its *alter ego.* It is therefore disingenuous for the Court to say that hereafter Penn Water is subject to control by the Commission, not by Consolidated, and that the Commission did not premise any of its findings on the assumed existence and continuation of the illegal contracts.* No matter how vehement our denial, the truth is that the Commission has laced Penn Water to Consolidated under a manage-

*The Commission entered its final order in the cases prior to the decision of the Court of Appeals in the Sherman Act litigation. The Commission opinion on rehearing was dated February 26, 1949, while the first decision of the Court of Appeals was on September 30, 1950.

ment contract that leaves Penn Water no initiative of private management.

Of course the Commission has authority under § 202 of the Federal Power Act to promote and at times compel interconnection and coordination of the facilities of public utility companies. But I know of no power in the Commission that authorizes it to place one company on the back of another company, to merge and consolidate companies as it chooses, or to give the management of one company a veto power over the management of a competitor. Those are practices which the Sherman Act condemns, and which nothing in the Federal Power Act sanctions.

These cases should be reversed and remanded to the Commission with directions that the Commission build its rate order on the powers that it has under the Federal Power Act, not on the unholy alliance that these utilities created and that the Commission has sought to perpetuate.

# JOHANSEN *v.* UNITED STATES.

NO. 401. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued March 4, 1952.—Decided May 26, 1952.

In the case of a civilian employee of the United States who was a member of the crew of a "public vessel" (not a "merchant vessel") of the United States and who, through negligence of the United States or unseaworthiness of the vessel, suffered injury or death in the performance of his duty, the benefits available under the Federal Employees Compensation Act of 1916 are exclusive, and a suit against the United States for damages under the Public Vessels Act is precluded. Pp. 428–441.

1. Although Congress did not specifically exclude such a claimant from the coverage of the Public Vessels Act, that Act must be fitted, as fairly as possible, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole. Pp. 431–434.

2. A different result is not required by the 1949 amendments to the Federal Employees Compensation Act. Pp. 434–441.

3. *United States* v. *Marine*, 155 F. 2d 456, and *Johnson* v. *United States*, 186 F. 2d 120, disapproved. P. 439.

4. To allow public-vessel seamen an election of remedies which is denied to civilian seamen employed through the War Shipping Administration, 50 U. S. C. App. § 1291, would contribute neither to uniformity nor to fairness. Pp. 440–441.

5. As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect. P. 441.

191 F. 2d 162, 164, affirmed.

In No. 401, a libel in admiralty against the United States under the Public Vessels Act was dismissed by the District Court. The Court of Appeals affirmed. 191

*Together with No. 414, *Mandel, Administrator*, v. *United States*, on certiorari to the United States Court of Appeals for the Third Circuit, argued March 4–5, 1952.

F. 2d 162. This Court granted certiorari. 342 U. S. 901. *Affirmed,* p. 441.

In No. 414, the District Court overruled the Government's motion to dismiss petitioner's suit for damages. The Court of Appeals reversed. 191 F. 2d 164. This Court granted certiorari. 342 U. S. 901. *Affirmed,* p. 441.

*Louis R. Harolds* argued the cause for petitioner in No. 401. With him on the brief was *William L. Standard.*

*Abraham E. Freedman* argued the cause and filed a brief for petitioner in No. 414.

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

MR. JUSTICE REED delivered the opinion of the Court.

These cases present the question whether Congress, in enacting the Public Vessels Act of 1925, 43 Stat. 1112, 46 U. S. C. §§ 781 *et seq.,* has consented that the United States be sued for "damages" by or on behalf of members of the civil service component of the crew of military transport vessels. We hold that the benefits available to such seamen under the Federal Employees Compensation Act of 1916, 39 Stat. 742, 5 U. S. C. §§ 751 *et seq.,* are of such a nature as to preclude a suit for damages under the Public Vessels Act.

Petitioner Johansen, in No. 401, and petitioner Mandel's decedent, in No. 414, were at the time of their injuries employed as civilian members of the crews of Army Transport vessels, owned and operated by the United States. For purposes of this review it is clear that these vessels were at that time being used as "public vessels,"

not "merchant vessels," [1] and that therefore petitioners have no remedy by way of a suit for damages under the Suits in Admiralty Act of 1920, 41 Stat. 525, 46 U. S. C. § 742. Both seamen were injured in the performance of their duties; petitioners were therefore concededly eligible for benefits under the Federal Employees Compensation Act of 1916. Both allege that the injuries resulted from the negligence of respondent, and petitioner Johansen further relies upon the alleged unseaworthiness of his vessel. The relief sought by petitioner Johansen is "damages, wages, maintenance and cure"; that sought by petitioner Mandel is "damages" for wrongful death.

Petitioner Johansen was a carpenter in the crew of the transport *Kingsport Victory*. On August 5, 1949, he sustained a lacerated leg in the course of his duties aboard the vessel, which was lying at a pier at the Bethlehem Shipyard, Brooklyn, New York. He was treated at the Marine Hospital until October 24, 1949, as a beneficiary of the Bureau of Employees Compensation. He filed a claim for compensation benefits under the Federal Em-

[1] In No. 401, both parties have agreed throughout these proceedings that the vessel in question was, as indicated by the allegations of the libel, a "public vessel," not a "merchant vessel."

In No. 414, petitioner alleged in his libel that the vessel in question was a "merchant vessel." The District Court was doubtful about this point, but did not decide it, holding that petitioner was entitled to recover whether the vessel was a "public vessel" or a "merchant vessel." In reversing, the Court of Appeals held that (1) if the vessel was a "public vessel," petitioner's remedy under the Federal Employees Compensation Act precluded recovery in this action, but (2) if the vessel was a "merchant vessel," the case would present different questions, which need not be decided on this record. Accordingly, the case was remanded to the District Court to permit petitioner, if he so desires, to introduce evidence to show that the vessel was a "merchant vessel." This Court affirms that mandate. Since petitioner does not specify the second holding as error, we review only the first, and assume for purposes of this review that the vessel was a "public vessel."

ployees Compensation Act, and collected a total of $358.20. On February 6, 1950, he filed this libel in admiralty in the District Court, relying upon the Public Vessels Act. The libel was dismissed, and, with one judge dissenting, the Second Circuit affirmed, 191 F. 2d 162, on the ground that the Federal Employees Compensation Act afforded petitioner his exclusive remedy. The court recognized that its decision conflicted on this point with a decision of the Fourth Circuit, *Johnson* v. *United States,* 186 F. 2d 120.

Petitioner Mandel's decedent was an assistant engineer on a tug operated and controlled by the United States Army and assigned to the Mediterranean Theater of Operations during World War II. On October 15, 1944, the tug was destroyed by a mine, in attempting to enter the port of Cagliari, Sardinia. In this disaster, decedent met his death in the presence of the enemy. Decedent's widow procured the appointment of an administrator who brought this suit for $150,000. The District Court overruled the Government's motion to dismiss, based partly on the claim that the Federal Employees Compensation Act is the exclusive remedy for the accident. During pretrial, when the Government refused to produce certain documentary evidence called for, the court entered an interlocutory decree of default against respondent. On appeal, pursuant to 28 U. S. C. § 1292 (3), the Third Circuit reversed. 191 F. 2d 164. It limited its consideration to the defense based on the Compensation Act. Recognizing conflict with the decision of the Fourth Circuit in *United States* v. *Marine,* 155 F. 2d 456, as well as *Johnson* v. *United States, supra,* that court nevertheless agreed with the Second Circuit, and held that the Federal Employees Compensation Act precluded recovery under the Public Vessels Act. To resolve the apparent conflict between these decisions, this Court granted certiorari. 342 U. S. 901.

Section 1 of the Public Vessels Act of 1925 provides "That a libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States . . . ." We have already held that this Act grants consent to be sued for personal injuries suffered by an individual not employed by the United States, caused by the negligent maintenance or operation of a public vessel of the United States. *American Stevedores, Inc.* v. *Porello,* 330 U. S. 446, cf. *Canadian Aviator, Ltd.* v. *United States,* 324 U. S. 215. If the congressional purpose was to allow damages for personal injuries sustained by federal employees while in the performance of duty, the literal language of the Act would allow actions of the nature of those before us.

This general language, however, must be read in the light of the central purpose of the Act, as derived from the legislative history of the Act and the surrounding circumstances of its enactment. The history of the Act has already been set forth in some detail in the *Porello* and *Canadian Aviator* cases cited above. It is sufficient here to recall that this Act was one of a number of statutes which attest "to the growing feeling of Congress that the United States should put aside its sovereign armor in cases where federal employees have tortiously caused personal injury or property damage." 330 U. S., at 453. These enactments were not usually directed toward cases where the United States had already put aside its sovereign armor, granting relief in other forms. With such a legislative history, one hesitates to reach a conclusion as to the meaning of the Act by adoption of a possible interpretation through a literal application of the words. Nor is the legislative history of the Act helpful. We are cited to no evidence that any member of Congress in 1925 contemplated that this Act might be thought to confer additional rights on claimants entitled to the benefits of the Federal Employees Compensation Act of

1916. Surely the lack of such evidence is not helpful to petitioners' case; the most that can be said of it is that Congress did not specifically exclude such claimants from the coverage of the Public Vessels Act.

Under these circumstances, it is the duty of this Court to attempt to fit the Public Vessels Act, as intelligently and fairly as possible, "into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres* v. *United States,* 340 U. S. 135, 139. It is important, then, to examine briefly the other statutes which are a part of the system of remedies against the Government available to seamen for personal injuries.

In 1916 Congress passed both the Shipping Act, 39 Stat. 728, 46 U. S. C. §§ 801 *et seq.,* and the Federal Employees Compensation Act. The former subjected Government vessels, employed solely as merchant vessels, to all laws, regulations and liabilities governing private merchant vessels, if they were purchased, chartered, or leased from the Shipping Board. Thus a remedy for damages for personal injuries was given to merchant seamen on ships in which the Government had an interest, but not to public-vessel seamen. Cf. *The G. A. Flagg,* 256 F. 852.

In the latter Act Congress undertook to provide a comprehensive compensation system for federal employees who sustain injuries in the performance of their duty. The payment of this compensation, subject to the provisions of the Act, is mandatory, for § 1 provides: "That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty . . . ." Section 7 provides "That as long as the employee is in receipt of compensation under this Act, . . . he shall not receive from the United States any salary, pay, or remuneration whatsoever ex-

cept in return for services actually performed, and except pensions for service in the Army or Navy of the United States." Section 8, however, recognized the conflict between that provision and the employee's possible right to paid sick or annual leave, and required the employee to elect between compensation and such paid leave. The Act made no other provision for election at that time. Later it was amended by the Public Health Service Act of 1944 to provide generally for election between compensation and any other payments from the United States to which the employee may be entitled by reason of his injury under any other Act of Congress because of his service as an employee of the United States. 58 Stat. 712. The 1944 amendment thus consolidated the various election provisions of the Civil Service Retirement Act of 1920, 5 U. S. C. § 714, and other special disability retirement and pension legislation. *E. g.,* 5 U. S. C. § 797; 10 U. S. C. § 1711; 14 U. S. C. §§ 311–312, 386; 34 U. S. C. §§ 855c, 857e; 50 U. S. C. App. § 1552. A further amendment in 1949 will be discussed below. Aside from these, there has never been any provision in the Compensation Act for election between compensation and other remedies. It is quite understandable that Congress did not specifically declare that the Compensation Act was exclusive of all other remedies. At the time of its enactment, it was the sole statutory avenue to recover from the Government for tortious injuries received in Government employment. Actually it was the only, and therefore the exclusive, remedy. See *Johnson* v. *United States,* 186 F. 2d 120, 123.

In 1920, the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. § 742, gave a broad remedy to seamen on United States merchant vessels, but did not extend these benefits to seamen on public vessels. An extension of this nature was proposed, but defeated. See *Canadian Aviator, Ltd.* v. *United States,* 324 U. S. 215, 220–221.

Next in the series was the Public Vessels Act of 1925, on which petitioners rely. So far as pertinent here, that Act simply provided that a libel might be brought against the United States for damages caused by a public vessel of the United States. No provision was made for election between this remedy and any remedies that might be available under other federal statutes. There is no indication that Congress recognized that this problem might arise.

In 1943 the Clarification Act, 57 Stat. 45, 50 U. S. C. App. § 1291, extended the remedies available to seamen on privately owned American vessels to seamen employed on United States vessels "as employees of the United States through the War Shipping Administration." Claims arising under this Act were to be enforced pursuant to the Suits in Admiralty Act of 1920, even though the vessel on which the seaman was employed might not be a "merchant vessel" within the meaning of the Suits in Admiralty Act. It was specifically provided, however, that this remedy under the Clarification Act was to be exclusive of any remedies that might otherwise be available under the Federal Employees Compensation Act, the Civil Service Retirement Act, and other similar acts. The Act thus gave effect to a congressional purpose to treat seamen employed through the War Shipping Administration as "merchant seamen," not as "public vessel seamen." See *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U. S. 783, 792, quoting from H. R. Rep. No. 107, 78th Cong., 1st Sess. The Act did not purport to change the status of public-vessel seamen not employed through the War Shipping Administration.

This was the situation prior to the 1949 amendments to the Federal Employees Compensation Act. Merchant seamen, other than those employed by the War Shipping Administration, on ships owned by the United States had a right to libel the United States pursuant to the Suits in

Admiralty Act of 1920, but whether they were entitled to the benefits of the Compensation Act was doubtful. See Comptroller General's Decision A–31684, Sept. 10, 1930; 34 Op. Atty. Gen. 363; *Johnson* v. *Fleet Corp.*, 280 U. S. 320. Seamen employed through the War Shipping Administration were by the Clarification Act to be treated as merchant seamen, whether they were serving on merchant vessels or public vessels. As public-vessel seamen injured other than in the course of duty are not covered by the Compensation Act they would presumably have had the same rights to recovery as the public generally under the Public Vessels Act. Public-vessel seamen injured in the course of duty were entitled to all the benefits of the Federal Employees Compensation Act. The issue in this case is whether this last group of Government-employed seamen is eligible under both schemes of recovery.

It is argued by petitioners that the 1949 amendments to the Compensation Act, 63 Stat. 854, show that Congress understood that the remedy of compensation had not been, until that time, exclusive of other remedies, and that the remedy of compensation for seamen still does not preclude recovery under the Public Vessels Act. These amendments added a new subsection [2] to § 7 of the Com-

[2] 63 Stat. 854:

"SEC. 201. Section 7 of the Federal Employees' Compensation Act, as amended (5 U. S. C., 1946 edition, sec. 757), is further amended by inserting the designation '(a)' immediately before the first sentence thereof and by adding to such section a new subsection reading as follows:

"'(b) The liability of the United States or any of its instrumentalities under this Act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury

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pensation Act of 1916 to provide clearly that the liability of the United States under the Compensation Act shall be exclusive of all other liability of the United States on account of the same injury. This amendment, however, was not to alter the rights of seamen in any way.[3] Petitioners argue that Congress in 1949 was seeking, for the first time, to establish the exclusive nature of the remedy of compensation, and deliberately omitted seamen from this limitation. The background of the amendment shows, however, that this impression is erroneous. Prior to 1949, there was a divergence of view in the courts as to the exclusiveness *vel non* of the remedy of compensation.[4] This uncertainty extended to suits by Government seamen seeking damages under the Public Vessels Act.[5] The purpose of the 1949 amendment is simply "to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities . . . ." S. Rep. No. 836, 81st Cong., 1st

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or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: *Provided, however,* That this subsection shall not apply to a master or a member of the crew of any vessel.' "

[3] See the proviso of this section, quoted in note 2 above. See also § 305 (b) of the 1949 Act: "Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel."

[4] See *Posey* v. *Tennessee Valley Authority,* 93 F. 2d 726; *Parr* v. *United States,* 172 F. 2d 462; *Thomason* v. *W. P. A.,* 47 F. Supp. 51, aff'd 138 F. 2d 342; *White* v. *Tennessee Valley Authority,* 58 F. Supp. 776; see also *Lewis* v. *United States,* 89 U. S. App. D. C. 21, 190 F. 2d 22.

[5] *O'Neal* v. *United States,* 11 F. 2d 869, aff'd 11 F. 2d 871; *Lopez* v. *United States,* 59 F. Supp. 831; *United States* v. *Loyola,* 161 F. 2d 126. See *Bradey* v. *United States,* 151 F. 2d 742, at 743 (dictum).

Sess., p. 23. This clarifying amendment, as reported out of the Senate Committee on Labor and Public Welfare, lacked the proviso protecting the rights, if any, of seamen under other federal statutes. However, no seamen's groups having participated in the hearings on the bill, Senator Morse proposed on the floor the proviso on which petitioners rely. Senator Morse himself recognized that his amendment did no more than preserve to seamen any rights which they might have in addition to compensation. There is language in his statement indicating that he was of the opinion that seamen employees had a choice between compensation and litigation in admiralty. 95 Cong. Rec. 13608, 13609. Senator Douglas, who was in charge of the bill, accepted these amendments for the reason that the seamen's groups had not been heard before the committee of Congress. He stated:

> "Mr. President, I should like to state my ground for agreeing to the amendments offered by the Senator from Oregon [Mr. Morse]. The primary consideration for accepting the Senator's amendments preserving the maritime rights and other statutory remedies of seamen is the fact that no hearings were held, no arguments were heard, and no discussion was had on this aspect of the pending bill. . . . For the same reason, namely, that we have had no hearings on the matter, we are not seeking to legislate affirmatively as to certain claims and denials of a right of election of remedies under existing laws, which claims and denials have not yet been adjudicated by the Supreme Court, although various other Federal courts have, in effect, held that federally employed seamen have such an election.
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> "In short, until the matter may be more fully considered by Congress, we seek by the amendments merely to make sure that seamen shall lose no existing rights." 95 Cong. Rec. 13609.

As thus recommended, the bill passed the Senate, 95 Cong. Rec. 13609, and a week later the House accepted the Senate amendments without debate. 95 Cong. Rec. 14060. This background makes it clear that the 1949 amendments, far from changing the law respecting seamen's remedies, do not even reflect a belief on the part of Congress that the remedy of compensation is not exclusive. There is nothing in these amendments to affect consideration of whether petitioners' sole remedy is under the Federal Employees Compensation Act. Cf. *Johnson* v. *United States,* 186 F. 2d 120, 123. If the remedy of compensation was exclusive prior to the passage of the 1949 amendment, it is exclusive now.

As indicated above, the courts have differed upon the question of exclusiveness of the remedy against the United States under the Federal Employees Compensation Act. This Court in *Dahn* v. *Davis,* 258 U. S. 421, held that a railway mail clerk, injured in a wreck on the railroad, while it was operated under the Federal Control Act of 1918, 40 Stat. 451, was barred from prosecuting a suit against the United States Director General because he had previously elected to accept payment under the Federal Employees Compensation Act. The judgment of the United States Court of Appeals for the Eighth Circuit, 267 F. 105, was affirmed here on the ground that, where the employee had two remedies, each for the same wrong, and both against the United States, he could not pursue one remedy to a conclusion and then seek "a second satisfaction of the same wrong." P. 429. The holding was thus based on the doctrine of election of remedies, but if the language is thought to allow the choice of an action against the Government for damages, it is to be noted that Government liability in that case depended upon § 10 of the Federal Control Act, permitting suits against carriers "as now provided by law," and General Order No. 50 directing that any proceeding which

"but for Federal control might have been brought against the carrier company, shall be brought against [the] Director General . . . and not otherwise." [6] There was therefore in the *Dahn* case legislation directly substituting the United States for the carriers in all litigation. Thus the carriers' business was conducted deliberately by the Government with as little change as possible from the situation when carriers controlled. Here the United States operates its own public vessels, without any such conformity legislation. As such operator it has established by the Compensation Act a method of redress for employees. There is no reason to have two systems of redress.[7] See also *United States* v. *Marine,* 155 F. 2d 456, a case allowing recovery to a civilian employee of the Government under the Suits in Admiralty Act, and *Johnson* v. *United States,* 186 F. 2d 120, which allowed a recovery under the Public Vessels Act to a civilian seaman on a public vessel. The opinions below in the cases we are considering take the opposite and, we think, the better view.

The Federal Employees Compensation Act, 5 U. S. C. §§ 751 *et seq.*, was enacted to provide for injuries to Government employees in the performance of their duties. It covers all employees. Enacted in 1916, it gave the first and exclusive right to Government employees for compensation, in any form, from the United States. It was a legislative breach in the wall of sovereign immunity to damage claims and it brought to Government employees the benefits of the socially desirable rule that society

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[6] *Missouri Pac. R. Co.* v. *Ault,* 256 U. S. 554, 562.

[7] It is suggested that *Brady* v. *Roosevelt S. S. Co.,* 317 U. S. 575, has a bearing on this issue. We think not. There is an assumption that an employee of the United States could have sued the Government for his injury, but the case was one for damages against private operators, not the Government. P. 577. *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U. S. 783, 789.

should share with the injured employee the costs of accidents incurred in the course of employment. Its benefits have been expanded over the years. See 5 U. S. C. (Supp. III) §§ 751 *et seq.* Such a comprehensive plan for waiver of sovereign immunity, in the absence of specific exceptions, would naturally be regarded as exclusive. See *United States* v. *Shaw,* 309 U. S. 495. Such a position does not run counter to the progressive liberalization of the right to sue the United States or its agencies for wrongs.[8] This Court accepted the principle of the exclusive character of federal plans for compensation in *Feres* v. *United States,* 340 U. S. 135. Seeking so to apply the Tort Claims Act to soldiers on active duty as "to make a workable, consistent and equitable whole," p. 139, we gave weight to the character of the federal "systems of simple, certain, and uniform compensation for injuries or death of those in armed services." P. 144. Much the same reasoning leads us to our conclusion that the Compensation Act is exclusive.

Had Congress intended to give a crew member on a public vessel a right of recovery for damages against the Government beyond the rights granted other Government employees on the same vessel under other plans for compensation, we think that this advantage would have been specifically provided.[9] As the Court of Appeals in the *Johansen* case explained, the duties and obligations of civilian and military members of the crew of a public vessel are much the same. Each has a general compensation system for injuries. To allow public-vessel seamen an election and to deny it to civilian seamen employed through the War Shipping Administration, 50 U. S. C.

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[8] Federal Tort Claims Act, 60 Stat. 842; Suits in Admiralty Act, 41 Stat. 525; Public Vessels Act, 43 Stat. 1112. See *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381.

[9] *Bradey* v. *United States,* 151 F. 2d 742. See *Dobson* v. *United States,* 27 F. 2d 807.

App. § 1291, would contribute neither to uniformity nor to fairness. See *Mandel* v. *United States,* 191 F. 2d 164.

All in all we are convinced that the Federal Employees Compensation Act is the exclusive remedy for civilian seamen on public vessels. As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect. Both cases are

*Affirmed.*

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

Petitioner in No. 414 sued the United States under the Public Vessels Act [1] to recover damages for the death of Willie Dillehay, Jr., who was killed when the United States public vessel on which he worked struck a mine. Petitioner in No. 401 sued under the same Act to recover for personal injuries he suffered while working aboard another public vessel of the United States. The Court, as it must, concedes that these actions are properly brought if the "literal language" [2] of the Public Vessels Act be adhered to. The Court nevertheless decides that petitioners should be denied the benefits accorded by the language of the Act. This holding is premised on the theory that the language Congress used conflicts hopelessly with the purpose Congress sought to achieve. Not being able to establish such a conflict from the Public Vessels Act itself, the Court moves back through the pages of the United States Code until it arrives at the Federal Employees Compensation Act.[3] Again it can find no

[1] 43 Stat. 1112, 46 U. S. C. § 781 *et seq.*

[2] Section 1 of the Act provides "That a libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States . . . ."

[3] 39 Stat. 742, as amended, 5 U. S. C. (Supp. IV) § 751 *et seq.*

language barring petitioners' rights to sue under the Public Vessels Act. However to find such a bar, the Court reasons thusly: The Compensation Act provides for an adequate (probably smaller) recovery in these cases; it is shocking to judicial concepts of symmetry to allow injured persons a choice between two remedies—besides "There is no reason to have two systems of redress"; therefore Congress intended the Compensation Act of 1916 to be exclusive and did not mean what it said nine years later in the Public Vessels Act.

The Court's holding is as unique as the reasoning behind it. Time and time again during the last thirty years other federal courts have allowed injured employees to take their pick—receive compensation benefits, or sue for damages under the Public Vessels or some other Act.[4] Moreover, the Court gives the Government precisely what Congress, after debate, refused to give in 1949. Government representatives then asked Congress to make the Compensation Act "exclusive, and in place of all other liability of the United States." The House yielded to this request. The House Report favoring the change stated that when the Compensation Act was enacted in 1916 a "provision making the compensation remedy exclusive apparently was then not deemed by the Congress to be necessary." [5] The Report also stated

[4] See *e. g., Johnson* v. *United States,* 186 F. 2d 120. In *Gibbs* v. *United States,* 94 F. Supp. 586, 588–589, District Judge Goodman said: "From a review of court decisions, it can be categorically stated that no federal court decision, other than the case of Posey v. Tenn. Valley Authority, 5 Cir., 1937, 93 F. 2d 726, has ever held that the FECA affords the exclusive remedy to federal employees. To the contrary, it has been specifically held that the FECA does not bar suits by federal civilian employees against the Panama Railroad, or against the United States under the Federal Control Act of 1918, under the Suits in Admiralty Act, under the Public Vessels Act and under the Federal Tort Claims Act." (Footnotes and citations omitted.)

[5] H. R. Rep. No. 729, 81st Cong., 1st Sess. 14.

that such a provision was now needed because of acts such as the Public Vessels Act which "in general terms" authorize the bringing of damage suits against the Government. The Senate refused to grant the Government's request and prevailed upon the House to accept the present provision of the Act which states that: "Nothing contained in this Act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel." [6] This Senate modification of the bill, as it had passed the House, was offered by Senator Morse and accepted by Senator Douglas who was in charge of the bill. In offering this modification, Senator Morse said: "Under existing law, Government-employed seamen have been accorded the right to assert their maritime rights against the United States under the Suits in Admiralty Act and Public Vessels Act . . . . I feel they should not be deprived of benefits they have enjoyed for many years without opportunity to have their arguments carefully considered by the appropriate committees of the Congress . . . ." 95 Cong. Rec. 13608. Senator Douglas agreed to the modification, stating that "The primary consideration for accepting the Senator's amendments preserving the maritime rights and other statutory remedies of seamen is the fact that no hearings were held, no arguments were heard, and no discussion was had on this aspect of the pending bill." 95 Cong. Rec. 13609.

I do not think this Court should deprive these seamen of rights which the Congress of 1925 gave them and the Congress of 1949 refused to take away.

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[6] 63 Stat. 868, § 305 (b). In addition § 201 (b), which states that the Compensation Act "shall be exclusive, and in place, of all other liability of the United States," contains the special exception: "*Provided, however,* That this subsection shall not apply to a master or a member of the crew of any vessel." 63 Stat. 861, 862.

# BESSER MANUFACTURING CO. ET AL. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 230. Argued April 21, 1952.—Decided May 26, 1952.

1. In this civil action brought by the United States to enjoin violations of the Sherman Act, the conclusions of the trial judge that appellants conspired to restrain and monopolize interstate commerce in machinery for making concrete blocks, and that they monopolized and attempted to monopolize that industry, are overwhelmingly supported by the evidence. Pp. 445–447.
2. This Court sustains provisions of the decree requiring appellants to issue patent licenses on a fair royalty basis and to grant to the existing lessees of their machines an option, on terms "mutually satisfactory to the parties concerned," (1) to terminate their lease, (2) to continue their lease, or (3) to purchase leased machines. P. 447.
3. Pursuant to a provision of the decree for fixing reasonable royalty rates under appellants' patent licenses, a committee consisting of two persons selected by appellants and two by the Government was appointed; and, on the basis of the evidence adduced before the committee, the trial judge resolved a deadlock which developed. *Held:* The procedure was fair and reasonable, and did not deprive appellants of their property without due process of law. Pp. 447–449.

   (a) In the absence of glaring error, this Court does not pass upon the question of the sufficiency of the evidentiary material considered in arriving at the royalties finally established. P. 448.

   (b) It was not incumbent upon the trial judge to have a full hearing of the royalty matters himself or to refer them to a master for such a hearing. Pp. 448–449.

   (c) In framing relief in antitrust cases, a range of discretion rests with the trial judge, and there was no abuse of discretion shown here. P. 449.
4. The Government's suggestion that this Court consider the royalty-setting procedure outlined by it in the trial court, and direct that

it be utilized hereafter in the proceedings in this case, cannot be accepted, since the framing of the decree is properly a function of the trial court rather than the appellate court. Pp. 449–450.

96 F. Supp. 304, affirmed.

In a civil action brought by the United States under § 4 of the Sherman Act to enjoin alleged violations of §§ 1 and 2, the District Court entered judgment against appellants and others. 96 F. Supp. 304. Appellants appealed directly to this Court under the Expediting Act. *Affirmed,* p. 450.

*Carl R. Henry* argued the cause for appellants. With him on the brief were *William J. Donovan, Roy W. McDonald, John W. Babcock* and *Peyton H. Moss.*

*Marcus A. Hollabaugh* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, James L. Morrisson, Charles H. Weston* and *Wharey M. Freeze.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

The United States brought this civil action under § 4 of the Sherman Act charging appellants and others with conspiring to restrain and monopolize interstate commerce in concrete block-making machinery in violation of §§ 1 and 2 of the Act, and charging appellants with monopolizing and attempting to monopolize the same industry in violation of § 2 of the Act.[1]

The defendants below were the Stearns Manufacturing Company, second largest producer in the country of

[1] 26 Stat. 209, as amended, 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 Gen-

concrete block-making machines, Besser Manufacturing Company, the country's dominant producer of such machinery and substantial stockholder in the Stearns Company, Jesse H. Besser, long-time president and virtually sole stockholder of the Besser Company, and two individuals, Gelbman and Andrus, co-owners of certain important patents in the concrete block-making machine field.

The United States District Court for the Eastern District of Michigan found the Government's charges clearly proved, and entered a judgment intended to correct the Sherman Act violations found to exist.[2]

Only the Besser Company and Jesse H. Besser have appealed, bringing their case here directly.[3]

Appellants assert that the factual conclusions of the trial court are erroneous. Only recently we reiterated the narrow scope of review here with respect to issues of fact in antitrust cases. *United States* v. *Oregon State Medical Society,* 343 U. S. 326. In this case we think it enough to say that the conclusions of the trial judge that appellants conspired to restrain and monopolize interstate commerce in concrete block-making machinery and that they monopolized and attempted to monopolize that industry are overwhelmingly supported

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eral, to institute proceedings in equity to prevent and restrain such violations. . . ."

15 U. S. C. § 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ."

15 U. S. C. § 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 States . . . shall be deemed guilty of a misdemeanor . . . ."

[2] 96 F. Supp. 304.

[3] Pursuant to § 2 of the Expediting Act of 1903, 32 Stat. 823, as amended, 15 U. S. C. § 29.

by the evidence. Not the slightest ground appears for concluding that the trial judge's findings were "clearly erroneous." Rule 52 (a), Fed. Rules Civ. Proc.

We turn now to the provisions of the judgment entered below which are attacked by appellants. It is unnecessary for us to review appellants' activities in detail, for they are adequately set out in the opinion below. Suffice it to say that appellants sought to eliminate competition through outright purchase of competitors and strict patent-licensing arrangements with the Stearns Company and the patent owners, Gelbman and Andrus.

Appellants contend that the provisions of the judgment requiring them to issue patent licenses on a fair royalty basis and requiring them to grant to existing lessees of their machines an option, on terms "mutually satisfactory to the parties concerned," (1) to terminate their lease, (2) to continue their lease, or (3) to purchase leased machines, are punitive, confiscatory and inappropriate.

However, compulsory patent licensing is a well-recognized remedy where patent abuses are proved in antitrust actions and it is required for effective relief. *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 413, 417–418; *United States* v. *National Lead Co.,* 332 U. S. 319, 338; *United States* v. *United States Gypsum Co.,* 340 U. S. 76, 94.

The compulsory sale provision of the judgment, strenuously attacked, is likewise a recognized remedy. *International Salt Co.* v. *United States,* 332 U. S. 392, 398–399. That required by the judgment in this case must be considered in conjunction with the alternatives associated with it. Appellants are left free to lease rather than sell if they can make a lease sufficiently attractive.

Appellants further argue that the method adopted by the court below for fixing reasonable royalty rates under

their patent licenses deprives them of their property without due process of law. The court directed Besser and the Government each to select two persons to serve as arbitrators on a committee to establish fair royalty rates and the form and contents of royalty contracts. It was also provided that in the event of a stalemate the four representatives should choose a fifth to vote and break the deadlock. If they could not agree on a fifth representative, the trial judge was to sit as the fifth or appoint another person to serve in his place. After some delay, and under protest, Besser appointed his representatives, the Government having appointed its shortly after the plan had been promulgated by the court. The representatives selected by the Government were taken from the industry, the Government noting to the court that they were serving on their own behalf and as agents of other prospective licensees, and not as agents of the Department of Justice.

When an impasse was reached with regard to royalty rates on certain Besser patents, the judge stepped in as the fifth arbitrator and voted for the rates proposed by the government-appointed representatives. Appellants assail this procedure with the contention that royalties set must be "made in judicial proceedings based on the hearing and evaluation of evidence in the light of appropriate criteria."

Appellants' argument fails on two counts. First, it necessarily attacks the sufficiency of the evidentiary material considered in arriving at the royalties finally established. We do not pass on matters of that character in the absence of glaring error not shown here. Secondly, appellants appear to have misunderstood the true nature of what was done, for it was always within the power of the trial judge to establish the royalty rates, and, in voting as he did, he did just that. They contend that the judge should either have held a full hearing

himself or referred the royalty matters to a master for such a hearing. We do not, however, think that in reducing the terms of a decree to concrete measures such procedures are mandatory. It is true that the procedure adopted below is an innovation in certain aspects, but novelty is not synonymous with error.

In framing relief in antitrust cases, a range of discretion rests with the trial judge. *United States* v. *National Lead Co., supra,* at 338; *International Salt Co.* v. *United States, supra,* at 400–401, 405; *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 185. We can see no abuse of discretion here. Compulsory licensing and sale of patented devices are recognized remedies. They would seem particularly appropriate where, as here, a penchant for abuses of patent rights is demonstrated. With respect to the procedure for establishing royalty rates, the court below was likewise acting within the discretion vested in it. "[The District Court] should provide for its determination of a reasonable royalty either in each instance of failure to agree or by an approved form *or by any other plan in its discretion.*" (Italics added.) *United States* v. *United States Gypsum Co., supra,* at 94. The procedure here was entirely reasonable and fair. A competent committee considered relevant evidence and the judge, on the basis of the evidence adduced before the committee, resolved the deadlock into which the negotiations had fallen.

Although not condemning the royalty-setting procedure used here, the Government indicates faint enthusiasm for it, and suggests that this Court consider the procedure outlined by it below and direct that it be utilized hereafter in the proceedings remaining in this litigation. We would exceed our appellate functions were we to adopt that suggestion in this case. "The framing of decrees should take place in the District rather than in Appellate Courts." *International Salt Co.* v. *United*

*States, supra,* at 400; *United States* v. *Crescent Amusement Co., supra,* at 185.

We have examined appellants' other contentions and concluded that they are without merit.

In accordance with the foregoing, the judgment below is

*Affirmed.*

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

Syllabus.

# PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA ET AL. *v.* POLLAK ET AL.

NO. 224. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.*

Argued March 3, 1952.—Decided May 26, 1952.

A street railway company in the District of Columbia, whose service and equipment are subject to regulation by the Public Utilities Commission of the District of Columbia, receives and amplifies radio programs through loudspeakers in its streetcars and busses. The programs consist generally of 90% music, 5% announcements, and 5% commercial advertising. The Commission, after an investigation and public hearings disclosing substantial grounds for doing so, concluded that the radio service is not inconsistent with public convenience, comfort and safety; and permitted it to continue despite protests of some passengers that their constitutional rights are thereby violated. *Held:* Neither the operation of the radio service nor the action of the Commission permitting its operation is precluded by the Federal Constitution. Pp. 453–466.

1. Upon review of the Commission's decision, the courts are expressly restricted by statute to the facts found by the Commission, insofar as those findings do not appear to be unreasonable, arbitrary or capricious. Pp. 458–460.

2. Apart from the constitutional issues, the order of the Commission dismissing its investigation was in accord with its prescribed statutory procedure and within the discretion properly vested in the Commission by Congress. Pp. 460–461.

(a) It is within the statutory authority of the Commission to prohibit or to permit and regulate the receipt and amplification of radio programs under such conditions that the total utility service shall not be unsafe, uncomfortable or inconvenient. P. 461.

3. This Court finds it appropriate to examine into what restriction, if any, the First and Fifth Amendments place upon the Federal Government under the facts of this case, assuming that the action of the street railway company in operating the radio service, together with the action of the Commission in permitting

*Together with No. 295, *Pollak et al.* v. *Public Utilities Commission of the District of Columbia et al.*, also on certiorari to the same court.

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such operation, amounts to sufficient Federal Government action to make the First and Fifth Amendments applicable thereto. Pp. 461–463.

(a) The First and Fifth Amendments apply to and restrict only the Federal Government and not private persons. P. 461.

(b) In finding a sufficiently close relation between the Federal Government and the radio service to make it necessary to consider the First and Fifth Amendments, this Court relies particularly upon the fact that the Commission, an agency authorized by Congress, ordered an investigation of the radio service and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby. P. 462.

4. The Commission did not find, and the testimony does not compel a finding, that the radio programs interfered substantially with the conversation of passengers or with rights of communication constitutionally protected in public places; nor is there any substantial claim that the programs have been used for objectionable propaganda. P. 463.

5. The radio programs do not invade rights of privacy of the passengers in violation of the Fifth Amendment. Pp. 463–465.

(a) The Fifth Amendment does not secure to each passenger on a public vehicle regulated by the Federal Government a right of privacy substantially equal to the privacy to which he is entitled in his own home. P. 464.

(b) In its regulation of streetcars and busses, the Federal Government is not only entitled, but is required, to take into consideration the interests of all concerned. P. 464.

(c) Where a regulatory body has jurisdiction, it will be sustained in its protection of activities in public places when those activities do not interfere with the general public convenience, comfort and safety. Pp. 464–465.

(d) The supervision of such practices by the Public Utilities Commission in the manner prescribed in the District of Columbia meets the requirements both of substantive and procedural due process when it is not arbitrarily and capriciously exercised. P. 465.

(e) The personal liberty which is protected by the Fifth Amendment does not permit an objector to override the preference of the majority of the other passengers and the regulatory body's finding, upon hearing and evidence, that the radio service was consistent with the public convenience, comfort and safety. P. 465.

(f) The question of the desirability of the radio service is a matter for decision between the street railway company, the public and the Commission. P. 465.

6. Since the radio programs containing music, commercial advertising and other announcements are constitutionally permissible, it is clear that programs limited to a like type of music alone would not be less so. Pp. 465–466.

89 U. S. App. D. C. 94, 191 F. 2d 450, reversed.

An appeal from an order of the Public Utilities Commission of the District of Columbia was dismissed by the District Court. The Court of Appeals partially reversed the judgment and directed that the Commission's order be vacated. 89 U. S. App. D. C. 94, 191 F. 2d 450. This Court granted certiorari. 342 U. S. 848. *Reversed,* p. 466.

*W. Theodore Pierson* argued the cause for petitioners in No. 224 and respondents in No. 295. On the brief were *Vernon E. West* and *Lloyd B. Harrison* for the Public Utilities Commission of the District of Columbia, *Edmund L. Jones, F. Gloyd Awalt, Samuel O. Clark, Jr., Daryal A. Myse* and *W. V. T. Justis* for the Capital Transit Co., and *Mr. Pierson, Vernon C. Kohlhaas* and *Thomas N. Dowd* for the Washington Transit Radio, Inc.

*Paul M. Segal* argued the cause for respondents in No. 224 and petitioners in No. 295. With him on the brief were *John W. Willis, Charles L. Black, Jr.* and *Harry P. Warner.* Also on the brief was *Franklin S. Pollak, pro se.*

Mr. Justice Burton delivered the opinion of the Court.

The principal question here is whether, in the District of Columbia, the Constitution of the United States precludes a street railway company from receiving and amplifying radio programs through loudspeakers in its passenger vehicles under the circumstances of this case.

The service and equipment of the company are subject to regulation by the Public Utilities Commission of the District of Columbia. The Commission, after an investigation and public hearings disclosing substantial grounds for doing so, has concluded that the radio service is not inconsistent with public convenience, comfort and safety and "tends to improve the conditions under which the public ride." The Commission, accordingly, has permitted the radio service to continue despite vigorous protests from some passengers that to do so violates their constitutional rights. For the reasons hereafter stated, we hold that neither the operation of the service nor the action of the Commission permitting its operation is precluded by the Constitution.

The Capital Transit Company, here called Capital Transit, is a privately owned public utility corporation, owning an extensive street railway and bus system which it operates in the District of Columbia under a franchise from Congress.[1] Washington Transit Radio, Inc., here called Radio, also is a privately owned corporation doing business in the District of Columbia. Both are petitioners in No. 224.

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[1] Capital Transit Company originates from the Act of Congress of March 4, 1925, authorizing the merger of street railway corporations operating in the District of Columbia. 43 Stat. 1265, D. C. Code (1940) § 43–503. The merger was approved by Joint Resolution, January 14, 1933. 47 Stat. 752, 819, D. C. Code (1940) note following § 43–503. That Resolution required the new company to be incorporated under the District Code and its corporate articles to be approved by the Public Utilities Commission of the District. 47 Stat. 753, 819, D. C. Code (1940) note following § 43–503; see 31 Stat. 1284 *et seq.*, D. C. Code (1940) § 29–201 *et seq.*

The same Resolution prohibited the establishment of any competitive street railway or bus line without the issuance of a certificate by the Commission to the effect that such line is necessary for the convenience of the public. 47 Stat. 760, D. C. Code (1940) § 44–201. The only competing line in the District is a relatively small interurban line.

In March, 1948, Capital Transit experimented with "music as you ride" radio programs received and amplified through loudspeakers in a streetcar and in a bus.[2] Those vehicles were operated on various lines at various hours. A poll of passengers who heard the programs showed that 92% favored their continuance. Experience in other cities was studied.[3] Capital Transit granted Radio the exclusive right to install, maintain, repair and use radio reception equipment in Capital Transit's streetcars, busses, terminal facilities, waiting rooms and division headquarters. Radio, in return, agreed to contract with a broadcasting station for programs to be received during a minimum of eight hours every day, except Sundays. To that end Radio secured the services of Station WWDC–FM. Its programs were to meet the specifications stated in Capital Transit's contract.[4] Radio agreed to pay Capital Transit, after a 90-day trial, $6 per month per radio installation, plus additional

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[2] Typically, the equipment includes a receiving set and six loudspeakers in each vehicle. The set is tuned to a single broadcasting station. The loudspeakers are so located that the radio programs can be heard substantially uniformly throughout the vehicle. The volume of sound is adjusted so as not to interfere with the signals or announcements incident to vehicle operations or generally with conversations between passengers.

[3] Uncontradicted testimony listed approximately the following numbers of vehicles equipped with transit radio in the areas named in October, 1949: St. Louis, Missouri, 1,000; Cincinnati, Ohio, 475; Houston, Texas, 270; Washington, D. C., 220; Worcester, Massachusetts, 220; Tacoma, Washington, 135; Evansville, Indiana, 110; Wilkes-Barre, Pennsylvania, 100; suburban Pittsburgh, Pennsylvania, 75; Allentown, Pennsylvania, 75; Huntington, West Virginia, 55; Des Moines, Iowa, 50; Topeka, Kansas, 50; suburban Washington, D. C., 30. Baltimore, Maryland, was listed but the number of vehicles was not stated.

[4] "(a) Program content shall be of good quality and consonant with a high standard of public acceptance and responsibility, it being understood that all programs shall be carefully planned, edited and

compensation dependent upon the station's receipts from sources such as commercial advertising on the programs. In February, 1949, when more than 20 installations had been made, the service went into regular operation. At the time of the Commission's hearings, October 27–November 1, 1949, there were 212. On that basis the minimum annual payment to Capital Transit came to $15,264. The potential minimum would be $108,000, based upon 1,500 installations. The contract covered five years, with an automatic five-year renewal in the absence of notice to the contrary from either party.

This proceeding began in July, 1949, when the Commission, on its own motion, ordered an investigation. 37 Stat. 983, D. C. Code (1940) §§ 43–408 through 43–410. The Commission stated that Capital Transit had embarked upon a program of installing radio receivers in its streetcars and busses and that a number of protests against the program had been received. Accordingly, the Commission was ordering an investigation to determine whether the installation and use of such receivers was "consistent with public convenience, comfort and safety." Radio was permitted to intervene. Pollak and

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produced in accordance with accepted practices employed by qualified broadcasting stations.

"(b) Commercial announcements shall not exceed sixty (60) seconds in duration, and cumulatively shall not exceed six (6) minutes in any sixty (60) minute period.

"(c) Broadcast Station shall agree to cancel or suitably to modify any commercial continuity upon notice from Capital that said continuity, or the sponsor thereof, is objectionable. Broadcast Station shall further agree that it shall give notice to Capital within twenty-four (24) hours after the acceptance of each new sponsor.

"(d) Capital is to receive without charge fifty per cent (50%) of the unsold time available for commercial continuity as provided in sub-section (b) hereof, (said free time not to exceed three (3) minutes in any sixty (60) minute period), for institutional and promotional announcements."

Martin, as protesting Capital Transit passengers, also intervened and they are the respondents in No. 224.

The Commission concluded "that the installation and use of radios in streetcars and busses of the Capital Transit Company is not inconsistent with public convenience, comfort, and safety" and dismissed its investigation. 81 P. U. R. (N. S.) 122, 126. It denied reconsideration. 49 Stat. 882, D. C. Code (1940) § 43–704. Pollak and Martin appealed to the United States District Court for the District of Columbia. 49 Stat. 882–884, D. C. Code (1940) §§ 43–705 through 43–710. John O'Dea, as People's Counsel, Capital Transit Company and Washington Transit Radio, Inc., were granted leave to intervene. That appeal was dismissed but Pollak and Martin took the case to the Court of Appeals. 49 Stat. 883, D. C. Code (1940) § 43–705. That court partially reversed the judgment of the District Court and gave instructions to vacate the Commission's order. It remanded the case for further proceedings in conformity with its opinion which included the following statement:

> "In our opinion Transit's broadcasts deprive objecting passengers of liberty without due process of law. Service that violates constitutional rights is not reasonable service. It follows that the Commission erred as a matter of law in finding that Transit's broadcasts are not inconsistent with public convenience, in failing to find that they are unreasonable, and in failing to stop them.
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> "This decision applies to 'commercials' and to 'announcements.' We are not now called upon to decide whether occasional broadcasts of music alone would infringe constitutional rights." 89 U. S. App. D. C. 94, 102, 191 F. 2d 450, 458.

The Court of Appeals, *en banc,* denied a rehearing. The Commission, Capital Transit and Radio petitioned

this Court for certiorari in No. 224. Contingent upon the granting of certiorari in that case, Pollak and Martin, by cross-petition in No. 295, sought to prohibit Capital Transit from receiving and amplifying in its vehicles not only "commercials" and "announcements," but also the balance of the radio programs. We granted certiorari in both cases because of the novelty and practical importance to the public of the questions involved. 342 U. S. 848. We have treated the petitions as though they were cross-petitions in a single case.

1. *Further facts.*—In this proceeding the courts are expressly restricted to the facts found by the Commission, insofar as those findings do not appear to be unreasonable, arbitrary or capricious.[5]

After reciting that it had given careful consideration to the testimony bearing on public convenience, comfort and safety, the Commission said that—

> "From the testimony of record, the conclusion is inescapable that radio reception in streetcars and busses is not an obstacle to safety of operation.

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[5] "PAR. 66. In the determination of any appeal from an order or decision of the Commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary or capricious." 49 Stat. 883, D. C. Code (1940) § 43–706.

On appeal to the District Court—

"the Commission shall file with the clerk of the said court the record, including a transcript of all proceedings had and testimony taken before the Commission, duly certified, upon which the said order or decision of the Commission was based, together with a statement of its findings of fact and conclusions upon the said record, and a copy of the application for reconsideration and the orders entered thereon: . . . ." 49 Stat. 883, D. C. Code (1940) § 43–705.

We treat the Commission's certification of its findings and conclusions, expressed in its statement of December 19, 1949, as meeting the above requirement. 81 P. U. R. (N. S.) 122, 124–126.

> "Further, it is evident that public comfort and convenience is not impaired and that, in fact, through the creation of better will among passengers, it tends to improve the conditions under which the public ride." 81 P. U. R. (N. S.), at 126.

Bearing upon its conclusion as to the public comfort and convenience resulting from the radio programs, the Commission cited the opinions of car and bus operators to the effect that the "music on the vehicles had a tendency to keep the passengers in a better mood, and that it simplified transit operations." *Id.*, at 125. The Commission also said that its analysis of accidents "reflects the fact that the radio does not in any way interfere with efficient operation and has not been the cause of any accidents, according to the testimony of . . . a safety supervisor." *Ibid.* Likewise, the Commission set forth the following as one premise for its conclusions:

> "A public opinion survey was conducted by Edward G. Doody & Company, from October 11, 1949, to October 17, 1949, in order to determine the attitude of Capital Transit Company customers toward transit radio. This survey employed the rules of random selection and was confined to interviews aboard radio-equipped vehicles. The principal results obtained through the survey, as presented in this record, were as follows:
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> "Of those interviewed, 93.4 per cent were not opposed; that is, 76.3 were in favor, 13.9 said they didn't care, and 3.2 said they didn't know; 6.6 per cent were not in favor, but when asked the question 'Well, even though you don't care for such programs personally, would you object if the majority of passengers wanted busses and streetcars equipped with radio receivers,' 3.6 said they would not object or

oppose the majority will. Thus, a balance of 3 per cent of those interviewed were firmly opposed to the use of radios in transit vehicles." [6] *Ibid.*

2. *Statutory authority.*—Apart from the constitutional issues, the order of the Commission dismissing its investigation was in accord with its prescribed statutory procedure and within the discretion properly vested in the Commission by Congress.

Transit radio service is a new income-producing incident of the operation of railway properties. The profit arises from the rental of facilities for commercial advertising purposes. This aspect of the enterprise bears some relation to the long-established practice of renting space for visual advertising on the inside and outside of streetcars and busses.

Through these programs Capital Transit seeks to improve its public relations. To minimize objection to the

[6] A comparable survey, made April 1–7, 1949, under the same direction, produced substantially the same result. The weight to be attached to these surveys was a proper matter for determination by the Commission.

The Commission invited views as to the radio service to be given to it freely, either through sworn testimony or otherwise. Many citizens' associations appeared or filed resolutions favoring or opposing the radio service. A large majority favored the service.

That the Commission gave consideration to the intensity and nature of the individual objections raised appears from the following:

"In general, the objections raised by individuals who attended the hearings to radios in transportation vehicles were based upon the following reasons, among others:

"It interfered with their thinking, reading, or chatting with their companions; it would lead to thought control; the noise was unbearable; the commercials, announcements, and time signals were annoying; the music was of the poorest class; the practice deprived them of their right to listen or not to listen; they were being deprived of their property rights without due process; their health was being impaired; the safety of operation was threatened because of the effect of radios upon the operators of the vehicles." 81 P. U. R. (N. S.), at 124.

advertising features of the programs, it requires that at least 90% of the radio time be used for purposes other than commercials and announcements. This results in programs generally consisting of 90% music, 5% news, weather reports and matters of civic interest, and 5% commercial advertising. The advertising is confined to statements of 15 to 30 seconds each. It occupies a total of about three minutes in each hour.

In view of the findings and conclusions of the Commission, there can be little doubt that, apart from the constitutional questions here raised, there is no basis for setting aside the Commission's decision. It is within the statutory authority of the Commission to prohibit or to permit and regulate the receipt and amplification of radio programs under such conditions that the total utility service shall not be unsafe, uncomfortable or inconvenient.

3. *Applicability of the First and Fifth Amendments.*— It was held by the court below that the action of Capital Transit in installing and operating the radio receivers, coupled with the action of the Public Utilities Commission in dismissing its own investigation of the practice, sufficiently involved the Federal Government in responsibility for the radio programs to make the First and Fifth Amendments to the Constitution of the United States applicable to this radio service.[7] These Amendments concededly apply to and restrict only the Federal Government and not private persons. See *Corrigan* v. *Buckley,* 271 U. S. 323, 330; *Talton* v. *Mayes,* 163 U. S. 376,

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[7] "AMENDMENT [I.]

"Congress shall make no law . . . abridging the freedom of speech . . . .

. . . . . .

"AMENDMENT [V.]

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . ."

382, 384; *Withers* v. *Buckley,* 20 How. 84, 89–91; *Barron* v. *The Mayor and City Council of Baltimore,* 7 Pet. 243; see also, *Virginia* v. *Rives,* 100 U. S. 313, 318.

We find in the reasoning of the court below a sufficiently close relation between the Federal Government and the radio service to make it necessary for us to consider those Amendments. In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress.[8] We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby. 81 P. U. R. (N. S.), at 126.

We, therefore, find it appropriate to examine into what restriction, if any, the First and Fifth Amendments place upon the Federal Government under the facts of this case, assuming that the action of Capital Transit in operating the radio service, together with the action of the Commission in permitting such operation, amounts to suffi-

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[8] "[W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." *American Communications Assn.* v. *Douds,* 339 U. S. 382, 401. Cf. *Smith* v. *Allwright,* 321 U. S. 649; and see *Olcott* v. *The Supervisors,* 16 Wall. 678, 695–696.

cient Federal Government action to make the First and Fifth Amendments applicable thereto.

4. *No violation of the First Amendment.*—Pollak and Martin contend that the radio programs interfere with their freedom of conversation and that of other passengers by making it necessary for them to compete against the programs in order to be heard. The Commission, however, did not find, and the testimony does not compel a finding, that the programs interfered substantially with the conversation of passengers or with rights of communication constitutionally protected in public places. It is suggested also that the First Amendment guarantees a freedom to listen only to such points of view as the listener wishes to hear. There is no substantial claim that the programs have been used for objectionable propaganda. There is no issue of that kind before us.[9] The inclusion in the programs of a few announcements explanatory and commendatory of Capital Transit's own services does not sustain such an objection.

5. *No violation of the Fifth Amendment.*—The court below has emphasized the claim that the radio programs are an invasion of constitutional rights of privacy of the passengers. This claim is that no matter how much Capital Transit may wish to use radio in its vehicles as part of its service to its passengers and as a source of income, no matter how much the great majority of its passengers may desire radio in those vehicles, and however positively the Commission, on substantial evidence,

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[9] See generally, Shipley, Some Constitutional Aspects of Transit Radio, 11 F. C. Bar J. 150.

The Communications Act of 1934, 48 Stat. 1064 *et seq.*, as amended, 47 U. S. C. § 151 *et seq.*, has been interpreted by the Federal Communications Commission as imposing upon each licensee the duty of fair presentation of news and controversial issues. F. C. C. Report on Editorializing by Licensees, 1 Pike & Fischer Radio Regulation 91:201 (1949).

may conclude that such use of radio does not interfere with the convenience, comfort and safety of the service but tends to improve it, yet if one passenger objects to the programs as an invasion of his constitutional right of privacy, the use of radio on the vehicles must be discontinued. This position wrongly assumes that the Fifth Amendment secures to each passenger on a public vehicle regulated by the Federal Government a right of privacy substantially equal to the privacy to which he is entitled in his own home. However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance. Streetcars and busses are subject to the immediate control of their owner and operator and, by virtue of their dedication to public service, they are for the common use of all of their passengers. The Federal Government in its regulation of them is not only entitled, but is required, to take into consideration the interests of all concerned.

In a public vehicle there are mutual limitations upon the conduct of everyone, including the vehicle owner. These conflicting demands limit policies on such matters as operating schedules and the location of car or bus stops, as well as policies relating to the desirability or nature of radio programs in the vehicles. Legislation prohibiting the making of artifically amplified raucous sounds in public places has been upheld. *Kovacs* v. *Cooper,* 336 U. S. 77.[10] Conversely, where a regulatory body has jurisdiction, it will be sustained in its protection of activities in public places when those activities do not interfere with the general public convenience, comfort

[10] The interest of some unwilling listeners was there held to justify some limitation on the freedom of others to amplify their speech. The decision, however, did not indicate that it would violate constitutional rights of privacy or due process for the city to authorize some use of sound trucks and amplifiers in public places.

and safety. The supervision of such practices by the Public Utilities Commission in the manner prescribed in the District of Columbia meets the requirements both of substantive and procedural due process when it is not arbitrarily and capriciously exercised.

The contention of Pollak and Martin would permit an objector, with a status no different from that of other passengers, to override not only the preference of the majority of the passengers but also the considered judgment of the federally authorized Public Utilities Commission, after notice, investigation and public hearings, and upon a record reasonably justifying its conclusion that the policy of the owner and operator did not interfere with public convenience, comfort and safety but tended, in general, to improve the utility service.

We do not agree with that contention. The protection afforded to the liberty of the individual by the Fifth Amendment against the action of the Federal Government does not go that far. The liberty of each individual in a public vehicle or public place is subject to reasonable limitations in relation to the rights of others.

This Court expresses no opinion as to the desirability of radio programs in public vehicles. In this case that is a matter for decision between Capital Transit, the public and the Public Utilities Commission. The situation is not unlike that which arises when a utility makes a change in its running schedules or in the locations of its stops in the interests of the majority of the passengers but against the vigorous protests of the few who are inconvenienced by the change.

The court below expressly refrained from passing on the constitutionality of the receipt and amplification in public vehicles of occasional broadcasts of music alone. Pollak and Martin, in No. 295, contend that broadcasts even so limited are unconstitutional. However, in view of our holding that the programs before us, containing

music, commercial advertising and other announcements are constitutionally permissible, it is clear that programs limited to a like type of music alone would not be less so.

The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded to the District Court.

*Reversed.*

MR. JUSTICE FRANKFURTER, for reasons stated by him, took no part in the consideration or decision of this case.

Separate opinion of MR. JUSTICE BLACK.

I concur in the Court's holding that this record shows no violation of the Due Process Clause of the Fifth Amendment. I also agree that Capital Transit's musical programs have not violated the First Amendment. I am of the opinion, however, that subjecting Capital Transit's passengers to the broadcasting of news, public speeches, views, or propaganda of any kind and by any means would violate the First Amendment. To the extent, if any, that the Court holds the contrary, I dissent.

MR. JUSTICE FRANKFURTER.

The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judg-

ment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.

This case for me presents such a situation. My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it. I am explicit as to the reason for my non-participation in this case because I have for some time been of the view that it is desirable to state why one takes himself out of a case.

MR. JUSTICE DOUGLAS, dissenting.

This is a case of first impression. There are no precedents to construe; no principles previously expounded to apply. We write on a clean slate.

The case comes down to the meaning of "liberty" as used in the Fifth Amendment. Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom. Part of our claim to privacy is in the prohibition of the Fourth Amendment against unreasonable searches and seizures. It gives the guarantee that a man's home is his castle beyond invasion either by inquisitive or by officious people. A man loses that privacy of course when he goes upon the streets or enters public places. But even in his activities outside the home he has immunities from controls bearing on privacy. He may not be compelled against his will to attend a religious service; he may not be forced to make an affirmation or observe a ritual that violates his scruples; he may not be made to accept one religious, political, or philosophical creed as against another. Freedom of religion and freedom of

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speech guaranteed by the First Amendment give more than the privilege to worship, to write, to speak as one chooses; they give freedom not to do nor to act as the government chooses. The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses, to believe what one wishes are important aspects of the constitutional right to be let alone.

If we remembered this lesson taught by the First Amendment, I do not believe we would construe "liberty" within the meaning of the Fifth Amendment as narrowly as the Court does. The present case involves a form of coercion to make people listen. The listeners are of course in a public place; they are on streetcars traveling to and from home. In one sense it can be said that those who ride the streetcars do so voluntarily. Yet in a practical sense they are forced to ride, since this mode of transportation is today essential for many thousands. Compulsion which comes from circumstances can be as real as compulsion which comes from a command.

The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice. One who is in a public vehicle may not of course complain of the noise of the crowd and the babble of tongues. One who enters any public place sacrifices some of his privacy. My protest is against the invasion of his privacy over and beyond the risks of travel.

The government may use the radio (or television) on public vehicles for many purposes. Today it may use it for a cultural end. Tomorrow it may use it for political purposes. So far as the right of privacy is concerned the purpose makes no difference. The music selected by one bureaucrat may be as offensive to some as it is soothing to others. The news commentator chosen to report on the events of the day may give overtones to the news that please the bureau head but which rile the streetcar

captive audience. The political philosophy which one radio speaker exudes may be thought by the official who makes up the streetcar programs to be best for the welfare of the people. But the man who listens to it on his way to work in the morning and on his way home at night may think it marks the destruction of the Republic.

One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes. One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the streetcar has no choice but to sit and listen, or perhaps to sit and to try *not* to listen.

When we force people to listen to another's ideas, we give the propagandist a powerful weapon. Today it is a business enterprise working out a radio program under the auspices of government. Tomorrow it may be a dominant political or religious group. Today the purpose is benign; there is no invidious cast to the programs. But the vice is inherent in the system. Once privacy is invaded, privacy is gone. Once a man is forced to submit to one type of radio program, he can be forced to submit to another. It may be but a short step from a cultural program to a political program.

If liberty is to flourish, government should never be allowed to force people to listen to any radio program. The right of privacy should include the right to pick and choose from competing entertainments, competing propaganda, competing political philosophies. If people are let alone in those choices, the right of privacy will pay dividends in character and integrity. The strength of our system is in the dignity, the resourcefulness, and the independence of our people. Our confidence is in their ability as individuals to make the wisest choice. That system cannot flourish if regimentation takes hold. The right of privacy, today violated, is a powerful deterrent to any one who would control men's minds.

# FEDERAL TRADE COMMISSION *v.* RUBEROID CO.

NO. 448. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued March 31 and April 1, 1952.—Decided May 26, 1952.

A company which was engaged in the manufacture of roofing materials was found by the Federal Trade Commission to have discriminated among customers in the prices charged for its products. The Commission held that the discriminations violated § 2 (a) of the Clayton Act, as amended, and ordered the company to cease and desist from selling "products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products." Upon the company's petition for review, the Court of Appeals affirmed, but refused an order of enforcement. *Held:*

1. Congress has vested in the Federal Trade Commission the primary responsibility for fashioning orders dealing with Clayton Act violations, and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist. P. 473.

2. Although in the company's price discriminations between competing purchasers the Commission found only differentials of 5% or more, the order was not too broad in prohibiting *all* price differentials between competing purchasers, in view of the Commission's finding that even very small differences in price were important factors in competition among the company's customers. Pp. 473–474.

3. Although the price discriminations found were in sales to retailers and applicators, not in sales to wholesalers, the extension of the order to "purchasers who in fact compete" was not unreasonable, in view of the evidence that the company's classification of its customers—as wholesalers, retailers, and applicators—did not follow real functional differences. Pp. 474–475.

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*Together with No. 504, *Ruberoid Co.* v. *Federal Trade Commission,* also on certiorari to the same court.

4. The order does not enjoin lawful acts by reason of the Commission's failure to except from its prohibitions differentials permitted by the terms of the Act (making allowance for differences in cost of manufacture, sale or delivery, or made in good faith to meet an equally low price of a competitor), since these exceptions are necessarily implicit in every order issued under authority of the Act. Pp. 475–476.

(a) However, in contesting enforcement or contempt proceedings, the seller may plead only those facts constituting statutory justification which it has not previously had an opportunity to present. Pp. 476–477.

5. The Commission is not entitled to a decree directing enforcement of an order issued under the Clayton Act in the absence of a showing that a violation of the order has occurred or is imminent. Pp. 477–480.

(a) The provision of the Act authorizing the Commission to apply for enforcement "if such person fails or neglects to obey such order" prescribes a prerequisite to the court's granting enforcement. Pp. 478–479.

(b) Disobedience or threatened disobedience of the order is a condition to the granting of enforcement, even where the order comes before the court upon petition for review by the affected party. Pp. 479–480.

191 F. 2d 294, affirmed.

Upon a petition for review of a cease-and-desist order of the Federal Trade Commission, 46 F. T. C. 379, the Court of Appeals affirmed and granted enforcement of the order. 189 F. 2d 893. On rehearing, it struck from its decision that part granting enforcement. 191 F. 2d 294. This Court granted certiorari. 342 U. S. 917. *Affirmed,* p. 480.

*Cyrus Austin* argued the cause and filed a brief for the Ruberoid Company.

*James W. Cassedy* argued the cause for the Federal Trade Commission. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Daniel M. Friedman, Ralph S. Spritzer* and *W. T. Kelley.*

MR. JUSTICE CLARK delivered the opinion of the Court.

In this case we granted cross-petitions for certiorari to review the decree of the Court of Appeals affirming, but refusing to enforce, a cease and desist order issued by the Federal Trade Commission to the Ruberoid Co.

Ruberoid is one of the nation's largest manufacturers of asphalt and asbestos roofing materials and allied products. The Commission found that Ruberoid, in a number of specific instances, had discriminated among customers in the prices charged them for roofing materials. Further finding that the effect of those discriminations "may be substantially to lessen competition in the line of commerce in which [those customers] are engaged, and to injure, destroy, or prevent competition between [those customers]," [1] the Commission held that the discriminations were violations of § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.[2] 46 F. T. C. 379. Ruberoid was ordered to:

> "[C]ease and desist from discriminating in price:
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> "By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products." [3]

Upon Ruberoid's petition for review, the Court of Appeals affirmed and granted enforcement of the order. 189 F. 2d 893. However, on rehearing, the Court of Appeals amended its mandate to strike that part which directed enforcement. 191 F. 2d 294. We granted certiorari to review questions, important in the administration of the Clayton Act, as to the scope and enforcement of Federal Trade Commission orders. 342 U. S. 917.

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[1] 46 F. T. C. 379, 386.

[2] 38 Stat. 730, as amended, 49 Stat. 1526, 15 U. S. C. § 13.

[3] 46 F. T. C. 379, 387.

We first consider the contentions of Ruberoid, which are mainly attacks upon the breadth of the order. Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.[4] Moreover, "[t]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" disclosed. *Jacob Siegel Co.* v. *Federal Trade Comm'n,* 327 U. S. 608, 611 (1946). Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices.[5] Therefore we have said that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.,* at 613.

In the light of these principles, we examine the specific objections of Ruberoid to the order in this case. First, it is argued that the order went too far in prohibiting *all* price differentials between competing purchasers, although only differentials of 5% or more were found. But the Commission found that very small differences in price

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[4] *Federal Trade Comm'n* v. *Morton Salt Co.,* 334 U. S. 37, 51–52 (1948); cf. *International Salt Co.* v. *United States,* 332 U. S. 392, 398–400 (1947).

[5] *Federal Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 726–727 (1948); 38 Stat. 722, 15 U. S. C. § 47.

were material factors in competition among Ruberoid's customers, and Ruberoid offered no evidence to the contrary. In this state of the record the Commission was not required to limit its prohibition to the specific differential shown to have been adopted in past violations of the statute.[6] In the absence of any indication that a lesser discrimination might not affect competition there was no need to afford an escape clause through which the seller might frustrate the whole purpose of the proceedings and the order by limiting future discrimination to something less than 5%.[7]

The roofing material customers of Ruberoid may be classified as wholesalers, retailers, and roofing contractors or applicators.[8] The discriminations found by the Commission were in sales to retailers and applicators. The

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[6] *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 51–52 (1948); cf. *Labor Board* v. *Express Publishing Co.*, 312 U. S. 426, 436–437 (1941).

[7] "True, the Commission did not merely prohibit future discounts, rebates, and allowances in the exact mathematical percentages previously utilized by respondent. Had the order done no more than that, respondent could have continued substantially the same unlawful practices despite the order by simply altering the discount percentages and the quantities of salt to which the percentages applied." *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 52–53 (1948). The discussion following these words in the *Morton Salt* case, of certain aspects of the order in question there, manifestly affords no support to Ruberoid's contention here. *Id.*, at 53–54.

[8] Ruberoid suggests a fourth category of purchasers—manufacturers—and contends that the order is too broad in that it prohibits discrimination in sales to that group, *e. g.*, in sales of shingles to competing manufacturers of prefabricated houses. We need not consider whether such an order would be too broad because we do not think the order here applies to such sales. By its terms, the order covers only sales to those competitively engaged "in the resale or distribution of such products [*i. e.*, 'asbestos or asphalt roofing materials'],'' and not sales to those who use roofing materials in the fabrication of wholly new and different products.

Commission held that there was insufficient evidence in the record to establish discrimination among wholesalers, as such. Ruberoid contends that the order should have been similarly limited to sales to retailers and applicators. But there was ample evidence that Ruberoid's classification of its customers did not follow real functional differences. Thus some purchasers which Ruberoid designated as "wholesalers" and to which Ruberoid allowed extra discounts in fact competed with other purchasers as applicators. And the Commission found that some purchasers operated as both wholesalers and applicators. So finding, the Commission disregarded these ambiguous labels, which might be used to cloak discriminatory discounts to favored customers, and stated its order in terms of "purchasers who in fact compete." Thus stated, we think the order is understandable, reasonably related to the facts shown by the evidence, and within the broad discretion which the Commission possesses in determining remedies.

Finally, Ruberoid complains that the order enjoins lawful acts by failing to except from its prohibitions differentials which merely make allowance for differences in cost of manufacture, sale or delivery, or which are made in good faith to meet an equally low price of a competitor. Differences in price satisfying either of these tests are permitted by the terms of the Act.[9] It is argued that the Commission has radically broadened its prohibitory

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[9] "[N]othing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ." 49 Stat. 1526, 15 U. S. C. § 13 (a). "[N]othing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . . ." 49 Stat. 1526, 15 U. S. C. § 13 (b), *Standard Oil Co.* v. *Federal Trade Comm'n*, 340 U. S. 231 (1951). Ruberoid does not complain of the omission

powers through failure to include these provisos in the order. We do not think so because we think the provisos are necessarily implicit in every order issued under the authority of the Act, just as if the order set them out *in extenso*. Although previous Commission orders have included these provisos, they gained no force by that inclusion. Their absence cannot preclude the seller from differentiating in price in a new competitive situation involving different circumstances where it can justify the discrimination in accordance with the statutory provisos. Nor is the seller required to seek modification of the order each time, for example, that a competitor's price reduction requires it either to lower its price in good faith to meet the lower competing price or to lose a fleeting sales opportunity. On the other hand, the implied inclusion of the provisos in the order does not shift from the seller the burden of proof of justification.[10] Neither does recognition of the implicit availability of these defenses allow the seller to relitigate issues already settled by prior proceedings before the Commission which resulted in an order that was affirmed in the courts. If questions of justification, claimed upon the basis of facts relating to costs or meeting competition, have once been finally decided against the seller, it cannot again interpose the same defense upon substantially similar facts when the Commission seeks to show that its order has been violated.[11]

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from the order of the statutory provisos relating to the seller's right to select its own customers and to price changes in response to changing conditions affecting the market for, or the marketability of, the goods concerned. Hence we do not deal with those defenses here.

[10] Cf. *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 44–45 (1948) (cost justification); *Federal Trade Comm'n* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945) (meeting-competition justification).

[11] Where the Commission seeks both affirmance and enforcement of its order in one proceeding, contending that the seller has con-

The same result follows where the evidence supporting the defense, although not produced in the previous proceedings, was then available to the seller. In short, the seller, in contesting enforcement or contempt proceedings, may plead only those facts constituting statutory justification which it has not had a previous opportunity to present.

The sole question presented by the Commission's petition concerns the lower court's holding, with one dissent, that the Commission could not "obtain a decree directing enforcement of an order issued under the Clayton Act in the absence of showing that a violation of the order has occurred or is imminent." [12] The pertinent parts of the Act provide:

> "If such person [subject to the order] fails or neglects to obey such order of the commission . . . while the same is in effect, the commission . . . may apply to the circuit court of appeals of the United States . . . for the enforcement of its order . . . . [T]he court . . . shall have power to make and enter . . . a decree affirming, modifying, or setting aside the order of the commission . . . .
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> "Any party required by such order of the commission . . . to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission . . . be set aside. . . . [T]he court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission . . . as in the case of an applica-

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tinued in its unlawful practices since the order was issued, the court, in deciding whether the order should be affirmed, will of course review the determination of the Commission in the ordinary manner. But questions thus settled will not be open in deciding whether the order has been violated and should therefore be enforced.

[12] 191 F. 2d 294, 295.

tion by the commission . . . for the enforcement of its order . . . .

"The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission . . . shall be exclusive." [13]

The Commission argues, first, that the provision authorizing it to apply for enforcement "if such person fails or neglects to obey such order" is merely "a Congressional directive to the Commission as to the circumstances under which it may go into court to seek enforcement," which does not amount to a prerequisite to the court's granting of enforcement.[14] We cannot subscribe to this argument, which disregards the unequivocal language of the statute and its consistent interpretation over the thirty-eight-year period of its existence.[15] Congress, in 1938, amended similar language in the Federal Trade Commission Act, so that the reviewing court is now plainly required, upon affirmance, to enforce an order based upon violation of that Act.[16] The Commission has

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[13] 38 Stat. 735, as amended, 15 U. S. C. § 21.

[14] Brief for the Federal Trade Commission in No. 448, p. 16.

[15] *E. g., Federal Trade Comm'n* v. *Whitney & Co.,* 192 F. 2d 746 (C. A. 9th Cir. 1951); *Federal Trade Comm'n* v. *Standard Brands, Inc.,* 189 F. 2d 510 (C. A. 2d Cir. 1951); *Federal Trade Comm'n* v. *Herzog,* 150 F. 2d 450 (C. A. 2d Cir. 1945); *Federal Trade Comm'n* v. *Baltimore Paint & Color Works,* 41 F. 2d 474 (C. A. 4th Cir. 1930); *Federal Trade Comm'n* v. *Balme,* 23 F. 2d 615 (C. A. 2d Cir. 1928); *Federal Trade Comm'n* v. *Standard Education Society,* 14 F. 2d 947 (C. A. 7th Cir. 1926). The last three cases cited arose under the Federal Trade Commission Act, but since the Clayton Act provisions involved here are identical with the corresponding provisions of the Federal Trade Commission Act prior to 1938, 38 Stat. 720, the decisions make no distinction between them.

[16] "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." 52 Stat. 113, 15 U. S. C. § 45 (c). Unless the party subject to an order issued under the

repeatedly sought similar amendment of the Clayton Act provisions involved in this case.[17] We will not now achieve the same result by reinterpretation in the face of Congress' failure to pass the bills thus brought before it.[18] Effective enforcement of the Clayton Act by the Commission may be handicapped by the present provisions, but that is a question of policy for Congress.

Alternatively, the Commission argues that, even though disobedience of the order is a condition to enforcement upon the application of the Commission, there is no such condition where the order comes before the court upon petition for review by the affected party. This argument begins with the difference in language between the statutory paragraphs providing for review at the instance of the respective parties, but consideration of the section as a whole convinces us that the most that can be said for the argument is that the section is ambiguous. We think the statutory prerequisite to enforcement applies when the Commission seeks enforcement by cross-petition after review has been set in motion by the party subject to the order as well as when the Commission makes the original application.[19] There is no reason why one who has complied with the order, but who seeks to have it reviewed and modified or set aside, should be placed in a worse position than one who does not exercise that right. We

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provisions of the Federal Trade Commission Act files a petition for review within sixty days, the order becomes final and its violation punishable. 52 Stat. 113–114, 15 U. S. C. § 45 (g) and (*l*).

[17] *E. g.*, Ann. Rep. F. T. C. (1951) 7–8; Ann. Rep. F. T. C. (1948) 12; Ann. Rep. F. T. C. (1947) 13; Ann. Rep. F. T. C. (1946) 12.

[18] *E. g.*, H. R. 10176, 75th Cong., 3d Sess.; H. R. 3402, 81st Cong., 1st Sess.

[19] Accord, *e. g.*, *Federal Trade Comm'n* v. *Fairyfoot Products Co.*, 94 F. 2d 844 (C. A. 7th Cir. 1938); *Butterick Co.* v. *Federal Trade Comm'n*, 4 F. 2d 910 (C. A. 2d Cir. 1925); *L. B. Silver Co.* v. *Federal Trade Comm'n*, 292 F. 752 (C. A. 6th Cir. 1923).

doubt that Congress intended its requirement for enforcement to depend entirely upon which party goes to court first.

*Affirmed.*

MR. JUSTICE BLACK concurs in the judgment and opinion of the Court, except that he thinks the Commission's order should expressly except from its prohibitions differentials which merely make allowances for differences in the cost of manufacture, sale, or delivery, or which are made in good faith to meet an equally low price of a competitor.

MR. JUSTICE FRANKFURTER, not having heard the argument, owing to illness, took no part in the disposition of this case.

MR. JUSTICE DOUGLAS dissents from the denial of enforcement of the order.

MR. JUSTICE JACKSON, dissenting in No. 504.

The Federal Trade Commission, in July of 1943, instituted before itself a proceeding against petitioner on a charge of discriminating in price between customers in violation of subsection (a) of § 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936, 15 U. S. C. § 13 (a).

Several violations were proved and admitted to have occurred in 1941. No serious opposition was offered to an order to cease and desist from such discriminations, but petitioner did object to being ordered to cease types of violations it never had begun and asked that any order include a clause to the effect that it did not forbid the price differentials between customers which are expressly allowed by statute.

However, the Commission refused to include such a provision as "unnecessary to assure respondent [petitioner here] its full legal rights." It also rejected the specific and limited order recommended by its Examiner and substituted a sweeping general order to "cease and desist from discriminating in price: By selling such products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products." It wrote no opinion and gave only the most cryptic reasons in its findings.[1]

On proceedings for review, petitioner attacked this order for its indeterminateness and its prohibition of differentials allowed by statute. The Court of Appeals, however, affirmed, saying:

> "We sympathize with the petitioner's position and can realize the difficulties of conducting business under such general prohibitions. Nevertheless we are convinced that the cause of the trouble is the Act itself, which is vague and general in its wording and which cannot be translated with assurance into any detailed set of guiding yardsticks." [2]

This appraisal of the result of almost ten years of litigation exposes a grave deficiency either in the Act itself or in the administrative process by which it has been applied. Admitting that the statute is "vague and general in its wording," it does not follow that a cease and desist order implementing it should be. I think such an outcome of administrative proceedings is not acceptable. We would rectify and advance the administrative proc-

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[1] A comprehensive study has pointed out the early failure of this Commission (and it applies as well to others) to clarify and develop the law and thereby avoid litigation by careful published opinions. Henderson, The Federal Trade Commission, 334.

[2] *Ruberoid Co.* v. *Federal Trade Commission*, 189 F. 2d 893, 894.

ess, which has become an indispensable adjunct to modern government, by returning this case to the Commission to perform its most useful function in administering an admittedly complicated Act.

If the Court of Appeals were correct, it would mean that the intercession of the administrative process between the Congress and the Court does nothing either to define petitioner's duties and liabilities or to impose sanctions. Congress might as well have declared, in these comprehensive terms, a duty not to discriminate and provided for prosecution of violations in the courts. That, of course, would impose on the courts the task of determining the meaning and application of the law to the facts. But that is just the task that this order imposes upon the courts in event of a contempt proceeding. The courts have derived no more detailed "guiding yardsticks" from the Commission than from Congress. On the contrary, the ultimate enforcement is further confused by the administrative proceeding, because it winds up with an order which literally forbids what the Act expressly allows and thus adds to the difficulty of eventual sanctions should they become necessary.

If the unsound result here were an isolated example of malaise in the administrative scheme, its tolerance by the Court would be less troubling, though no less wrong. But I think its decision may encourage a deterioration of the administrative process of which this case is symptomatic and which invites invasion of the independent agency administrative field by executive agencies. Other symptoms, betokening the same basic confusion, are the numerous occasions when administrative findings are inadequate for purposes of review and recent instances in which part of the government appears before us fighting another part—usually a wholly executive-controlled agency attacking one of the independent administrative agencies—the Departments of Agriculture (*Secretary of*

*Agriculture* v. *United States et al.,* No. 710, now pending in this Court) and Justice (*United States* v. *Interstate Commerce Commission,* 337 U. S. 426) against the Interstate Commerce Commission, the Department of Justice against the Maritime Commission (*Far East Conference* v. *United States,* 342 U. S. 570), the Secretary of the Interior against the Federal Power Commission (*United States ex rel. Chapman* v. *Federal Power Commission,* No. 658, now pending in this Court, certiorari granted 343 U. S. 941). Abstract propositions may not solve concrete cases, but, when basic confusion is responsible for a particular result, resort to the fundamental principles which determine the position of the administrative process in our system may help to illuminate the shortcomings of that result.

I.

*The Act, like many regulatory measures, sketches a general outline which contemplates its completion and clarification by the administrative process before court review or enforcement.*

This section of the Act admittedly is complicated and vague in itself and even more so in its context. Indeed, the Court of Appeals seems to have thought it almost beyond understanding. By the Act, nothing is commanded to be done or omitted unconditionally, and no conduct or omission is *per se* punishable. The commercial discriminations which it forbids are those only which meet three statutory conditions and survive the test of five statutory provisos. To determine which of its overlapping and conflicting policies shall govern a particular case involves inquiry into grades and qualities of goods, discriminations and their economic effects on interstate commerce, competition between customers, the economic effect of price differentials to lessen competition or tend to create a monopoly, allowance for differences in cost of

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manufacturing, sale or delivery and good faith in meeting of the price, services or facilities of competitors.

This Act exemplifies the complexity of the modern lawmaking task and a common technique for regulatory legislation. It is typical of instances where the Congress cannot itself make every choice between possible lines of policy. It must legislate in generalities and delegate the final detailed choices to some authority with considerable latitude to conform its orders to administrative as well as legislative policies.

The large importance that policy and expertise were expected to play in reducing this Act to "guiding yardsticks" is evidenced by the fact that authority to enforce the section is not confided to a single body for all industries but is dispersed among four administrative agencies which deal with special types of commerce besides the Federal Trade Commission.[3]

A seller may violate this section of the Act without guilty knowledge or intent and may unwittingly subject himself to a cease and desist order. But neither violation of the Act nor of the order will call for criminal sanctions; neither is even enforceable on behalf of the United States by injunction until after an administrative proceeding has resulted in a cease and desist order and it has been reviewed and affirmed, if review be sought, by the Court of Appeals. Only an enforcement order issued from the court carries public sanctions,[4] and its violation is punishable as a contempt.

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[3] 15 U. S. C. § 21 vests enforcement in the Interstate Commerce Commission where applicable to certain regulated common carriers; in the Federal Communications Commission as to wire and radio communications; Civil Aeronautics Board as to air carriers; Federal Reserve Board as to banks, etc., and Federal Trade Commission as to all other types of commerce.

[4] 15 U. S. C. § 21.

Thus Congress, in this Act, has refrained from imposition of an unconditional duty directly enforceable by the government through civil or criminal proceedings in court, as it has in the Sherman Antitrust Act and the Wilson Tariff Act of 1894.[5] It has carefully kept such cases as this out of the courts and has shielded a violator from any penalty until the administrative tribunal hands down a definitive order. The difference is accented by another section of the Robinson-Patman Act which does make participation by any person in specified transactions which discriminate "to his knowledge" a criminal violation judicially punishable.[6]

It may help clarify the proper administrative function in such cases to think of the legislation as unfinished law which the administrative body must complete before it is ready for application.[7] In a very real sense the legis-

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[5] 15 U. S. C. §§ 1–4, 8, 9.

[6] 15 U. S. C. § 13a.

[7] For emphasis and appreciation of this concept of American administrative law and of the function of the administrative tribunal as we have evolved it, I am indebted to an unpublished treatise by Dr. Robert F. Weissenstein, whose Viennese and European background, education and practice gave him a perspective attained with difficulty by us who are so accustomed to our own process.

Lord Chancellor Herschell has employed a different but effective figure. "The truth is," said he, "the legislation is a skeleton piece of legislation left to be filled up in all its substantial and material particulars by the action of rules to be made by the Board of Trade. . . . it was the intention of the Legislature, having expressed the general object, and having provided the necessary penalty, to leave the subordinate legislation, so to speak, to be carried out by the Board of Trade." *Institute of Patent Agents* v. *Lockwood,* [1894] A. C. 347, 356–357.

For an excellent study of English "Delegated Legislation Today" see Willis, Parliamentary Powers of English Government Departments, c. II, p. 47. For the extent to which this system has been used in England, see Lord Macmillan, Local Government Law and Administration in England and Wales, Vol. I, Preface.

lation does not bring to a close the making of the law. The Congress is not able or willing to finish the task of prescribing a positive and precise legal right or duty by eliminating all further choice between policies, expediences or conflicting guides, and so leaves the rounding out of its command to another, smaller and specialized agency.

It is characteristic of such legislation that it does not undertake to declare an end result in particular cases but rather undertakes to control the processes in the administrator's mind by which he shall reach results. Because Congress cannot predetermine the weight and effect of the presence or absence of all of the competing considerations or conditions which should influence decisions regulating modern business, it attempts no more than to indicate generally the outside limits of the ultimate result and to set out matters about which the administrator must think when he is determining what within those confines the compulsion in a particular case is to be.

Such legislation does not confer on any of the parties in interest the right to a particular result, nor even to what we might think ought to be the correct one, but it gives them the right to a process for determining these rights and duties. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U. S. 246, 251; *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194, 195.

Such legislation represents inchoate law in the sense that it does not lay down rules which call for immediate compliance on pain of punishment by judicial process. The intervention of another authority must mature and perfect an effective rule of conduct before one is subject to coercion. The statute, in order to rule any individual case, requires an additional exercise of discretion and that

last touch of selection which neither the primary legislator nor the reviewing court can supply. The only reason for the intervention of an administrative body is to exercise a grant of unexpended legislative power to weigh what the legislature wants weighed, to reduce conflicting abstract policies to a concrete net remainder of duty or right. Then, and then only, do we have a completed expression of the legislative will, in an administrative order which we may call a sort of secondary legislation, ready to be enforced by the courts.

## II.

*The constitutional independence of the administrative tribunal presupposes that it will perform the function of completing unfinished law.*

The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. They also have begun to have important consequences on personal rights. Cf. *United States* v. *Spector,* 343 U. S. 169. They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.

Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken

down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

The perfect example is the Federal Trade Commission itself. By the doctrine that it exercises legislative discretions as to policy in completing and perfecting the legislative process, it has escaped executive domination on the one hand and been exempted in large measure from judicial review on the other. If all it has to do is to order the literal statute faithfully executed, it would exercise a function confided exclusively to the President and would be subject to his control. Cf. *Myers* v. *United States,* 272 U. S. 52; U. S. Const., Art. II, §§ 1, 3. This Court saved it from executive domination only by recourse to the doctrine that "In administering the provisions of the statute in respect of 'unfair methods of competition'—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially." *Humphrey's Executor* v. *United States,* 295 U. S. 602, 628.

When Congress enacts a statute that is complete in policy aspects and ready to be executed as law, Congress has recognized that enforcement is only an executive function and has yielded that duty to wholly executive agencies, even though determination of fact questions was necessary.[8] Examples of the creation of such rights

[8] The legislative history of the Fair Labor Standards Act, 29 U. S. C. § 201 *et seq.*, exemplifies the choice which Congress must make between itself completing the legislation, and delegating the completion to an administrative agency. H. R. Rep. No. 2738, 75th Cong., 3d Sess., sets forth a summary of both the House Bill and the Senate Bill. The Senate Bill provided for the creation of a Labor Standards Board composed of five members, which was empowered to declare from time to time, for such occupations as

and obligations are patent, revenue and customs laws. Only where the law is not yet clear of policy elements and therefore not ready for mere executive enforcement is it withdrawn from the executive department and confided to independent tribunals. If the tribunal to which such discretion is delegated does nothing but promulgate as its own decision the generalities of its statutory charter, the rationale for placing it beyond executive control is gone.

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are brought within the bill, minimum wages "which shall be as nearly adequate as economically feasible without curtailing opportunity for employment, to maintain a minimum standard of living necessary for health, efficiency, and general well-being . . ." but not in excess of 40 cents per hour. *Id.*, at 15. Similar provisions empowered the Board to determine maximum hours, provided that in no case should the maximum be set at less than 40 hours. *Id.*, at 16. Likewise, the Board was empowered to require the elimination of substandard labor conditions. *Id.*, at 17.

The House Bill, on the other hand, itself laid down the minimum wage and maximum hour requirements, *id.*, 22–23, and gave to the Secretary of Labor discretion only to determine which industries were within the terms of the law, plus the power to investigate compliance with the law. *Id.*, at 23. The Act as ultimately adopted followed the House Bill; although there was created the office of Administrator of the Wage and Hour Division in the Department of Labor, the Administrator was given discretion only in minor matters relating to the applicability of the congressional standards. 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*

The Administration favored the plan of delegating legislative discretion to an independent administrative body to apply general standards to concrete cases. See testimony of Secretary of Labor Frances Perkins, Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess. 178. However, the attempt of Congress itself to complete this complex law for enforcement by the Executive, through the courts, not only flooded the courts with litigation, but the courts' interpretation of the Act contrary to the policy which Congress thought it had indicated had disastrous consequences. 61 Stat. 84, 29 U. S. C. § 251 *et seq.*

## III.

*The quasi-legislative function of filling in blank spaces in regulatory legislation and reconciling conflicting policy standards must neither be passed on to the courts nor assumed by them.*

That the work of a Commission in translating an abstract statute into a concrete cease and desist order in large measure escapes judicial review because of its legislative character is an axiom of administrative law, as the Court's decision herein shows. In delegating the function of filling out the legislative will in particular cases, Congress must not leave the statute too empty of meaning. Courts look to its standards to see whether the Commission's result is within the prescribed terms of reference, whether the secondary legislation properly derives from the primary legislation.

Then, too, we look to administrative findings, not to reconsider their justification, but to learn whether the parties have had the process of determination to which the statute has entitled them and whether the Commission has thought about—or at least has written about—all factors which Congress directed it to consider in translating unfinished legislation into a "detailed set of guiding yardsticks" that becomes law of the case for parties and courts.[9]

However, a determination by an independent agency, with "quasi-legislative" discretion in its armory, has a

[9] If the independent agencies could realize how much trustworthiness judges give to workmanlike findings and opinions and how their causes are prejudiced on review by slipshod, imprecise findings and failure to elucidate by opinion the process by which ultimate determinations have been reached, their work and their score on review would doubtless improve. See Henderson, The Federal Trade Commission, c. VI, p. 327. See also Commission on Organization of the Executive Branch of the Government, Task Force Report on Regulatory Commissions (App. N), pp. 129–130.

much larger immunity from judicial review than does a determination by a purely executive agency. The court, in review of a case under the tax law or the patent law, where the legislative function has been exhausted and policy considerations are settled in the Acts themselves, follows the same mental operation as the executive officer. On the facts, there results an obligation to pay tax, or there is a right to a patent. The court can deduce these legal rights or obligations from the statute in the same manner as the executive officer. Hence, review of such executive decisions proceeds with no more deference to the administrative judgment than to a decision of a lower court.

Very different, however, is the review of the "quasi-legislative" decision. There the right or liability of the parties is not determined by mere application of statute to the facts. The right or obligation results not merely from the abstract expression of the will of Congress in the statute, but from the Commission's completion and concretization of that will in its order. Cf. *Montana-Dakota Co.* v. *Northwestern Public Service Co., supra,* 251; *Phelps Dodge Corp.* v. *Labor Board, supra.*

On review, the Court does not decide whether *the* correct determination has been reached. So far as the Court is concerned, a wide range of results may be equally correct. In review of such a decision, the Court does not at all follow the same mental processes as the Commission did in making it, for the judicial function excludes (in theory, at least) the policy-making or legislative element, which rightfully influences the Commission's judgment but over which judicial power does not extend. Since it is difficult for a court to determine from the record where quasi-legislative policy making has stopped and quasi-judicial application of policy has begun, the entire process escapes very penetrating scrutiny. Cf.

*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591.

Courts are no better equipped to handle policy questions and no more empowered to exercise legislative discretion on contempt proceedings than on review proceedings. It is plain that, if the scheme of regulating complicated enterprises through unfinished legislation is to be just and effective, we must insist that the legislative function be performed and exhausted by the administrative body before the case is passed on to the courts.

## IV.

*This proceeding should be remanded for a more definitive and circumscribed order.*

Returning to this case, I cannot find that ten years of litigation have served any useful purpose whatever. No doubt it is administratively convenient to blanket an industry under a comprehensive prohibition in bulk—an undiscriminating prohibition of discrimination. But this not only fails to give the precision and concreteness of legal duties to the abstract policies of the Act, it really promulgates an inaccurate partial paraphrase of its indeterminate generalities. Instead of completing the legislation by an order which will clarify the petitioner's duty, it confounds confusion by literally ordering it to cease what the statute permits it to do.

This Court and the court below defer solution of the problems inherent in such an order, on the theory that if petitioner offends again there may be an enforcement order, and if it then offends again there may be a contempt proceeding and that will be time enough for the court to decide what the order against the background of the Act really means. While I think this less than justice, I am not greatly concerned about what the Court's decision does to this individual petitioner, for whom I foresee no danger more serious than endless litigation.

But I am concerned about what it does to administrative law.

To leave definition of the duties created by an order to a contempt proceeding is for the courts to end where they should begin. Injunctions are issued to be obeyed, even when justification to issue them may be debatable. *United States* v. *United Mine Workers,* 330 U. S. 258, 289 *et seq.,* 307. But in this case issues that seem far from frivolous as to what is forbidden are reserved for determination when punishment for disobedience is sought. The Court holds that some modifications are "implicit" in this order. Why should they not be made explicit? Why approve an order whose literal terms we know go beyond the authorization, on the theory that its excesses may be retracted if ever it needs enforcement? Why invite judicial indulgence toward violation by failure to be specific, positive and concrete?

It does not impress me as lawyerly practice to leave to a contempt proceeding the clarification of the reciprocal effects of this Act and order, and determination of the effect of statutory provisos which are then to be read into the order. The courts cannot and should not assume that function. It is, by our own doctrine, a legislative or "quasi-legislative" function, and the courts cannot take over the discretionary functions of the Commission which should enter into its determinations. Plainly this order is not in shape to enforce and does not become so by the Court's affirmance.

This proceeding should be remanded to the Commission with directions to make its order specific and concrete, to specify the types of discount which are forbidden and reserve to petitioner the rights which the statute allows it, unless they are deemed lost, forfeited or impaired by the violations, in which case any limitation should be set forth. The Commission should, in short, in the light of its own policy and the record, translate

this Act into a "set of guiding yardsticks," admittedly now lacking. If that cannot be done, there should be no judicial approval for an order to cease and desist from we don't know what.

If that were done, I should be inclined to accept the Government's argument that, along with affirmance, enforcement may be ordered. I see no real sense, when the case is already before the Court and is approved, in requiring one more violation before its obedience will be made mandatory on pain of contempt. But, as this order stands, I am not surprised that enforcement should be left to some later generation of judges.

# JOSEPH BURSTYN, INC. *v.* WILSON, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 522. Argued April 24, 1952.—Decided May 26, 1952.

Provisions of the New York Education Law which forbid the commercial showing of any motion picture film without a license and authorize denial of a license on a censor's conclusion that a film is "sacrilegious," *held* void as a prior restraint on freedom of speech and of the press under the First Amendment, made applicable to the states by the Fourteenth Amendment. Pp. 497–506.

1. Expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. Pp. 499–502.

(a) It cannot be doubted that motion pictures are a significant medium for the communication of ideas. Their importance as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. P. 501.

(b) That the production, distribution and exhibition of motion pictures is a large-scale business conducted for private profit does not prevent motion pictures from being a form of expression whose liberty is safeguarded by the First Amendment. Pp. 501–502.

(c) Even if it be assumed that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression, it does not follow that they are not entitled to the protection of the First Amendment or may be subjected to substantially unbridled censorship. P. 502.

(d) To the extent that language in the opinion in *Mutual Film Corp.* v. *Industrial Comm'n*, 236 U. S. 230, is out of harmony with the views here set forth, it is no longer adhered to. P. 502.

2. Under the First and Fourteenth Amendments, a state may not place a prior restraint on the showing of a motion picture film on the basis of a censor's conclusion that it is "sacrilegious." Pp. 502–506.

(a) Though the Constitution does not require absolute freedom to exhibit every motion picture of every kind at all times and all places, there is no justification in this case for making an

exception to the basic principles of freedom of expression previously announced by this Court with respect to other forms of expression. Pp. 502–503.

(b) Such a prior restraint as that involved here is a form of infringement upon freedom of expression to be especially condemned. *Near* v. *Minnesota*, 283 U. S. 697. Pp. 503–504.

(c) New York cannot vest in a censor such unlimited restraining control over motion pictures as that involved in the broad requirement that they not be "sacrilegious." Pp. 504–505.

(d) From the standpoint of freedom of speech and the press, a state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. P. 505.

303 N. Y. 242, 101 N. E. 2d 665, reversed.

The New York Appellate Division sustained revocation of a license for the showing of a motion picture under § 122 of the New York Education Law on the ground that it was "sacrilegious." 278 App. Div. 253, 104 N. Y. S. 2d 740. The Court of Appeals of New York affirmed. 303 N. Y. 242, 101 N. E. 2d 665. On appeal to this Court under 28 U. S. C. § 1257 (2), *reversed*, p. 506.

*Ephraim S. London* argued the cause and filed a brief for appellant.

*Charles A. Brind, Jr.* and *Wendell P. Brown*, Solicitor General of New York, argued the cause for appellees. With them on the brief were *Nathaniel L. Goldstein*, Attorney General of New York, and *Ruth Kessler Toch*, Assistant Attorney General.

*Morris L. Ernst, Osmond K. Fraenkel, Arthur Garfield Hays, Herbert Monte Levy, Emanuel Redfield, Shad Polier, Will Maslow, Leo Pfeffer, Herman Seid* and *Eberhard P. Deutsch* filed a brief for the American Civil Liberties Union et al., as *amici curiae*, urging reversal.

*Charles J. Tobin, Edmond B. Butler* and *Porter R. Chandler* filed a brief for the New York State Catholic Welfare Committee, as *amicus curiae*, urging affirmance.

MR. JUSTICE CLARK delivered the opinion of the Court.

The issue here is the constitutionality, under the First and Fourteenth Amendments, of a New York statute which permits the banning of motion picture films on the ground that they are "sacrilegious." That statute makes it unlawful "to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel [with specified exceptions not relevant here], unless there is at the time in full force and effect a valid license or permit therefor of the education department . . . ." [1] The statute further provides:

> "The director of the [motion picture] division [of the education department] or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto." [2]

Appellant is a corporation engaged in the business of distributing motion pictures. It owns the exclusive rights to distribute throughout the United States a film produced in Italy entitled "The Miracle." On November 30, 1950, after having examined the picture, the motion picture division of the New York education depart-

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[1] McKinney's N. Y. Laws, 1947, Education Law, § 129.

[2] *Id.*, § 122.

ment, acting under the statute quoted above, issued to appellant a license authorizing exhibition of "The Miracle," with English subtitles, as one part of a trilogy called "Ways of Love." [3] Thereafter, for a period of approximately eight weeks, "Ways of Love" was exhibited publicly in a motion picture theater in New York City under an agreement between appellant and the owner of the theater whereby appellant received a stated percentage of the admission price.

During this period, the New York State Board of Regents, which by statute is made the head of the education department,[4] received "hundreds of letters, telegrams, post cards, affidavits and other communications" both protesting against and defending the public exhibition of "The Miracle." [5] The Chancellor of the Board of Regents requested three members of the Board to view the picture and to make a report to the entire Board. After viewing the film, this committee reported to the Board that in its opinion there was basis for the claim that the picture was "sacrilegious." Thereafter, on January 19, 1951, the Regents directed appellant to show cause, at a hearing to be held on January 30, why its license to show "The Miracle" should not be rescinded on that ground. Appellant appeared at this hearing, which was conducted by the same three-member committee of the Regents which had previously viewed the picture, and challenged the jurisdiction of the committee and of the Regents to proceed with the case. With the consent of the committee, various interested persons and

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[3] The motion picture division had previously issued a license for exhibition of "The Miracle" without English subtitles, but the film was never shown under that license.

[4] McKinney's N. Y. Laws, 1947, Education Law, § 101; see also N. Y. Const., Art. V, § 4.

[5] Stipulation between appellant and appellee, R. 86.

organizations submitted to it briefs and exhibits bearing upon the merits of the picture and upon the constitutional and statutory questions involved. On February 16, 1951, the Regents, after viewing "The Miracle," determined that it was "sacrilegious" and for that reason ordered the Commissioner of Education to rescind appellant's license to exhibit the picture. The Commissioner did so.

Appellant brought the present action in the New York courts to review the determination of the Regents.[6] Among the claims advanced by appellant were (1) that the statute violates the Fourteenth Amendment as a prior restraint upon freedom of speech and of the press; (2) that it is invalid under the same Amendment as a violation of the guaranty of separate church and state and as a prohibition of the free exercise of religion; and, (3) that the term "sacrilegious" is so vague and indefinite as to offend due process. The Appellate Division rejected all of appellant's contentions and upheld the Regents' determination. 278 App. Div. 253, 104 N. Y. S. 2d 740. On appeal the New York Court of Appeals, two judges dissenting, affirmed the order of the Appellate Division. 303 N. Y. 242, 101 N. E. 2d 665. The case is here on appeal. 28 U. S. C. § 1257 (2).

As we view the case, we need consider only appellant's contention that the New York statute is an unconstitutional abridgment of free speech and a free press. In *Mutual Film Corp.* v. *Industrial Comm'n*, 236 U. S. 230 (1915), a distributor of motion pictures sought to enjoin the enforcement of an Ohio statute which required the prior approval of a board of censors before any motion

[6] The action was brought under Article 78 of the New York Civil Practice Act, Gilbert-Bliss N. Y. Civ. Prac., Vol. 6B, 1944, 1949 Supp., § 1283 *et seq.* See also McKinney's N. Y. Laws, 1947, Education Law, § 124.

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picture could be publicly exhibited in the state, and which directed the board to approve only such films as it adjudged to be "of a moral, educational or amusing and harmless character." The statute was assailed in part as an unconstitutional abridgment of the freedom of the press guaranteed by the First and Fourteenth Amendments. The District Court rejected this contention, stating that the first eight Amendments were not a restriction on state action. 215 F. 138, 141 (D. C. N. D. Ohio 1914). On appeal to this Court, plaintiff in its brief abandoned this claim and contended merely that the statute in question violated the freedom of speech and publication guaranteed by the Constitution of Ohio. In affirming the decree of the District Court denying injunctive relief, this Court stated:

> "It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion." [7]

In a series of decisions beginning with *Gitlow* v. *New York*, 268 U. S. 652 (1925), this Court held that the liberty of speech and of the press which the First Amendment guarantees against abridgment by the federal government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action.[8] That principle has been

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[7] 236 U. S., at 244.

[8] *Gitlow* v. *New York*, 268 U. S. 652, 666 (1925); *Stromberg* v. *California*, 283 U. S. 359, 368 (1931); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 707 (1931); *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244 (1936); *De Jonge* v. *Oregon*, 299 U. S. 353, 364 (1937); *Lovell* v. *Griffin*, 303 U. S. 444, 450 (1938); *Schneider* v. *State*, 308 U. S. 147, 160 (1939).

followed and reaffirmed to the present day. Since this series of decisions came after the *Mutual* decision, the present case is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secures to any form of "speech" or "the press." [9]

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.[10] The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in *Winters* v. *New York*, 333 U. S. 507, 510 (1948):

> "The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amend-

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[9] See *Lovell* v. *Griffin*, 303 U. S. 444, 452 (1938).

[10] See Inglis, Freedom of the Movies (1947), 20–24; Klapper, The Effects of Mass Media (1950), *passim*; Note, Motion Pictures and the First Amendment, 60 Yale L. J. 696, 704–708 (1951), and sources cited therein.

ment.[11] We fail to see why operation for profit should have any different effect in the case of motion pictures.

It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.

For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in *Mutual Film Corp.* v. *Industrial Comm'n, supra,* is out of harmony with the views here set forth, we no longer adhere to it.[12]

To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other

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[11] See *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936); *Thomas* v. *Collins,* 323 U. S. 516, 531 (1945).

[12] See *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131, 166 (1948): "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." It is not without significance that talking pictures were first produced in 1926, eleven years after the *Mutual* decision. Hampton, A History of the Movies (1931), 382–383.

media of communication of ideas.[13] Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.

The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697 (1931). The Court there recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection.[14] It was further stated that "the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only

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[13] *E. g., Feiner* v. *New York,* 340 U. S. 315 (1951); *Kovacs* v. *Cooper,* 336 U. S. 77 (1949); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942); *Cox* v. *New Hampshire,* 312 U. S. 569 (1941).

[14] *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 713–719 (1931); see also *Lovell* v. *Griffin,* 303 U. S. 444, 451–452 (1938); *Grosjean* v. *American Press Co.,* 297 U. S. 233, 245–250 (1936); *Patterson* v. *Colorado,* 205 U. S. 454, 462 (1907).

in exceptional cases." *Id.*, at 716. In the light of the First Amendment's history and of the *Near* decision, the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case.

New York's highest court says there is "nothing mysterious" about the statutory provision applied in this case: "It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule . . . ." [15] This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society.[16] In seeking to apply the broad and all-inclusive definition of "sacrilegious" given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no

[15] 303 N. Y. 242, 258, 101 N. E. 2d 665, 672. At another point the Court of Appeals gave "sacrilegious" the following definition: "the act of violating or profaning anything sacred." *Id.*, at 255, 101 N. E. 2d at 670. The Court of Appeals also approved the Appellate Division's interpretation: "As the court below said of the statute in question, 'All it purports to do is to bar a visual caricature of religious beliefs held sacred by one sect or another . . . .'" *Id.*, at 258, 101 N. E. 2d at 672. Judge Fuld, dissenting, concluded from all the statements in the majority opinion that "the basic criterion appears to be whether the film treats a religious theme in such a manner as to offend the religious beliefs of any group of persons. If the film does have that effect, and it is 'offered as a form of entertainment,' it apparently falls within the statutory ban regardless of the sincerity and good faith of the producer of the film, no matter how temperate the treatment of the theme, and no matter how unlikely a public disturbance or breach of the peace. The drastic nature of such a ban is highlighted by the fact that the film in question makes no direct attack on, or criticism of, any religious dogma or principle, and it is not claimed to be obscene, scurrilous, intemperate or abusive." *Id.*, at 271–272, 101 N. E. 2d at 680.

[16] Cf. *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940); *Stromberg* v. *California*, 283 U. S. 359, 369–370 (1931).

charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor. Cf. *Kunz* v. *New York,* 340 U. S. 290 (1951).[17] Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. Application of the "sacrilegious" test, in these or other respects, might raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all.[18] However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.[19]

Since the term "sacrilegious" is the sole standard under attack here, it is not necessary for us to decide, for ex-

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[17] Cf. *Niemotko* v. *Maryland,* 340 U. S. 268 (1951); *Saia* v. *New York,* 334 U. S. 558 (1948); *Largent* v. *Texas,* 318 U. S. 418 (1943); *Lovell* v. *Griffin,* 303 U. S. 444 (1938).

[18] See *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940).

[19] See the following statement by Mr. Justice Roberts, speaking for a unanimous Court in *Cantwell* v. *Connecticut,* 310 U. S. 296, 310 (1940):

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of

ample, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us.[20] We hold only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is "sacrilegious."

*Reversed.*

MR. JUSTICE REED, concurring in the judgment of the Court.

Assuming that a state may establish a system for the licensing of motion pictures, an issue not foreclosed by the Court's opinion, our duty requires us to examine the facts of the refusal of a license in each case to determine

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this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

"The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds."

[20] In the *Near* case, this Court stated that "the primary requirements of decency may be enforced against obscene publications." 283 U. S. 697, 716. In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942), Mr. Justice Murphy stated for a unanimous Court: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." But see *Kovacs* v. *Cooper*, 336 U. S. 77, 82 (1949): "When ordinances undertake censorship of speech or religious practices before permitting their exercise, the Constitution forbids their enforcement."

whether the principles of the First Amendment have been honored. This film does not seem to me to be of a character that the First Amendment permits a state to exclude from public view.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE JACKSON joins, concurring in the judgment of the Court; MR. JUSTICE BURTON, having concurred in the opinion of the Court, also joins this opinion.

A practised hand has thus summarized the story of "The Miracle": [1]

> "A poor, simple-minded girl is tending a herd of goats on a mountainside one day, when a bearded stranger passes. Suddenly it strikes her fancy that he is St. Joseph, her favorite saint, and that he has come to take her to heaven, where she will be happy and free. While she pleads with him to transport her, the stranger gently plies the girl with wine, and when she is in a state of tumult, he apparently ravishes her. (This incident in the story is only briefly and discreetly implied.)
>
> "The girl awakens later, finds the stranger gone, and climbs down from the mountain not knowing whether he was real or a dream. She meets an old priest who tells her that it is quite possible that she did see a saint, but a younger priest scoffs at the notion. 'Materialist!' the old priest says.
>
> "There follows now a brief sequence—intended to be symbolic, obviously—in which the girl is reverently sitting with other villagers in church. Moved by a whim of appetite, she snitches an apple from the basket of a woman next to her. When she leaves the church, a cackling beggar tries to make her share

[1] Crowther, "The Strange Case of 'The Miracle,'" Atlantic Monthly, April, 1951, pp. 35, 36–37.

the apple with him, but she chases him away as by habit and munches the fruit contentedly.

"Then, one day, while tending the village youngsters as their mothers work at the vines, the girl faints and the women discover that she is going to have a child. Frightened and bewildered, she suddenly murmurs, 'It is the grace of God!' and she runs to the church in great excitement, looks for the statue of St. Joseph, and then prostrates herself on the floor.

"Thereafter she meekly refuses to do any menial work and the housewives humor her gently but the young people are not so kind. In a scene of brutal torment, they first flatter and laughingly mock her, then they cruelly shove and hit her and clamp a basin as a halo on her head. Even abused by the beggars, the poor girl gathers together her pitiful rags and sadly departs from the village to live alone in a cave.

"When she feels her time coming upon her, she starts back towards the village. But then she sees the crowds in the streets; dark memories haunt her; so she turns towards a church on a high hill and instinctively struggles towards it, crying desperately to God. A goat is her sole companion. She drinks water dripping from a rock. And when she comes to the church and finds the door locked, the goat attracts her to a small side door. Inside the church, the poor girl braces herself for her labor pains. There is a dissolve, and when we next see her sad face, in close-up, it is full of a tender light. There is the cry of an unseen baby. The girl reaches towards it and murmurs, 'My son! My love! My flesh!' "

"The Miracle"— a film lasting forty minutes—was produced in Italy by Roberto Rossellini. Anna Magnani played the lead as the demented goat-tender. It was first shown at the Venice Film Festival in August, 1948,

combined with another moving picture, "L'Umano Voce," into a diptych called "Amore." According to an affidavit from the Director of that Festival, if the motion picture had been "blasphemous" it would have been barred by the Festival Committee. In a review of the film in L'Osservatore Romano, the organ of the Vatican, its film critic, Piero Regnoli, wrote: "Opinions may vary and questions may arise—even serious ones—of a religious nature (not to be diminished by the fact that the woman portrayed is mad [because] the author who attributed madness to her is not mad) . . . ." [2] While acknowledging that there were "passages of undoubted cinematic distinction," Regnoli criticized the film as being "on such a pretentiously cerebral plane that it reminds one of the early d'Annunzio." The Vatican newspaper's critic concluded: "we continue to believe in Rossellini's art and we look forward to his next achievement." [3] In October, 1948, a month after the Rome premiere of "The Miracle," the Vatican's censorship agency, the Catholic Cinematographic Centre, declared that the picture "constitutes in effect an abominable profanation from religious and moral viewpoints." [4] By the Lateran agreements and the Italian Constitution the Italian Government is bound to bar whatever may offend the Catholic religion. However, the Catholic Cinematographic Centre did not invoke any governmental sanction thereby afforded. The Italian Government's censorship agency gave "The Miracle" the regular *nulla osta* clearance. The film was freely shown throughout Italy, but was not a great success.[5] Italian movie critics divided in opinion. The critic for Il Popolo, speaking for the Christian Democratic Party, the Catholic

[2] L'Osservatore Romano, Aug. 25, 1948, p. 2, col. 1, translated in part in The Commonweal, Mar. 23, 1951, p. 592, col. 2.

[3] *Ibid.*

[4] N. Y. Times, Feb. 11, 1951, § 2, p. 4, cols. 4–5.

[5] Time, Feb. 19, 1951, pp. 60–61.

party, profusely praised the picture as a "beautiful thing, humanly felt, alive, true and without religious profanation as someone has said, because in our opinion the meaning of the characters is clear and there is no possibility of misunderstanding." [6] Regnoli again reviewed "The Miracle" for L'Osservatore Romano.[7] After criticising the film for technical faults, he found "the most courageous and interesting passage of Rossellini's work" in contrasting portrayals in the film; he added: "Unfortunately, concerning morals, it is necessary to note some slight defects." He objected to its "carnality" and to the representation of illegitimate motherhood. But he did not suggest that the picture was "sacrilegious." The tone of Regnoli's critique was one of respect for Rossellini, "the illustrious Italian producer." [8]

On March 2, 1949, "The Miracle" was licensed in New York State for showing without English subtitles.[9] However, it was never exhibited until after a second license was issued on November 30, 1950, for the trilogy, "Ways of Love," combining "The Miracle" with two French films, Jean Renoir's "A Day in the Country" and Marcel Pagnol's "Jofroi." [10] All had English subtitles. Both li-

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[6] Il Popolo, Nov. 3, 1948, p. 2, col. 9, translated by Camille M. Cianfarra, N. Y. Times, Feb. 11, 1951, § 2, p. 4, col. 5.

[7] L'Osservatore Romano, Nov. 12, 1948, p. 2, cols. 3–4.

[8] *Ibid.*

[9] "The Miracle" was passed by customs. To import "any obscene, lewd, lascivious, or filthy . . . motion-picture film" is a criminal offense, 35 Stat. 1088, 1138, 18 U. S. C. (Supp. IV) § 1462; and importation of any obscene "print" or "picture" is barred. 46 Stat. 590, 688, 19 U. S. C. § 1305. Compare the provision, "all photographic-films imported . . . shall be subject to such censorship as may be imposed by the Secretary of the Treasury." 38 Stat. 114, 151 (1913), 42 Stat. 858, 920 (1922), repealed 46 Stat. 590, 762 (1930). See Inglis, Freedom of the Movies, 68.

[10] Life, Jan. 15, 1951, p. 63; Sat. Rev. of Lit., Jan. 27, 1951, pp. 28–29.

censes were issued in the usual course after viewings of the picture by the Motion Picture Division of the New York State Education Department. The Division is directed by statute to "issue a license" "unless [the] film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime." N. Y. Education Law, § 122. The trilogy opened on December 12, 1950, at the Paris Theatre on 58th Street in Manhattan. It was promptly attacked as "a sacrilegious and blasphemous mockery of Christian religious truth" [11] by the National Legion of Decency, a private Catholic organization for film censorship, whose objectives have intermittently been approved by various non-Catholic church and social groups since its formation in 1933.[12] However, the National Board of Review (a non-industry lay organization devoted to raising the level of motion pictures by mobilizing public opinion, under the slogan "Selection Not Censorship")[13] recommended the picture as "especially worth seeing." New York critics on the whole praised "The Miracle"; those who dispraised did not suggest sacrilege.[14] On December 27 the critics selected the "Ways of Love" as the best foreign language

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[11] N. Y. Times, Dec. 31, 1950, p. 23, col. 4.

[12] Inglis, Freedom of the Movies, 120 *et seq.*

[13] *Id.*, at 74–82.

[14] Howard Barnes, N. Y. Herald Tribune, Dec. 13, 1950, p. 30, cols. 1–3: "it would be wise to time a visit to the Paris in order to skip ['The Miracle']. . . . Altogether it leaves a very bad taste in one's mouth."

Bosley Crowther, N. Y. Times, Dec. 13, 1950, p. 50, cols. 2–3: "each one of the [three] items . . . stacks up with the major achievements of the respective directors . . . . ['The Miracle'] is by far the most overpowering and provocative of the lot." N. Y. Times, Dec. 17, 1950, § 2, p. 3, cols. 7–8: "a picture of mounting intensity that wrings the last pang of emotion as it hits its dramatic

film in 1950.[15] Meanwhile, on December 23, Edward T. McCaffrey, Commissioner of Licenses for New York City, declared the film "officially and personally blasphemous" and ordered it withdrawn at the risk of suspension of the license to operate the Paris Theatre.[16] A week later the program was restored at the theatre upon the decision by the New York Supreme Court that the City

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peak . . . vastly compassionate comprehension of the suffering and the triumph of birth."

Wanda Hale, N. Y. Daily News, Dec. 13, 1950, p. 82, cols. 1–3: "Rossellini's best piece of direction, since his greatest, 'Open City.' . . . artistic and beautifully done by both the star and the director."

Archer Winsten, N. Y. Post, Dec. 13, 1950, p. 80, cols. 1–3: "Magnani's performance is a major one and profoundly impressive. This reviewer's personal opinion marked down the film as disturbingly unpleasant and slow."

Seymour Peck, N. Y. Daily Compass, Dec. 13, 1950, p. 13, cols. 3–5: " 'The Miracle' is really all Magnani. . . . one of the most exciting solo performances the screen has known."

Alton Cook, N. Y. World-Telegram, Dec. 13, 1950, p. 50, cols. 1–2: "['The Miracle' is] charged with the same overwrought hysteria that ran through his 'Stromboli.' . . . the picture has an unpleasant preoccupation with filth and squalor . . . exceedingly trying experience."

Time, Jan. 8, 1951, p. 72, cols. 2–3: "['The Miracle'] is second-rate Rossellini despite a virtuoso performance by Anna Magnani."

Newsweek, Dec. 18, 1950, pp. 93–94, col. 3: "strong medicine for most American audiences. However, it shows what an artist of Rossellini's character can do in the still scarcely explored medium of the film short story."

Hollis Alpert, Sat. Rev. of Lit., Jan. 27, 1951, pp. 28–29: "pictorially the picture is a gem, with its sensitive evocation of a small Italian town and the surrounding countryside near Salerno . . . . Anna Magnani again demonstrates her magnificent qualities of acting. The role is difficult . . . .

"But my quarrel would be with Mr. Rossellini, whose method of improvisation from scene to scene . . . can also result in extraneous detail that adds little, or even harms, the over-all effect."

[15] N. Y. Times, Dec. 28, 1950, p. 22, col. 1.

[16] *Id.*, Dec. 24, 1950, p. 1, cols. 2–3.

License Commissioner had exceeded his authority in that he was without powers of movie censorship.[17]

Upon the failure of the License Commissioner's effort to cut off showings of "The Miracle," the controversy took a new turn. On Sunday, January 7, 1951, a statement of His Eminence, Francis Cardinal Spellman, condemning the picture and calling on "all right thinking citizens" to unite to tighten censorship laws, was read at all masses in St. Patrick's Cathedral.[18]

The views of Cardinal Spellman aroused dissent among other devout Christians. Protestant clergymen, repre-

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[17] *Joseph Burstyn, Inc.* v. *McCaffrey*, 198 Misc. 884, 101 N. Y. S. 2d 892.

[18] N. Y. Times, Jan. 8, 1951, p. 1, col. 2. The Cardinal termed "The Miracle" "a vile and harmful picture," "a despicable affront to every Christian" ("We believe in miracles. This picture ridicules that belief"), and finally "a vicious insult to Italian womanhood." As a consequence, he declared: "we, as the guardians of the moral law, must summon you and all people with a sense of decency to refrain from seeing it and supporting the venal purveyors of such pictures . . . ." *Id.*, at p. 14, cols. 2–3.

For completeness' sake, later incidents should be noted. Picketers from the Catholic War Veterans, the Holy Name Society, and other Catholic organizations—about 1,000 persons in all during one Sunday—paraded before the Paris Theatre. *Id.*, Dec. 29, 1950, p. 36, col. 3; Jan. 8, 1951, p. 1, col. 2; Jan. 9, 1951, p. 34, col. 7; Jan. 10, 1951, p. 22, col. 6; Jan. 15, 1951, p. 23, col. 3. A smaller number of counterpickets appeared on several days. *Id.*, Jan. 10, 1951, p. 22, col. 6; Jan. 20, 1951, p. 10, cols. 4–5. See also *id.*, Jan. 23, 1951, p. 21, col. 8; Jan. 25, 1951, p. 27, col. 7.

The Paris Theatre on two different evenings was emptied on threat of bombing. *Id.*, Jan. 21, 1951, p. 1, cols. 2–3; Jan. 28, 1951, p. 1, cols. 2–3. Coincidently with the proceedings before the New York Board of Regents which started this case on the way to this Court, the Paris Theatre also was having difficulties with the New York City Fire Department. The curious may follow the development of those incidents, not relevant here, in the N. Y. Times, Jan. 21, 1951, p. 53, cols. 4–5; Jan. 27, 1951, p. 11, col. 3; Feb. 6, 1951, p. 29, col. 8; Feb. 10, 1951, p. 15, col. 8; Feb. 15, 1951, p. 33, col. 2.

senting various denominations, after seeing the picture, found in it nothing "sacrilegious or immoral to the views held by Christian men and women," and with a few exceptions agreed that the film was "unquestionably one of unusual artistic merit." [19]

In this estimate some Catholic laymen concurred.[20] Their opinion is represented by the comment by Otto L. Spaeth, Director of the American Federation of Arts and prominent in Catholic lay activities:

> "At the outbreak of the controversy, I immediately arranged for a private showing of the film. I invited a group of Catholics, competent and respected for their writings on both religious and cultural subjects. The essential approval of the film was unanimous.
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> "There was indeed 'blasphemy' in the picture—but it was the blasphemy of the villagers, who stopped at nothing, not even the mock singing of a

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[19] Excerpts from letters and statements by a great many clergymen are reproduced in the Record before this Court, pages 95–140. The representative quotations in the text are from letters written by the Rev. H. C. DeWindt, Minister of the West Park Presbyterian Church, New York City, R. 97, and the Rev. W. J. Beeners of Princeton, New Jersey, R. 98, respectively.

[20] Catholic opinion generally, as expressed in the press, supported the view of the Legion of Decency and of Cardinal Spellman. See, for example, The [New York] Catholic News, Dec. 30, 1950, p. 10; Jan. 6, 1951, p. 10; Jan. 20, 1951, p. 10; Feb. 3, 1951, p. 10; Feb. 10, 1951, p. 12; and May 19, 1951, p. 12; Commonweal, Jan. 12, 1951, p. 351, col. 1; The [Brooklyn] Tablet, Jan. 20, 1951, p. 8, col. 4; *id.*, Jan. 27, 1951, p. 10, col. 3; *id.*, Feb. 3, 1951, p. 8, cols. 3–4; Martin Quigley, Jr., "'The Miracle'—An Outrage"; The [San Francisco] Monitor, Jan. 12, 1951, p. 7, cols. 3–4 (reprinted from Motion Picture Herald, Jan. 6, 1951); The [Boston] Pilot, Jan. 6, 1951, p. 4. There doubtless were comments on "The Miracle" in other diocesan papers which circulate in various parts of the country, but which are not on file in the Library of Congress or the library of the Catholic University of America.

> hymn to the Virgin, in their brutal badgering of the tragic woman. The scathing indictment of their evil behavior, implicit in the film, was seemingly overlooked by its critics." [21]

William P. Clancy, a teacher at the University of Notre Dame, wrote in The Commonweal, the well-known Catholic weekly, that "the film is not *obviously* blasphemous or obscene, either in its intention or execution." [22] The Commonweal itself questioned the wisdom of transforming Church dogma which Catholics may obey as "a free act" into state-enforced censorship for all.[23] Allen Tate, the well-known Catholic poet and critic, wrote: "The picture seems to me to be superior in acting and photography but inferior dramatically. . . . In the long run what Cardinal Spellman will have succeeded in doing is insulting the intelligence and faith of American Catholics with the assumption that a second-rate motion picture could in any way undermine their morals or shake their faith." [24]

At the time "The Miracle" was filmed, all the persons having significant positions in the production—producer, director, and cast—were Catholics. Roberto Rossellini, who had Vatican approval in 1949 for filming a life of St. Francis, using in the cast members of the Franciscan

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[21] Spaeth, "Fogged Screen," Magazine of Art, Feb., 1951, p. 44; N. Y. Herald Tribune, Jan. 30, 1951, p. 18, col. 4.

[22] Clancy, "The Catholic as Philistine," The Commonweal, Mar. 16, 1951, pp. 567–569.

[23] The Commonweal, Mar. 2, 1951, pp. 507–508. Much the same view was taken by Frank Getlein writing in The Catholic Messenger, Mar. 22, 1951, p. 4, cols. 1–8, in an article bearing the headline: "Film Critic Gives Some Aspects of 'The Miracle' Story: Raises Questions Concerning Tactics of Organized Catholic Resistance Groups in New York." See also, "Miracles Do Happen," The New Leader, Feb. 5, 1951, p. 30, col. 2.

[24] N. Y. Times, Feb. 1, 1951, p. 24, col. 7.

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Order, cabled Cardinal Spellman protesting against boycott of "The Miracle":

> "In *The Miracle* men are still without pity because they still have not come back to God, but God is already present in the faith, however confused, of that poor, persecuted woman; and since God is wherever a human being suffers and is misunderstood, *The Miracle* occurs when at the birth of the child the poor, demented woman regains sanity in her maternal love." [25]

In view of the controversy thus aroused by the picture, the Chairman of the Board of Regents appointed a committee of three Board members to review the action of the Motion Picture Division in granting the two licenses. After viewing the picture on Jan. 15, 1951, the committee declared it "sacrilegious." The Board four days later issued an order to the licensees to show cause why the licenses should not be cancelled in that the picture was "sacrilegious." The Board of Regents rescinded the licenses on Feb. 16, 1951, saying that the "mockery or profaning of these beliefs that are sacred to any portion of our citizenship is abhorrent to the laws of this great State." On review the Appellate Division upheld the Board of Regents, holding that the banning of any motion picture "that may fairly be deemed sacrilegious to the adherents of any religious group . . . is directly related to public peace and order" and is not a denial of religious freedom, and that there was "substantial evidence upon which the Regents could act." 278 App. Div. 253, 257, 258, 260, 104 N. Y. S. 2d 740, 743, 744–745, 747.

The New York Court of Appeals, with one judge concurring in a separate opinion and two others dissenting,

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[25] *Id.*, Jan. 13, 1951, p. 10, col. 6; translation by Chworowsky, "The Cardinal: Critic and Censor," The Churchman, Feb. 1, 1951, p. 7, col. 2.

affirmed the order of the Appellate Division. 303 N. Y. 242, 101 N. E. 2d 665. After concluding that the Board of Regents acted within its authority and that its determination was not "one that no reasonable mind could reach," *id.*, at 250–255, 256–257, 101 N. E. 2d 665, 667–671, the majority held, first, that "sacrilegious" was an adequately definite standard, quoting a definition from Funk & Wagnalls' Dictionary and referring to opinions in this Court that in passing used the term "profane," which the New York court said was a synonym of "sacrilegious"; second, that the State's assurance "that no religion . . . shall be treated with contempt, mockery, scorn and ridicule . . . by those engaged in selling entertainment by way of motion pictures" does not violate the religious guarantee of the First Amendment; and third, that motion pictures are not entitled to the immunities from regulation enjoyed by the press, in view of the decision in *Mutual Film Corp.* v. *Ohio Industrial Comm'n,* 236 U. S. 230. *Id.*, at 255–256, 258–260, 260–262, 101 N. E. 2d 670–674. The two dissenting judges, after dealing with a matter of local law not reviewable here, found that the standard "sacrilegious" is unconstitutionally vague, and, finally, that the constitutional guarantee of freedom of speech applied equally to motion pictures and prevented this censorship. 303 N. Y. 242, 264, 101 N. E. 2d 665, 675. Both State courts, as did this Court, viewed "The Miracle."

Arguments by the parties and in briefs *amici* invite us to pursue to their farthest reach the problems in which this case is involved. Positions are advanced so absolute and abstract that in any event they could not properly determine this controversy. See *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 341, 346–348. We are asked to decide this case by choosing between two mutually exclusive alternatives: that motion pictures may be subjected to unrestricted censorship, or that they

must be allowed to be shown under any circumstances. But only the tyranny of absolutes would rely on such alternatives to meet the problems generated by the need to accommodate the diverse interests affected by the motion pictures in compact modern communities. It would startle Madison and Jefferson and George Mason, could they adjust themselves to our day, to be told that the freedom of speech which they espoused in the Bill of Rights authorizes a showing of "The Miracle" from windows facing St. Patrick's Cathedral in the forenoon of Easter Sunday,[26] just as it would startle them to be told that any picture, whatever its theme and its expression, could be barred from being commercially exhibited. The general principle of free speech, expressed in the First Amendment as to encroachments by Congress, and included as it is in the Fourteenth Amendment, binding on the States, must be placed in its historical and legal contexts. The Constitution, we cannot recall too often, is an organism, not merely a literary composition.

If the New York Court of Appeals had given "sacrilegious" the meaning it has had in Catholic thought since St. Thomas Aquinas formulated its scope, and had sustained a finding by the Board of Regents that "The Miracle" came within that scope, this Court would have to meet some of the broader questions regarding the relation to the motion picture industry of the guarantees of the First Amendment so far as reflected in the Fourteenth. But the New York court did not confine "sacrilegious" within such technical, Thomist limits, nor within any specific, or even approximately specified, limits. It may fairly be said that that court deemed "sacrilegious" a self-defining term, a word that carries a well-known, settled meaning in the common speech of men.

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[26] That such offensive exploitation of modern means of publicity is not a fanciful hypothesis, see N. Y. Times, April 14, 1952, p. 1, col. 4.

So far as the Court of Appeals sought to support its notion that "sacrilegious" has the necessary precision of meaning which the Due Process Clause enjoins for statutes regulating men's activities, it relied on this definition from Funk & Wagnalls' Dictionary: "The act of violating or profaning anything sacred." But this merely defines by turning an adjective into a noun and bringing in two new words equally undefined. It leaves wide open the question as to what persons, doctrines or things are "sacred." It sheds no light on what representations on the motion picture screen will constitute "profaning" those things which the State censors find to be "sacred."

To criticize or assail religious doctrine may wound to the quick those who are attached to the doctrine and profoundly cherish it. But to bar such pictorial discussion is to subject non-conformists to the rule of sects.

Even in *Mutual Film Corp.* v. *Ohio Industrial Comm'n,* 236 U. S. 230, it was deemed necessary to find that the terms "educational, moral, amusing or harmless" do not leave "decision to arbitrary judgment." Such general words were found to "get precision from the sense and experience of men." *Id.,* at 245, 246. This cannot be said of "sacrilegious." If there is one thing that the history of religious conflicts shows, it is that the term "sacrilegious"—if by that is implied offense to the deep convictions of members of different sects, which is what the Court of Appeals seems to mean so far as it means anything precisely—does not gain "precision from the sense and experience of men."

The vast apparatus of indices and digests, which mirrors our law, affords no clue to a judicial definition of sacrilege. Not one case, barring the present, has been uncovered which considers the meaning of the term in any context. Nor has the practice under the New York law contributed light. The Motion Picture Division of the Education Department does not support with ex-

planatory statements its action on any specific motion picture, which we are advised is itself not made public. Of the fifty-odd reported appeals to the Board of Regents from denials of licenses by the Division, only three concern the category "sacrilegious." [27] In these cases, as in others under the Act, the Board's reported opinion confines itself to a bare finding that the film was or was not "sacrilegious," without so much as a description of the allegedly offensive matter, or even of the film as a whole to enlighten the inquirer. Well-equipped law libraries are not niggardly in their reflection of "the sense and experience of men," but we must search elsewhere for any which gives to "sacrilege" its meaning.

Sacrilege,[28] as a restricted ecclesiastical concept, has a long history. Naturally enough, religions have sought to protect their priests and anointed symbols from physical injury.[29] But history demonstrates that the term is hopelessly vague when it goes beyond such ecclesiastical definiteness and is used at large as the basis for punishing deviation from doctrine.

Etymologically "sacrilege" is limited to church-robbing: *sacer,* sacred, and *legere,* to steal or pick out. But we are

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[27] *In the Matter of "The Puritan,"* 60 N. Y. St. Dept. 163 (1939); *In the Matter of "Polygamy,"* 60 N. Y. St. Dept. 217 (1939); *In the Matter of "Monja y Casada—Virgen y Martir"* (*"Nun and Married—Virgin and Martyr"*), 52 N. Y. St. Dept. 488 (1935).

[28] Since almost without exception "sacrilegious" is defined in terms of "sacrilege," our discussion will be directed to the latter term. See Bailey, Universal Etymological English Dictionary (London, 1730), "Sacrilegious"—"of, pertaining to, or guilty of Sacrilege"; Funk & Wagnalls' New Standard Dictionary (1937), "Sacrilegious"—"Having committed or being ready to commit sacrilege. Of the nature of sacrilege; as, *sacrilegious* deeds."

[29] For general discussions of "sacrilege," see Encyclopaedia of Religion and Ethics (Hastings ed., 1921), "Sacrilege" and "Tabu"; Rev. Thomas Slater, A Manual of Moral Theology (1908), 226–230; The Catholic Encyclopedia (1912), "Sacrilege"; and Encyclopaedia Britannica, "Sacrilege."

told that "already in Cicero's time it had grown to include in popular speech any insult or injury to [sacred things]." [30] "In primitive religions [sacrilege is] inclusive of almost every serious offence even in fields now regarded as merely social or political . . . ." [31] The concept of "tabu" in primitive society is thus close to that of "sacrilege." [32] And in "the Theodosian Code the various crimes which are accounted sacrilege include—apostasy, heresy, schism, Judaism, paganism, attempts against the immunity of churches and clergy or privileges of church courts, the desecration of sacraments, etc., and even Sunday. Along with these crimes against religion went treason to the emperor, offences against the laws, especially counterfeiting, defraudation in taxes, seizure of confiscated property, evil conduct of imperial officers, etc." [33] During the Middle Ages the Church considerably delimited the application of the term. St. Thomas Aquinas classified the objects of "sacrilege" as persons, places, and thing.[34] The injuries which would constitute

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[30] Encyclopaedia Britannica (1951), "Sacrilege."

[31] *Ibid.*

[32] See Encyclopaedia of Religion and Ethics (Hastings ed., 1921), "Tabu."

[33] Encyclopaedia Britannica (1951), "Sacrilege."

[34] St. Thomas Aquinas, Summa Theologica, part II–II, question 99. The modern Codex Juris Canonici does not give any definition of "sacrilege," but merely says it "shall be punished by the Ordinary in proportion to the gravity of the fault, without prejudice to the penalties established by law . . . ." See Bouscaren and Ellis, Canon Law (1946), 857. 2 Woywod, A Practical Commentary on the Code of Canon Law (1929), par. 2178, 477–478, thus defines sacrilege: "Sacrilege consists in the unworthy use or treatment of sacred things and sacred persons. Certain things are of their nature sacred (e. g., the Sacraments); others become so by blessing or consecration legitimately bestowed on things or places by authority of the Church. Persons are rendered sacred by ordination or consecration or by other forms of dedication to the divine service by authority of the Church (e. g., by first tonsure, by religious profession)."

"sacrilege" received specific and detailed illustration.[35] This teaching of Aquinas is, I believe, still substantially the basis of the official Catholic doctrine of sacrilege. Thus, for the Roman Catholic Church, the term came to have a fairly definite meaning, but one, in general, limited to protecting things physical against injurious acts.[36] Apostasy, heresy, and blasphemy coexisted as religious crimes alongside sacrilege; they were peculiarly in the realm of religious dogma and doctrine, as "sacrilege" was not. It is true that Spelman, writing "The History and Fate of Sacrilege" in 1632, included in "sacrilege" acts whereby "the very Deity is invaded, profaned, or robbed of its glory . . . . In this high sin are blasphemers,

[35] After his method of raising objections and then refuting them, St. Thomas Aquinas defends including within the proscription of "sacrilege," anyone "who disagree[s] about the sovereign's decision, and doubt[s] whether the person chosen by the sovereign be worthy of honor" and "any man [who] shall allow the Jews to hold public offices." Summa Theologica, part II–II, question 99, art. 1.

[36] Rev. Thomas Slater, S. J., A Manual of Moral Theology (1908), c. VI, classifies and illustrates the modern theological view of "sacrilege":

Sacrilege against sacred persons: to use physical violence against a member of the clergy; to violate "the privilege of immunity of the clergy from civil jurisdiction, as far as this is still in force"; to violate a vow of chastity.

Sacrilege against sacred places: to violate the immunity of churches and other sacred places "as far as this is still in force"; to commit a crime such as homicide, suicide, bloody attack there; to break by sexual act a vow of chastity there; to bury an infidel, heretic, or excommunicate in churches or cemeteries canonically established; or to put the sacred place to a profane use, as a secular courtroom, public market, banquet hall, stable, etc.

Sacrilege against sacred things: to treat with irreverence, contempt, or obscenity the sacraments (particularly the Eucharist), Holy Scriptures, relics, sacred images, etc., to steal sacred things, or profane things from sacred places; to commit simony; or to steal, confiscate, or damage wilfully ecclesiastical property. See also, The Catholic Encyclopedia, "Sacrilege."

sorcerers, witches, and enchanters." [37] But his main theme was the "spoil of church lands done by Henry VIII" and the misfortunes that subsequently befell the families of the recipients of former ecclesiastical property as divine punishment.

To the extent that English law took jurisdiction to punish "sacrilege," the term meant the stealing from a church, or otherwise doing damage to church property.[38] This special protection against "sacrilege," that is, property damage, was granted only to the Established Church.[39] Since the repeal less than a century ago of the English law punishing "sacrilege" against the property of the Established Church, religious property has received little special protection. The property of all sects has had substantially the same protection as is accorded non-religious property.[40] At no time up to the present has English law known "sacrilege" to be used in any wider sense than the physical injury to church property. It is true that, at times in the past, English law has

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[37] Sir Henry Spelman, The History and Fate of Sacrilege (2d ed., 1853), 121–122. Two priests of the Anglican Church prepared a long prefatory essay to bring Spelman's data up to the date of publication of the 1853 edition. Their essay shows their understanding also of "sacrilege" in the limited sense. *Id.*, at 1–120.

[38] 2 Russell, Crime (10th ed., 1950), 975–976; Stephen, A Digest of the Criminal Law (9th ed., 1950), 348–349. See 23 Hen. VIII, c. 1, § III; 1 Edw. VI, c. 12, § X; 1 Mary, c. 3, §§ IV–VI.

[39] 7 & 8 Geo. IV, c. 29, § X, which the marginal note summarized as "Sacrilege, when capital," read: "if any Person shall break and enter any Church or Chapel, and steal therein any Chattel . . . [he] shall suffer Death as a Felon." This statute was interpreted to apply only to buildings of the established church. *Rex* v. *Nixon,* 7 Car. & P. 442 (1836).

[40] 7 & 8 Geo. IV, c. 29, § X, was repealed by 24 & 25 Vict., c. 95. The Larceny Act and the Malicious Injuries to Property Act, both of 1861, treated established church property substantially the same as all other property. 24 & 25 Vict., c. 96, § 50; c. 97, §§ 1, 11, 39, superseded by Larceny Act, 1916, 6 & 7 Geo. V, c. 50, § 24.

taken jurisdiction to punish departures from accepted dogma or religious practice or the expression of particular religious opinions, but never have these "offenses" been denominated "sacrilege." Apostasy, heresy, offenses against the Established Church, blasphemy, profanation of the Lord's Day, etc., were distinct criminal offenses, characterized by Blackstone as "offences against God and religion." [41] These invidious reflections upon religious susceptibilities were not covered under sacrilege as they might be under the Court of Appeals' opinion. Anyone doubting the dangerous uncertainty of the New York definition, which makes "sacrilege" overlap these other "offenses against religion," need only read Blackstone's account of the broad and varying content given each of these offenses.

A student of English lexicography would despair of finding the meaning attributed to "sacrilege" by the New York court.[42] Most dictionaries define the concept in the limited sense of the physical abuse of physical objects. The definitions given for "sacrilege" by two dictionaries published in 1742 and 1782 are typical. Bailey's defined it as "the stealing of Sacred Things, Church Robbing; an Alienation to Laymen, and to profane and common Purposes, of what was given to religious Persons, and to pious Uses." [43] Barclay's said it is "the crime of taking any thing dedicated to divine worship, or profaning any thing sacred," where "to profane" is defined "to apply any thing sacred to common uses. To be irreverent to sacred persons or things." [44] The

[41] Blackstone, bk. IV, c. 4, 41–64.

[42] Compare the definitions of "sacrilege" and "blasphemy" in the dictionaries, starting with Cockeram's 1651 edition, which are collected in the Appendix, *post*, p. 533.

[43] Bailey, An Universal Etymological English Dictionary (London, 1742), "Sacrilege."

[44] Barclay, A Complete and Universal English Dictionary (London, 1782), "Sacrilege."

same dictionaries defined "blasphemy," a peculiarly verbal offense, in much broader terms than "sacrilege," indeed in terms which the New York court finds encompassed by "sacrilegious." For example, Barclay said "blasphemy" is "an offering some indignity to God, any person of the Trinity, any messengers from God, his holy writ, or the doctrines of revelation." [45] It is hardly necessary to comment that the limits of this definition remain too uncertain to justify constraining the creative efforts of the imagination by fear of pains and penalties imposed by a necessarily subjective censorship. It is true that some earlier dictionaries assigned to "sacrilege" the broader meaning of "abusing Sacraments or holy Mysteries," [46] but the broader meaning is more indefinite, not less. Noah Webster first published his American Dictionary in 1828. Both it and the later dictionaries published by the Merriam Company, Webster's International Dictionary and Webster's New International Dictionary, have gone through dozens of editions and printings, revisions and expansions. In all editions throughout 125 years, these American dictionaries have defined "sacrilege" and "sacrilegious" to echo substantially the narrow, technical definitions from the earlier British dictionaries collected in the Appendix, *post,* p. 533.[47]

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[45] *Id.,* "Blasphemy."

[46] Thomas Blount, Glossographia (3d ed., London, 1670).

[47] Webster's Compendious Dictionary of the English Language (1806): "Sacrilege"—"the robbery of a church or chapel." "Sacrilegious"—"violating a thing made sacred."

Webster's American Dictionary (1828): "Sacrilege"—"The crime of violating or profaning sacred things; or the alienating to laymen or to common purposes what has been appropriated or consecrated to religious persons or uses." "Sacrilegious"—"Violating sacred things; polluted with the crime of sacrilege."

Webster's International Dictionary (G. & C. Merriam & Co., 1890): "Sacrilege"—"The sin or crime of violating or profaning sacred things; the alienating to laymen, or to common purposes,

The New York Court of Appeals' statement that the dictionary "furnishes a clear definition," justifying the vague scope it gave to "sacrilegious," surely was made without regard to the lexicographic history of the term. As a matter of fact, the definition from Funk & Wagnalls' used by the Court of Appeals is taken straight from 18th Century dictionaries, particularly Doctor Johnson's.[48] In light of that history it would seem that the Funk &

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what has been appropriated or consecrated to religious persons or uses." "Sacrilegious"—"violating sacred things; polluted with sacrilege; involving sacrilege; profane; impious."

Webster's New International Dictionary (G. & C. Merriam Co., 1st ed., 1909): "Sacrilege"—"The sin or crime of violating or profaning sacred things; specif., the alienating to laymen, or to common purposes, what has been appropriated or consecrated to religious persons or uses." "Sacrilegious"—"Violating sacred things; polluted with, or involving, sacrilege; impious." Repeated in the 1913, 1922, 1924, 1928, 1933 printings, among others.

Webster's New International Dictionary (G. & C. Merriam Co., 2d ed., 1934): "Sacrilege"—"The crime of stealing, misusing, violating, or desecrating that which is sacred, or holy, or dedicated to sacred uses. Specif.: **a** *R. C. Ch.* The sin of violating the conditions for a worthy reception of a sacrament. **b** Robbery from a church; also, that which is stolen. **c** Alienation to laymen, or to common purposes, of what has been appropriated or consecrated to religious persons or uses." "Sacrilegious"—"Committing sacrilege; characterized by or involving sacrilege; polluted with sacrilege; as, *sacrilegious* robbers, depredations, or acts." Repeated in the 1939, 1942, 1944, 1949 printings, among others.

[48] Funk & Wagnalls' Standard Dictionary of the English Language, which was first copyrighted in 1890, defined sacrilege as follows in the 1895 printing: "**1.** The act of violating or profaning anything sacred. **2.** *Eng. Law* (1) The larceny of consecrated things from a church; the breaking into a church with intent to commit a felony, or breaking out after a felony. (2) Formerly, the selling to a layman of property given to pious uses." This definition remained unchanged through many printings of that dictionary. The current printing of Funk & Wagnalls' New Standard Dictionary of the English Language, first copyrighted in 1913, carries exactly the same definition of "sacrilege" except that the first definition has been expanded to read: "The

Wagnalls' definition uses "sacrilege" in its historically restricted meaning, which was not, and could hardly have been, the basis for condemning "The Miracle." If the New York court reads the Funk & Wagnalls' definition in a broader sense, in a sense for which history and experience provide no gloss, it inevitably left the censor free to judge by whatever dogma he deems "sacred" and to ban whatever motion pictures he may assume would "profane" religious doctrine widely enough held to arouse protest.

Examination of successive editions of the Encyclopaedia Britannica over nearly two centuries up to the present day gives no more help than the dictionaries. From 1768 to the eleventh edition in 1911, merely a brief dictionary-type definition was given for "sacrilege." [49] The eleventh edition, which first published a longer article, was introduced as follows: "the violation or profanation of sacred things, a crime of varying scope in different religions. It is naturally much more general and accounted more dreadful in those primitive religions in

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act of violating or profaning anything sacred, including sacramental vows."

Funk & Wagnalls' Standard Dictionary (1895) defined "to profane" as "**1.** To treat with irreverence or abuse; make common or unholy; desecrate; pollute. **2.** Hence, to put to a wrong or degrading use; debase." The New Standard Dictionary adds a third meaning: "**3.** To vulgarize; give over to the crowd."

[49] Encyclopaedia Britannica, 2d ed., 1782: "Sacrilege"—"the crime of profaning sacred things, or those devoted to the service of God."

3d ed., 1797: "Sacrilege"—"the crime of profaning sacred things, or things devoted to God; or of alienating to laymen, for common purposes, what was given to religious persons and pious uses."

8th ed., 1859: "Sacrilege"—same as 3d ed., 1797.

9th ed., 1886: "Sacrilege"—A relatively short article the author of which quite apparently had a restricted definition for "sacrilege": "robbery of churches," "breaking or defacing of an altar, crucifix, or cross," etc.

which cultural objects play so great a part, than in more highly spiritualized religions where they tend to disappear. But wherever the idea of sacred exists, sacrilege is possible." [50] The article on "sacrilege" in the current edition of the Encyclopaedia Britannica is substantially the same as that in the 1911 edition.

History teaches us the indefiniteness of the concept "sacrilegious" in another respect. In the case of most countries and times where the concept of sacrilege has been of importance, there has existed an established church or a state religion. That which was "sacred," and so was protected against "profaning," was designated in each case by ecclesiastical authority. What might have been definite when a controlling church imposed a detailed scheme of observances becomes impossibly confused and uncertain when hundreds of sects, with widely disparate and often directly conflicting ideas of sacredness, enjoy, without discrimination and in equal measure, constitutionally guaranteed religious freedom. In the Rome of the late emperors, the England of James I, or the Geneva of Calvin, and today in Roman Catholic Spain, Mohammedan Saudi Arabia, or any other country with a monolithic religion, the category of things sacred might have clearly definable limits. But in America the multiplicity of the ideas of "sacredness" held with equal but conflicting fervor by the great number of religious groups makes the term "sacrilegious" too indefinite to satisfy constitutional demands based on reason and fairness.

If "sacrilegious" bans more than the physical abuse of sacred persons, places, or things, if it permits censorship of religious opinions, which is the effect of the holding below, the term will include what may be found to be "blasphemous." England's experience with that treacherous word should give us pause, apart from our

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[50] Encyclopaedia Britannica (11th ed., 1911), "Sacrilege."

requirements for the separation of Church and State. The crime of blasphemy in Seventeenth Century England was the crime of dissenting from whatever was the current religious dogma.[51] King James I's "Book of Sports" was first required reading in the churches; later all copies were consigned to the flames. To attack the mass was once blasphemous; to perform it became so. At different times during that century, with the shifts in the attitude of government towards particular religious views, persons who doubted the doctrine of the Trinity (*e. g.*, Unitarians, Universalists, etc.) or the divinity of Christ, observed the Sabbath on Saturday, denied the possibility of witchcraft, repudiated child baptism or urged methods of baptism other than sprinkling, were charged as blasphemers, or their books were burned or banned as blasphemous. Blasphemy was the chameleon phrase which meant the criticism of whatever the ruling authority of the moment established as orthodox religious doctrine.[52] While it is true that blasphemy prosecutions

[51] Schroeder, Constitutional Free Speech (1919), 178–373, makes a lengthy review of "Prosecutions for Crimes Against Religion." The examples in the text are from Schroeder. See also Encyclopaedia of the Social Sciences, "Blasphemy"; Encyclopaedia of Religion and Ethics, "Blasphemy"; Nokes, A History of the Crime of Blasphemy (1928).

[52] 1 Yorke, The Life of Lord Chancellor Hardwicke (1913), 80, writes thus of the prosecution of Thomas Woolston for blasphemy: "The offence, in the first place, consisted in the publication in 1725 of a tract entitled *A Moderator between an Infidel and an Apostate,* in which the author questioned the historical accuracy of the Resurrection and the Virgin Birth. Such speculations, however much they might offend the religious feeling of the nation, would not now arouse apprehensions in the civil government, or incur legal penalties; but at the time of which we are writing, when the authority of government was far less stable and secure and rested on far narrower foundations than at present, such audacious opinions were considered, not without some reason, as a menace, not only to religion but to the state."

have continued in England—although in lessening numbers—into the present century,[53] the existence there of an established church gives more definite contours to the crime in England than the term "sacrilegious" can possibly have in this country. Moreover, the scope of the English common-law crime of blasphemy has been considerably limited by the declaration that "if the decencies of controversy are observed, even the fundamentals of religion may be attacked," [54] a limitation which the New York court has not put upon the Board of Regents' power to declare a motion picture "sacrilegious."

In *Cantwell* v. *Connecticut,* 310 U. S. 296, 310, Mr. Justice Roberts, speaking for the whole Court, said: "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor." Conduct and beliefs dear to one may seem the rankest "sacrilege" to another. A few examples suffice to show the difficulties facing a conscientious censor or motion picture producer or distributor in determining what the New York statute condemns as sacrilegious. A motion picture portraying Christ as divine—for example, a movie showing medieval Church art—would offend the religious opinions of the members of several Protestant denominations who do not believe in the Trinity, as well as those of a non-Christian faith. Conversely, one showing Christ as merely an ethical teacher could not but offend millions of Christians of many denominations. Which is "sacrilegious"? The doctrine of transubstantiation, and the veneration of relics or particular stone and wood embodiments of saints or divinity, both sacred to

[53] See, *e. g.*, *Rex* v. *Boulter,* 72 J. P. 188 (1908); *Bowman* v. *Secular Society, Ltd.,* [1917] A. C. 406.

[54] *Reg.* v. *Ramsay,* 15 Cox's C. C. 231, 238 (1883) (Lord Coleridge's charge to the jury); *Bowman* v. *Secular Society, Ltd.,* [1917] A. C. 406.

Catholics, are offensive to a great many Protestants, and therefore for them sacrilegious in the view of the New York court. Is a picture treating either subject, whether sympathetically, unsympathetically, or neutrally, "sacrilegious"? It is not a sufficient answer to say that "sacrilegious" is definite, because all subjects that in any way might be interpreted as offending the religious beliefs of any one of the 300 sects of the United States [55] are banned in New York. To allow such vague, undefinable powers of censorship to be exercised is bound to have stultifying consequences on the creative process of literature and art—for the films are derived largely from literature. History does not encourage reliance on the wisdom and moderation of the censor as a safeguard in the exercise of such drastic power over the minds of men. We not only do not know but cannot know what is condemnable by "sacrilegious." And if we cannot tell, how are those to be governed by the statute to tell?

It is this impossibility of knowing how far the form of words by which the New York Court of Appeals explained "sacrilegious" carries the proscription of religious subjects that makes the term unconstitutionally vague.[56] To stop short of proscribing all subjects that might conceivably be interpreted to be religious, inevitably creates a situation whereby the censor bans only that against which

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[55] The latest available statistics of the Bureau of the Census give returns from 256 denominations; 57 other denominations, which did not report, are listed. Bureau of the Census, Religious Bodies: 1936, Vol. I, iii, 7.

[56] It is not mere fantasy to suggest that the effect of a ban of the "sacrilegious" may be to ban all motion pictures dealing with any subject that might be deemed religious by any sect. The industry's self-censorship has already had a distorting influence on the portrayal of historical figures. "Pressure forced deletion of the clerical background of Cardinal Richelieu from *The Three Musketeers*. The [Motion Picture Production] code provision appealed to was the section providing that ministers should not be portrayed as villains." Note,

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there is a substantial outcry from a religious group. And that is the fair inference to be drawn, as a matter of experience, from what has been happening under the New York censorship. Consequently the film industry, normally not guided by creative artists, and cautious in putting large capital to the hazards of courage, would be governed by its notions of the feelings likely to be aroused by diverse religious sects, certainly the powerful ones. The effect of such demands upon art and upon those whose function is to enhance the culture of a society need not be labored.

To paraphrase Doctor Johnson, if nothing may be shown but what licensors may have previously approved, power, the yea-or-nay-saying by officials, becomes the standard of the permissible. Prohibition through words that fail to convey what is permitted and what is prohibited for want of appropriate objective standards, offends Due Process in two ways. First, it does not sufficiently apprise those bent on obedience of law of what may reasonably be foreseen to be found illicit by the law-enforcing authority, whether court or jury or administrative agency. Secondly, where licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative. On the basis of such a portmanteau word as "sacrilegious," the judiciary has no standards with which to judge the validity of administrative action which necessarily involves, at least in large measure, subjective determinations. Thus, the administrative first step becomes the last step.

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"Motion Pictures and the First Amendment," 60 Yale L. J. 696, 716, n. 42.

The press recently reported that plans are being made to film a "Life of Martin Luther." N. Y. Times, April 27, 1952, § 2, p. 5, col. 7. Could Luther be sympathetically portrayed and not appear "sacrilegious" to some; or unsympathetically, and not to others?

From all that has been said one is compelled to conclude that the term "sacrilegious" has come down the stream of time encrusted with a specialized, strictly confined meaning, pertaining to things in space not things in the mind. The New York Court of Appeals did not give the term this calculable content. It applied it to things in the mind, and things in the mind so undefined, so at large, as to be more patently in disregard of the requirement for definiteness, as the basis of proscriptions and legal sanctions for their disobedience, than the measures that were condemned as violative of Due Process in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233; *Connally* v. *General Construction Co.*, 269 U. S. 385; *Winters* v. *New York*, 333 U. S. 507; *Kunz* v. *New York*, 340 U. S. 290. This principle is especially to be observed when what is so vague seeks to fetter the mind and put within unascertainable bounds the varieties of religious experience.

APPENDIX TO OPINION OF MR. JUSTICE FRANKFURTER.*

Cockeram, English Dictionarie (10th ed., London, 1651).

Blasphemy: No entry.

Sacrilege: "The robbing of a Church, the stealing of holy things, abusing of Sacraments or holy Mysteries."

Sacrilegious: "Abominable, very wicked."

Blount, Glossographia (3d ed., London, 1670).

Blasphemy: No entry.

Sacrilege: "the robbing a Church, or other holy consecrated place, the stealing holy things, or abusing Sacraments or holy Mysteries."

Sacrilegious: "that robs the Church; wicked, extremely bad."

*See Mathews, A Survey of English Dictionaries (1933).

Blount, A Law-Dictionary (London, 1670).

Blasphemy: No entry.

Sacrilege: No entry.

Phillips, The New World of Words (3d ed., London, 1671).

Blasphemy: "an uttering of reproachfull words, tending either to the dishonour of God, or to the hurt and disgrace of any mans name and credit."

Sacrilegious: "committing Sacriledge, *i. e.* a robbing of Churches, or violating of holy things."

Cowel, The Interpreter of Words and Terms (Manley ed., London, 1701).

Blasphemy: No entry.

Sacrilege: "an Alienation to Lay-Men, and to profane or common purposes, of what was given to Religious Persons, and to Pious Uses, etc."

Rastell, Law Terms (London, 1708).

Blasphemy: No entry.

Sacrilege: "is, when one steals any Vessels, Ornaments, or Goods of Holy Church, which is felony, 3 Cro. 153, 154."

Kersey, A General English Dictionary (3d ed., London, 1721).

Blasphemy: "an uttering of reproachful Words, that tend to the Dishonour of God, &c."

Sacrilege: "the stealing of Sacred Things, Church robbing."

Cocker, English Dictionary (London, 1724).

Blasphemy: No entry.

Sacrilege: "robbing the Church, or what is dedicated thereto."

Bailey, Universal Etymological English Dictionary (London, 1730).

Blasphemy: "an uttering of reproachful words tending to the dishonour of God, &c. vile, base language."

Sacrilege: "the stealing of sacred Things, Church-Robbing; the Crime of profaning sacred Things, or alienating to Laymen, or common Uses, what was given to pious Uses and religious Persons."

Coles, An English Dictionary (London, 1732).

Blasphemy: "reproach."

Sacrilege: "the robbing of God, the church, &c."

Bullokar, The English Expositor (14th ed., London, 1731).

Blasphemy: No entry.

Sacrilege: "The Robbing of a Church; the Stealing of holy things, or Abusing of Sacraments or holy Mysteries."

Defoe, A Compleat English Dictionary (Westminster, 1735).

Blasphemy: "vile or opprobrious Language, tending to the Dishonour of God."

Sacrilege: "the stealing of sacred Things, Church robbing."

Bailey, An Universal Etymological English Dictionary (London, 1742).

Blasphemy: "Cursing and Swearing, vile reproachful Language, tending to the Dishonour of God."

Sacrilege: "the stealing of Sacred Things, Church Robbing; an Alienation to Laymen, and to profane and common Purposes, of what was given to religious Persons, and to pious Uses."

Martin, A New Universal English Dictionary (London, 1754).

Blasphemy: "cursing, vile language tending to the dishonour of God or religion."

Sacrilege: "the stealing things out of a holy place, or the profaning things devoted to God."

Johnson, A Dictionary of the English Language (2d ed., London, 1755).

Blasphemy: "strictly and properly, is an offering of some indignity, or injury, unto God himself, either by words or writing."

Sacrilege: "The crime of appropriating to himself what is devoted to religion; the crime of robbing heaven; the crime of violating or profaning things sacred."

Rider, A New Universal English Dictionary (London, 1759).

Blasphemy: "an offering some indignity to God, any person of the Trinity, any messengers from God; his holy writ, or the doctrines of revelation, either by speaking or writing any thing ill of them, or ascribing any thing ill to them inconsistent with their natures and the reverence we owe them."

Sacrilege: "the crime of taking any thing dedicated to divine worship. The crime of profaning any thing sacred."

Profane: "to apply any thing sacred to common use. To be irreverent to sacred persons or things. To put to a wrong use."

Gordon and Marchant, A New Complete English Dictionary (London, 1760).

Blasphemy: "is an offering some indignity to God himself."

Sacrilege: "is the crime of appropriating to himself what is devoted to religion; the crime of robbing Heaven."

Buchanan, A New English Dictionary (London, 1769).

Blasphemy: "Language tending to the dishonour of God."

Sacrilege: "The stealing things out of a holy place."

Cunningham, A New and Complete Law-Dictionary (London, 1771).

Blasphemy: A long definition reading in part: "Is an injury offered to God, by denying that which is due and belonging to him, or attributing to him what is not agreeable to his nature."

Sacrilege: "Is church robbery, or a taking of things out of a holy place; as where a person steals any vessels, ornaments, or goods of the church. And it is said to be a robbery of God, at least of what is dedicated to his service. 2 Cro. 153, 154.

". . . an alienation to lay-men, and to profane or common purposes, of what was given to religious persons, and to pious uses."

Kenrick, A New Dictionary of the English Language (London, 1773).

Blasphemy: "Treating the name and attributes of the Supreme Being with insult and indignity."

Sacrilege: "The crime of appropriating to himself what is devoted to religion; *the crime of robbing heaven,* says Johnson; the crime of violating or profaning things sacred."

Profane: "To violate; to pollute.—To put to wrong use."

Ash, The New and Complete Dictionary of the English Language (London, 1775).

Blasphemy: "The act of speaking or writing reproachfully of the Divine Being, the act of attributing to the creature that which belongs to the Creator."

Sacrilege: "The act of appropriating to one's self what is devoted to religion, the crime of violating sacred things."

Dyche, A New General English Dictionary (London, 1777).

Blasphemy: "the reproaching or dishonouring God, religion, and holy things."

Sacrilege: "the stealing or taking away those things that were appropriated to religious uses or designs."

Sacrilegious: "of a profane, thievish nature, sort, or disposition."

Barclay, A Complete and Universal English Dictionary (London, 1782).

Blasphemy: "an offering some indignity to God, any person of the Trinity, any messengers from God, his holy writ, or the doctrines of revelation."

Sacrilege: "the crime of taking any thing dedicated to divine worship, or profaning any thing sacred."

Profane: "to apply any thing sacred to common use. To be irreverent to sacred persons or things."

Lemon, English Etymology (London, 1783).

Blaspheme: "*to speak evil of any one; to injure his fame*, or *reputation.*"

Sacrilege: No entry.

Entick, New Spelling Dictionary (London, 1786).

Blasphemy: "indignity offered to God."

Blasphemer: "one who abuses God."

Sacrilege: "the robbery of a church or chapel."

Sacrilegious: "violating a thing made sacred."

Burn, A New Law Dictionary (Dublin, 1792).

Blasphemy: "See Prophaneness."

Profaneness: A long definition, not reproduced here.

Sacrilege: "robbing of the church, or stealing things out of a sacred place."

Sheridan, A Complete Dictionary of the English Language (6th ed., Phila., 1796).

Blasphemy: "Offering of some indignity to God."

Sacrilege: "The crime of robbing a church."

Scott, Dictionary of the English Language (Edinburgh, 1797).

Blasphemy: "indignity offered to God."

Sacrilege: "the robbery of a church, &c."

Richardson, A New Dictionary of the English Language (London, 1839).

Blasphemy: "To attack, assail, insult, (the name, the attributes, the ordinances, the revelations, the will or government of God.)"

Sacrilege: "to take away, to steal any thing *sacred,* or consecrated, or dedicated to holy or religious uses."

Bell, A Dictionary and Digest of the Law of Scotland (Edinburgh, 1861).

Blasphemy: "is the denying or vilifying of the Deity, by speech or writing."

Sacrilege: "is any violation of things dedicated to the offices of religion."

Staunton, An Ecclesiastical Dictionary (N. Y., 1861).

Blasphemy: A long entry.

Sacrilege: "The act of violating or subjecting sacred things to profanation; or the desecration of objects consecrated to God. Thus, the robbing of churches or of graves, the abuse of sacred vessels and altars by employing them for unhallowed purposes, the plundering and misappropriation of alms and donations, are acts of sacrilege, which in the ancient Church were punished with great severity."

Bouvier, A Law Dictionary (11th ed., Phila., 1866).

Blasphemy: "To attribute to God that which is contrary to his nature, and does not belong to him, and to deny what does; or it is a false reflection uttered with a malicious design of reviling God."

Sacrilege: "The act of stealing from the temples or churches dedicated to the worship of God, articles consecrated to divine uses."

Shipley, A Glossary of Ecclesiastical Terms (London, 1872).

Blasphemy: "Denying the existence or providence of God; contumelous reproaches of Jesus Christ; profane scoffing at the holy Scriptures, or exposing any part thereof to contempt or ridicule."

Sacrilege: "The profanation or robbery of persons or things which have been solemnly dedicated to the service of God. *v.* 24 & 25 Vict. c. 96, s. 50."

Brown, A Law Dictionary (Sprague ed., Albany, 1875).

Blasphemy: "To revile at or to deny the truth of Christianity as by law established, is a blasphemy, and as such is punishable by the common law. . . ."

Sacrilege: "A desecration of any thing that is holy. The alienation of lands which were given to religious purposes to laymen, or to profane and common purposes, was also termed sacrilege."

# STEMBRIDGE *v.* GEORGIA.

CERTIORARI TO THE COURT OF APPEALS OF GEORGIA AND TO THE SUPREME COURT OF GEORGIA.

No. 474. Argued April 22, 1952.—Decided May 26, 1952.

Having been convicted in a Georgia state court of involuntary manslaughter and his conviction having been affirmed by the Court of Appeals of Georgia, petitioner moved in the trial court for a new trial on the ground of newly discovered evidence. Denial of this motion by the trial court was affirmed by the Court of Appeals on adequate state grounds. Petitioner then moved in the Court of Appeals for a rehearing on that decision and, for the first time, attempted to claim a violation of his federal constitutional rights. This motion was denied by the Court of Appeals without opinion and the Supreme Court of Georgia denied certiorari without opinion. Thereafter, petitioner obtained from the Court of Appeals an amendment of the record purporting to show that, on the motion for rehearing, it had considered the federal constitutional question and decided it adversely to petitioner. Without seeking a review of this amending order in the Supreme Court of Georgia, petitioner applied to this Court for certiorari, which was granted. *Held:* It now appearing that the decision of the Supreme Court of Georgia might have rested on an adequate state ground, the writ of certiorari was improvidently granted, and the case is dismissed. Pp. 542–548.

1. Since the Supreme Court of Georgia, which was the highest state court in which a decision could be had in this case, was not asked to pass upon and did not pass upon the amending order of the Court of Appeals, this Court has no occasion to consider its effect. P. 546.

2. Since the Supreme Court of Georgia's earlier denial of certiorari without opinion *might* have rested on an adequate state ground, this Court will not take jurisdiction to review that judgment. Pp. 546–547.

3. The amending order of the Georgia Court of Appeals does not change the posture of this case, since it does not remove the strong possibility, in the light of Georgia law, that the Supreme Court of Georgia might have rested its order denying certiorari on a nonfederal ground. P. 547.

Case dismissed.

A writ of certiorari having been improvidently granted in this case, 342 U. S. 940, the case is *dismissed,* p. 548.

Petitioner argued the cause and filed a brief *pro se.*

*M. H. Blackshear, Jr.,* Deputy Assistant Attorney General of Georgia, argued the cause for respondent. With him on the brief were *Eugene Cook,* Attorney General, *Lamar W. Sizemore,* Assistant Attorney General, and *C. S. Baldwin, Jr.* for respondent.

Mr. Justice Minton delivered the opinion of the Court.

Petitioner was convicted of voluntary manslaughter for the fatal shooting of an eighteen-year-old woman in an altercation growing out of a business transaction. A second woman was wounded in the affray. At his trial, petitioner claimed that he killed the deceased in self-defense. The jury obviously did not believe him or it would not have found him guilty of voluntary manslaughter. He appealed to the Court of Appeals of Georgia which affirmed the conviction on July 12, 1950. *Stembridge* v. *State,* 82 Ga. App. 214, 60 S. E. 2d 491. Certiorari to the Supreme Court of Georgia was denied.

Petitioner thereafter filed in the trial court what he called an "Extraordinary Motion for New Trial." This motion alleged that after the appellate proceedings above mentioned, petitioner for the first time, to wit, September, 1950, discovered new evidence which, had he known of and been able to use, would have resulted in his acquittal. He supported the motion with affidavits of ten of the jurors in the case stating that had this evidence been before them, they "would have never agreed to any verdict except one of not guilty . . . ."

The newly discovered evidence consisted of a conflict between a written statement made by Mrs. Mary Harri-

son, the other woman who was shot in the affray, and her testimony at the trial. Petitioner could not contend that he was unaware of the existence of this statement because the police investigator who recorded it was cross-examined at length about the statement and its contents by petitioner's counsel at the trial. Petitioner claims only that he did not know of the conflict between the statement and Mrs. Harrison's testimony at the trial until after the trial was over. The statement was made by Mrs. Harrison in the hospital, shortly after she was shot. It is not sworn to. At least, there is no jurat exhibited as a part thereof. This statement, often referred to as a dying declaration, and the copy thereof remained at all times in the hands of the police. Since Mrs. Harrison did not die, the State could not use the statement as a dying declaration. Ga. Code, § 38–307 (1933).

The motion alleges that at petitioner's trial, Mrs. Harrison testified that he "did go into the third room of the house and that he did shoot Emma Johnekin after he had already wounded her in the front of the house, and after she had seated herself on a trunk in this rear room." The house where the shooting occurred consisted of three rooms, in line from front to rear, and a kitchen. The statement made by Mrs. Harrison while in the hospital, which is allegedly in conflict with her testimony, was "and Emma [deceased] never got out of the front bed room until after the men [Stembridge and Terry] had already gone."

This motion for a new trial based on newly discovered evidence was denied by the trial court. The Court of Appeals affirmed on the ground that the evidence was impeaching only and under the Georgia Code, § 70–204, was not the basis for the granting of a new trial. *Stembridge* v. *State,* 84 Ga. App. 413, 415–416, 65 S. E. 2d 819, 821. This judgment was entered June 5, 1951.

Petitioner then filed a motion for rehearing in the Court of Appeals and for the first time attempted to raise the question of his federal constitutional rights under the Fourteenth Amendment. He contended that he had been denied equal protection and due process in that the State had used Mrs. Harrison's testimony to obtain his conviction with knowledge that it was perjured. The motion for rehearing was denied July 17, 1951, in these words: "Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied." On September 12, 1951, the Supreme Court of Georgia denied certiorari without opinion. On September 17, 1951, the Court of Appeals, at petitioner's request, stayed the remittitur for ninety days to enable him to apply to this Court for certiorari.

On October 22, 1951, petitioner sought and obtained from the Court of Appeals of Georgia an amendment of the record in the following words:

> "In the consideration by this court of the rehearing which raised the Federal question that 'the placing in this case, by the State, of evidence known to be perjured seeks to deprive plaintiff in error of liberty without due process of law in violation of Section 2–103 of the Constitution of Georgia and in violation of the 14th Amendment to the Constitution of the United States,' this court considered the constitutional question thus raised and decided it against the contentions of the plaintiff in error. In so doing this court considered Sec. 110–706 of the Code of Georgia of 1933 which provides as follows: 'Any judgment, verdict, rule or order of court, which may have been obtained or entered up, shall be set aside and be of no effect, if it shall appear that the same was entered up in consequence of corrupt and wilful perjury; and it shall be the duty of the court

in which such verdict, judgment, rule or order was obtained or entered up to cause the same to be set aside upon motion and notice to the adverse party; but it shall not be lawful for the said court to do so, unless the person charged with such perjury shall have been thereof duly convicted, and unless it shall appear to the said court that the said verdict, judgment, rule or order could not have been obtained and entered up without the evidence of such perjured person, saving always to third persons innocent of such perjury the rights which they may lawfully have acquired under such verdict, judgment, rule, or order before the same shall have been actually vacated and set aside'; and Burke v. State, 205 Ga. 656, et seq. which is a decision of the Supreme Court of this State and is therefore binding on this Court, and in which the Constitutional question raised by the plaintiff in error was decided adversely to his contentions. The decision of this Court on the rehearing in question being adverse to the plaintiff in error necessarily brought into consideration the question of whether the rights of the plaintiff in error as guaranteed to him under the 14th Amendment to the Constitution of the United States had been violated, and such decision necessarily determined that such rights had not been so violated. The decision by this court denying the rehearing necessarily determined that the action of the Solicitor General as shown by the record did not deprive the plaintiff in error of any rights guaranteed to him under the 14th Amendment of the Constitution of the United States; also the decision of this court necessarily applied the Fourteenth Amendment to the Constitution of the United States to Sec. 110–706 of the Code of Georgia of 1933 and decided that its application in this case did not amount to an

> abridgement of any of the rights of the plaintiff in error guaranteed to him under the 14th Amendment to the Constitution of the United States; and also that this Court necessarily considered Burke v. State, 205 Ga. 656, which is a decision of the Supreme Court of this State by which this Court is bound and which must be followed by this Court, the effect of which is to hold that it does not abridge any of the rights of the plaintiff in error guaranteed to him under the 14th Amendment to the Constitution of the United States."

Review of this amending order, which purported to pass upon the constitutional question raised in the motion for rehearing, was not sought in the Supreme Court of Georgia. Instead, certiorari was sought here and granted. 342 U. S. 940.

First, since the Supreme Court of Georgia, which was the highest court of the state in which a decision could be had in this case, was not asked to pass upon and did not pass upon the purported amending order, we have no occasion to consider its effect.

Secondly, at the time the petition for certiorari was denied by the Supreme Court of Georgia, there appeared in the petition the following recital:

> "This judgment and decision of the Court of Appeals in this case in failing and refusing to decide applicant's case in accordance with Sec. 2–3708 of the Constitution of Georgia also violates article 1, sec. 1, par. 3 of the Constitution of Georgia (Code § 2–103) and the Fourteenth Amendment to the Constitution of the United States (Code Sec. 1–815); both of which sections provide that no person shall be deprived of his liberty without due process of law; and article 1, sec. 1, par. 2, of the Constitution of the State of Georgia and the Fourteenth Amendment to

> the Constitution of the United States (Code § 1–815), guaranteeing to all persons equal protection of the law."

It is apparent from the record that the Supreme Court of Georgia took no action upon the question of federal constitutional rights raised for the first time on the motion for rehearing in the Court of Appeals. This was in accord with its rule that constitutional questions must first be raised in the trial court. *Beckmann* v. *Atlantic Rfg. Co.,* 181 Ga. 456, 182 S. E. 595. The attempt to raise the question of constitutional rights in the general terms of the above quotation from the petition for certiorari did not begin to meet the requirement of the Supreme Court of Georgia for definiteness. *Persons* v. *Lea,* 207 Ga. 384, 61 S. E. 2d 832.

At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment. *Hedgebeth* v. *North Carolina,* 334 U. S. 806; *Woods* v. *Nierstheimer,* 328 U. S. 211; *White* v. *Ragen,* 324 U. S. 760; *McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 2; *Woolsey* v. *Best,* 299 U. S. 1; *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52; *Cuyahoga Power Co.* v. *Northern Realty Co.,* 244 U. S. 300, 303–304; *Adams* v. *Russell,* 229 U. S. 353, 358–362; *Allen* v. *Arguimbau,* 198 U. S. 149, 154–155; *Johnson* v. *Risk,* 137 U. S. 300, 307; *Klinger* v. *Missouri,* 13 Wall. 257, 263.

The amending order of the Georgia Court of Appeals does not, in our view, change the posture of this case—it does not remove the strong possibility, in light of Georgia law, that the Supreme Court of Georgia might have rested its order on a nonfederal ground. We are without jurisdiction when the question of the existence of an

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adequate state ground is debatable. *Bachtel* v. *Wilson*, 204 U. S. 36.

The petition for certiorari was improvidently granted, and the case is dismissed.

*Dismissed.*

MR. JUSTICE REED, concurring.

While I think the better course would be to affirm the decision of the Georgia courts, I join in the judgment of this Court.

MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER and MR. JUSTICE BURTON dissent from the dismissal.

# THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 513. Argued April 23, 1952.—Decided June 2, 1952.

Grain may be shipped over the Missouri Pacific Railroad to Kansas City from Lenora via Atchison, Kansas, at 19¢ per 100 pounds; and the rate to Omaha is 25.5¢. Upon complaint that the Missouri Pacific's rates discriminate against Omaha, the Interstate Commerce Commission, without attempting to make the inquiry and findings required by § 15 of the Interstate Commerce Act for the establishment of through routes, but finding that a through route from Lenora to Omaha via Concordia and the Burlington Railroad was already in existence, ordered the Missouri Pacific to provide transportation over that route at a rate not exceeding the rate to Kansas City. There was no evidence that the carriers had ever offered through service from Lenora to Omaha via the Burlington. *Held:* The order of the Commission was without evidentiary support and was invalid under the Interstate Commerce Act. Pp. 550–561.

1. The Commission's finding that a through route from Lenora to Omaha via the Burlington was already in existence is inconsistent with the meaning of "through route" as used in the Interstate Commerce Act. Pp. 552–561.

(a) The Commission's power to establish through routes is limited by § 15 (3) and (4) of the Act, whenever, as here, a carrier would be required to short haul itself. Pp. 552–555.

(b) The test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service. Pp. 556–557.

(c) The fact that the Missouri Pacific connects with the Burlington at Concordia does not aid the Commission in proving the existence of a through route, since the power to establish through routes under § 15 presupposes such physical connection. Pp. 557–558.

(d) The showing that the Missouri Pacific publishes a local rate from Lenora to Concordia and that the Burlington publishes a local rate from Concordia to Omaha proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines. P. 558.

(e) The existence of through routes from Lenora to points on the Burlington line short of Omaha does not prove the existence of a through route to Omaha via the Burlington. Pp. 558–559.

2. To sustain the Commission's order in this case would circumvent acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes. Pp. 554–555, 560–561.

101 F. Supp. 48, reversed.

In a suit to enjoin the enforcement of an order of the Interstate Commerce Commission, 278 I. C. C. 519, a three-judge District Court dismissed appellant's complaint. 101 F. Supp. 48. On direct appeal to this Court under 28 U. S. C. § 1253, *reversed,* p. 561.

*Toll R. Ware* argued the cause for appellant. With him on the brief were *T. T. Railey* and *Geo. W. Holmes.*

*Samuel R. Howell* argued the cause for the Interstate Commerce Commission, appellee. With him on the brief was *Daniel W. Knowlton.*

*Solicitor General Perlman, Assistant Attorney General Morison* and *Ralph S. Spritzer* submitted on brief for the United States, appellee.

*B. W. La Tourette* and *G. M. Rebman* submitted on brief for the Omaha Grain Exchange, appellee.

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

The sole question before the Court in this case concerns the content of the term "through route" as used in the Interstate Commerce Act.[1]

The question arises out of a controversy as to the shipment of grain to market from points in Kansas on the Central Branch of the Missouri Pacific Railroad. From Lenora, Kansas, a typical origin point, grain may be shipped eastward to the Kansas City market over Mis-

[1] 49 U. S. C. § 1 *et seq.*

souri Pacific lines via Atchison, Kansas, at a rate of 19 cents per hundred pounds. The Missouri Pacific also provides service from Lenora to Omaha, Nebraska, via Atchison, at the rate of 25.5 cents. Midway between Lenora and Atchison, at Concordia, Kansas, the Missouri Pacific connects with a line of the Chicago, Burlington & Quincy Railroad running in a northeasterly direction to Omaha. Concordia is listed by the carriers as a point for interchange of traffic and there is evidence that the Missouri Pacific and the Burlington offer through transportation via Concordia from Lenora to points on the Burlington line short of Omaha. But there is no evidence that any shipment has ever been made from Lenora to Omaha via the Burlington line or that the carriers have ever offered through service over that route, although the haul from Lenora to Omaha via the Burlington is approximately the same length as the haul from Lenora to Kansas City over the lines of the Missouri Pacific.

The Omaha Grain Exchange complained to the Interstate Commerce Commission that the rates published by appellant, Trustee for the Missouri Pacific, on grain shipped from Lenora and other Kansas origins are unreasonable and discriminate against Omaha in violation of Sections 1 and 3 of the Interstate Commerce Act.[2] In the complaint it was contended that the route to Omaha via Concordia and the Burlington line "is a practicable through route as provided in Section 15 of the Interstate Commerce Act, and that the rates to the market of Omaha should be no greater than the rates to the market of Kansas City."

Section 15 (3) of the Act provides that—

> "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the

[2] See 49 U. S. C. §§ 1 (5)(a), 3 (1).

> public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, . . . ." 54 Stat. 911, 49 U. S. C. § 15 (3).

The Commission's power to establish through routes is limited by a provision of Section 15 (4), quoted in the margin,[3] whenever such action would require a carrier to short haul itself. Under that Section, a carrier may be required to short haul itself only where its own line makes the existing through route "unreasonably long as compared with another practicable through route which could otherwise be established," or where the Commission makes special findings that a proposed through route "is needed in order to provide adequate, and more efficient or more economic, transportation."[4] Establishment of a new through route from Lenora to Omaha, via

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[3] "In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. . . ." 54 Stat. 911–912, 49 U. S. C. § 15 (4).

[4] The short-hauling provisions are discussed and applied in *Pennsylvania R. Co.* v. *United States,* 323 U. S. 588 (1945).

the Burlington, would compel the Missouri Pacific to permit use of the Lenora-Concordia portion of its line in the new through route to Omaha in competition with the Missouri Pacific's own route from Lenora to Omaha via Atchison. As a result, establishment of a new through route as requested by the Omaha Grain Exchange admittedly invokes the restriction against short hauling in Section 15 (4).

The parties dispute whether, on the record in this case, there is sufficient basis for making the findings required by Section 15 (3) and (4) for the establishment of a through route. We do not reach this question because there was no attempt to make the inquiry and findings required by Section 15, the Commission finding that a through route from Lenora to Omaha via Concordia and the Burlington line was already in existence and, therefore, did not have to be "established." The Commission granted relief to the complainant Omaha Grain Exchange by finding that the sum of the local rate from Lenora to Concordia published by appellant and the local rate from Concordia to Omaha published by the Burlington (totaling 30 cents per hundred pounds) is an "unreasonable" rate over the route from Lenora to Omaha via the Burlington. Appellant was ordered to provide transportation of grain from Lenora to Omaha at rates not exceeding the rates charged by the Missouri Pacific on like traffic to Kansas City (19 cents). The Commission did not consider the reasonableness of the rate published by appellant for the route from Lenora to Omaha via Atchison, nor is there any finding that the local rate from Lenora to Concordia published by appellant is itself either unreasonable or discriminatory. 278 I. C. C. 519, affirming Division 2, 272 I. C. C. 368.

Appellant sued in the District Court to enjoin enforcement of the Commission's order on the sole ground that the Commission erred in finding the existence of a

through route from Lenora to Omaha via the Burlington with the result that the order, in effect, establishes a new through route without complying with the requirements of Section 15 (3) and (4) of the Act. A three-judge District Court, one judge dissenting, sustained the Commission's order and dismissed appellant's complaint. The District Court concluded that "evidence of physical interchange connection at Concordia, plus long established joint rates to some points on the Burlington short of Omaha, plus combination rates to Omaha," furnished sufficient evidentiary basis for the Commission's finding of the existence of a through route. 101 F. Supp. 48. The case is here on direct appeal. 28 U. S. C. (Supp. IV) § 1253.

Under the Interstate Commerce Act, a carrier must not only provide transportation service at reasonable rates over its own lines but has the additional duty "to establish reasonable through routes with other such carriers, and just and reasonable rates . . . applicable thereto." [5] Through routes may be, and ordinarily are, established by the voluntary action of connecting carriers. Since 1906, through routes may also be established by order of the Interstate Commerce Commission. In that year, Congress authorized the Commission to establish through routes "provided no reasonable or satisfactory through route exists." [6] In 1910, Congress first empowered the Commission to establish alternate through routes but restricted this power by adding the forerunner of present Section 15 (4) to prevent the Commission from establishing any through route requiring a carrier to short

[5] 49 U. S. C. § 1 (4).

[6] 34 Stat. 584, 590. In *I. C. C.* v. *Northern Pacific R. Co.*, 216 U. S. 538 (1910), this Court held that the restrictions on the Commission's power to establish through routes were judicially enforceable.

haul itself unless the existing route was unreasonably long compared to the proposed route.[7]

The Commission's effort to limit by construction the impact of the short-hauling restriction on its power to establish through routes was rejected by this Court in *United States* v. *Missouri Pacific R. Co.,* 278 U. S. 269 (1929). Following this decision, the Commission asked Congress to delete completely the short-hauling restriction.[8] In the Transportation Act of 1940, Congress refused to eliminate the restriction against short hauling, but adopted a compromise under which the restriction against short hauling was retained subject to a new exception applicable only where the Commission makes the special findings listed in the amended Section 15 (4).[9]

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[7] 36 Stat. 539, 552. See S. Rep. No. 355, 61st Cong., 2d Sess. 9–10 (1910).

[8] The Commission first asked Congress to adopt the narrow construction of the short-hauling restriction rejected by this Court in *United States* v. *Missouri Pacific R. Co., supra.* Ann. Rep. I. C. C. (1929) 89; *id.* (1930) 97; *id.* (1931) 83–84, 121; *id.* (1932) 102. When the Federal Transportation Coordinator recommended that the short-hauling restriction be eliminated, S. Doc. No. 152, 73d Cong., 2d Sess. 92–94 (1934), the Commission urged Congress to follow the Coordinator's recommendation. Ann. Rep. I. C. C. (1937) 106; *id.* (1938) 122.

In the 74th Congress, S. 1636 and H. R. 5364 were introduced to enact the Commission's recommendation, the Senate bill was reported favorably, S. Rep. No. 1970, 74th Cong., 2d Sess. (1936), but no further action was taken. In the 75th Congress, similar bills were introduced, S. 1261 and H. R. 4341, the Senate bill was reported favorably, S. Rep. No. 404, 75th Cong., 1st Sess. (1937), and was passed by the Senate, 81 Cong. Rec. 8603 (1937), but no further action was taken.

[9] In the 76th Congress, bills to delete the short-hauling restriction were again introduced, S. 1085 and H. R. 3400. At the same time, the extensive revision of the Interstate Commerce Act which became the Transportation Act of 1940 was being considered. S. 2009. A

Confronted with this consistent legislative refusal to eliminate the short-hauling restriction on its power to establish through routes, the Commission justifies its order on the ground that a "through route" from Lenora to Omaha via the Burlington was already in existence. If the Commission has correctly applied the term "through route" in this case, the Commission's restricted power to "establish" through routes under Section 15 (3) and (4) is not relevant to this case. The statutory term "through route," used throughout the Interstate Commerce Act,[10] has been defined by this Court as follows:

> "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a 'through rate.' This 'through rate' is not necessarily a 'joint rate.' It may be merely an aggregation of separate rates fixed independently by the several carriers forming the 'through route'; as where the 'through rate' is 'the sum of the locals' on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transporta-

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Senate Committee included in its over-all revision the "through-routes provision long advocated by the Commission," S. Rep. No. 433, 76th Cong., 1st Sess. 6, 21–22 (1939), and the Transportation Act, so amended, was passed by the Senate. The Transportation Act as passed by the House did not provide for any change in Section 15 (4). The present form of Section 15 (4) emerged as Section 10 (b) of the Transportation Act of 1940. 54 Stat. 898, 911–912. See Conference Reports: H. R. Rep. No. 2016, 76th Cong., 3d Sess. 64–65 (1940); H. R. Rep. No. 2832, 76th Cong., 3d Sess. 70–71 (1940).

[10] 49 U. S. C. §§ 1 (4), 6 (1), 15 (3)(4)(8); 49 U. S. C. (Supp. IV) § 5b (4).

> tion. *Through Routes and Through Rates,* 12 I. C. C. 163, 166." [11]

The Commission decision cited by the Court was summarized as follows in the Commission's 21st Annual Report to Congress:

> "A through route is a continuous line of railway formed by an arrangement, express or implied, between connecting carriers. . . . Existence of a through route is to be determined by the incidents and circumstances of the shipment, such as the billing, the transfer from one carrier to another, the collection and division of transportation charges, or the use of a proportional rate to or from junction points or basing points. These incidents named are not to be regarded as exclusive of others which may tend to establish a carrier's course of business with respect to through shipments." [12]

In short, the test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.

In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington.[13] The carriers' course of business negatives the existence of any such through

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[11] *St. Louis Southwestern R. Co.* v. *United States,* 245 U. S. 136, 139, note 2 (1917). See also *Great Northern R. Co.* v. *United States,* 81 F. Supp. 921, 924 (D. Del. 1948), affirmed, 336 U. S. 933 (1949).

[12] Ann. Rep. I. C. C. (1907) 75–76.

[13] Compare *Beaman Elevator Co.* v. *Chicago & N. W. R. Co.,* 155 I. C. C. 313 (1929), where the Commission held that proof of one shipment on a through bill of lading over a certain route was not sufficient to show the existence of a through route because that one shipment was not representative of the carriers' course of business.

route. The fact that appellant's line connects with the Burlington at Concordia does not aid the Commission in proving the existence of a through route, since the power to establish through routes under Section 15 (3) and (4) also presupposes such physical connection. And the showing that appellant publishes a local rate from Lenora to Concordia and that the Burlington publishes a local rate from Concordia to Omaha proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines.[14]

The only remaining evidence urged in support of the Commission's finding that a through route from Lenora to Omaha via the Burlington already exists is the showing that the Missouri Pacific and the Burlington offer through service from Lenora to points on the Burlington line short of Omaha.[15] Under Section 1 (4) of the Interstate Commerce Act,[16] the Missouri Pacific is required to establish reasonable through routes. In conformity with that Section, the Missouri Pacific furnishes through service from Lenora to Omaha on its own lines via Atchison and, since its own lines do not serve points on the Burlington line short of Omaha, it offers through service to such points in conjunction with the

[14] 49 U. S. C. § 6 (1).

[15] The District Court indicated that such through service was offered on joint rates, but appellant states in this Court that such through service was offered on a through rate made up of a combination of the applicable local rates. We need not pause over this conflict since "through routes" from Lenora to points on the Burlington short of Omaha are implied from the fact of through carriage, and are not dependent upon the form of the rates charged. See *St. Louis Southwestern R. Co.* v. *United States*, note 11, *supra*, and *United States* v. *Great Northern R. Co.*, 343 U. S. 562 (decided this day).

[16] 49 U. S. C. § 1 (4).

Burlington. Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha unless we are to hold that compliance with Section 1 (4) causes the Missouri Pacific to lose its right to serve Omaha via its own lines, a right guaranteed by Section 15 (4). We reject the Commission's argument that the existence of through routes from Lenora to points on the Burlington line short of Omaha proves the existence of a through route to Omaha via the Burlington as requiring an unwarranted distortion of the statutory pattern.

The United States, having joined in defense of the Commission's order in the District Court and on motion to affirm in this Court, has filed a memorandum conceding that the Commission erred in finding that through routes over the Burlington line already exist. The Commission continues to support its order, but the logical conclusion of the theory advanced by the Commission is that through routes exist between all points throughout the country wherever physical rail connections are available. If there is no through carriage over any combination of connecting carriers, the Commission under its present theory would never have to establish through routes under Section 15 (3) and (4) but could divert traffic to any route between two points by ordering reduction of the sum of the local rates over that route. Acceptance of this argument would mean that Congress' insistence on protecting carriers from being required to short haul themselves could be evaded whenever the Commission chose to alter the form of its order.[17] The Com-

[17] For example, in *United States* v. *Missouri Pacific R. Co., supra,* the Missouri Pacific furnished through traffic over its own lines from Memphis westward to Ft. Smith, Arkansas, and beyond. The Ft. Smith, Subiaco & R. I. R. Co., desirous of obtaining additional traffic, asked the Commission to establish a through route from

mission, by using the form of order employed in this case, could also divert traffic from existing through routes to the lines of a weak carrier solely to assist that carrier to meet its financial needs, thereby evading completely the applicable prohibition of Section 15 (4), before the Court in *United States* v. *Great Northern R. Co.*, 343 U. S. 562 (decided this day). In short, acceptance of the Commission's argument would mean that the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage.

We hold that the Commission's efforts to support its finding that a through route from Lenora to Omaha via the Burlington line already exists are inconsistent with the meaning of the term "through route" as used in the Interstate Commerce Act.[18] Since there is admittedly no

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Memphis to Ft. Smith via the connecting lines of the Rock Island Railroad, the Subiaco and a line of the Missouri Pacific. The Commission ordered the establishment of the through route with through rates at the same level as the rates then charged over the existing through route between Memphis and Ft. Smith. This Court held the order invalid as infringing upon the rights of the Missouri Pacific under the short-hauling provisions of Section 15 (4). If the Commission is correct in this case, it could have accomplished the forbidden result merely by altering the form of its order—*i. e.*, instead of ordering establishment of a new through route, the Commission could have assumed the existence of a through route from Memphis to Ft. Smith via the lines of the Rock Island, the Subiaco and the Missouri Pacific and accomplished the identical result by ordering reduction of the sum of the local rates over each portion of the route to the level of the rate over the existing through route.

[18] *Virginian R. Co.* v. *United States*, 272 U. S. 658 (1926), is inapposite since through routes were there found to be in existence but commercially closed solely because of unreasonable and discriminatory rates charged by the Virginian over its portion of the route. In this case, there is no finding that the local rate charged by the

evidence that the Missouri Pacific ever offered through transportation service over the route in question, the Commission's order is without evidentiary support under the accepted tests for determining the existence of a through route. Accordingly, the judgment of the District Court dismissing appellant's complaint must be

*Reversed.*

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Missouri Pacific from Lenora to Concordia is either unreasonable or discriminatory. Similarly, the decision in *Atchison, T. & S. F. R. Co.* v. *United States*, 279 U. S. 768 (1929), is not applicable to the facts of this case.

The Commission's argument that appellant's rates discriminate against Omaha in violation of Section 3 (1) of the Act and thereby cause appellant to lose the protection of Section 15 (4) is without substance because the Commission did not consider whether the rates charged by the Missouri Pacific over its own lines are discriminatory, much less make any finding to that effect.

# UNITED STATES ET AL. *v.* GREAT NORTHERN RAILWAY CO.

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

No. 151. Argued January 8–9, 1952.—Decided June 2, 1952.

Under § 15 (3) and (6) of the Interstate Commerce Act, the Interstate Commerce Commission ordered the establishment of joint rates by certain carriers, in lieu of combination rates over through routes which were already in existence, and ordered a division of revenues between the carriers for the purpose of providing additional revenue for a financially weak participating carrier. *Held:* The District Court erred in enjoining the Commission's order as prohibited by § 15 (4). Pp. 563–578.

1. The Commission's order did not establish any through route, but did establish joint rates for the admitted purpose of assisting the particular carrier to meet its financial needs. Pp. 569–570.

2. The prohibition of § 15 (4) against establishing through routes for the purpose of assisting a carrier to meet its financial needs is not limited to cases where short hauling is a problem. Pp. 570–572.

3. The financial needs prohibition of § 15 (4) does not limit the Commission's power to establish joint rates generally, but deals only with the power to establish a "through route and joint rates applicable thereto," *i. e.*, those joint rates applicable to a through route established by the Commission. Since the Commission did not establish the through routes, the prohibition of § 15 (4) is inapplicable. Pp. 572–577.

4. The Commission is empowered, in the public interest, to cause a redistribution of revenue between two carriers participating in transportation of through traffic, and may in that connection consider a branch line's value in producing profitable traffic for a railroad. P. 577.

5. Since the Commission's order in this case (which also denied the particular carrier's application to abandon its line) was attacked also for want of essential findings and for lack of substantial evidence justifying continued operation of the line, and since it is the practice of this Court not to review an administrative record

in the first instance after finding that a lower court has applied an incorrect principle of law, the case is remanded to the District Court for further proceedings. Pp. 577–578.

96 F. Supp. 298, reversed.

In a suit to enjoin enforcement of an order of the Interstate Commerce Commission, 275 I. C. C. 512, a three-judge District Court granted the relief prayed. 96 F. Supp. 298. On direct appeal to this Court under 28 U. S. C. § 1253, *reversed and remanded,* p. 578.

*Ralph S. Spritzer* argued the cause for the United States and the Interstate Commerce Commission, appellants. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Daniel W. Knowlton* and *Edward M. Reidy.*

*Arnold H. Olsen,* Attorney General of Montana, argued the cause for the Valier Community Club and the Board of Railroad Commissioners of Montana, appellants. With him on the brief were *Charles V. Huppe,* Assistant Attorney General, *Edwin S. Booth* and *Lester H. Loble.*

*Art Jardine* argued the cause for the Montana Western Railway Co., appellant. With him on the brief was *S. B. Chase, Jr.*

*Louis E. Torinus, Jr.* argued the cause for appellee. With him on the brief were *Edwin C. Matthias* and *Anthony Kane.*

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

This is a suit to enjoin enforcement of an order of the Interstate Commerce Commission establishing joint rates over through routes. In this case, unlike *Thompson* v. *United States,* 343 U. S. 549 (decided this day), the through routes in question already exist since the carriers

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concerned have continuously provided through service over the same through routes at a combination of separately established rates. The Commission did not change any route or alter the total amount charged for any shipment but did order the establishment of joint rates in place of the combination rates. The Commission also ordered a division of revenues between the carriers in order to provide additional revenue for one financially weak carrier. The question presented is whether the Commission has power to establish joint rates for the purpose of assisting a carrier to meet its financial needs.

The Montana Western Railway Company, incorporated in 1909, furnishes the only rail service over the twenty miles between Valier, Montana, and Conrad, Montana, where connection is made with the interstate rail lines of the appellee Great Northern Railway. Appellee and a land irrigation company, now called the Valier Company, furnished the money to build the railroad. The Montana Western's stock is owned by the Valier Company and its bonds in the sum of $165,000 are held by appellee.

Operation of the Montana Western has been unprofitable. An average annual deficit of over $18,000 has been experienced during the fifteen years preceding this case. The Montana Western's general manager estimated that the total annual revenue deficiency under existing rates would amount to $33,825. In addition to the anticipated operating losses, continued operation of the Montana Western would require construction of a new bridge and a new roundhouse and replacement of a large number of crossties. The Montana Western has not been able to satisfy either its bonded indebtedness or the interest thereon. Moreover, appellee has advanced money to pay operating losses to the extent that Montana Western's total debt to appellee amounted to $737,604 at

the beginning of these proceedings. Apparently because of the Montana Western's value as a feeder line providing profitable traffic, appellee offered to provide additional funds for the rehabilitation of the Montana Western and offered to extend the maturity date of the mortgage bonds. However, the Montana Western's officers refused to extend the bonds on the ground that there was no hope of ever paying off the indebtedness. Thereafter, appellee announced that: "In view of the Montana Western's attitude . . . Great Northern cannot be expected [to make further cash advances]."

The Montana Western applied to the Interstate Commerce Commission for the permission to abandon its entire line, required under 49 U. S. C. § 1 (18)–(22), on the ground that, without financial assistance from appellee, continued operation of the line was not economically feasible. After hearings in the abandonment proceeding had demonstrated the financial plight of the Montana Western, the Valier Community Club, representing shippers in the Valier area, instituted another action before the Commission.[1] The shippers' purpose was to preserve existing through routes originating at Valier by securing for the Montana Western the additional revenue needed for continued operation. Since ninety percent of the Montana Western's revenue is derived from grain traffic, additional revenue necessarily had to be obtained through adjustment in the grain rate structure.

Grain now moves on through routes from Valier over the Montana Western line to Conrad where appellee continues the through shipment to market. Under the

[1] Appellee was not a party before the Commission until this complaint was filed. The record of prior hearings in the abandonment proceeding was incorporated into the complaint proceeding and appellee was afforded the opportunity to cross-examine the witnesses who had previously testified.

existing grain rate structure, a shipper pays a through rate of 71½ cents per hundred pounds on a shipment from Valier to Minneapolis. This through rate is also called a combination rate because it is a combination of Montana Western's separately established proportional rate of 9 cents from Valier to Conrad plus appellee's proportional rate of 62½ cents to Minneapolis.[2] Complainant Valier Community Club did not propose to alter any existing through routes or change the amount of any through rates. Rather, complainant asked the Commission to increase Montana Western's revenue by substituting "joint rates" for the present combination rate and determining a division of joint rates that would have the effect of increasing the Montana Western's present compensation of 9 cents for the Valier to Conrad segment of the through shipments.

After hearing evidence on the complaint, an Examiner recommended that the Montana Western's application for abandonment be denied because of the public need for railroad service in the Valier area. He further recommended that joint rates on grain be established from Valier to all interstate points on appellee's lines at the level of the present combination rates. After comparing division of revenues on similar joint rates established on other lines in the area, the Examiner recommended that the Montana Western receive a division of 10 cents, an increase of 1 cent over the present proportional rate. The Interstate Commerce Commission agreed that the public need for rail service in the Valier area called for denial of

[2] The local rate from Conrad, Montana, to Minneapolis is 65½ cents. When a through rate consists of a combination of rates for intermediate distances, the rate for one segment of the shipment is referred to as a proportional rate where, as here, that rate is lower than the local rate over that segment. See *Atchison, T. & S. F. R. Co.* v. *United States,* 279 U. S. 768, 771 (1929); Berry, A Study of Proportional Rates, 10 I. C. C. Pract. J. 545 (1943).

the abandonment application. The Commission also agreed that the public interest required establishment of joint rates. However, the Commission, stating that financial needs were a justification for relatively high divisions, ordered, for example, that the Montana Western receive 16.3 cents as its share of the 71½ cents through rate on a shipment from Valier to Minneapolis. 275 I. C. C. 512. It is conceded by the Commission in this Court that its order establishing joint rates was but a means to the end of assisting the Montana Western to meet obvious financial needs.

Appellee brought this action in the District Court to enjoin enforcement of that part of the Commission's order establishing joint rates and divisions of revenues. A three-judge court rejected the Commission's contention that Section 15, paragraphs (3) and (6), of the Interstate Commerce Act authorized the order; instead, it enjoined enforcement of the order as one prohibited by a provision of Section 15 (4).[3] 96 F. Supp. 298. The relevant statutes are set forth in the margin.[4] The case

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[3] The Commission did not discuss Section 15 (4) in its report. We were advised at the bar of this Court that the question presented by that Section was first raised before the Commission on a petition for reconsideration which was denied without opinion. Since appellants, including the Commission, have considered the Section 15 (4) question as having been properly raised before the Commission, we also treat the question as properly before us. Compare *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143, 155 (1946); *United States* v. *Hancock Truck Lines*, 324 U. S. 774 (1945); *General Transp. Co.* v. *United States*, 65 F. Supp. 981 (D. Mass. 1946), aff'd, 329 U. S. 668 (1946) (waiver issue not raised on appeal).

[4] "(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property

was brought here on direct appeal by the United States, the Interstate Commerce Commission, the Valier Community Club, the Montana Western Railroad, and the Board of Railroad Commissioners of the State of Montana, appellants. 28 U. S. C. (Supp. IV) § 1253.

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by carriers subject to this part, . . . ." 54 Stat. 911, 49 U. S. C. § 15 (3).

"(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest." 54 Stat. 911–912, 49 U. S. C. § 15 (4).

"(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise

*First.* Under Section 15 (3), the Commission is empowered to "establish through routes, joint classifications, and joint rates, fares, or charges." The only pertinent limitation to their establishment found in Section 15 (3) itself is that the Commission deem such action "necessary or desirable in the public interest."

Once joint rates are lawfully established, the Commission is authorized by Section 15 (6) to prescribe "just, reasonable, and equitable divisions" of revenue between the participating carriers and to determine such divisions by giving due consideration to various listed factors, including "the amount of revenue required" by participating carriers. In *The New England Divisions Case,* 261 U. S. 184, 189–195 (1923), this Court held that Section 15 (6) was designed for affirmative use in relieving the financial needs of weak carriers.[5]

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established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, . . . . In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge." 41 Stat. 486, 49 U. S. C. § 15 (6).

[5] The Montana Western and appellee maintain joint rates established by agreement for many commodities, including coal, lumber and livestock. If it had happened that a joint rate had been agreed upon for grain (or that the bulk of Montana Western's revenues were derived from commodities that now move on joint rates), the Commission could have diverted additional revenue to the Montana Western without resort to the power granted in Section 15 (3).

Section 15 (4) conditions the powers granted the Commission in Section 15 (3). Prior to the Transportation Act of 1940, Section 15 (4) contained two provisions, one being the restriction on the Commission's power to establish a through route that would require a carrier to short haul itself, considered in *Thompson* v. *United States,* 343 U. S. 549 (decided this day), and the other granting the Commission additional power to establish through routes in emergencies. The 1940 revision of Section 15 (4) retained the emergency through route provision, increased the power of the Commission to establish through routes which require a carrier to short haul itself and added the following provision:

> "No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

The Commission's order in this case did not establish any through route, but did establish joint rates for the admitted purpose of assisting the Montana Western Railway to meet its financial needs. As stated above, the District Court held that such an order was prohibited by the above-quoted provision of Section 15 (4).

*Second.* Much of appellants' argument against the holding of the District Court misses the mark. Appellants construe the prohibition against establishing through routes for the purpose of assisting a carrier to meet its financial needs as limited to cases where short hauling is a problem. Appellants would have the Court read the financial assistance prohibition as merely another restriction on the Commission's power to require a carrier to short haul itself in addition to the restriction against short hauling found in the first provision of Section 15 (4). Since existence of a short-hauling problem

presupposes the existence of alternate rail connections, such a problem cannot arise in this case where the Montana Western is the only carrier serving Valier.

Appellants would have the Court ignore the fact that the financial assistance prohibition stands as a separate sentence in Section 15 (4). Certainly that sentence is grammatically capable of independent significance. And it may be noted that the sentence is directed to a specific problem that arose in the administration of the Commission's power under Section 15 (3) and (4) to establish through routes—a problem quite separate from that presented by the restriction against short hauling. This different problem arises when a carrier asks the Commission to establish a through route, not primarily to serve any need of the shipping public for additional routes, but because the carrier needs additional revenue which it seeks to obtain by diverting to its own line traffic served by other routes. The question presented in such a case is whether the Commission's power to establish through routes "in the public interest" extends to establishing through routes, with the resulting rearrangement in the movement of rail traffic, for the purpose of meeting the financial needs of a carrier. This question was presented in the through route litigation that led to the 1940 revision of Section 15 (4) [6] and was repeatedly raised dur-

[6] In the *Subiaco* litigation, a short-line carrier asked the Commission to establish a through route that included its line. The Commission's report stated the questions presented as (1) the applicability of the short-haul limitation of Section 15 (4), and (2) whether it was in the public interest to establish a new through route so that the financially weak carrier would benefit from new business and resulting increased revenues. The Commission ordered establishment of the new route over the dissent of one Commissioner on the second question. *Ft. Smith, Subiaco & R. I. R. Co.* v. *Alabama & Vicksburg R. Co.*, 107 I. C. C. 523 (1926). Reaching only the short-haul

ing the legislative consideration of the amendments to Section 15 (4).[7]

As revised in 1940, Section 15 (4) deals at length with the short-haul problem and, in addition, contains the separate sentence prohibiting the establishment of through routes for the purpose of assisting a carrier to meet its financial needs. Since this prohibition stands as an independent sentence dealing with an independent problem, we cannot accept appellants' suggestion that the sentence can be ignored unless a short-hauling problem is also involved in the case.

*Third.* Although the prohibition against establishment of through routes and joint rates applicable thereto for the purpose of assisting a carrier to meet its financial needs cannot be read as limited to short-hauling situations, it by no means follows that the prohibition may be read as applicable to all Commission orders establishing joint rates.

The Interstate Commerce Act contemplates the existence of through routes in the absence of joint rates.[8] And

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question, this Court held the order invalid in *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269 (1929). Efforts to amend Section 15 (4) began with the final decision in the *Subiaco* litigation. See *Thompson* v. *United States*, 343 U. S. 549 (decided this day).

[7] See Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 5364, 74th Cong., 2d Sess. 70–71 (1936); Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on S. 1261, 75th Cong., 2d and 3d Sess. 104–106, 159–160 (1937, 1938); Hearings before a Subcommittee of the Senate Committee on Interstate Commerce on S. 1085, 76th Cong., 1st Sess. 88–89 (1939); Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 3400, 76th Cong., 1st Sess. 232–234 (1939). See also S. 1261, 75th Cong., 1st Sess.; S. Rep. No. 404, 75th Cong., 1st Sess. 3 (1937).

[8] It is the duty of every carrier to establish reasonable through routes but there is no corresponding duty to establish joint rates with

this Court expressly has approved the Commission's consistent recognition of the existence of through routes whether the through rates applicable thereto are joint rates or combinations of separately established rates.[9] As a result, the establishment of joint rates is an act separate and distinct under the statute from the establishment of through routes. In this case, the Commission ordered the establishment of joint rates over through routes, Valier to Minneapolis for example, which were already in existence on a combination of proportional rates. Under the Commission's order, the same cars would move over the same tracks to the same destinations and at the same through rates as before. It is a matter of little concern to shippers whether combination rates or joint rates at the same level are charged, so long as the through route continues to be available.[10] Whatever theories may be advanced as to determining the existence of a through route where no traffic passes over the route, see *Thompson* v. *United States,* 343 U. S. 549 (decided

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other carriers. 49 U. S. C. § 1 (4). Joint rates may be established either by agreement of the carriers, 49 U. S. C. § 6 (4), or by Commission order, 49 U. S. C. § 15 (3). Section 6 (1) of the Interstate Commerce Act requires that a carrier file and post all rates, fares, and charges between different points on its own routes and between points on the route of any other carrier "when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file [and post] the separately established rates, fares, and charges applied to the through transportation." 49 U. S. C. § 6 (1). See *Brown Lumber Co.* v. *Louisville & N. R. Co.,* 299 U. S. 393, 395 (1937).

[9] See *St. Louis Southwestern R. Co.* v. *United States,* 245 U. S. 136, 139 (1917), quoted in *Thompson* v. *United States,* 343 U. S. 549 (decided this day). See also *Virginian R. Co.* v. *United States,* 272 U. S. 658, 666 (1926).

[10] See *Louisville & N. R. Co.* v. *Sloss-Sheffield Steel & Iron Co.,* 269 U. S. 217, 234 (1925).

this day), it is not questioned that through routes over the Montana Western and appellee's lines long have been in existence. These through routes were not established by the Commission in this case.

Commission action establishing joint rates in lieu of combination rates for service over through routes is a proper form of regulation.[11] It is crucial to this case that the financial-needs prohibition of Section 15 (4) does not limit the Commission's power to establish joint rates generally, but deals only with the power to establish a "through route and joint rates applicable thereto," *i. e.*, those joint rates applicable to a through route established by the Commission. Since the order in this case did not establish a through route, Section 15 (4) does not affect the Commission's power in this case. And, because joint rates published by two or more carriers are by definition always applicable to a through route over the lines of those carriers, reading the financial assistance prohibition as affecting this order establishing only joint rates for existing through routes would render the words "applicable thereto" surplusage, attributing to Congress a useless and misleading use of words.

It is one form of regulation to redistribute revenues between connecting carriers by determining divisions of revenues received on existing through routes. The economic ramifications are quite different if the Commission establishes through routes which divert traffic to the lines of a financially weak carrier. Such action not only serves to assist that carrier financially but can also, at the same time, cause important changes in the movement of traffic, diverting traffic to a new geographic area at the expense

[11] Regulation in "the form of compelling the substitution of a joint rate for a through rate made by a combination of local rates" was approved in *St. Louis Southwestern R. Co.* v. *United States,* note 9, *supra,* at 142.

of other carriers and other areas. Congress amended Section 15 (4) to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs. But the provisions of Section 15 (4)—the restrictions against short hauling, the financial-needs prohibition and the emergency route provision—all deal with the Commission's power to establish through routes.

Congress could well have prohibited the Commission from considering financial needs in issuing any order under Section 15 (3). This was proposed in one bill and expressly rejected by a congressional committee.[12] Or, Congress could have prohibited consideration of financial needs in ordering establishment of *joint* through routes where through routes were in existence, as was also proposed.[13] Instead, Congress adopted a provision prohibiting reliance on financial needs only in respect to orders establishing through routes. It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written. Where, as here, the Commission did not establish through routes, Section 15 (4) has no application.[14]

Beginning with the Transportation Act of 1920, Congress has regulated the railroads not only to prohibit such abuses as excessive and discriminatory rates but also with the purpose of assuring adequate transportation service.

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[12] S. Rep. No. 404, 75th Cong., 1st Sess. 3 (1937).

[13] Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on S. 1261, 75th Cong., 2d and 3d Sess. 106 (1937, 1938); Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 3400, 76th Cong., 1st Sess. 234 (1939).

[14] The Commission has recognized in prior cases that in establishing joint rates over existing through routes, the provisions of Section 15 (4) respecting establishment of through routes are not applicable. See *Beaman Elevator Co.* v. *Chicago & N. W. R. Co.*, 148 I. C. C. 444, 451 (1928), 155 I. C. C. 313 (1929).

*The New England Divisions Case, supra.* The relationship between this transportation policy and the power of the Commission to prescribe divisions of joint rates was described by the Court in *United States* v. *Abilene & Southern R. Co.,* 265 U. S. 274, 284–285 (1924):

> "It is settled that in determining what the divisions should be, the Commission may, in the public interest, take into consideration the financial needs of a weaker road; and that it may be given a division larger than justice merely as between the parties would suggest 'in order to maintain it in effective operation as part of an adequate transportation system,' provided the share left to its connections is 'adequate to avoid a confiscatory result.' *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 477; *New England Divisions Case,* 261 U. S. 184, 194, 195."

The power of the Commission to establish joint rates is similarly essential to the congressional policy of assuring adequate transportation service, as expressly stated in *The New England Divisions Case, supra,* at 194–195. The Transportation Act of 1940 reenacted the provisions of the Interstate Commerce Act implementing that policy and added that the Act was to be administered so as to develop, coordinate, and preserve an adequate "national transportation system." [15] Since the financial assistance prohibition of Section 15 (4), added by the Transportation Act of 1940, restricted the Commission's power over joint rates only in respect to those joint rates applicable to through routes established by the Commission, the Commission's power to establish joint rates over existing through routes remains unimpaired.

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[15] 54 Stat. 899 (1940).

As a result, the Commission is empowered, in the public interest, to cause a redistribution of revenue between two carriers participating in transportation of through traffic. It is immaterial, from the viewpoint of the public, whether the revenue was obtained by charging joint rates established by agreement of the carriers or by a combination of separately established rates. And, from the viewpoint of the national transportation system, it is immaterial whether an independently owned rail line is saved from abandonment by such a redistribution of revenue or whether permission to abandon a branch of a main line carrier is denied on the basis of a similar reallocation of revenue. Just as the Commission may examine into the value of a branch line as "feeding" additional traffic to the main line of a single carrier, the value of the Montana Western as producing traffic for appellee need not be disregarded by the Commission.[16] Indeed, the Montana Western's value in producing profitable traffic for appellee is shown by the fact that appellee was willing to continue and even increase its financial support while the Montana Western itself chose to seek abandonment.

We hold that the District Court erred in enjoining the Commission's order as prohibited by Section 15 (4). Apart from the question of the Commission's power to establish joint rates, the Commission's order establishing joint rates and divisions in this case is attacked for want of essential findings and for lack of substantial

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[16] In passing upon applications to abandon branch lines under 49 U. S. C. § 1 (18)–(20), the Commission has required a showing of the "feeder value" of the branch by crediting to that branch the gross system revenues less the estimated cost of moving the traffic over the rest of the system. *E. g., Chicago, R. I. & P. R. Co. Trustees Abandonment,* 254 I. C. C. 187, 190 (1943). See Cherington, The Regulation of Railroad Abandonments (1948), 159–166.

evidence justifying continued operation of this particular carrier. Since it is the practice of this Court not to review an administrative record in the first instance after finding that a lower court has applied an incorrect principle of law,[17] the case is remanded to the District Court for further proceedings not inconsistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE BLACK, MR. JUSTICE JACKSON and MR. JUSTICE BURTON concur in the result.

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[17] Compare *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474 (1951), with *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U. S. 504, 508 (1951).

Syllabus.

# YOUNGSTOWN SHEET & TUBE CO. ET AL. *v.* SAWYER.

NO. 744. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.*

Argued May 12–13, 1952.—Decided June 2, 1952.

To avert a nation-wide strike of steel workers in April 1952, which he believed would jeopardize national defense, the President issued an Executive Order directing the Secretary of Commerce to seize and operate most of the steel mills. The Order was not based upon any specific statutory authority but was based generally upon all powers vested in the President by the Constitution and laws of the United States and as President of the United States and Commander in Chief of the Armed Forces. The Secretary issued an order seizing the steel mills and directing their presidents to operate them as operating managers for the United States in accordance with his regulations and directions. The President promptly reported these events to Congress; but Congress took no action. It had provided other methods of dealing with such situations and had refused to authorize governmental seizures of property to settle labor disputes. The steel companies sued the Secretary in a Federal District Court, praying for a declaratory judgment and injunctive relief. The District Court issued a preliminary injunction, which the Court of Appeals stayed. *Held:*

1. Although this case has proceeded no further than the preliminary injunction stage, it is ripe for determination of the constitutional validity of the Executive Order on the record presented. Pp. 584–585.

(a) Under prior decisions of this Court, there is doubt as to the right to recover in the Court of Claims on account of properties unlawfully taken by government officials for public use. P. 585.

(b) Seizure and governmental operation of these going businesses were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement. P. 585.

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*Together with No. 745, *Sawyer, Secretary of Commerce,* v. *Youngstown Sheet & Tube Co. et al.,* also on certiorari to the same court.

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2. The Executive Order was not authorized by the Constitution or laws of the United States; and it cannot stand. Pp. 585–589.

(a) There is no statute which expressly or impliedly authorizes the President to take possession of this property as he did here. Pp. 585–586.

(b) In its consideration of the Taft-Hartley Act in 1947, Congress refused to authorize governmental seizures of property as a method of preventing work stoppages and settling labor disputes. P. 586.

(c) Authority of the President to issue such an order in the circumstances of this case cannot be implied from the aggregate of his powers under Article II of the Constitution. Pp. 587–589.

(d) The Order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. P. 587.

(e) Nor can the Order be sustained because of the several provisions of Article II which grant executive power to the President. Pp. 587–589.

(f) The power here sought to be exercised is the lawmaking power, which the Constitution vests in the Congress alone, in both good and bad times. Pp. 587–589.

(g) Even if it be true that other Presidents have taken possession of private business enterprises without congressional authority in order to settle labor disputes, Congress has not thereby lost its exclusive constitutional authority to make the laws necessary and proper to carry out all powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof." Pp. 588–589.

103 F. Supp. 569, affirmed.

For concurring opinion of MR. JUSTICE FRANKFURTER, see *post*, p. 593.

For concurring opinion of MR. JUSTICE DOUGLAS, see *post*, p. 629.

For concurring opinion of MR. JUSTICE JACKSON, see *post*, p. 634.

For concurring opinion of MR. JUSTICE BURTON, see *post*, p. 655.

For opinion of MR. JUSTICE CLARK, concurring in the judgment of the Court, see *post*, p. 660.

For dissenting opinion of MR. CHIEF JUSTICE VINSON, joined by MR. JUSTICE REED and MR. JUSTICE MINTON, see *post*, p. 667.

The District Court issued a preliminary injunction restraining the Secretary of Commerce from carrying out the terms of Executive Order No. 10340, 16 Fed. Reg.

3503. 103 F. Supp. 569. The Court of Appeals issued a stay. 90 U. S. App. D. C. —, 197 F. 2d 582. This Court granted certiorari. 343 U. S. 937. The judgment of the District Court is *affirmed,* p. 589.

*John W. Davis* argued the cause for petitioners in No. 744 and respondents in No. 745. On the brief were *Mr. Davis, Nathan L. Miller, John Lord O'Brian, Roger M. Blough, Theodore Kiendl, Porter R. Chandler* and *Howard C. Westwood* for the United States Steel Co.; *Bruce Bromley, E. Fontaine Broun* and *John H. Pickering* for the Bethlehem Steel Co.; *Luther Day, T. F. Patton, Edmund L. Jones, Howard Boyd* and *John C. Gall* for the Republic Steel Corp.; *John C. Bane, Jr., H. Parker Sharp* and *Sturgis Warner* for the Jones & Laughlin Steel Corp.; *Mr. Gall, John J. Wilson* and *J. E. Bennett* for the Youngstown Sheet & Tube Co. et al.; *Charles H. Tuttle, Winfred K. Petigrue* and *Joseph P. Tumulty, Jr.* (who also filed an additional brief) for the Armco Steel Corp. et al.; and *Randolph W. Childs, Edgar S. McKaig* and *James Craig Peacock* (who also filed an additional brief) for E. J. Lavino & Co., petitioners in No. 744 and respondents in No. 745.

*Solicitor General Perlman* argued the cause for respondent in No. 744 and petitioner in No. 745. With him on the brief were *Assistant Attorney General Baldridge, James L. Morrisson, Samuel D. Slade, Oscar H. Davis, Robert W. Ginnane, Marvin E. Frankel, Benjamin Forman* and *Herman Marcuse.*

By special leave of Court, *Clifford D. O'Brien* and *Harold C. Heiss* argued the cause for the Brotherhood of Locomotive Engineers et al., as *amici curiae,* supporting petitioners in No. 744 and respondents in No. 745. With them on the brief were *Ruth Weyand* and *V. C. Shuttleworth.*

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By special leave of Court, *Arthur J. Goldberg* argued the cause for the United Steelworkers of America, C. I. O., as *amicus curiae*. With him on the brief was *Thomas E. Harris*.

Mr. Justice Black delivered the opinion of the Court.

We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills. The mill owners argue that the President's order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President. The Government's position is that the order was made on findings of the President that his action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States. The issue emerges here from the following series of events:

In the latter part of 1951, a dispute arose between the steel companies and their employees over terms and conditions that should be included in new collective bargaining agreements. Long-continued conferences failed to resolve the dispute. On December 18, 1951, the employees' representative, United Steelworkers of America, C. I. O., gave notice of an intention to strike when the existing bargaining agreements expired on December 31. The Federal Mediation and Conciliation Service then intervened in an effort to get labor and management to agree. This failing, the President on December 22, 1951, referred the dispute to the Federal Wage Stabilization

Board [1] to investigate and make recommendations for fair and equitable terms of settlement. This Board's report resulted in no settlement. On April 4, 1952, the Union gave notice of a nation-wide strike called to begin at 12:01 a. m. April 9. The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel. Reciting these considerations for his action, the President, a few hours before the strike was to begin, issued Executive Order 10340, a copy of which is attached as an appendix, *post,* p. 589. The order directed the Secretary of Commerce to take possession of most of the steel mills and keep them running. The Secretary immediately issued his own possessory orders, calling upon the presidents of the various seized companies to serve as operating managers for the United States. They were directed to carry on their activities in accordance with regulations and directions of the Secretary. The next morning the President sent a message to Congress reporting his action. Cong. Rec., April 9, 1952, p. 3962. Twelve days later he sent a second message. Cong. Rec., April 21, 1952, p. 4192. Congress has taken no action.

Obeying the Secretary's orders under protest, the companies brought proceedings against him in the District Court. Their complaints charged that the seizure was not authorized by an act of Congress or by any constitutional provisions. The District Court was asked to declare the orders of the President and the Secretary invalid and to issue preliminary and permanent injunctions restraining their enforcement. Opposing the motion for pre-

[1] This Board was established under Executive Order 10233, 16 Fed. Reg. 3503.

liminary injunction, the United States asserted that a strike disrupting steel production for even a brief period would so endanger the well-being and safety of the Nation that the President had "inherent power" to do what he had done—power "supported by the Constitution, by historical precedent, and by court decisions." The Government also contended that in any event no preliminary injunction should be issued because the companies had made no showing that their available legal remedies were inadequate or that their injuries from seizure would be irreparable. Holding against the Government on all points, the District Court on April 30 issued a preliminary injunction restraining the Secretary from "continuing the seizure and possession of the plants . . . and from acting under the purported authority of Executive Order No. 10340." 103 F. Supp. 569. On the same day the Court of Appeals stayed the District Court's injunction. 90 U. S. App. D. C. —, 197 F. 2d 582. Deeming it best that the issues raised be promptly decided by this Court, we granted certiorari on May 3 and set the cause for argument on May 12. 343 U. S. 937.

Two crucial issues have developed: *First*. Should final determination of the constitutional validity of the President's order be made in this case which has proceeded no further than the preliminary injunction stage? *Second*. If so, is the seizure order within the constitutional power of the President?

I.

It is urged that there were non-constitutional grounds upon which the District Court could have denied the preliminary injunction and thus have followed the customary judicial practice of declining to reach and decide constitutional questions until compelled to do so. On this basis it is argued that equity's extraordinary injunctive relief should have been denied because (a) seizure of the companies' properties did not inflict irreparable dam-

ages, and (b) there were available legal remedies adequate to afford compensation for any possible damages which they might suffer. While separately argued by the Government, these two contentions are here closely related, if not identical. Arguments as to both rest in large part on the Government's claim that should the seizure ultimately be held unlawful, the companies could recover full compensation in the Court of Claims for the unlawful taking. Prior cases in this Court have cast doubt on the right to recover in the Court of Claims on account of properties unlawfully taken by government officials for public use as these properties were alleged to have been. See *e. g., Hooe* v. *United States,* 218 U. S. 322, 335–336; *United States* v. *North American Co.,* 253 U. S. 330, 333. But see *Larson* v. *Domestic & Foreign Corp.,* 337 U. S. 682, 701–702. Moreover, seizure and governmental operation of these going businesses were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement. Viewing the case this way, and in the light of the facts presented, the District Court saw no reason for delaying decision of the constitutional validity of the orders. We agree with the District Court and can see no reason why that question was not ripe for determination on the record presented. We shall therefore consider and determine that question now.

## II.

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure. There are two statutes which do authorize the President

to take both personal and real property under certain conditions.[2] However, the Government admits that these conditions were not met and that the President's order was not rooted in either of the statutes. The Government refers to the seizure provisions of one of these statutes (§ 201 (b) of the Defense Production Act) as "much too cumbersome, involved, and time-consuming for the crisis which was at hand."

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency.[3] Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining.[4] Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances. Instead, the plan sought to bring about settlements by use of the customary devices of mediation, conciliation, investigation by boards of inquiry, and public reports. In some instances temporary injunctions were authorized to provide cooling-off periods. All this failing, unions were left free to strike after a secret vote by employees as to whether they wished to accept their employers' final settlement offer.[5]

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[2] The Selective Service Act of 1948, 62 Stat. 604, 625–627, 50 U. S. C. App. (Supp. IV) § 468; the Defense Production Act of 1950, Tit. II, 64 Stat. 798, as amended, 65 Stat. 132.

[3] 93 Cong. Rec. 3637–3645.

[4] 93 Cong. Rec. 3835–3836.

[5] Labor Management Relations Act, 1947, 61 Stat. 136, 152–156, 29 U. S. C. (Supp. IV) §§ 141, 171–180.

It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "The executive Power shall be vested in a President . . ."; that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States."

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The

first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitu-

tion "in the Government of the United States, or any Department or Officer thereof."

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.

The judgment of the District Court is

*Affirmed.*

MR. JUSTICE FRANKFURTER.

Although the considerations relevant to the legal enforcement of the principle of separation of powers seem to me more complicated and flexible than may appear from what MR. JUSTICE BLACK has written, I join his opinion because I thoroughly agree with the application of the principle to the circumstances of this case. Even though such differences in attitude toward this principle may be merely differences in emphasis and nuance, they can hardly be reflected by a single opinion for the Court. Individual expression of views in reaching a common result is therefore important.

## APPENDIX TO OPINION OF THE COURT.

### EXECUTIVE ORDER

Directing the Secretary of Commerce to Take Possession of and Operate the Plants and Facilities of Certain Steel Companies

WHEREAS on December 16, 1950, I proclaimed the existence of a national emergency which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our na-

tional security and to fulfill our responsibilities in the efforts being made throughout the United Nations and otherwise to bring about a lasting peace; and

WHEREAS American fighting men and fighting men of other nations of the United Nations are now engaged in deadly combat with the forces of aggression in Korea, and forces of the United States are stationed elsewhere overseas for the purpose of participating in the defense of the Atlantic Community against aggression; and

WHEREAS the weapons and other materials needed by our armed forces and by those joined with us in the defense of the free world are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials; and

WHEREAS steel is likewise indispensable to the carrying out of programs of the Atomic Energy Commission of vital importance to our defense efforts; and

WHEREAS a continuing and uninterrupted supply of steel is also indispensable to the maintenance of the economy of the United States, upon which our military strength depends; and

WHEREAS a controversy has arisen between certain companies in the United States producing and fabricating steel and the elements thereof and certain of their workers represented by the United Steel Workers of America, CIO, regarding terms and conditions of employment; and

WHEREAS the controversy has not been settled through the processes of collective bargaining or through the efforts of the Government, including those of the Wage Stabilization Board, to which the controversy was referred on December 22, 1951, pursuant to Executive Order No. 10233, and a strike has been called for 12:01 A. M., April 9, 1952; and

WHEREAS a work stoppage would immediately jeopardize and imperil our national defense and the defense

of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field; and

WHEREAS in order to assure the continued availability of steel and steel products during the existing emergency, it is necessary that the United States take possession of and operate the plants, facilities, and other property of the said companies as hereinafter provided:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

1. The Secretary of Commerce is hereby authorized and directed to take possession of all or such of the plants, facilities, and other property of the companies named in the list attached hereto, or any part thereof, as he may deem necessary in the interests of national defense; and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation.

2. In carrying out this order the Secretary of Commerce may act through or with the aid of such public or private instrumentalities or persons as he may designate; and all Federal agencies shall cooperate with the Secretary of Commerce to the fullest extent possible in carrying out the purposes of this order.

3. The Secretary of Commerce shall determine and prescribe terms and conditions of employment under which the plants, facilities, and other properties possession of which is taken pursuant to this order shall be operated. The Secretary of Commerce shall recognize the rights of workers to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining, adjustment of grievances, or other mutual aid or protection, provided

that such activities do not interfere with the operation of such plants, facilities, and other properties.

4. Except so far as the Secretary of Commerce shall otherwise provide from time to time, the managements of the plants, facilities, and other properties possession of which is taken pursuant to this order shall continue their functions, including the collection and disbursement of funds in the usual and ordinary course of business in the names of their respective companies and by means of any instrumentalities used by such companies.

5. Except so far as the Secretary of Commerce may otherwise direct, existing rights and obligations of such companies shall remain in full force and effect, and there may be made, in due course, payments of dividends on stock, and of principal, interest, sinking funds, and all other distributions upon bonds, debentures, and other obligations, and expenditures may be made for other ordinary corporate or business purposes.

6. Whenever in the judgment of the Secretary of Commerce further possession and operation by him of any plant, facility, or other property is no longer necessary or expedient in the interest of national defense, and the Secretary has reason to believe that effective future operation is assured, he shall return the possession and operation of such plant, facility, or other property to the company in possession and control thereof at the time possession was taken under this order.

7. The Secretary of Commerce is authorized to prescribe and issue such regulations and orders not inconsistent herewith as he may deem necessary or desirable for carrying out the purposes of this order; and he may delegate and authorize subdelegation of such of his functions under this order as he may deem desirable.

Harry S. Truman.

The White House, April 8, 1952.

MR. JUSTICE FRANKFURTER, concurring.

Before the cares of the White House were his own, President Harding is reported to have said that government after all is a very simple thing. He must have said that, if he said it, as a fleeting inhabitant of fairyland. The opposite is the truth. A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale. The Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing. They acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light not merely on the need for effective power, if a society is to be at once cohesive and civilized, but also on the need for limitations on the power of governors over the governed.

To that end they rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power. It is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Val-

ley. The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

The Framers, however, did not make the judiciary the overseer of our government. They were familiar with the revisory functions entrusted to judges in a few of the States and refused to lodge such powers in this Court. Judicial power can be exercised only as to matters that were the traditional concern of the courts at Westminster, and only if they arise in ways that to the expert feel of lawyers constitute "Cases" or "Controversies." Even as to questions that were the staple of judicial business, it is not for the courts to pass upon them unless they are indispensably involved in a conventional litigation—and then, only to the extent that they are so involved. Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution. The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle—preferably forever—a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits. An English observer of our scene has acutely described it: "At the first sound of a new argument over the United States Constitution and its interpretation the hearts of Americans leap with a fearful joy. The blood stirs powerfully in their veins and a new lustre brightens their eyes. Like King Harry's men before Harfleur, they stand like greyhounds in the slips, straining upon the start." The Economist, May 10, 1952, p. 370.

The path of duty for this Court, it bears repetition, lies in the opposite direction. Due regard for the implications of the distribution of powers in our Constitution and for the nature of the judicial process as the ultimate authority in interpreting the Constitution, has not only confined the Court within the narrow domain of appropriate adjudication. It has also led to "a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." Brandeis, J., in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 341, 346. A basic rule is the duty of the Court not to pass on a constitutional issue at all, however narrowly it may be confined, if the case may, as a matter of intellectual honesty, be decided without even considering delicate problems of power under the Constitution. It ought to be, but apparently is not, a matter of common understanding that clashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is properly available. Constitutional adjudications are apt by exposing differences to exacerbate them.

So here our first inquiry must be not into the powers of the President, but into the powers of a District Judge to issue a temporary injunction in the circumstances of this case. Familiar as that remedy is, it remains an extraordinary remedy. To start with a consideration of the relation between the President's powers and those of Congress—a most delicate matter that has occupied the thoughts of statesmen and judges since the Nation was founded and will continue to occupy their thoughts as long as our democracy lasts—is to start at the wrong end. A plaintiff is not entitled to an injunction if money damages would fairly compensate him for any wrong he may have suffered. The same considerations by which the Steelworkers, in their brief *amicus,* demonstrate, from the seizure here in controversy, con-

sequences that cannot be translated into dollars and cents, preclude a holding that only compensable damage for the plaintiffs is involved. Again, a court of equity ought not to issue an injunction, even though a plaintiff otherwise makes out a case for it, if the plaintiff's right to an injunction is overborne by a commanding public interest against it. One need not resort to a large epigrammatic generalization that the evils of industrial dislocation are to be preferred to allowing illegality to go unchecked. To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power, which presumably only avowed great public interest brings into action. And so, with the utmost unwillingness, with every desire to avoid judicial inquiry into the powers and duties of the other two branches of the government, I cannot escape consideration of the legality of Executive Order No. 10340.

The pole-star for constitutional adjudications is John Marshall's greatest judicial utterance that "it is *a constitution* we are expounding." *McCulloch* v. *Maryland,* 4 Wheat. 316, 407. That requires both a spacious view in applying an instrument of government "made for an undefined and expanding future," *Hurtado* v. *California,* 110 U. S. 516, 530, and as narrow a delimitation of the constitutional issues as the circumstances permit. Not the least characteristic of great statesmanship which the Framers manifested was the extent to which they did not attempt to bind the future. It is no less incumbent upon this Court to avoid putting fetters upon the future by needless pronouncements today.

Marshall's admonition that "it is *a constitution* we are expounding" is especially relevant when the Court is required to give legal sanctions to an underlying principle of the Constitution—that of separation of pow-

ers. "The great ordinances of the Constitution do not establish and divide fields of black and white." Holmes, J., dissenting in *Springer* v. *Philippine Islands,* 277 U. S. 189, 209.

The issue before us can be met, and therefore should be, without attempting to define the President's powers comprehensively. I shall not attempt to delineate what belongs to him by virtue of his office beyond the power even of Congress to contract; what authority belongs to him until Congress acts; what kind of problems may be dealt with either by the Congress or by the President or by both, cf. *La Abra Silver Mng. Co.* v. *United States,* 175 U. S. 423; what power must be exercised by the Congress and cannot be delegated to the President. It is as unprofitable to lump together in an undiscriminating hotch-potch past presidential actions claimed to be derived from occupancy of the office, as it is to conjure up hypothetical future cases. The judiciary may, as this case proves, have to intervene in determining where authority lies as between the democratic forces in our scheme of government. But in doing so we should be wary and humble. Such is the teaching of this Court's rôle in the history of the country.

It is in this mood and with this perspective that the issue before the Court must be approached. We must therefore put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given. These and other questions, like or unlike, are not now here. I would exceed my authority were I to say anything about them.

The question before the Court comes in this setting. Congress has frequently—at least 16 times since 1916—

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specifically provided for executive seizure of production, transportation, communications, or storage facilities. In every case it has qualified this grant of power with limitations and safeguards. This body of enactments—summarized in tabular form in Appendix I, *post,* p. 615—demonstrates that Congress deemed seizure so drastic a power as to require that it be carefully circumscribed whenever the President was vested with this extraordinary authority. The power to seize has uniformly been given only for a limited period or for a defined emergency, or has been repealed after a short period. Its exercise has been restricted to particular circumstances such as "time of war or when war is imminent," the needs of "public safety" or of "national security or defense," or "urgent and impending need." The period of governmental operation has been limited, as, for instance, to "sixty days after the restoration of productive efficiency." Seizure statutes usually make executive action dependent on detailed conditions: for example, (a) failure or refusal of the owner of a plant to meet governmental supply needs or (b) failure of voluntary negotiations with the owner for the use of a plant necessary for great public ends. Congress often has specified the particular executive agency which should seize or operate the plants or whose judgment would appropriately test the need for seizure. Congress also has not left to implication that just compensation be paid; it has usually legislated in detail regarding enforcement of this litigation-breeding general requirement. (See Appendix I, *post,* p. 615.)

Congress in 1947 was again called upon to consider whether governmental seizure should be used to avoid serious industrial shutdowns. Congress decided against conferring such power generally and in advance, without special Congressional enactment to meet each particular need. Under the urgency of telephone and coal strikes in

the winter of 1946, Congress addressed itself to the problems raised by "national emergency" strikes and lockouts.[1] The termination of wartime seizure powers on December 31, 1946, brought these matters to the attention of Congress with vivid impact. A proposal that the President be given powers to seize plants to avert a shutdown where the "health or safety" of the Nation was endangered, was thoroughly canvassed by Congress and rejected. No room for doubt remains that the proponents as well as the opponents of the bill which became the Labor Management Relations Act of 1947 clearly understood that as a result of that legislation the only recourse for preventing a shutdown in any basic industry, after failure of mediation, was Congress.[2] Authorization for seizure as

[1] The power to seize plants under the War Labor Disputes Act ended with the termination of hostilities, proclaimed on Dec. 31, 1946, prior to the incoming of the Eightieth Congress; and the power to operate previously seized plants ended on June 30, 1947, only a week after the enactment of the Labor Management Relations Act over the President's veto. 57 Stat. 163, 165, 50 U. S. C. App. (1946 ed.) § 1503. See 2 Legislative History of the Labor Management Relations Act, 1947 (published by National Labor Relations Board, 1948), 1145, 1519, 1626.

[2] Some of the more directly relevant statements are the following: "In most instances the force of public opinion should make itself sufficiently felt in this 80-day period to bring about a peaceful termination of the controversy. Should this expectation fail, the bill provides for the President laying the matter before Congress for whatever legislation seems necessary to preserve the health and safety of the Nation in the crisis." Senate Report No. 105, 80th Cong., 1st Sess. 15.

"We believe it would be most unwise for the Congress to attempt to adopt laws relating to any single dispute between private parties." Senate Minority Report, *id.*, Part 2, at 17.

In the debates Senator H. Alexander Smith, a member of the Senate Committee on Labor and Public Welfare, said, "In the event of a deadlock and a strike is not ended, the matter is referred to the President, who can use his discretion as to whether he will present

an available remedy for potential dangers was unequivocally put aside. The Senate Labor Committee, through its Chairman, explicitly reported to the Senate that a general grant of seizure powers had been considered and rejected in favor of reliance on *ad hoc* legislation, as a particular emergency might call for it.[3] An amendment presented in the House providing that, where necessary "to preserve and protect the public health and security," the President might seize any industry in which there is

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the matter to the Congress, whether or not the situation is such that emergency legislation is required.

"Nothing has been done with respect to the Smith-Connally Act. There is no provision for taking over property or running plants by the Government. We simply provide a procedure which we hope will be effective in 99 out of 100 cases where the health or safety of the people may be affected, and still leave a loophole for congressional action." 93 Cong. Rec. 4281.

The President in his veto message said, ". . . it would be mandatory for the President to transfer the whole problem to the Congress, even if it were not in session. Thus, major economic disputes between employers and their workers over contract terms might ultimately be thrown into the political arena for disposition. One could scarcely devise a less effective method for discouraging critical strikes." 93 Cong. Rec. 7487.

[3] Senator Taft said:

"If there finally develops a complete national emergency threatening the safety and health of the people of the United States, Congress can pass an emergency law to cover the particular emergency. . . .

"We have felt that perhaps in the case of a general strike, or in the case of other serious strikes, after the termination of every possible effort to resolve the dispute, the remedy might be an emergency act by Congress for that particular purpose.

". . . But while such a bill [for seizure of plants and union funds] might be prepared, I should be unwilling to place such a law on the books until we actually face such an emergency, and Congress applies the remedy for the particular emergency only. Eighty days will provide plenty of time within which to consider the possibility of what should be done; and we believe very strongly that there should not be anything in this law which prohibits finally the right to strike." 93 Cong. Rec. 3835–3836.

an impending curtailment of production, was voted down after debate, by a vote of more than three to one.[4]

In adopting the provisions which it did, by the Labor Management Relations Act of 1947, for dealing with a "national emergency" arising out of a breakdown in peaceful industrial relations, Congress was very familiar with Governmental seizure as a protective measure. On a balance of considerations, Congress chose not to lodge this power in the President. It chose not to make available in advance a remedy to which both industry and labor were fiercely hostile.[5] In deciding that authority to seize should be given to the President only after full consideration of the particular situation should show such legislation to be necessary, Congress presumably acted on experience with similar industrial conflicts in the past. It evidently assumed that industrial shutdowns in basic industries are not instances of spontaneous generation,

[4] 93 Cong. Rec. 3637–3645.

[5] See, for instance, the statements of James B. Carey, Secretary of the C. I. O., in opposition to S. 2054, 77th Cong., 1st Sess., which eventually became the War Labor Disputes Act. Central to that Act, of course, was the temporary grant of the seizure power to the President. Mr. Carey then said:

"Senator BURTON. If this would continue forever it might mean the nationalization of industry?

"Mr. CAREY. Let us consider it on a temporary basis. How is the law borne by labor? Here is the Government-sponsored strike breaking agency, and nothing more.

. . . . . .

"Our suggestion of a voluntary agreement of the representatives of industry and labor and Government, participating in calling a conference, is a democratic way. The other one is the imposition of force, the other is the imposition of seizure of certain things for a temporary period; the destruction of collective bargaining, and it would break down labor relations that may have been built up over a long period."

Hearing before a Subcommittee of the Senate Committee on the Judiciary on S. 2054, 77th Cong., 1st Sess. 132.

and that danger warnings are sufficiently plain before the event to give ample opportunity to start the legislative process into action.

In any event, nothing can be plainer than that Congress made a conscious choice of policy in a field full of perplexity and peculiarly within legislative responsibility for choice. In formulating legislation for dealing with industrial conflicts, Congress could not more clearly and emphatically have withheld authority than it did in 1947. Perhaps as much so as is true of any piece of modern legislation, Congress acted with full consciousness of what it was doing and in the light of much recent history. Previous seizure legislation had subjected the powers granted to the President to restrictions of varying degrees of stringency. Instead of giving him even limited powers, Congress in 1947 deemed it wise to require the President, upon failure of attempts to reach a voluntary settlement, to report to Congress if he deemed the power of seizure a needed shot for his locker. The President could not ignore the specific limitations of prior seizure statutes. No more could he act in disregard of the limitation put upon seizure by the 1947 Act.

It cannot be contended that the President would have had power to issue this order had Congress explicitly negated such authority in formal legislation. Congress has expressed its will to withhold this power from the President as though it had said so in so many words. The authoritatively expressed purpose of Congress to disallow such power to the President and to require him, when in his mind the occasion arose for such a seizure, to put the matter to Congress and ask for specific authority from it, could not be more decisive if it had been written into §§ 206–210 of the Labor Management Relations Act of 1947. Only the other day, we treated the Congressional gloss upon those sections as part of the Act. *Bus Employees* v. *Wisconsin Board,* 340 U. S. 383, 395–

396. Grafting upon the words a purpose of Congress thus unequivocally expressed is the regular legislative mode for defining the scope of an Act of Congress. It would be not merely infelicitous draftsmanship but almost offensive gaucherie to write such a restriction upon the President's power in terms into a statute rather than to have it authoritatively expounded, as it was, by controlling legislative history.

By the Labor Management Relations Act of 1947, Congress said to the President, "You may not seize. Please report to us and ask for seizure power if you think it is needed in a specific situation." This of course calls for a report on the unsuccessful efforts to reach a voluntary settlement, as a basis for discharge by Congress of its responsibility—which it has unequivocally reserved—to fashion further remedies than it provided.[6] But it is now claimed that the President has seizure power by virtue of the Defense Production Act of 1950 and its Amendments.[7] And the claim is based on the occurrence of new events—Korea and the need for stabilization, etc.—although it was well known that seizure power was withheld by the Act of 1947, and although the President, whose specific requests for other authority were in the main granted by Congress, never suggested that in view of the new events he needed the power of seizure which Congress in its judgment had decided to withhold from him. The utmost that the Korean conflict may imply is that it may have been desirable to have given the President further authority, a freer hand in these matters. Absence of authority in the President to deal with a crisis does not

[6] Clearly the President's message of April 9 and his further letter to the President of the Senate on April 21 do not satisfy this requirement. Cong. Rec., April 9, 1952, pp. 3962–3963; *id.*, April 21, 1952, p. 4192.

[7] 64 Stat. 798 *et seq.*, 65 Stat. 131 *et seq.*, 50 U. S. C. App. § 2061 *et seq.*

imply want of power in the Government. Conversely the fact that power exists in the Government does not vest it in the President. The need for new legislation does not enact it. Nor does it repeal or amend existing law.

No authority that has since been given to the President can by any fair process of statutory construction be deemed to withdraw the restriction or change the will of Congress as expressed by a body of enactments, culminating in the Labor Management Relations Act of 1947. Title V of the Defense Production Act, entitled "Settlement of Labor Disputes," pronounced the will of Congress "that there be effective procedures for the settlement of labor disputes affecting national defense," and that "primary reliance" be placed "upon the parties to any labor dispute to make every effort through negotiation and collective bargaining and the full use of mediation and conciliation facilities to effect a settlement in the national interest." [8] Section 502 authorized the President to hold voluntary conferences of labor, industry, and public and government representatives and to "take such action as may be agreed upon in any such conference and appropriate to carry out the provisions of this title," provided that no action was taken inconsistent with the Labor Management Relations Act of 1947.[9] This provision [10] was said by the Senate Commit-

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[8] §§ 501, 502, 64 Stat. 798, 812, 50 U. S. C. App. §§ 2121, 2122.

[9] §§ 502, 503, 64 Stat. 798, 812, 50 U. S. C. App. §§ 2122, 2123.

[10] The provision of § 502 in S. 3936, as reported by the Senate Committee on Banking and Currency, read as follows: "The President is authorized, after consultation with labor and management, to establish such principles and procedures and to take such action as he deems appropriate for the settlement of labor disputes affecting national defense, including the designation of such persons, boards or commissions as he may deem appropriate to carry out the provisions

tee on Banking and Currency to contemplate a board similar to the War Labor Board of World War II and "a national labor-management conference such as was held during World War II, when a no-strike, no-lock-out pledge was obtained." [11] Section 502 was believed nec-

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of this title." That language was superseded in the Conference Report by the language that was finally enacted. H. R. Rep. No. 3042, 81st Cong., 2d Sess. 16, 35. The change made by the Conference Committee was for the purpose of emphasizing the voluntary nature of the cooperation sought from the public, labor, and management; as Senator Ives explained under repeated questioning, "If any group were to hold out, there would be no agreement [on action to carry out the provisions of this title]." 96 Cong. Rec. 14071. Chairman Maybank of the Senate Committee on Banking and Currency said, "The labor disputes title of the Senate was accepted by the House with amendment which merely indicates more specific avenues through which the President may bring labor and management together." *Id.*, at 14073.

[11] S. Rep. No. 2250, 81st Cong., 2d Sess. 41; H. R. Rep. No. 3042, 81st Cong., 2d Sess. 35. It is hardly necessary to note that Congressional authorization of an agency similar to the War Labor Board does not imply a Congressional grant of seizure power similar to that given the President specifically by § 3 of the War Labor Disputes Act of 1943. The War Labor Board, created by § 7 of the 1943 Act, had only administrative sanctions. See 57 Stat. 163, 166–167; see Report of Senate Committee on Labor and Public Welfare, The Disputes Functions of the Wage Stabilization Board, 1951, S. Rep. No. 1037, 82d Cong., 1st Sess. 6. The seizure power given by Congress in § 3 of the 1943 Act was given to the President, not to the War Labor Board, and was needed only when the War Labor Board reported it had failed; the seizure power was separate and apart from the War Labor Board machinery for settling disputes. At most the Defense Production Act does what § 7 of the War Labor Disputes Act did; the omission of any grant of seizure power similar to § 3 is too obvious not to have been conscious. At any rate, the Wage Stabilization Board differs substantially from the earlier War Labor Board. In 1951 the Senate Committee studying the disputes functions of the Wage Stabilization Board pointed out the substan-

essary in addition to existing means for settling disputes voluntarily because the Federal Mediation and Conciliation Service could not enter a labor dispute unless requested by one party.[12] Similar explanations of Title V were given in the Conference Report and by Senator Ives, a member of the Senate Committee to whom Chairman Maybank during the debates on the Senate floor referred questions relating to Title V.[13] Senator Ives said:

> "It should be remembered in this connection that during the period of the present emergency it is expected that the Congress will not adjourn, but, at most, will recess only for very limited periods of time. If, therefore, any serious work stoppage should arise or even be theatened, in spite of the terms of the Labor-Management Relations Act of 1947, the Congress would be readily available to pass such legislation as might be needed to meet the difficulty." [14]

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tial differences between that Board and its predecessor and concluded that "The new Wage Stabilization Board . . . does not rely on title V of the Defense Production Act for its authority." S. Rep. No. 1037, 82d Cong., 1st Sess., *supra*, at 4–6.

[12] S. Rep. No. 2250, 81st Cong., 2d Sess. 41.

[13] See 96 Cong. Rec. 14071.

[14] *Id.*, at 12275. Just before the paragraph quoted in the text, Senator Ives had said:

"In fact, the courts have upheld the constitutionality of the national emergency provisions of the Labor-Management Relations Act of 1947, which can require that workers stay on the job for at least 80 days when a strike would seriously threaten the national health and safety in peacetime.

"By the terms of the pending bill, the Labor-Management Relations Act of 1947 would be controlling in matters affecting the relationship between labor and management, including collective bargaining. It seems to me, however, that this is as far as we should go in legislation of this type."

The Defense Production Act affords no ground for the suggestion that the 1947 denial to the President of seizure powers has been impliedly repealed, and its legislative history contradicts such a suggestion. Although the proponents of that Act recognized that the President would have a choice of alternative methods of seeking a mediated settlement, they also recognized that Congress alone retained the ultimate coercive power to meet the threat of "any serious work stoppage."

That conclusion is not changed by what occurred after the passage of the 1950 Act. Seven and a half months later, on April 21, 1951, the President by Executive Order 10233 gave the reconstituted Wage Stabilization Board authority to investigate labor disputes either (1) submitted voluntarily by the parties, or (2) referred to it by the President.[15] The Board can only make "recommendations to the parties as to fair and equitable terms of settlement," unless the parties agree to be bound by the Board's recommendations. About a month thereafter Subcommittees of both the House and Senate Labor Committees began hearings on the newly assigned disputes functions of the Board.[16] Amendments to deny the

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[15] 16 Fed. Reg. 3503. The disputes functions were not given to the Wage Stabilization Board under Title V, see note 11, *supra*, but apparently under the more general Title IV, entitled "Price and Wage Stabilization."

[16] See Hearings before a Subcommittee of the House Committee on Education and Labor, Disputes Functions of Wage Stabilization Board, 82d Cong., 1st Sess. (May 28–June 15, 1951); Hearings before the Subcommittee on Labor and Labor-Management Relations of Senate Committee on Labor and Public Welfare, Wage Stabilization and Disputes Program, 82d Cong., 1st Sess. (May 17–June 7, 1951). The resulting Report of the Senate Committee, S. Rep. No. 1037, 82d Cong., 1st Sess. 9, recommended that "Title V of the Defense Production Act be retained" and that "No statutory limitations be imposed on the President's authority to deal with disputes through

Board these functions were voted down in the House,[17] and Congress extended the Defense Production Act without changing Title V in relevant part.[18] The legislative history of the Defense Production Act and its Amendments in 1951 cannot possibly be vouched for more than Congressional awareness and tacit approval that the President had charged the Wage Stabilization Board with authority to seek voluntary settlement of labor disputes. The most favorable interpretation of the statements in the committee reports can make them mean no more than "We are glad to have all the machinery possible for the voluntary settlement of labor disputes." In considering the Defense Production Act Amendments, Congress was never asked to approve—and there is not the slightest indication that the responsible committees ever had in mind—seizure of plants to coerce settlement of disputes.

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*voluntary* machinery; such limitations, we believe, would infringe on the President's constitutional power." (Emphasis added.) The Committee found, *id.*, at 10, that the "Wage Stabilization Board relies completely on voluntary means for settling disputes and is, therefore, an extension of free collective bargaining. The Board has no powers of legal compulsion." "Executive Order No. 10233," the Committee found further, "does not in any way run counter to the . . . Taft-Hartley Act. It is simply an additional tool, not a substitute for these laws." Of particular relevance to the present case, the Committee declared:

"The recommendations of the Wage Stabilization Board in disputes certified by the President have no compulsive force. The parties are free to disregard recommendations of the Wage Stabilization Board . . . .

"There is, of course, the President's authority to seize plants under the Selective Service Act [a power not here used], but this is an authority which exists independently of the Wage Stabilization Board and its disputes-handling functions. In any case, seizure is an extraordinary remedy, and the authority to seize, operates whether or not there is a disputes-handling machinery." *Id.*, at 5.

[17] 97 Cong. Rec. 8390–8415.

[18] 65 Stat. 131.

We are not even confronted by an inconsistency between the authority conferred on the Wage Board, as formulated by the Executive Order, and the denial of Presidential seizure powers under the 1947 legislation. The Board has been given merely mediatory powers similar to those of agencies created by the Taft-Hartley Act and elsewhere, with no other sanctions for acceptance of its recommendations than are offered by its own moral authority and the pressure of public opinion. The Defense Production Act and the disputes-mediating agencies created subsequent to it still leave for solution elsewhere the question what action can be taken when attempts at voluntary settlement fail. To draw implied approval of seizure power from this history is to make something out of nothing.

It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

The legislative history here canvassed is relevant to yet another of the issues before us, namely, the Government's argument that overriding public interest prevents the issuance of the injunction despite the illegality of the seizure. I cannot accept that contention. "Balancing the equities" when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. When Congress itself has struck

the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.

Apart from his vast share of responsibility for the conduct of our foreign relations, the embracing function of the President is that "he shall take Care that the Laws be faithfully executed . . . ." Art. II, § 3. The nature of that authority has for me been comprehensively indicated by Mr. Justice Holmes. "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Myers* v. *United States,* 272 U. S. 52, 177. The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives essential content to undefined provisions in the frame of our government.

To be sure, the content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed. The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part

of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.

Such was the case of *United States* v. *Midwest Oil Co.*, 236 U. S. 459. The contrast between the circumstances of that case and this one helps to draw a clear line between authority not explicitly conferred yet authorized to be exercised by the President and the denial of such authority. In both instances it was the concern of Congress under express constitutional grant to make rules and regulations for the problems with which the President dealt. In the one case he was dealing with the protection of property belonging to the United States; in the other with the enforcement of the Commerce Clause and with raising and supporting armies and maintaining the Navy. In the *Midwest Oil* case, lands which Congress had opened for entry were, over a period of 80 years and in 252 instances, and by Presidents learned and unlearned in the law, temporarily withdrawn from entry so as to enable Congress to deal with such withdrawals. No remotely comparable practice can be vouched for executive seizure of property at a time when this country was not at war, in the only constitutional way in which it can be at war. It would pursue the irrelevant to reopen the controversy over the constitutionality of some acts of Lincoln during the Civil War. See J. G. Randall, Constitutional Problems under Lincoln (Revised ed. 1951). Suffice it to say that he seized railroads in territory where armed hostilities had already interrupted the movement of troops to the beleaguered Capital, and his order was ratified by the Congress.

The only other instances of seizures are those during the periods of the first and second World Wars.[19] In his eleven seizures of industrial facilities, President Wilson

[19] Instances of seizure by the President are summarized in Appendix II, *post*, p. 620.

acted, or at least purported to act,[20] under authority granted by Congress. Thus his seizures cannot be adduced as interpretations by a President of his own powers in the absence of statute.

Down to the World War II period, then, the record is barren of instances comparable to the one before us. Of twelve seizures by President Roosevelt prior to the enactment of the War Labor Disputes Act in June, 1943, three were sanctioned by existing law, and six others

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[20] One of President Wilson's seizures has given rise to controversy. In his testimony in justification of the Montgomery Ward seizure during World War II, Attorney General Biddle argued that the World War I seizure of Smith & Wesson could not be supported under any of the World War I statutes authorizing seizure. He thus adduced it in support of the claim of so-called inherent Presidential power of seizure. See Hearings before House Select Committee to Investigate the Seizure of Montgomery Ward, 78th Cong., 2d Sess. 167–168. In so doing, he followed the ardor of advocates in claiming everything. In his own opinion to the President, he rested the power to seize Montgomery Ward on the statutory authority of the War Labor Disputes Act, see 40 Op. Atty. Gen. 312 (1944), and the Court of Appeals decision upholding the Montgomery Ward seizure confined itself to that ground. *United States* v. *Montgomery Ward & Co.*, 150 F. 2d 369. What Attorney General Biddle said about Smith & Wesson was, of course, *post litem motam.* Whether or not the World War I statutes were broad enough to justify that seizure, it is clear that the taking officers conceived themselves as moving within the scope of statute law. See Letter from Administrative Div., Advisory Sec. to War Dep't. Bd. of Appraisers, National Archives, Records of the War Department, Office of the Chief of Ordnance, O. O. 004.002/194 Smith & Wesson, Apr. 2, 1919; n. 3, Appendix II, *post*, p. 620. Thus, whether or not that seizure was within the statute, it cannot properly be cited as a precedent for the one before us. On this general subject, compare Attorney General Knox's opinion advising President Theodore Roosevelt against the so-called "stewardship" theory of the Presidency. National Archives, Opinions of the Attorney General, Book 31, Oct. 10, 1902 (R. G. 60); Theodore Roosevelt, Autobiography, 388–389; 3 Morison, The Letters of Theodore Roosevelt, 323–366.

were effected after Congress, on December 8, 1941, had declared the existence of a state of war. In this case, reliance on the powers that flow from declared war has been commendably disclaimed by the Solicitor General. Thus the list of executive assertions of the power of seizure in circumstances comparable to the present reduces to three in the six-month period from June to December of 1941. We need not split hairs in comparing those actions to the one before us, though much might be said by way of differentiation. Without passing on their validity, as we are not called upon to do, it suffices to say that these three isolated instances do not add up, either in number, scope, duration or contemporaneous legal justification, to the kind of executive construction of the Constitution revealed in the *Midwest Oil* case. Nor do they come to us sanctioned by long-continued acquiescence of Congress giving decisive weight to a construction by the Executive of its powers.

A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford. I know no more impressive words on this subject than those of Mr. Justice Brandeis:

> "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but,

> by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Myers* v. *United States*, 272 U. S. 52, 240, 293.

It is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated by concern for the Nation's well-being, in the assured conviction that he acted to avert danger. But it would stultify one's faith in our people to entertain even a momentary fear that the patriotism and the wisdom of the President and the Congress, as well as the long view of the immediate parties in interest, will not find ready accommodation for differences on matters which, however close to their concern and however intrinsically important, are overshadowed by the awesome issues which confront the world. When at a moment of utmost anxiety President Washington turned to this Court for advice, and he had to be denied it as beyond the Court's competence to give, Chief Justice Jay, on behalf of the Court, wrote thus to the Father of his Country:

> "We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States." Letter of August 8, 1793, 3 Johnston, Correspondence and Public Papers of John Jay (1891), 489.

In reaching the conclusion that conscience compels, I too derive consolation from the reflection that the President and the Congress between them will continue to safeguard the heritage which comes to them straight from George Washington.

APPENDIX I—SYNOPTIC ANALYSIS OF LEGISLATION AUTHORIZING SEIZURE OF INDUSTRIAL PROPERTY.

| STATUTE | DURATION | | SCOPE OF AUTHORITY | LIMITATIONS ON ITS EXERCISE | TERMS AND CONDITIONS OF EMPLOYMENT DURING SEIZURE | COMPENSATION |
|---|---|---|---|---|---|---|
| | As enacted | As extended or repealed | | | | |
| *1.* Railroad and Telegraph Act of 1862, 12 Stat. 334.<br><br>Enacted 1/31/62; amended, 12 Stat. 625, 7/14/62. | Not "in force any longer than is necessary for the suppression of this rebellion." | | President may "take possession of" telegraph lines and railroads; prescribe rules for their operation; and place all officers and employees under military control. | *a.* "When in his [the President's] judgment the public safety may require it."<br>*b.* President may not "engage in any work of railroad construction." | None. | President shall appoint three commissioners to assess compensation to which the company is entitled and to report to Congress for its action. |
| *2.* § 120 of National Defense Act of 1916, 39 Stat. 166, 213, 50 U. S. C. § 80, as amended.<br><br>Enacted 6/3/16. | No time limit. | | President, through the head of any department, may seize any plant and may operate plants through the Army Ordnance Department. | *a.* Exercisable "in time of war or when war is imminent."<br>*b.* Plant is equipped for making "necessary supplies or equipment for the Army" or "in the opinion of the Secretary of War" can be transformed readily to such use.<br>*c.* Owner refuses to give government order precedence or to perform. | None. | Compensation "shall be fair and just." |
| *3.* Army Appropriations Act of 1916, 39 Stat. 619, 645, 10 U. S. C. § 1361.<br><br>Enacted 8/29/16. | No time limit. | | President, through Secretary of War, may take possession of and utilize any system or part of any system of transportation. | Exercisable "in time of war."* | None. | Compensation "shall be fair and just." |
| *4.* Naval Emergency Fund Act of 1917, 39 Stat. 1168, 1192–1195, 50 U. S. C. § 82.<br><br>Enacted 3/4/17. (*Cf.* Emergency Shipping Fund Act of 1917, *infra.*) | No time limit. | | President may<br>1. "take over for use or operation" any factory "whether [or not] the United States has . . . agreement with the owner or occupier."<br><br>2. "take immediate possession of any factory" producing ships or war material for the Navy. | Exercisable "in time of war" (or of national emergency determined by the President before 3/1/18).<br><br>*a.* Owner fails or refuses to give precedence to an order for "ships or war material as the necessities of the Government"; refuses to deliver or to comply with a contract as modified by President.<br>*b.* Exercisable within "the limits of the amounts appropriated therefor." | None.<br><br>None. | President shall determine "just compensation"; if the claimant is dissatisfied, he shall be paid 50 percent of the amount determined by the President and may sue, subject to existing law, in the district courts and the Court of Claims for the rest of "just compensation." |

*Governmental possession of the Nation's railroads taken on December 28, 1917, was specifically terminated by statute on March 1, 1920, prior to the end of the "war." See § 200 of the Transportation Act of 1920, 41 Stat. 456, 457.

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APPENDIX I—Continued.

| STATUTE | DURATION | | SCOPE OF AUTHORITY | LIMITATIONS ON ITS EXERCISE | TERMS AND CONDITIONS OF EMPLOYMENT DURING SEIZURE | COMPENSATION |
|---|---|---|---|---|---|---|
| | As enacted | As extended or repealed | | | | |
| *5.* Emergency Shipping Fund Act of 1917, 40 Stat. 182.<br><br>Enacted 6/15/17. | To 6 months after peace with the German Empire, 40 Stat. 182, 183. | Repealed after 3 years, § 2 (a) (1), 41 Stat. 988, 6/5/20. | President may<br>1. "take over for use or operation" any plant, "whether [or not] United States has . . . agreement with the owner or occupier." | Exercisable "within the limits of the amounts herein authorized." | None. | Same as next above, except that the prepaid percentage when the owner is dissatisfied is 75 percent. |
| | | | 2. "take immediate possession of any . . . plant" "equipped for the building or production of ships or material." | Failure or refusal of owner of ship-building plant to give Government orders precedence or to comply with order. | None. | |
| *6.* 1918 Amendments to Emergency Shipping Fund Act of 1917.<br><br>A. 40 Stat. 535.<br><br>Enacted 4/22/18. | To 6 months after peace with the German Empire. | Repealed after 2 years, 41 Stat. 988, 6/5/20. | President may<br>1. "take possession of . . . any street railroad." | *a.* The street railroad is necessary for transporting employees of plants which are or may be hereafter engaged in "construction of ships or equipment therefor for the United States."<br>*b.* Exercisable "within the limits of the amounts herein authorized." | None. | Same as next above. |
| B. 40 Stat. 1020, 1022.<br><br>Enacted 11/4/18. | To 6 months after peace with the German Empire. | Repealed after 1½ years, 41 Stat. 988, 6/5/20. | 2. extend seized plants constructing ships or materials therefor and requisition land for use in extensions. | Exercisable "within the limits of the amounts herein authorized." | None. | |
| *7.* Food and Fuel Act of 1917, 40 Stat. 276.<br><br>Enacted 8/10/17.<br><br>§ 10, 40 Stat. 276, 279. | To end of World War I with Germany. | | President may<br>1. requisition foods, fuels, feeds, etc., and storage facilities for them. | The requisitioning is "necessary to the support of the Army or the . . . Navy, or any other public use connected with the common defense." | None. | President "shall ascertain and pay a just compensation"; if the owner is dissatisfied, he shall be paid 75 percent of the amount determined by the President and may sue in the district courts, which are hereby given jurisdiction, for the rest of "just compensation." |
| § 12, 40 Stat. 276, 279. | | | 2. take over any factory, packing house, oil pipe line, mine, or other plant where any necessaries are or may be "produced, prepared, or mined, and to operate the same." | *a.* President finds "it necessary to secure an adequate supply of necessaries for . . . the Army or . . . the Navy, or for any other public use connected with the common defense."<br>*b.* President must turn facility back as soon as further Government operation "is not essential for the national security or defense." | President may make regulations for "the employment, control, and compensation of employees." | Same as in the Emergency Shipping Fund Act of 1917, *supra.* |

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APPENDIX I—Continued.

| STATUTE | DURATION | | SCOPE OF AUTHORITY | LIMITATIONS ON ITS EXERCISE | TERMS AND CONDITIONS OF EMPLOYMENT DURING SEIZURE | COMPENSATION |
|---|---|---|---|---|---|---|
| | As enacted | As extended or repealed | | | | |
| Food and Fuel Act of 1917—Continued. § 25, 40 Stat. 276, 284. | To end of World War I with Germany. | | 3. "requisition and take over the plant, business, and all appurtenances thereof belonging to such producer or dealer" of coal and coke, and may operate it through an agency of his choice. | Producer or dealer<br>*a.* Fails to conform to prices or regulations set by the Federal Trade Commission under the direction of the President, who deems it "necessary for the efficient prosecution of the war,"<br>or<br>*b.* Fails to operate efficiently, or conducts business in a way "prejudicial to the public interest." | President may "prescribe . . . regulations . . . for the employment, control, and compensation of the employees." | Same as next above. |
| *8.* Joint Resolution of July 16, 1918, 40 Stat. 904. | "during the continuance of the present war." | Terminated on 7/31/19 by repeal, 7/11/19, 41 Stat. 157. | President may "take possession . . . of [and operate] any telegraph, telephone, marine cable or radio system." | President deems "it necessary for the national security or defense." | None. | Same as next above. |
| *9.* § 16 of Federal Water Power Act of 1920, 41 Stat. 1063, 1072, 16 U. S. C. § 809.<br><br>Enacted 6/10/20. | No time limit. | | President may take possession of any project, dams, power houses, transmission lines, etc., constructed or operated under a license from the Federal Power Commission and may operate them. | *a.* President believes, as "evidenced by a written order addressed to the holder of any license hereunder [that] the safety of the United States demands it."<br>*b.* Seizure is "for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States."<br>*c.* Control is limited to the "length of time as may appear to the President to be necessary to accomplish said purposes." | None. | Owner shall be paid "just and fair compensation for the use of said property as may be fixed by the [Federal Power] commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of the taking over thereof, less the reasonable value of any improvements . . . made thereto by the United States and which are valuable and serviceable to the [owner]." |
| *10.* § 606 of Communications Act of 1934, 48 Stat. 1064, 1104, 47 U. S. C. § 606(c).<br><br>Enacted 6/19/34. | No time limit. | | President may "use or control . . . any such station and/or its apparatus and equipment by any department of the Government under such regulations as he may prescribe." | *a.* President proclaims that there exists<br>(1) war or threat of war or<br>(2) a state of public peril or disaster or other national emergency,<br>or<br>*b.* It is necessary to preserve the neutrality of the United States. | None. | President shall ascertain just compensation and certify it to Congress for appropriation; if the owner is dissatisfied, he shall be paid 75 percent of the amount determined by the President and may sue, subject to existing law, in the district courts and the Court of Claims for the rest of "just compensation." |

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APPENDIX I—Continued.

| STATUTE | DURATION | | SCOPE OF AUTHORITY | LIMITATIONS ON ITS EXERCISE | TERMS AND CONDITIONS OF EMPLOYMENT DURING SEIZURE | COMPENSATION |
|---|---|---|---|---|---|---|
| | As enacted | As extended or repealed | | | | |
| *11.* Amendments to Communications Act, 56 Stat. 18, 47 U. S. C. § 606(d).<br><br>Enacted 1/26/42. | No time limit. | | Same power as in § 606(c), Communications Act of 1934, next above. | *a.* President proclaims a state or threat of war.<br>*b.* President "deems it necessary in the interest of the national security and defense."<br>*c.* Power to seize and use property continues to "not later than six months after the termination of such state or threat of war" or than a date set by concurrent resolution of Congress. | None. | Same as next above. |
| *12.* § 8(b) of National Defense Act of 1940, 54 Stat. 676, 680.<br><br>Enacted 6/28/40. | No time limit. | Repealed in less than 3 months, 9/16/40, 54 Stat. 885, 893. | Secretary of Navy, under President's direction, may "take over and operate such plant or facility." | *a.* Secretary of Navy deems any existing plant necessary for the national defense.<br>*b.* He is unable to reach agreement with its owner for its use or operation. | Secretary of Navy may operate the plant "either by Government personnel or by contract with private firms." | Secretary of Navy may "fix the compensation." |
| *13.* § 9 of Selective Training and Service Act of 1940, 54 Stat. 885, 892, 50 U. S. C. App. (1946 ed.) § 309.<br><br>Enacted 9/16/40; amended by War Labor Disputes Act, 57 Stat. 163, 164, *q. v., infra.* | To 5/15/45, 54 Stat. 885, 897. | Extended to 3/31/47, 60 Stat. 341, 342. | President may "take immediate possession of any such plant." (Extended by amendment to "any plant, mine, or facility" capable of producing "any articles or materials which may be required . . . or which may be useful" for the war effort. 57 Stat. 163, 164.) | *a.* Plant is equipped for or capable of being readily transformed for the manufacture of necessary supplies.<br>*b.* Owner refuses to give Government order precedence or to fill it. | None. | "The compensation . . . shall be fair and just." |
| *14.* § 3 of War Labor Disputes Act of 1943, 57 Stat. 163, 164, 50 U. S. C. App. (1946 ed.) § 1503.<br><br>Enacted 6/25/43. | To termination of this Act by concurrent resolution by Congress or of hostilities. Plants seized previously may be operated until 6 months after termination of hostilities. | | President may "take immediate possession" of "any plant, mine, or facility equipped for the manufacture, production, or mining of any articles or materials which may be required . . . or which may be useful" for the war effort. | *a.* Finding and proclamation by the President that<br>(1) there is an interruption on account of a labor disturbance,<br>(2) the war effort will be unduly impeded,<br>(3) seizure is necessary to insure operation.<br>*b.* Plant must be returned to owner within 60 days "after the restoration of the productive efficiency." | Same "terms and conditions of employment which were in effect at the time [of taking] possession," except that terms and conditions might be changed by order of the War Labor Board, on application. §§ 4, 5, 57 Stat. 163, 165. | Same as next above. |

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APPENDIX I—Continued.

| STATUTE | DURATION | | SCOPE OF AUTHORITY | LIMITATIONS ON ITS EXERCISE | TERMS AND CONDITIONS OF EMPLOYMENT DURING SEIZURE | COMPENSATION |
|---|---|---|---|---|---|---|
| | As enacted | As extended or repealed | | | | |
| *15.* Title VIII, "Repricing of War Contracts," of Revenue Act of 1943, 58 Stat. 21, 92, 50 U. S. C. App. (1946 ed.) § 1192.<br><br>Enacted 2/25/44. | To termination of hostilities. | | President may "take immediate possession of the plant or plants . . . and . . . operate them in accordance with section 9 of the Selective Training and Service Act of 1940, as amended." | *a.* The Secretary of a Department deems the price of an article or service required directly or indirectly by the Department is unreasonable.<br>*b.* The Secretary, after the refusal of the person furnishing the article or service to agree to a price, sets a price.<br>*c.* The person "wilfully refuses, or wilfully fails" to furnish the articles or services at the price fixed by the Secretary. | None. | Same as next above. |
| *16.* Selective Service Act of 1948, 62 Stat. 604, 625, 626, 50 U. S. C. App. § 468.<br><br>Enacted 6/24/48. | No time limit. | | President may "take immediate possession of any plant, mine, or other facility . . . and to operate it . . . for the production of such articles or materials." | *a.* President with advice of the National Security Resources Board determines prompt delivery of articles or materials is "in the interest of the national security."<br>*b.* Procurement "has been authorized by the Congress exclusively for the use of the armed forces" or the A. E. C.<br>*c.* Owner refuses or fails to give precedence to Government order placed with notice that it is made pursuant to this section, or to fill the order properly. | None. | "Fair and just compensation shall be paid." |
| *17.* § 201(a) of Defense Production Act, 64 Stat. 798, 799, 50 U. S. C. App. § 2081(a).<br><br>Enacted 9/8/50; amended, 65 Stat. 131, 132, *q. v., infra.* | To 6/30/51. But see § 716(a), 64 Stat. 798, 822. | Extended to 7/31/51, 65 Stat. 110. Extended to 6/30/52, § 111, 65 Stat. 131, 144. | President may "requisition" "equipment, supplies or component parts thereof, or materials or facilities necessary for the manufacture, servicing, or operation of such equipment, supplies, or component parts." 64 Stat. 798, 799. Restricted in the main to personal property by § 102(b), 65 Stat. 132. | President determines that<br>*a.* its use is "needed for national defense,"<br>*b.* the need is "immediate and impending," "will not admit of delay or resort to any other source of supply,"<br>*c.* other reasonable means of obtaining use of the property have been exhausted. | None. | President shall determine just compensation as of the time the property is taken; if owner is dissatisfied, he shall be promptly paid 75 percent of the amount determined by the President and may sue within three years in the district courts or the Court of Claims, regardless of the amount involved, for the rest of "just compensation." |
| *18.* § 102(b)(2) of Defense Production Act Amendments of 1951, 65 Stat. 131, 132, 50 U. S. C. App. § 2081(b).<br><br>Enacted 7/31/51. | To 6/30/52, 65 Stat. 131, 144. | | Court condemnation of real property in accordance with existing statutes. | President deems the real property "necessary in the interest of national defense." | None. | Under existing statutes for condemnation. Immediate possession given only upon deposit of amount "estimated to be just compensation," 75 percent of which is immediately paid without prejudice to the owner. |

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APPENDIX II.—SUMMARY OF SEIZURES OF INDUSTRIAL PLANTS AND FACILITIES BY THE PRESIDENT.

Civil War Period.

| PLANT OR FACILITY SEIZED | DURATION OF SEIZURE | | ORDER EFFECTING SEIZURE | AUTHORITY CITED | REASON FOR SEIZURE | OPERATIONS DURING SEIZURE |
|---|---|---|---|---|---|---|
| | From | To | | | | |
| Railroads and telegraph lines between Washington and Annapolis, Md.[1] | 4/27/61 | (?) | Order of Secretary of War dated 4/27/61 appointing Thomas A. Scott officer in charge. War of the Rebellion, Official Records of the Union and Confederate Armies, Ser. I, Vol. II, 603. | None. | Communications between Washington and the North were interrupted by bands of southern sympathizers who destroyed railway and telegraph facilities. | Northern troops guarded railway and telegraph facilities; they were repaired and restored to operation under orders of the Secretary of War. |
| Telegraph lines. | 2/26/62 | (?) | Order of Secretary of War dated 2/25/62 appointing Anson Stager officer in charge. Richardson, Messages and Papers of the Presidents, Lincoln, Order of Feb. 25, 1862. | "by virtue of the act of Congress" (presumably Railroad and Telegraph Act of 1862, 12 Stat. 334). | To insure effective transmission and security of military communications. | Lines operated under military supervision; censorship of messages; lines extended and completed subject to limitations of Joint Resolution of July 14, 1862, 12 Stat. 625. |
| Railroads. | 5/25/62 | 8/8/65 | Order of Secretary of War dated 5/25/62. Richardson, Messages and Papers of the Presidents, Lincoln, Order of May 25, 1862. | "by virtue of the authority vested by act of Congress" (presumably Railroad and Telegraph Act of 1862, 12 Stat. 334). | To insure effective priority to movement of troops and supplies. | Railways operated under military supervision; lines extended and completed subject to limitations of Joint Resolution of July 14, 1862, 12 Stat. 625; interruption of regular passenger and freight traffic. |

World War I Period.[2]

| | | | | | | |
|---|---|---|---|---|---|---|
| Bigelow-Hartford Carpet Co., Lowell, Mass. | 12/27/17 | 12/31/19 | Order of Secretary of War, Req. 20 A/C, Ord. No. 62, dated 12/27/17. | Constitution and laws.[3] | Requisitioned for use of United States Cartridge Co. for cartridge manufacture. | |
| Railroads. | 12/28/17 | 3/1/20 | Presidential proclamation, 40 Stat. 1733. | Joint Resolution of April 6, 1917.<br>Joint Resolution of Dec. 7, 1917.<br>Act of Aug. 29, 1916.<br>"all other powers thereto me enabling." | Labor difficulties; congestion; ineffective operation in terms of war effort. | Wage increase; changes in operating practices and procedures. |
| Liberty Ordnance Co., Bridgeport, Conn. | 1/7/18 | 5/20/19 | Order of Secretary of War, Req. 26 A/C, Ord. No. 27, dated 1/5/18. | Constitution and laws.[3] | Inadequate financing and other difficulties leading to failure to perform contract for manufacture of 75 mm. guns. | Turned over to American Can Co. for operation. |
| Hoboken Land & Improvement Co., Hoboken, N. J. | 2/28/18 | 4/1/19 | Order of Secretary of War, Req. 37 A/C, Ord. No. 516, dated 2/28/18. | Constitution and laws.[3] | Requisitioned for use of Remington Arms-U. M. C. Co. for cartridge manufacture. | |
| Bijur Motor Appliance Co., Hoboken, N. J. | 4/1/18<br>8/15/18 | 5/1/19 | Order of Secretary of War, Req. 37 A/C, Ord. No. 516, dated 2/28/18. | Constitution and laws.[3] | Requisitioned for use of Remington Arms-U. M. C. Co. for cartridge manufacture. | |
| Jewel Tea Co., Hoboken, N. J. | 4/1/18 | 9/2/19 | Order of Secretary of War, Req. 37 A/C, Ord. No. 516, dated 2/28/18. | Constitution and laws.[3] | Requisitioned for use of Remington Arms-U. M. C. Co. for cartridge manufacture. | |

[1] Clyde B. Aitchison states that on March 31, 1861, the Federal authorities took "under military control the Philadelphia, Wilmington & Baltimore Railway to insure uninterrupted communication between the North Atlantic States and Washington." Aitchison, War Time Control of American Railways, 26 Va. L. Rev. 847, 856 (1940). He adds that the return of the road to its private owners followed "shortly thereafter." *Ibid.* Original documents on this seizure are unavailable and it has, therefore, not been included in the table.

[2] The material in this table is taken from original documents in the National Archives and Hearings before the Senate Special Committee Investigating the Munitions Industry, 73d Cong., Part 17, 4270–4271 (1934).

[3] Although no specific statutory authority was cited in the seizing order, it is clear from correspondence and reports in connection with the administration of the program that the seizure was effected under wartime legislation. See, *e. g.*, Davisson, History of the Advisory Section, Administrative Division, Ordnance Office in connection with the Commandeering of Private Property, National Archives, Records of the War Department, Office of the Chief of Ordnance, O. .O. 023/1362, Nov. 1920; Letter from Ordnance Office, Administrative Division to The Adjutant General, National Archives, Records of the War Department, Office of The Adjutant General, AG 386.2, Jan. 7, 1919.

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APPENDIX II—Continued.

| PLANT OR FACILITY SEIZED | DURATION OF SEIZURE | | ORDER EFFECTING SEIZURE | AUTHORITY CITED | REASON FOR SEIZURE | OPERATIONS DURING SEIZURE |
|---|---|---|---|---|---|---|
| | From | To | | | | |
| Telegraph lines. | 7/25/18 | 7/31/19 | Presidential proclamation, 40 Stat. 1807. | Joint Resolution of July 16, 1918. "all other powers thereto me enabling." | Labor difficulties. | Anti-union discrimination terminated. |
| Smith & Wesson, Springfield, Mass. | 9/13/18 | 1/31/19 | Order of Secretary of War, Req. 709 B/C, Ord. No. 604, dated 8/31/18. | Constitution and laws.[3] | Labor difficulties. | Anti-union discrimination terminated; operation by the National Operating Co., a Government corporation. |
| Federal Enameling & Stamping Co., McKees Rocks, Pa. | 9/23/18 | 12/13/18 | Order of Secretary of War, Req. 738 B/C, Ord. No. 609, dated 9/11/18. | Constitution and laws.[3] | Failure to fill compulsory order. | |
| Mosler Safe Co., Hamilton, Ohio. | 9/23/18 | 2/25/19 | Order of Secretary of War, Req. 781 B/C, Ord. No. 612, dated 9/23/18. | Constitution and laws.[3] | Failure to fill compulsory order. | |
| Bush Terminal Co., Brooklyn, N. Y. | (?) | (?) | (?) | Act of Aug. 29, 1916. Food and Fuel Act of 1917. | (?) | (?) |

World War II Period[4]—Seizures Connected With Labor Disputes.

*1. Before Pearl Harbor.*

| PLANT OR FACILITY SEIZED | DURATION OF SEIZURE | | EXECUTIVE ORDER | STATUTORY AUTHORITY CITED[5] | DURATION OF STOPPAGE | | CHANGES IN CONDITIONS OF EMPLOYMENT DURING SEIZURE[7] | BASIS FOR CHANGES | REPORTED LEGAL ACTION[8] |
|---|---|---|---|---|---|---|---|---|---|
| | From | To | | | From | To[6] | | | |
| North American Aviation, Inc., Inglewood, Calif. | 6/9/41 | 7/2/41 | 8773. 6 Fed. Reg. 2777. | None. (Order cites contracts of company with Government and ownership by Government of machinery, materials and work in progress in plant.) | 6/5/41 | 6/10/41 | Property returned on agreement of parties to wage increase and maintenance of membership. | Agreement of parties on National Defense Mediation Board recommendation. | |
| Federal Shipbuilding & Drydock Co., Kearny, N. J. | 8/23/41 | 1/6/42 | 8868. 6 Fed. Reg. 4349. | None. (Order cites contracts of company with Government and ownership by Government of vessels under construction, materials and equipment in yard.) | 8/6/41 | 8/23/41 | Maintenance of membership during period of seizure. | National Defense Mediation Board recommendation. | |
| Air Associates, Inc., Bendix, N. J. | 10/30/41 | 12/29/41 | 8928. 6 Fed. Reg. 5559. | None. (Order cites contracts of company with Government and ownership by Government of facilities in plant.) | 7/11/41<br>9/30/41 | 7/27/41<br>10/24/41 | Strikers reinstated over replacements hired by company prior to seizure. | Agreement of parties on National Defense Mediation Board recommendation. | |

[3] See n. 3, p. 620, *supra*.

[4] The material in this table is summarized from a number of sources, chief of which are the War Labor Reports, contemporary accounts in the New York Times, United States National Wage Stabilization Board, Research and statistics report No. 2 (1946), and Johnson, Government Seizures and Labor Disputes (Philadelphia, Pa., 1948) (unpublished doctoral dissertation at the University of Pennsylvania). Question marks appear in the tables in instances where no satisfactory information on the particular point was available.

[5] Each of the Executive Orders uses the stock phrase "the Constitution and laws" as authority for the President's action as well as his position as Commander in Chief. Only specific statutory authority relied upon is given in this table. The form of reference of the particular Executive Order is used. Statutes referred to in the table are analyzed in Appendix I, *supra*, p. 615. For convenience, their citations are repeated here:

(1) Army Appropriations Act of Aug. 29, 1916, 39 Stat. 619, 645, 10 U. S. C. § 1361.

(2) Federal Water Power Act of 1920, § 16, 41 Stat. 1063, 1072, 16 U. S. C. § 809.

(3) Selective Training and Service Act of 1940, § 9, 54 Stat. 885, 892.

(4) War Labor Disputes Act, § 3, 57 Stat. 163, 164.

(5) Revenue Act of 1943, Tit. VIII, "Repricing of War Contracts," 58 Stat. 21, 92.

When seizures of transportation facilities were effected through agencies other than the War Department, the First War Powers Act of 1941, 55 Stat. 838, was cited. Title I of that Act permitted the President to shift certain functions among executive agencies in aid of the war effort. The Act of Aug. 29, 1916, authorizing seizure of transportation facilities, specified that it should be accomplished through the Secretary of War.

[6] Stoppages continuing during seizure are indicated by an asterisk (*).

[7] Unless otherwise indicated, changes in conditions of employment instituted during seizure were continued by management upon the return of the facilities to its control.

[8] Validity of seizure was challenged in comparatively few cases. Most litigation concerned the consequences of seizure. Cases in which the validity of the seizure was attacked are indicated by a dagger (†).

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APPENDIX II—Continued.

*2. Between Pearl Harbor and the Passage of the War Labor Disputes Act, June 25, 1943.*

| PLANT OR FACILITY SEIZED | DURATION OF SEIZURE | | EXECUTIVE ORDER | STATUTORY AUTHORITY CITED [5] | DURATION OF STOPPAGE | | CHANGES IN CONDITIONS OF EMPLOYMENT DURING SEIZURE [7] | BASIS FOR CHANGES | REPORTED LEGAL ACTION [8] |
|---|---|---|---|---|---|---|---|---|---|
| | From | To | | | From | To [6] | | | |
| Toledo, P. & W. R. Co. | 3/21/42 | 10/1/45 | 9108.<br>7 Fed. Reg. 2201. | None. | 12/28/41 | 3/21/42 | Wage increase during period of seizure. | War Labor Board recommendation. | *Toledo P. & W. R. Co.* v. *Stover*, 60 F. Supp. 587 (S. D. Ill. 1945). |
| General Cable Co., Bayonne, N. J., plant. | 8/13/42 | 8/20/42 | 9220.<br>7 Fed. Reg. 6413. | None. | 8/10/42 | 8/13/42 | None. | War Labor Board recommendation. | |
| S. A. Woods Machine Co., South Boston, Mass. | 8/19/42 | 8/25/45 | 9225.<br>7 Fed. Reg. 6627. | None. | None. | None. | Maintenance of membership. | War Labor Board recommendation. | |
| Coal Mines. | 5/2/43 | 10/12/43 | 9340.<br>8 Fed. Reg. 5695. | None. | 4/22/43<br>6/1/43<br>6/20/43 | 5/2/43<br>6/7/43*<br>(?)* | Six-day week; eight-hour day. (To increase take-home pay.) | Order of the Secretary of Interior. | *United States* v. *Pewee Coal Co.*, 341 U. S. 114; *NLRB* v. *West Ky. Coal Co.*, 152 F. 2d 198 (6th Cir. 1945); *Glen Alden Coal Co.* v. *NLRB*, 141 F. 2d 47 (3d Cir. 1944). |
| American R. Co. of Porto Rico. | 5/13/43 | 7/1/44 | 9341.<br>8 Fed. Reg. 6323. | None. | 5/12/43 | 5/13/43 | Wage increase. | War Labor Board recommendation. | |
| *3. Between June 25, 1943, and VJ Day.* | | | | | | | | | |
| Atlantic Basin Iron Works, Brooklyn, N. Y. | 9/3/43 | 9/22/43 | 9375.<br>8 Fed. Reg. 12253. | War Labor Disputes Act. | None. | None. | Maintenance of membership. | War Labor Board recommendation. | |
| Coal Mines. | 11/1/43 | 6/21/44 | 9393.<br>8 Fed. Reg. 14877. | War Labor Disputes Act. | 10/12/43<br>11/1/43 | 11/4/43* | Changes in wages and hours. | Agreement with Secretary of Interior. | |
| Leather Manufacturers in Salem, Peabody, and Danvers, Mass. | 11/20/43 | 12/13/43 | 9395B.<br>8 Fed. Reg. 16957. | None. | 9/25/43 (sporadic) | 11/24/43* (sporadic) | None. (Jurisdictional strike.) | None | |
| Western Electric Co., Point Breeze plant, Baltimore, Md. | 12/19/43 | 3/23/44 | 9408.<br>8 Fed. Reg. 16958. | War Labor Disputes Act. | 12/14/43 | 12/19/43 | None. (Strike in protest of War Labor Board nonsegregation ruling.) | None. | |
| Railroads. | 12/30/43 | 1/18/44 | 9412.<br>8 Fed. Reg. 17395. | Act of Aug. 29, 1916. | None. | None. | Control relinquished when parties accepted Presidential compromise of wage demands. | Presidential arbitration based on Railway Labor Act Emergency Board recommendations. | *Thorne* v. *Washington Terminal Co.*, 55 F. Supp. 139 (D. D. C. 1944). |
| Fall River, Mass., Textile Plants. | 2/7/44 | 2/28/44 | 9420.<br>9 Fed. Reg. 1563. | War Labor Disputes Act. | 12/13/43 | 2/14/44* | Property returned upon agreement by parties on seniority provisions. | War Labor Board recommendation. | |

[5] See n. 5, p. 621, *supra.* [6] See n. 6, p. 621, *supra.* [7] See n. 7, p. 621, *supra.* [8] See n. 8, p. 621, *supra.*

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APPENDIX II—Continued.

| PLANT OR FACILITY SEIZED | DURATION OF SEIZURE | | EXECUTIVE ORDER | STATUTORY AUTHORITY CITED [5] | DURATION OF STOPPAGE | | CHANGES IN CONDITIONS OF EMPLOYMENT DURING SEIZURE [7] | BASIS FOR CHANGES | REPORTED LEGAL ACTION [8] |
|---|---|---|---|---|---|---|---|---|---|
| | From | To | | | From | To [6] | | | |
| Department of Water and Power, Los Angeles, Calif. | 2/23/44 | 2/29/44 | 9426.<br>9 Fed. Reg. 2113. | War Labor Disputes Act. | 2/14/44 | 2/24/44 | None. | None. | |
| Jenkins Bros., Inc., Bridgeport, Conn. | 4/13/44 | 6/15/44 | 9435.<br>9 Fed. Reg. 4063. | § 9, Selective Service Act of 1940 as amended. | None. | None. | Wage increase. | War Labor Board recommendation. | *In re Jenkins Bros., Inc.*, 15 W. L. R. 719 (D. D. C. 1944).† |
| Ken-Rad Tube & Lamp Co., Owensboro, Ky. | 4/13/44 | 6/15/44 | 9436.<br>9 Fed. Reg. 4063. | § 9, Selective Service Act of 1940 as amended. | None. | None. | Changes in wage scales; maintenance of membership. | War Labor Board recommendation. | *Ken-Rad Tube & Lamp Corp.* v. *Badeau*, 55 F. Supp. 193 (W. D. Ky. 1944).† |
| Montgomery Ward & Co., Chicago, Ill., facilities. | 4/25/44 | 5/9/44 | 9438.<br>9 Fed. Reg. 4459. | None. | None. | None. | None. (Government extended expired contract pending NLRB election to determine bargaining representative.) | War Labor Board recommendation. | *United States* v. *Montgomery Ward & Co.*, 150 F. 2d 369 (7th Cir. 1945).† |
| Montgomery Ward & Co., Hummer Mfg. division, Springfield, Ill. | 5/21/44 | 7/2/45 | 9443.<br>9 Fed. Reg. 5395. | § 9, Selective Service Act of 1940 as amended. | 5/5/44 | 5/21/44 | Maintenance of membership; voluntary check-off. | War Labor Board recommendation. | |
| Philadelphia Transportation Co., Philadelphia, Pa. | 8/3/44 | 8/17/44 | 9459.<br>9 Fed. Reg. 9878. | Act of Aug. 29, 1916.<br>First War Powers Act of 1941.<br>§ 9 of Selective Service Act of 1940, as amended. | 8/1/44 | 8/7/44* | None. (Strike in protest of WLB nonsegregation ruling.) | None. | *United States* v. *McMenamin*, 58 F. Supp. 478 (E. D. Pa. 1944).† |
| Midwest Trucking Operators. | 8/11/44 | 1/1/45<br>11/1/45 | 9462.<br>9 Fed. Reg. 10071. | Act of Aug. 29, 1916.<br>First War Powers Act of 1941.<br>§ 9, Selective Service Act of 1940, as amended by the War Labor Disputes Act. | 8/4/44 | 8/11/44 | Wage increase. | War Labor Board recommendation. | |
| San Francisco, Calif., Machine Shops. | 8/14/44<br>8/19/44 | 9/14/45 | 9463.<br>9 Fed. Reg. 9879.<br>9466.<br>9 Fed. Reg. 10139. | § 9, Selective Service Act of 1940, as amended. | Sporadic. | Sporadic. | Union agreed not to discipline employees who worked overtime. Cancellation of employee draft deferments, gas rations, and job referral rights. | War Labor Board recommendation. | *San Francisco Lodge No. 68 IAM* v. *Forrestal*, 58 F. Supp. 466 (N. D. Calif. 1944). |
| Anthracite Coal Mines. | 8/23/44<br>9/19/44 | 2/24/45 | 9469.[9]<br>9 Fed. Reg. 10343. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | 6/29/44<br>8/?/44 | 8/23/44<br>9/?/44 [10] | None. | None. | |
| International Nickel Co., Huntington, W. Va., plant. | 8/29/44 | 10/14/44 | 9473.<br>9 Fed. Reg. 10613. | § 9, Selective Service Act of 1940 as amended. | 8/18/44 | 8/29/44 | None. | None. | |

[5] See n. 5, p. 621, *supra*.
[6] See n. 6, p. 621, *supra*.
[7] See n. 7, p. 621, *supra*.
[8] See n. 8, p. 621, *supra*.

[9] This order was followed by a series drawn in the same terms extending the seizure to additional mines. The Executive Orders were: No. 9474, 9 Fed. Reg. 10815; No. 9476, 9 Fed. Reg. 10817; No. 9478, 9 Fed. Reg. 11045; No. 9481, 9 Fed. Reg. 11387; No. 9482, 9 Fed. Reg. 11459; No. 9483, 9 Fed. Reg. 11601.

[10] A series of strikes for recognition by supervisory employees at the various mines were usually, though not always, terminated on seizure of the affected property.

APPENDIX II—Continued.

| PLANT OR FACILITY SEIZED | DURATION OF SEIZURE | | EXECUTIVE ORDER | STATUTORY AUTHORITY CITED [5] | DURATION OF STOPPAGE | | CHANGES IN CONDITIONS OF EMPLOYMENT DURING SEIZURE [7] | BASIS FOR CHANGES | REPORTED LEGAL ACTION [8] |
|---|---|---|---|---|---|---|---|---|---|
| | From | To | | | From | To [6] | | | |
| Hughes Tool Co., Houston Tex., facilities. | 9/2/44 | 8/29/45 | 9475A.<br>9 Fed. Reg. 10943. | § 9, Selective Service Act of 1940 as amended. | None. | None. | Maintenance of membership during period of seizure. | War Labor Board recommendation. | |
| Cleveland Graphite Bronze Co., Cleveland, Ohio. | 9/5/44 | 11/8/44 | 9477.<br>9 Fed. Reg. 10941. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | 8/31/44 | 9/5/44 | Union agreed to arbitrate grievance which had precipitated the strike. | War Labor Board recommendation. | |
| Twentieth Century Brass Works, Inc., Minneapolis, Minn. | 9/9/44 | 2/17/45 | 9480.<br>9 Fed. Reg. 11143. | § 9, Selective Service Act of 1940 as amended. | 8/21/44 | 9/9/44 | Wage increase. | War Labor Board recommendation. | |
| Farrell Cheek Steel Co., Sandusky, Ohio. | 9/23/44 | 8/28/45 | 9484.<br>9 Fed. Reg. 11731. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | 9/11/44 | 9/23/44 | Wage increase; maintenance of membership during period of seizure. | War Labor Board recommendation. | |
| Toledo, Ohio, Machine Shops. | 11/4/44 | 11/6/44 | 9496.<br>9 Fed. Reg. 13187. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | 10/27/44 | 11/5/44 | None. (Jurisdictional strike.) | None. | |
| Cudahy Bros. Co., Cudahy, Wis. | 12/6/44 | 8/31/45 | 9505.<br>9 Fed. Reg. 14473. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | None. | None. | Maintenance of membership; voluntary check-off. | War Labor Board recommendation. | |
| Montgomery Ward & Co., Detroit, Mich., and other facilities. | 12/27/44 | 10/18/45 | 9508.<br>9 Fed. Reg. 15079. | War Labor Disputes Act.<br>§ 9, Selective Service Act of 1940 as amended. | 12/9/44 | 12/27/44 | Maintenance of membership and voluntary check-off during period of seizure. | War Labor Board recommendation. | *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528 (D. C. Cir. 1944). |
| Cleveland Electric Illuminating Co., Cleveland, Ohio. | 1/13/45 | 1/15/45 | 9511.<br>10 Fed. Reg. 549. | § 9, Selective Service Act of 1940 as amended. | 1/12/45 | 1/13/45 | None. | None. | |
| Bingham & Garfield R. R., Utah. | 1/24/45 | 8/29/45 | 9516.<br>10 Fed. Reg. 1313. | Act of Aug. 29, 1916.<br>First War Powers Act of 1941.<br>War Labor Disputes Act. | 1/23/45 | 1/24/45 | Property returned upon agreement by parties on wage scale for certain positions. | Railway Labor Act Emergency Board recommendation. | |
| American Enka Corp., Enka, N. C. | 2/18/45 | 6/6/45 | 9523.<br>10 Fed. Reg. 2133. | War Labor Disputes Act.<br>Selective Service Act as amended. | 2/7/45 | 2/18/45 | None. (Strike over question of contract interpretation submitted to arbitration.) | War Labor Board recommendation. | |
| Coal Mines: | | | | | | | | | |
| Bituminous. | 4/10/45 | 5/12/45<br>10/25/45 | 9536.<br>10 Fed. Reg. 3939. | §9, Selective Service Act as amended by the War Labor Disputes Act. | 4/1/45 | 4/11/45 | Wage increase. | Agreement of parties. | |
| Anthracite. | 5/3/45 | 6/23/45 | 9548.<br>10 Fed. Reg. 5025. | | 5/1/45 | 5/24/45* | Wage increase. | Agreement of parties. | |
| Cities Service Refining Corp., Lake Charles, La., plant. | 4/17/45 | 12/23/45 | 9540.<br>10 Fed. Reg. 4193. | §9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | (?) | 4/17/45 | None. (Strike over housing conditions.) | None. | |

[5] See n. 5, p. 621, *supra*. [6] See n. 6, p. 621, *supra*. [7] See n. 7, p. 621, *supra*. [8] See n. 8, p. 621, *supra*.

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APPENDIX II—Continued.

| PLANT OR FACILITY SEIZED | DURATION OF SEIZURE | | EXECUTIVE ORDER | STATUTORY AUTHORITY CITED [5] | DURATION OF STOPPAGE | | CHANGES IN CONDITIONS OF EMPLOYMENT DURING SEIZURE [7] | BASIS FOR CHANGES | REPORTED LEGAL ACTION [8] |
|---|---|---|---|---|---|---|---|---|---|
| | From | To | | | From | To [6] | | | |
| United Engineering Co., Ltd., San Francisco, Calif. | 4/25/45 | 8/31/45 | 9542.<br>10 Fed. Reg. 4591. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | 4/12/45 | (?)* | Union's privileges under contract revoked. | War Labor Board recommendation. | |
| Cocker Machine & Foundry Co., Gastonia, N. C. | 5/20/45 | 8/31/45 | 9552.<br>10 Fed. Reg. 5757. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | (?) | 5/20/45 | Wage increase; maintenance of membership during period of seizure. | War Labor Board recommendation. | |
| Chicago, Ill., Motor Carriers. | 5/23/45 | 8/16/45 | 9554.<br>10 Fed. Reg. 5981. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act.<br>Act of Aug. 29, 1916.<br>First War Powers Act of 1941. | 5/19/45<br>6/16/45 | 5/24/45<br>6/27/45* | Wage increase. | War Labor Board recommendation. | |
| Gaffney Mfg. Co., Gaffney, S. C. | 5/28/45 | 9/9/45 | 9559.<br>10 Fed. Reg. 6287. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | (?) | 5/28/45 | Wage increase and maintenance of membership during period of seizure. | War Labor Board recommendation. | |
| Mary-Leila Cotton Mills, Greensboro, Ga. | 6/1/45 | 8/31/45 | 9560.<br>10 Fed. Reg. 6547. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | 4/1/45 | 6/1/45 | Contract extension; maintenance of membership and voluntary check-off during period of seizure. | War Labor Board recommendation. | |
| Humble Oil & Refining Co., Ingleside, Tex., plant. | 6/5/45 | 9/10/45 | 9564.<br>10 Fed. Reg. 6791. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | None. | None. | Maintenance of membership during period of seizure. | War Labor Board recommendation. | *Eighth Regional War Labor Bd.* v. *Humble Oil & Refining Co.*, 145 F. 2d 462 (5th Cir. 1945).† |
| Pure Oil Co., Cabin Creek oil field, Dawes, W. Va., facilities. | 6/6/45 | 9/10/45 | 9565.<br>10 Fed. Reg. 6792. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | 5/14/45 | 6/6/45 | Maintenance of membership during period of seizure. | War Labor Board recommendation. | |
| Scranton Transit Co., Scranton, Pa. | 6/14/45 | 7/8/45 | 9570.<br>10 Fed. Reg. 7235. | § 9, Selective Service Act of 1940 as amended by § 3 of the War Labor Disputes Act.<br>Act of Aug. 20, 1916.<br>First War Powers Act of 1941. | 5/20/45 | 6/14/45 | None. | None. | |
| Diamond Alkali Co., Painesville, Ohio. | 6/19/45 | 7/19/45 | 9574.<br>10 Fed. Reg. 7435. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | 6/15/45 | 6/19/45 | Property returned upon agreement by parties to wage increase. | None. | |
| Texas Co., Port Arthur, Tex., plant. | 7/1/45 | 9/10/45 | 9577A.<br>10 Fed. Reg. 8090. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | 6/29/45 | 7/1/45 | None. (Strike over racial discrimination.) | None. | |

[5] See n. 5, p. 621, *supra*. [6] See n. 6, p. 621, *supra*. [7] See n. 7, p. 621, *supra*. [8] See n. 8, p. 621, *supra*.

APPENDIX II—Continued.

| PLANT OR FACILITY SEIZED | DURATION OF SEIZURE | | EXECUTIVE ORDER | STATUTORY AUTHORITY CITED [5] | DURATION OF STOPPAGE | | CHANGES IN CONDITIONS OF EMPLOYMENT DURING SEIZURE [7] | BASIS FOR CHANGES | REPORTED LEGAL ACTION [8] |
|---|---|---|---|---|---|---|---|---|---|
| | From | To | | | From | To [6] | | | |
| Goodyear Tire & Rubber Co., Akron, Ohio. | 7/4/45 | 8/30/45 | 9585.<br>10 Fed. Reg. 8335. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | 6/20/45 | 7/4/45 | Agreement by union to submit future disputes to federal agency. | (?). | |
| Sinclair Rubber Co., Houston, Tex., butadiene plant. | 7/19/45 | 11/19/45 | 9589A.<br>10 Fed. Reg. 8949. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | None. | None. | Change in union security arrangements. | War Labor Board recommendation. | |
| Springfield Plywood Co., Springfield, Oreg. | 7/25/45 | 8/30/45 | 9593.<br>10 Fed. Reg. 9379. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | (?) | 7/25/45 | None. | None. | |
| U. S. Rubber Co., Detroit, Mich., facilities. | 7/31/45 | 10/10/45 | 9595.<br>10 Fed. Reg. 9571. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | 7/14/45 | 7/31/45 | None. | None. | |
| *4. Between VJ Day and the Expiration of the War Labor Disputes Act Seizure Powers, Dec. 31, 1946.* | | | | | | | | | |
| Illinois Central R. Co. | 8/23/45 | 5/27/46 | 9602.<br>10 Fed Reg. 10957. | § 9, Selective Service Act of 1940 as amended by § 3 of the War Labor Disputes Act.<br>Act of Aug. 29, 1916.<br>First War Powers Act of 1941. | None. | None. | None. (Jurisdictional strike) | Railway Labor Act Emergency Board recommended against change. | |
| Petroleum Refineries and Pipelines. (One-half national refining capacity.) | 10/4/45 | 12/12/45<br>2/?/46 | 9639.<br>10 Fed. Reg. 12592. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | 9/16/45 | 10/5/45 | Plants returned on agreement of owners to 18 percent wage increase. | *Ad hoc* fact-finding board recommendation. | |
| Capital Transit Co., Washington, D. C. | 11/21/45 | 1/7/46 | 9658.<br>10 Fed. Reg. 14351. | § 9, Selective Service Act of 1940 as amended by § 3 of the War Labor Disputes Act.<br>Act of Aug. 29, 1916.<br>First War Powers Act of 1941. | 11/6/45<br>11/20/45 | 11/7/45<br>11/21/45 | Facilities returned when parties agreed to arbitration award on wages. | *Ad hoc* arbitration board award. | |
| Great Lakes Towing Co., Cleveland, Ohio. | 11/29/45 | 12/18/46 | 9661.<br>10 Fed. Reg. 14591. | § 9, Selective Service Act of 1940 as amended by § 3 of the War Labor Disputes Act.<br>Act of Aug. 29, 1916.<br>First War Powers Act of 1941. | 9/4/45<br>11/1/45 | 11/29/45 | Wage increase. | National Wage Stabilization Board recommendation. | |
| Meatpacking Industry. | 1/24/46 | 3/12/46<br>5/22/46 | 9685.<br>11 Fed. Reg. 989.<br>9690.<br>11 Fed. Reg. 1337. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | 1/16/46 | 1/28/46* | Plants returned as companies agreed to wage increase recommended by fact-finding board. | *Ad hoc* fact-finding board recommendation approved by National Wage Stabilization Board. | |

[5] See n. 5, p. 621, *supra.* [6] See n. 6, p. 621, *supra.* [7] See n. 7, p. 621, *supra.* [8] See n. 8, p. 621, *supra.*

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| PLANT OR FACILITY SEIZED | DURATION OF SEIZURE | | EXECUTIVE ORDER | STATUTORY AUTHORITY CITED [5] | DURATION OF STOPPAGE | | CHANGES IN CONDITIONS OF EMPLOYMENT DURING SEIZURE [7] | BASIS FOR CHANGES | REPORTED LEGAL ACTION [8] |
|---|---|---|---|---|---|---|---|---|---|
| | From | To | | | From | To [6] | | | |
| New York Harbor Tugboat Companies. | 2/5/46 | 3/3/46 | 9693.<br>11 Fed. Reg. 1421. | § 9, Selective Service Act of 1940 as amended by § 3 of the War Labor Disputes Act.<br>Act of Aug. 29, 1916.<br>First War Powers Act of 1941. | 2/4/46 | 2/13/46* | Properties returned after agreement of parties to arbitrate dispute. | None. | |
| Railroads. | 5/17/46 | 5/26/46 | 9727.<br>11 Fed. Reg. 5461. | § 9, Selective Service Act of 1940 as amended by § 3 of the War Labor Disputes Act.<br>Act of Aug. 29, 1916.<br>First War Powers Act of 1941. | 5/23/46 | 5/25/46* | Properties returned after unions agreed to Presidential compromise of wage demands. | Railway Labor Act Emergency Board recommendation as modified by President. | |
| Bituminous Coal Mines. | 5/21/46 | 6/30/47 | 9728.<br>11 Fed. Reg. 5593. | § 9, Selective Service Act of 1940 as amended by the War Labor Disputes Act. | 4/1/46<br>5/25/46 | 5/11/46<br>5/30/46* | Wage increase, welfare and retirement fund, mine safety provisions, and recognition of UMW as representative of supervisory employees during period of seizure. | Contract between union and Secretary of Interior. | *United States* v. *United Mine Workers*, 330 U. S. 258; *Jones & Laughlin Steel Co.* v. *UMW*, 159 F. 2d 18 (D. C. Cir. 1946); *Krug* v. *Fox*, 161 F. 2d 1013 (4th Cir. 1947).† |
| Monongahela Connecting R. Co., Pittsburgh, Pa. | 6/14/46 | 8/12/46 | 9736.<br>11 Fed. Reg. 6661. | § 9, Selective Service Act of 1940 as amended by § 3 of the War Labor Disputes Act.<br>Act of Aug. 29, 1916.<br>First War Powers Act of 1941. | 6/10/46 | 6/14/46 | None. (Property returned on recession of union from wage demands.) | None. | |
| *5. Since the expiration of the War Labor Disputes Act Seizures Powers, Dec. 31, 1946.* | | | | | | | | | |
| Railroads. | 5/10/48 | 7/9/48 | 9957.<br>13 Fed. Reg. 2503. | Act of Aug. 29, 1916. | None. | None. | Property returned on agreement of parties to wage increase. | Railway Labor Act Emergency Board recommendation as modified. | *United States* v. *Brotherhood of Locomotive Engineers*, 79 F. Supp. 485 (D. D. C. 1948). |
| Chicago, Rock Island & Pacific R. Co. | 7/8/50 | 5/23/52 | 10141.<br>15 Fed. Reg. 4363. | Act of Aug. 29, 1916. | 6/25/50 | 7/8/50 | Property returned on agreement of parties to wage increase. | Railway Labor Act Emergency Board recommendation as modified. | |
| Railroads. | 8/27/50 | 5/23/52 | 10155.<br>15 Fed. Reg. 5785. | Act of Aug. 29, 1916. | 12/10/50<br>1/29/51<br>3/9/52 | 12/15/50<br>2/19/51<br>3/12/52 | Agreement reached by carriers and some of the Brotherhoods put into effect. Property returned on agreement of parties to wage increase. | Railway Labor Act Emergency Board recommendation as modified. | |

[5] See n. 5, p. 621, *supra*. [6] See n. 6, p. 621, *supra*. [7] See n. 7, p. 621, *supra*. [8] See n. 8, p. 621, *supra*.

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APPENDIX II—Continued.

World War II Period[4]—Seizures Unconnected With Labor Disputes.

| PLANT OR FACILITY SEIZED | DURATION OF SEIZURE | | EXECUTIVE ORDER | STATUTORY AUTHORITY CITED[5] | REASONS FOR SEIZURE | CHANGES INSTITUTED DURING SEIZURE |
|---|---|---|---|---|---|---|
| | From | To | | | | |
| Grand River Dam Authority, Oklahoma. | 11/19/41 | 7/31/46 | 8944.<br>6 Fed. Reg. 5947. | § 16, Federal Power Act. | This was a State power project, financed by federal loan and grant. Seizure was based on (1) State default on loan interest; (2) refusal of State legislature to issue bonds to complete financing; (3) failure to meet scheduled completion date in power-short defense area. | Federal Works Administrator replaced management and completed the project. Transferred to Department of Interior, Executive Order No. 9373, 8 Fed. Reg. 12001, 8/30/43. Returned pursuant to Act of July 31, 1946, 60 Stat. 743. |
| Brewster Aeronautical Corp., Long Island City, N. Y., Newark, N. J., Johnsville, Pa. | 4/18/42 | 5/20/42 | 9141.<br>7 Fed. Reg. 2961. | None. | (1) Inefficient management; (2) failure to operate at full capacity; (3) failure to maintain delivery schedules on Army and Navy aircraft. (Congressional investigation suggested labor difficulties as well, due to employment of enemy aliens.) | New board of directors and officers installed; majority shareholders established 2½ year voting trust in favor of new president. |
| Triumph Explosives, Inc., Maryland and Delaware plants. | 10/12/42 | 2/28/43<br>6/5/43 | 9254.<br>7 Fed. Reg. 8333. | None. | Overpayments (presumably bribes) of $1,400,000 to procurement officers. | New board of directors and officers; indictments against former officials. |
| Howarth Pivoted Bearings Co., Philadelphia, Pa. | 6/14/43 | 8/25/45 | 9351.<br>8 Fed. Reg. 8097. | None. | Inefficient management. | Designees of Secretary of Navy operated plant for duration of war. |
| Remington Rand, Inc., Southport, N. Y., plant. | 11/23/43 | 9/30/44 | 9399.<br>8 Fed. Reg. 16269. | § 9, Selective Service Act of 1940 as amended. | (1) Norden bombsight parts production of unacceptable quality; (2) deliveries behind schedule. | Designees of Secretary of Navy supervised operations for duration of seizure. |
| Los Angeles Shipbuilding & Drydock Corp., Los Angeles, Calif. | 12/8/43 | 8/25/45 | 9400.<br>8 Fed. Reg. 16641. | § 9, Selective Service Act of 1940 as amended. | (1) Excessive costs; (2) production behind schedule. | Operated by contractor (Todd Shipyard Co.) for duration of war. |
| York Safe & Lock Co., York, Pa. | 1/23/44 | 3/15/45 | 9416.<br>9 Fed. Reg. 936. | § 9, Selective Service Act of 1940 as amended. | (1) Inefficient management; (2) deliveries behind schedule. | Designees of Secretary of Navy operated company for duration of war, except for a portion which was condemned and transferred to Blaw-Knox Co. |
| Lord Mfg. Co., Erie, Pa.[11] | 10/24/44 | 8/25/45 | 9493.<br>9 Fed. Reg. 12860. | Tit. VIII, Revenue Act of 1943.<br>§ 9, Selective Service Act of 1940 as amended. | Refusal to deliver items at "fair and reasonable prices" fixed by the Secretary of the Navy in contract renegotiation. | Designees of Secretary of Navy operated company for duration of war. |

[4] See n. 4, p. 621, *supra*. [5] See n. 5, p. 621, *supra*. [11] See *Lord Mfg. Co.* v. *Collisson*, 62 F. Supp. 79 (W. D. Pa. 1945).

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MR. JUSTICE DOUGLAS, concurring.

There can be no doubt that the emergency which caused the President to seize these steel plants was one that bore heavily on the country. But the emergency did not create power; it merely marked an occasion when power should be exercised. And the fact that it was necessary that measures be taken to keep steel in production does not mean that the President, rather than the Congress, had the constitutional authority to act. The Congress, as well as the President, is trustee of the national welfare. The President can act more quickly than the Congress. The President with the armed services at his disposal can move with force as well as with speed. All executive power—from the reign of ancient kings to the rule of modern dictators—has the outward appearance of efficiency.

Legislative power, by contrast, is slower to exercise. There must be delay while the ponderous machinery of committees, hearings, and debates is put into motion. That takes time; and while the Congress slowly moves into action, the emergency may take its toll in wages, consumer goods, war production, the standard of living of the people, and perhaps even lives. Legislative action may indeed often be cumbersome, time-consuming, and apparently inefficient. But as Mr. Justice Brandeis stated in his dissent in *Myers* v. *United States,* 272 U. S. 52, 293:

> "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

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We therefore cannot decide this case by determining which branch of government can deal most expeditiously with the present crisis. The answer must depend on the allocation of powers under the Constitution. That in turn requires an analysis of the conditions giving rise to the seizure and of the seizure itself.

The relations between labor and industry are one of the crucial problems of the era. Their solution will doubtless entail many methods—education of labor leaders and business executives; the encouragement of mediation and conciliation by the President and the use of his great office in the cause of industrial peace; and the passage of laws. Laws entail sanctions—penalties for their violation. One type of sanction is fine and imprisonment. Another is seizure of property. An industry may become so lawless, so irresponsible as to endanger the whole economy. Seizure of the industry may be the only wise and practical solution.

The method by which industrial peace is achieved is of vital importance not only to the parties but to society as well. A determination that sanctions should be applied, that the hand of the law should be placed upon the parties, and that the force of the courts should be directed against them, is an exercise of legislative power. In some nations that power is entrusted to the executive branch as a matter of course or in case of emergencies. We chose another course. We chose to place the legislative power of the Federal Government in the Congress. The language of the Constitution is not ambiguous or qualified. It places not *some* legislative power in the Congress; Article I, Section 1 says "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The legislative nature of the action taken by the President seems to me to be clear. When the United States

takes over an industrial plant to settle a labor controversy, it is condemning property. The seizure of the plant is a taking in the constitutional sense. *United States* v. *Pewee Coal Co.*, 341 U. S. 114. A permanent taking would amount to the nationalization of the industry. A temporary taking falls short of that goal. But though the seizure is only for a week or a month, the condemnation is complete and the United States must pay compensation for the temporary possession. *United States* v. *General Motors Corp.*, 323 U. S. 373; *United States* v. *Pewee Coal Co., supra.*

The power of the Federal Government to condemn property is well established. *Kohl* v. *United States*, 91 U. S. 367. It can condemn for any public purpose; and I have no doubt but that condemnation of a plant, factory, or industry in order to promote industrial peace would be constitutional. But there is a duty to pay for all property taken by the Government. The command of the Fifth Amendment is that no "private property be taken for public use, without just compensation." That constitutional requirement has an important bearing on the present case.

The President has no power to raise revenues. That power is in the Congress by Article I, Section 8 of the Constitution. The President might seize and the Congress by subsequent action might ratify the seizure.[1] But until and unless Congress acted, no condemnation would be lawful. The branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that

[1] What a President may do as a matter of expediency or extremity may never reach a definitive constitutional decision. For example, President Lincoln suspended the writ of habeas corpus, claiming the constitutional right to do so. See *Ex parte Merryman*, 17 Fed. Cas. No. 9,487. Congress ratified his action by the Act of March 3, 1863. 12 Stat. 755.

the President has effected.[2] That seems to me to be the necessary result of the condemnation provision in the Fifth Amendment. It squares with the theory of checks and balances expounded by MR. JUSTICE BLACK in the opinion of the Court in which I join.

If we sanctioned the present exercise of power by the President, we would be expanding Article II of the Constitution and rewriting it to suit the political conveniences of the present emergency. Article II which vests the "executive Power" in the President defines that power with particularity. Article II, Section 2 makes the Chief Executive the Commander in Chief of the Army and Navy. But our history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs. Article II, Section 3 provides that the President shall "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." The power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend and that it is the function of the Congress to legislate. Article II,

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[2] Mr. Justice Brandeis, speaking for the Court in *United States* v. *North American Co.*, 253 U. S. 330, 333, stated that the basis of the Government's liability for a taking of property was legislative authority, "In order that the Government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power."

That theory explains cases like *United States* v. *Causby*, 328 U. S. 256, where the acts of the officials resulting in a taking were acts authorized by the Congress, though the Congress had not treated the acts as one of appropriation of private property.

Wartime seizures by the military in connection with military operations (cf. *United States* v. *Russell*, 13 Wall. 623) are also in a different category.

Section 3 also provides that the President "shall take Care that the Laws be faithfully executed." But, as MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER point out, the power to execute the laws starts and ends with the laws Congress has enacted.

The great office of President is not a weak and powerless one. The President represents the people and is their spokesman in domestic and foreign affairs. The office is respected more than any other in the land. It gives a position of leadership that is unique. The power to formulate policies and mould opinion inheres in the Presidency and conditions our national life. The impact of the man and the philosophy he represents may at times be thwarted by the Congress. Stalemates may occur when emergencies mount and the Nation suffers for lack of harmonious, reciprocal action between the White House and Capitol Hill. That is a risk inherent in our system of separation of powers. The tragedy of such stalemates might be avoided by allowing the President the use of some legislative authority. The Framers with memories of the tyrannies produced by a blending of executive and legislative power rejected that political arrangement. Some future generation may, however, deem it so urgent that the President have legislative authority that the Constitution will be amended. We could not sanction the seizures and condemnations of the steel plants in this case without reading Article II as giving the President not only the power to execute the laws but to make some. Such a step would most assuredly alter the pattern of the Constitution.

We pay a price for our system of checks and balances, for the distribution of power among the three branches of government. It is a price that today may seem exorbitant to many. Today a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow another

President might use the same power to prevent a wage increase, to curb trade-unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure.

MR. JUSTICE JACKSON, concurring in the judgment and opinion of the Court.

That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety. While an interval of detached reflection may temper teachings of that experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction. But as we approach the question of presidential power, we half overcome mental hazards by recognizing them. The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies—such as wages or stabilization—and lose sight of enduring consequences upon the balanced power structure of our Republic.

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from

respected sources on each side of any question. They largely cancel each other.[1] And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.[2] In these cir-

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[1] A Hamilton may be matched against a Madison. 7 The Works of Alexander Hamilton, 76–117; 1 Madison, Letters and Other Writings, 611–654. Professor Taft is counterbalanced by Theodore Roosevelt. Taft, Our Chief Magistrate and His Powers, 139–140; Theodore Roosevelt, Autobiography, 388–389. It even seems that President Taft cancels out Professor Taft. Compare his "Temporary Petroleum Withdrawal No. 5" of September 27, 1909, *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 467, 468, with his appraisal of executive power in "Our Chief Magistrate and His Powers" 139–140.

[2] It is in this class of cases that we find the broadest recent statements of presidential power, including those relied on here. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, involved, not the question of the President's power to act without congressional au-

cumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government

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thority, but the question of his right to act under and in accord with an Act of Congress. The constitutionality of the Act under which the President had proceeded was assailed on the ground that it delegated legislative powers to the President. Much of the Court's opinion is *dictum*, but the *ratio decidendi* is contained in the following language:

"When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed. As this court said in *Mackenzie* v. *Hare*, 239 U. S. 299, 311, 'As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. *We should hesitate long before limiting or embarrassing such powers.*' (Italics supplied.)" *Id.*, at 321–322.

That case does not solve the present controversy. It recognized internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs. It was intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress.

Other examples of wide definition of presidential powers under statutory authorization are *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, and *Hirabayashi* v. *United States*, 320 U. S. 81. But see, *Jecker* v. *Montgomery*, 13 How. 498, 515; *United States* v. *Western Union Telegraph Co.*, 272 F. 311; aff'd, 272 F. 893; rev'd on consent of the parties, 260 U. S. 754; *United States Harness Co.* v. *Graham*, 288 F. 929.

as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.[3]

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by dis-

[3] Since the Constitution implies that the writ of habeas corpus may be suspended in certain circumstances but does not say by whom, President Lincoln asserted and maintained it as an executive function in the face of judicial challenge and doubt. *Ex parte Merryman,* 17 Fed. Cas. 144; *Ex parte Milligan,* 4 Wall. 2, 125; see *Ex parte Bollman,* 4 Cranch 75, 101. Congress eventually ratified his action. Habeas Corpus Act of March 3, 1863, 12 Stat. 755. See Hall, Free Speech in War Time, 21 Col. L. Rev. 526. Compare *Myers* v. *United States,* 272 U. S. 52, with *Humphrey's Executor* v. *United States,* 295 U. S. 602; and *Hirabayashi* v. *United States,* 320 U. S. 81, with the case at bar. Also compare *Ex parte Vallandigham,* 1 Wall. 243, with *Ex parte Milligan, supra.*

abling the Congress from acting upon the subject.[4] Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Into which of these classifications does this executive seizure of the steel industry fit? It is eliminated from the first by admission, for it is conceded that no congressional authorization exists for this seizure. That takes away also the support of the many precedents and declarations which were made in relation, and must be confined, to this category.[5]

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[4] President Roosevelt's effort to remove a Federal Trade Commissioner was found to be contrary to the policy of Congress and impinging upon an area of congressional control, and so his removal power was cut down accordingly. *Humphrey's Executor* v. *United States*, 295 U. S. 602. However, his exclusive power of removal in executive agencies, affirmed in *Myers* v. *United States*, 272 U. S. 52, continued to be asserted and maintained. *Morgan* v. *Tennessee Valley Authority*, 115 F. 2d 990, cert. denied, 312 U. S. 701; *In re Power to Remove Members of the Tennessee Valley Authority*, 39 Op. Atty. Gen. 145; President Roosevelt's Message to Congress of March 23, 1938, The Public Papers and Addresses of Franklin D. Roosevelt, 1938 (Rosenman), 151.

[5] The oft-cited Louisiana Purchase had nothing to do with the separation of powers as between the President and Congress, but only with state and federal power. The Louisiana Purchase was subject to rather academic criticism, not upon the ground that Mr. Jefferson acted without authority from Congress, but that neither had express authority to expand the boundaries of the United States by purchase or annexation. Mr. Jefferson himself had strongly opposed the doctrine that the States' delegation of powers to the Federal Government could be enlarged by resort to implied powers. Afterwards in a letter to John Breckenridge, dated August 12, 1803, he declared:

"The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union. The executive in seizing the fugitive occurrence which so much ad-

Can it then be defended under flexible tests available to the second category? It seems clearly eliminated from that class because Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure. In cases where the purpose is to supply needs of the Government itself, two courses are provided: one, seizure of a plant which fails to comply with obligatory orders placed by the Government;[6] another, condemnation of facilities, including temporary use under the power of eminent domain.[7] The third is applicable where it is the general economy of the country that is to be protected rather than exclusive governmental interests.[8] None of these were invoked. In choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress to legislate upon the occasions, grounds and methods for seizure of industrial properties.

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vances the good of their country, have done an act beyond the Constitution. The Legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify and pay for it, and throw themselves on their country for doing for them unauthorized, what we know they would have done for themselves had they been in a situation to do it." 10 The Writings of Thomas Jefferson 407, 411.

[6] Selective Service Act of 1948, § 18, 62 Stat. 625, 50 U. S. C. App. (Supp. IV) § 468 (c).

[7] Defense Production Act of 1950, § 201, 64 Stat. 799, amended, 65 Stat. 132, 50 U. S. C. App. (Supp. IV) § 2081. For the latitude of the condemnation power which underlies this Act, see *United States* v. *Westinghouse Co.*, 339 U. S. 261, and cases therein cited.

[8] Labor Management Relations Act, 1947, §§ 206–210, 61 Stat. 136, 155, 156, 29 U. S. C. (Supp. IV) §§ 141, 176–180. The analysis, history and application of this Act are fully covered by the opinion of the Court, supplemented by that of MR. JUSTICE FRANKFURTER and of MR. JUSTICE BURTON, in which I concur.

This leaves the current seizure to be justified only by the severe tests under the third grouping, where it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject. In short, we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress. Thus, this Court's first review of such seizures occurs under circumstances which leave presidential power most vulnerable to attack and in the least favorable of possible constitutional postures.

I did not suppose, and I am not persuaded, that history leaves it open to question, at least in the courts, that the executive branch, like the Federal Government as a whole, possesses only delegated powers. The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand. However, because the President does not enjoy unmentioned powers does not mean that the mentioned ones should be narrowed by a niggardly construction. Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times. I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism.

The Solicitor General seeks the power of seizure in three clauses of the Executive Article, the first reading, "The executive Power shall be vested in a President of the United States of America." Lest I be thought to exaggerate, I quote the interpretation which his brief puts upon it: "In our view, this clause constitutes a grant of all the executive powers of which the Government is capable." If that be true, it is difficult to see why the

forefathers bothered to add several specific items, including some trifling ones.[9]

The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. Continental European examples were no more appealing. And if we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian. I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.

The clause on which the Government next relies is that "The President shall be Commander in Chief of the Army and Navy of the United States . . . ." These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title. But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends. It undoubtedly puts the Nation's armed forces under presidential command. Hence, this loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the

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[9] ". . . he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . ." U. S. Const., Art. II, § 2. He ". . . shall Commission all the Officers of the United States." U. S. Const., Art. II, § 3. Matters such as those would seem to be inherent in the Executive if anything is.

idea being that it vests power to do anything, anywhere, that can be done with an army or navy.

That seems to be the logic of an argument tendered at our bar—that the President having, on his own responsibility, sent American troops abroad derives from that act "affirmative power" to seize the means of producing a supply of steel for them. To quote, "Perhaps the most forceful illustration of the scope of Presidential power in this connection is the fact that American troops in Korea, whose safety and effectiveness are so directly involved here, were sent to the field by an exercise of the President's constitutional powers." Thus, it is said, he has invested himself with "war powers."

I cannot foresee all that it might entail if the Court should indorse this argument. Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.[10]

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[10] How widely this doctrine espoused by the President's counsel departs from the early view of presidential power is shown by a comparison. President Jefferson, without authority from Congress, sent the American fleet into the Mediterranean, where it engaged in a naval battle with the Tripolitan fleet. He sent a message to Congress on December 8, 1801, in which he said:

"Tripoli, the least considerable of the Barbary States, had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war on our failure to comply before a given day. The style of the demand admitted but one answer. I sent a small squadron of frigates into the Mediterranean . . . with orders to protect our commerce against the threatened attack. . . . Our commerce in the Mediterranean was blockaded and that of the

I do not, however, find it necessary or appropriate to consider the legal status of the Korean enterprise to discountenance argument based on it.

Assuming that we are in a war *de facto,* whether it is or is not a war *de jure,* does that empower the Commander in Chief to seize industries he thinks necessary to supply our army? The Constitution expressly places in Congress power "to raise and *support* Armies" and "to *provide* and *maintain* a Navy." (Emphasis supplied.) This certainly lays upon Congress primary responsibility for supplying the armed forces. Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement. I suppose no one would doubt that Congress can take over war supply as a Government enterprise. On the other hand, if Congress sees fit to rely on free private enterprise collectively bargaining with free labor for support and maintenance of our armed forces, can the Executive, because of lawful disagreements incidental to that process, seize the facility for operation upon Government-imposed terms?

There are indications that the Constitution did not contemplate that the title Commander in Chief *of the*

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Atlantic in peril. . . . One of the Tripolitan cruisers having fallen in with and engaged the small schooner *Enterprise,* . . . was captured, after a heavy slaughter of her men . . . . Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight." I Richardson, Messages and Papers of the Presidents, 314.

*Army and Navy* will constitute him also Commander in Chief of the country, its industries and its inhabitants. He has no monopoly of "war powers," whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the "Government and Regulation of land and naval Forces," by which it may to some unknown extent impinge upon even command functions.

That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history. Time out of mind, and even now in many parts of the world, a military commander can seize private housing to shelter his troops. Not so, however, in the United States, for the Third Amendment says, "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." Thus, even in war time, his seizure of needed military housing must be authorized by Congress. It also was expressly left to Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . ."[11] Such a limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy. Congress, fulfilling that function, has authorized the President to use the army to enforce certain civil rights.[12] On the other hand, Congress has forbidden him to use the army for the pur-

[11] U. S. Const., Art. I, § 8, cl. 15.

[12] 14 Stat. 29, 16 Stat. 143, 8 U. S. C. § 55.

pose of executing general laws except when *expressly* authorized by the Constitution or by Act of Congress.[13]

While broad claims under this rubric often have been made, advice to the President in specific matters usually has carried overtones that powers, even under this head, are measured by the command functions usual to the topmost officer of the army and navy. Even then, heed has been taken of any efforts of Congress to negative his authority.[14]

We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. His command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch

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[13] 20 Stat. 152, 10 U. S. C. § 15.

[14] In 1940, President Roosevelt proposed to transfer to Great Britain certain overage destroyers and small patrol boats then under construction. He did not presume to rely upon any claim of constitutional power as Commander in Chief. On the contrary, he was advised that such destroyers—if certified not to be essential to the defense of the United States—could be "transferred, exchanged, sold, or otherwise disposed of," because Congress had so authorized him. Accordingly, the destroyers were exchanged for air bases. In the same opinion, he was advised that Congress had prohibited the release or transfer of the so-called "mosquito boats" then under construction, so those boats were not transferred. *Acquisition of Naval and Air Bases in Exchange for Over-age Destroyers,* 39 Op. Atty. Gen. 484. See also *Training of British Flying Students in the United States,* 40 Op. Atty. Gen. 58.

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is a representative Congress. The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office. No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role. What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment.

The third clause in which the Solicitor General finds seizure powers is that "he shall take Care that the Laws be faithfully executed . . . ." [15] That authority must be matched against words of the Fifth Amendment that "No person shall be . . . deprived of life, liberty or property, without due process of law . . . ." One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.

The Solicitor General lastly grounds support of the seizure upon nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations. The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law.

Loose and irresponsible use of adjectives colors all nonlegal and much legal discussion of presidential powers.

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[15] U. S. Const., Art. II, § 3.

"Inherent" powers, "implied" powers, "incidental" powers, "plenary" powers, "war" powers and "emergency" powers are used, often interchangeably and without fixed or ascertainable meanings.

The vagueness and generality of the clauses that set forth presidential powers afford a plausible basis for pressures within and without an administration for presidential action beyond that supported by those whose responsibility it is to defend his actions in court. The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself. But prudence has counseled that actual reliance on such nebulous claims stop short of provoking a judicial test.[16]

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[16] President Wilson, just before our entrance into World War I, went before the Congress and asked its approval of his decision to authorize merchant ships to carry defensive weapons. He said:

"No doubt I already possess that authority without special warrant of law, by the plain implication of my constitutional duties and powers; but I prefer, in the present circumstances, not to act upon general implication. I wish to feel that the authority and the power of the Congress are behind me in whatever it may become necessary for me to do. We are jointly the servants of the people and must act together and in their spirit, so far as we can divine and interpret it." XVII Richardson, *op. cit.*, 8211.

When our Government was itself in need of shipping whilst ships flying the flags of nations overrun by Hitler, as well as belligerent merchantmen, were immobilized in American harbors where they had taken refuge, President Roosevelt did not assume that it was in his power to seize such foreign vessels to make up our own deficit. He informed Congress: "I am satisfied, after consultation with the heads of the interested departments and agencies of the Government,

The Solicitor General, acknowledging that Congress has never authorized the seizure here, says practice of prior Presidents has authorized it. He seeks color of legality from claimed executive precedents, chief of which is President Roosevelt's seizure on June 9, 1941, of the California plant of the North American Aviation Company. Its superficial similarities with the present case, upon analysis, yield to distinctions so decisive that it

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that we should have statutory authority to take over any such vessels as our needs may require . . . ." 87 Cong. Rec. 3072 (77th Cong., 1st Sess.); The Public Papers and Addresses of Franklin D. Roosevelt, 1941 (Rosenman), 94. The necessary statutory authority was shortly forthcoming. 55 Stat. 242.

In his first inaugural address President Roosevelt pointed out two courses to obtain legislative remedies, one being to enact measures he was prepared to recommend, the other to enact measures "the Congress may build out of its experience and wisdom." He continued, "But in the event that the Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. *I shall ask the Congress for the one remaining instrument to meet the crisis*—broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe." (Emphasis supplied.) The Public Papers and Addresses of Franklin D. Roosevelt, 1933 (Rosenman), 15.

On March 6, 1933, President Roosevelt proclaimed the Bank Holiday. The Proclamation did not invoke constitutional powers of the Executive but expressly and solely relied upon the Act of Congress of October 6, 1917, 40 Stat. 411, § 5 (b), as amended. He relied steadily on legislation to empower him to deal with economic emergency. The Public Papers and Addresses of Franklin D. Roosevelt, 1933 (Rosenman), 24.

It is interesting to note Holdsworth's comment on the powers of legislation by proclamation when in the hands of the Tudors. "The extent to which they could be legally used was never finally settled in this century, because the Tudors made so tactful a use of their powers that no demand for the settlement of this question was raised." 4 Holdsworth, History of English Law, 104.

cannot be regarded as even a precedent, much less an authority for the present seizure.[17]

The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although

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[17] The North American Aviation Company was under direct and binding contracts to supply defense items to the Government. No such contracts are claimed to exist here. Seizure of plants which refused to comply with Government orders had been expressly authorized by Congress in § 9 of the Selective Service Act of 1940, 54 Stat. 885, 892, so that the seizure of the North American plant was entirely consistent with congressional policy. The company might have objected on technical grounds to the seizure, but it was taken over with acquiescence, amounting to all but consent, of the owners who had admitted that the situation was beyond their control. The strike involved in the North American case was in violation of the union's collective agreement and the national labor leaders approved the seizure to end the strike. It was described as in the nature of an insurrection, a Communist-led political strike against the Government's lend-lease policy. Here we have only a loyal, lawful, but regrettable economic disagreement between management and labor. The North American plant contained government-owned machinery, material and goods in the process of production to which workmen were forcibly denied access by picketing strikers. Here no Government property is protected by the seizure. See New York Times of June 10, 1941, pp. 1, 14 and 16, for substantially accurate account of the proceedings and the conditions of violence at the North American plant.

The North American seizure was regarded as an execution of congressional policy. I do not regard it as a precedent for this, but, even if I did, I should not bind present judicial judgment by earlier partisan advocacy.

Statements from a letter by the Attorney General to the Chairman of the Senate Committee on Labor and Public Welfare, dated February 2, 1949, with reference to pending labor legislation, while not cited by any of the parties here, are sometimes quoted as being in support of the "inherent" powers of the President. The proposed bill contained a mandatory provision that during certain investigations the disputants in a labor dispute should continue operations under the terms and conditions of employment existing prior to the

it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it,[18] they made no express provision for exercise of extraordinary authority because of a crisis.[19] I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so, although many modern nations have forthrightly recognized that war and economic crises may upset the normal balance between liberty and au-

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beginning of the dispute. It made no provision as to how continuance should be enforced and specified no penalty for disobedience. The Attorney General advised that in appropriate circumstances the United States would have access to the courts to protect the national health, safety and welfare. This was the rule laid down by this Court in *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548. The Attorney General observed:

"However, with regard to the question of the power of the Government under Title III, I might point out that the inherent power of the President to deal with emergencies that affect the health, safety and welfare of the entire Nation is exceedingly great. See Opinion of Attorney General Murphy of October 4, 1939 (39 Op. A. G. 344, 347); *United States* v. *United Mine Workers of America,* 330 U. S. 258 (1947)." See Hearings before the Senate Committee on Labor and Public Welfare on S. 249, 81st Cong., 1st Sess. 263.

Regardless of the general reference to "inherent powers," the citations were instances of congressional authorization. I do not suppose it is open to doubt that power to see that the laws are faithfully executed was ample basis for the specific advice given by the Attorney General in this letter.

[18] U. S. Const., Art. I, § 9, cl. 2.

[19] I exclude, as in a very limited category by itself, the establishment of martial law. Cf. *Ex parte Milligan,* 4 Wall. 2; *Duncan* v. *Kahanamoku,* 327 U. S. 304.

thority. Their experience with emergency powers may not be irrelevant to the argument here that we should say that the Executive, of his own volition, can invest himself with undefined emergency powers.

Germany, after the First World War, framed the Weimar Constitution, designed to secure her liberties in the Western tradition. However, the President of the Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President Von Hindenberg to suspend all such rights, and they were never restored.[20]

The French Republic provided for a very different kind of emergency government known as the "state of siege." It differed from the German emergency dictatorship, particularly in that emergency powers could not be assumed at will by the Executive but could only be granted as a parliamentary measure. And it did not, as in Germany, result in a suspension or abrogation of law but was a legal institution governed by special legal rules and terminable by parliamentary authority.[21]

Great Britain also has fought both World Wars under a sort of temporary dictatorship created by legislation.[22] As Parliament is not bound by written constitutional limitations, it established a crisis government simply by

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[20] 1 Nazi Conspiracy and Aggression 126–127; Rossiter, Constitutional Dictatorship, 33–61; Brecht, Prelude to Silence, 138.

[21] Rossiter, Constitutional Dictatorship, 117–129.

[22] Defence of the Realm Act, 1914, 4 & 5 Geo. V, c. 29, as amended, c. 63; Emergency Powers (Defence) Act, 1939, 2 & 3 Geo. VI, c. 62; Rossiter, Constitutional Dictatorship, 135–184.

delegation to its Ministers of a larger measure than usual of its own unlimited power, which is exercised under its supervision by Ministers whom it may dismiss. This has been called the "high-water mark in the voluntary surrender of liberty," but, as Churchill put it, "Parliament stands custodian of these surrendered liberties, and its most sacred duty will be to restore them in their fullness when victory has crowned our exertions and our perseverance." [23] Thus, parliamentary control made emergency powers compatible with freedom.

This contemporary foreign experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. But it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the "inherent powers" formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience.

In the practical working of our Government we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency. Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency. In 1939, upon congressional request, the Attorney General listed ninety-nine such separate statutory grants by Congress of emergency or wartime executive powers.[24] They were invoked from time to time as need appeared. Under this procedure we retain Government

[23] Churchill, The Unrelenting Struggle, 13. See also *id.*, at 279–281.

[24] 39 Op. Atty. Gen. 348.

by law—special, temporary law, perhaps, but law nonetheless. The public may know the extent and limitations of the powers that can be asserted, and persons affected may be informed from the statute of their rights and duties.

In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction.

As to whether there is imperative necessity for such powers, it is relevant to note the gap that exists between the President's paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.

Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed

to check and balance his power which often cancels their effectiveness.

Moreover, rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution. Indeed, Woodrow Wilson, commenting on the President as leader both of his party and of the Nation, observed, "If he rightly interpret the national thought and boldly insist upon it, he is irresistible . . . . His office is anything he has the sagacity and force to make it." [25] I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review,[26] at the expense of Congress.

But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.

The essence of our free Government is "leave to live by no man's leave, underneath the law"—to be governed by those impersonal forces which we call law. Our Gov-

[25] Wilson, Constitutional Government in the United States, 68–69.

[26] Rossiter, The Supreme Court and the Commander in Chief, 126–132.

ernment is fashioned to fulfill this concept so far as humanly possible. The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.[27]

MR. JUSTICE BURTON, concurring in both the opinion and judgment of the Court.

My position may be summarized as follows:

The validity of the President's order of seizure is at issue and ripe for decision. Its validity turns upon its relation to the constitutional division of governmental power between Congress and the President.

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[27] We follow the judicial tradition instituted on a memorable Sunday in 1612, when King James took offense at the independence of his judges and, in rage, declared: "Then I am to be *under* the law—which it is treason to affirm." Chief Justice Coke replied to his King: "Thus wrote Bracton, 'The King ought not to be under any man, but he is under God and the Law.'" 12 Coke 65 (as to its verity, 18 Eng. Hist. Rev. 664–675); 1 Campbell, Lives of the Chief Justices (1849), 272.

The Constitution has delegated to Congress power to authorize action to meet a national emergency of the kind we face.[1] Aware of this responsibility, Congress has responded to it. It has provided at least two procedures for the use of the President.

It has outlined one in the Labor Management Relations Act, 1947, better known as the Taft-Hartley Act. The accuracy with which Congress there describes the present emergency demonstrates its applicability. It says:

> "Whenever in the opinion of the President of the United States, a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. . . ." [2]

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[1] "Article. I.

"Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States . . . .

. . . . . .

"Section. 8. The Congress shall have Power . . . ;

. . . . . .

"To regulate Commerce with foreign Nations, and among the several States . . . ;

. . . . . .

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

[2] 61 Stat. 155, 29 U. S. C. (Supp. IV) § 176.

In that situation Congress has authorized not only negotiation, conciliation and impartial inquiry but also a 60-day cooling-off period under injunction, followed by 20 days for a secret ballot upon the final offer of settlement and then by recommendations from the President to Congress.[3]

For the purposes of this case the most significant feature of that Act is its omission of authority to seize an affected industry. The debate preceding its passage demonstrated the significance of that omission. Collective bargaining, rather than governmental seizure, was to be relied upon. Seizure was not to be resorted to without specific congressional authority. Congress reserved to itself the opportunity to authorize seizure to meet particular emergencies.[4]

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[3] 61 Stat. 155–156, 29 U. S. C. (Supp. IV) §§ 176–180.

[4] The Chairman of the Senate Committee sponsoring the bill said in the Senate:

"We did not feel that we should put into the law, as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona-fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided.

"We have felt that perhaps in the case of a general strike, or in the case of other serious strikes, after the termination of every possible effort to resolve the dispute, the remedy might be an emergency act by Congress for that particular purpose.

"I have had in mind drafting such a bill, giving power to seize the plants, and other necessary facilities, to seize the unions, their money, and their treasury, and requisition trucks and other equipment; in fact, to do everything that the British did in their general strike of 1926. But while such a bill might be prepared, I should

The President, however, chose not to use the Taft-Hartley procedure. He chose another course, also authorized by Congress. He referred the controversy to the Wage Stabilization Board.[5] If that course had led to a settlement of the labor dispute, it would have avoided the need for other action. It, however, did not do so.

Now it is contended that although the President did not follow the procedure authorized by the Taft-Hartley Act, his substituted procedure served the same purpose and must be accepted as its equivalent. Without appraising that equivalence, it is enough to point out that neither procedure carried statutory authority for the seizure of private industries in the manner now at issue.[6] The exhaustion of both procedures fails to cloud the

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be unwilling to place such a law on the books until we actually face such an emergency, and Congress applies the remedy for the particular emergency only. Eighty days will provide plenty of time within which to consider the possibility of what should be done; and we believe very strongly that there should not be anything in this law which prohibits finally the right to strike." 93 Cong. Rec. 3835–3836.

Part of this quotation was relied upon by this Court in *Bus Employees* v. *Wisconsin Board,* 340 U. S. 383, 396, note 21.

[5] Under Titles IV and V of the Defense Production Act of 1950, 64 Stat. 803–812, 50 U. S. C. App. (Supp. IV) §§ 2101–2123; and see Exec. Order No. 10233, 16 Fed. Reg. 3503.

[6] Congress has authorized other types of seizure under conditions not present here. Section 201 of the Defense Production Act authorizes the President to acquire specific "real property, including facilities, temporary use thereof, or other interest therein . . ." by condemnation. 64 Stat. 799, as amended, 65 Stat. 132, see 50 U. S. C. App. (Supp. IV) § 2081. There have been no declarations of taking or condemnation proceedings in relation to any of the properties involved here. Section 18 of the Selective Service Act of 1948 authorizes the President to take possession of a plant or other facility failing to fill certain defense orders placed with it in the manner there prescribed. 62 Stat. 625, 50 U. S. C. App. (Supp. IV) § 468. No orders have been so placed with the steel plants seized.

clarity of the congressional reservation of seizure for its own consideration.

The foregoing circumstances distinguish this emergency from one in which Congress takes no action and outlines no governmental policy. In the case before us, Congress authorized a procedure which the President declined to follow. Instead, he followed another procedure which he hoped might eliminate the need for the first. Upon its failure, he issued an executive order to seize the steel properties in the face of the reserved right of Congress to adopt or reject that course as a matter of legislative policy.

This brings us to a further crucial question. Does the President, in such a situation, have inherent constitutional power to seize private property which makes congressional action in relation thereto unnecessary? We find no such power available to him under the present circumstances. The present situation is not comparable to that of an imminent invasion or threatened attack. We do not face the issue of what might be the President's constitutional power to meet such catastrophic situations. Nor is it claimed that the current seizure is in the nature of a military command addressed by the President, as Commander-in-Chief, to a mobilized nation waging, or imminently threatened with, total war.[7]

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[7] The President and Congress have recognized the termination of the major hostilities in the total wars in which the Nation has been engaged. Many wartime procedures have expired or been terminated.

The War Labor Disputes Act, 57 Stat. 163 *et seq.*, 50 U. S. C. App. §§ 1501–1511, expired June 30, 1947, six months after the President's declaration of the end of hostilities, 3 CFR, 1946 Supp., p. 77. The Japanese Peace Treaty was approved by the Senate March 20, 1952, Cong. Rec., Mar. 20, 1952, p. 2635, and proclaimed by the President April 28, 1952, 17 Fed. Reg. 3813.

The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency. Congress has reserved to itself the right to determine where and when to authorize the seizure of property in meeting such an emergency. Under these circumstances, the President's order of April 8 invaded the jurisdiction of Congress. It violated the essence of the principle of the separation of governmental powers. Accordingly, the injunction against its effectiveness should be sustained.

MR. JUSTICE CLARK, concurring in the judgment of the Court.

One of this Court's first pronouncements upon the powers of the President under the Constitution was made by Mr. Chief Justice John Marshall some one hundred and fifty years ago. In *Little* v. *Barreme*,[1] he used this characteristically clear language in discussing the power of the President to instruct the seizure of the *Flying Fish*, a vessel bound from a French port: "It is by no means clear that the president of the United States whose high duty it is to 'take care that the laws be faithfully executed,' and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that [an act of Congress] gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing *to* a French port, the legislature seem to have prescribed that

[1] 2 Cranch 170 (1804).

the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel *not* bound *to* a French port." [2] Accordingly, a unanimous Court held that the President's instructions had been issued without authority and that they could not "legalize an act which without those instructions would have been a plain trespass." I know of no subsequent holding of this Court to the contrary.[3]

The limits of presidential power are obscure. However, Article II, no less than Article I, is part of "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." [4] Some of our Presidents, such as Lincoln, "felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the na-

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[2] *Id.*, at 177–178 (emphasis changed).

[3] Decisions of this Court which have upheld the exercise of presidential power include the following: *Prize Cases,* 2 Black 635 (1863) (subsequent ratification of President's acts by Congress); *In re Neagle,* 135 U. S. 1 (1890) (protection of federal officials from personal violence while performing official duties); *In re Debs,* 158 U. S. 564 (1895) (injunction to prevent forcible obstruction of interstate commerce and the mails); *United States* v. *Midwest Oil Co.,* 236 U. S. 459 (1915) (acquiescence by Congress in more than 250 instances of exercise of same power by various Presidents over period of 80 years); *Myers* v. *United States,* 272 U. S. 52 (1926) (control over subordinate officials in executive department) [but see *Humphrey's Executor* v. *United States,* 295 U. S. 602, 626–628 (1935)]; *Hirabayashi* v. *United States,* 320 U. S. 81 (1943), and *Korematsu* v. *United States,* 323 U. S. 214 (1944) (express congressional authorization); cf. *United States* v. *Russell,* 13 Wall. 623 (1871) (imperative military necessity in area of combat during war; *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304 (1936) (power to negotiate with foreign governments); *United States* v. *United Mine Workers,* 330 U. S. 258 (1947) (seizure under specific statutory authorization).

[4] Mr. Chief Justice Marshall, in *McCulloch* v. *Maryland,* 4 Wheat. 316, 415 (1819).

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tion." [5] Others, such as Theodore Roosevelt, thought the President to be capable, as a "steward" of the people, of exerting all power save that which is specifically prohibited by the Constitution or the Congress.[6] In my view—taught me not only by the decision of Mr. Chief Justice Marshall in *Little* v. *Barreme,* but also by a score of other pronouncements of distinguished members of this bench—the Constitution does grant to the President extensive authority in times of grave and imperative national emergency. In fact, to my thinking, such a grant may well be necessary to the very existence of the Constitution itself. As Lincoln aptly said, "[is] it possible to lose the nation and yet preserve the Constitution?" [7] In describing this authority I care not whether one calls it "residual," "inherent," "moral," "implied," "aggregate," "emergency," or otherwise. I am of the conviction that those who have had the gratifying experience of being the President's lawyer have used one or more of these adjectives only with the utmost of sincerity and the highest of purpose.

I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation. I cannot sustain the seizure in question because here, as in *Little* v. *Barreme,* Congress had prescribed methods to be followed by the President in meeting the emergency at hand.

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[5] Letter of April 4, 1864, to A. G. Hodges, in 10 Complete Works of Abraham Lincoln (Nicolay and Hay ed. 1894), 66.

[6] Roosevelt, Autobiography (1914 ed.), 371–372.

[7] Letter of April 4, 1864, to A. G. Hodges, in 10 Complete Works of Abraham Lincoln (Nicolay and Hay ed. 1894), 66.

Three statutory procedures were available: those provided in the Defense Production Act of 1950, the Labor Management Relations Act, and the Selective Service Act of 1948. In this case the President invoked the first of these procedures; he did not invoke the other two.

The Defense Production Act of 1950 provides for mediation of labor disputes affecting national defense. Under this statutory authorization, the President has established the Wage Stabilization Board. The Defense Production Act, however, grants the President no power to seize real property except through ordinary condemnation proceedings, which were not used here, and creates no sanctions for the settlement of labor disputes.

The Labor Management Relations Act, commonly known as the Taft-Hartley Act, includes provisions adopted for the purpose of dealing with nationwide strikes. They establish a procedure whereby the President may appoint a board of inquiry and thereafter, in proper cases, seek injunctive relief for an 80-day period against a threatened work stoppage. The President can invoke that procedure whenever, in his opinion, "a threatened or actual strike . . . affecting an entire industry . . . will, if permitted to occur or to continue, imperil the national health or safety." [8] At the time that Act was passed, Congress specifically rejected a proposal to empower the President to seize any "plant, mine, or facility" in which a threatened work stoppage would, in his judgment, "imperil the public health or security." [9] Instead, the Taft-Hartley Act directed the President, in the event a strike had not been settled during the 80-day injunction period, to submit to Congress "a full and comprehensive report . . . together with such recommendations as he may see fit to make for consideration and

[8] 61 Stat. 155, 29 U. S. C. (Supp. IV) § 176.

[9] 93 Cong. Rec. 3637–3645; cf. *id.*, at 3835–3836.

appropriate action." [10] The legislative history of the Act demonstrates Congress' belief that the 80-day period would afford it adequate opportunity to determine whether special legislation should be enacted to meet the emergency at hand.[11]

The Selective Service Act of 1948 gives the President specific authority to seize plants which fail to produce goods required by the armed forces or the Atomic Energy Commission for national defense purposes. The Act provides that when a producer from whom the President has ordered such goods "refuses or fails" to fill the order within a period of time prescribed by the President, the President may take immediate possession of the producer's plant.[12] This language is significantly broader than

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[10] 61 Stat. 156, 29 U. S. C. (Supp. IV) § 180.

[11] *E. g.*, S. Rep. No. 105, 80th Cong., 1st Sess. 15; 93 Cong. Rec. 3835–3836; *id.*, at 4281.

[12] The producer must have been notified that the order was placed pursuant to the Act. The Act provides in pertinent part as follows:

"(a) Whenever the President after consultation with and receiving advice from the National Security Resources Board determines that it is in the interest of the national security for the Government to obtain prompt delivery of any articles or materials the procurement of which has been authorized by the Congress exclusively for the use of the armed forces of the United States, or for the use of the Atomic Energy Commission, he is authorized, through the head of any Government agency, to place with any person operating a plant, mine, or other facility capable of producing such articles or materials an order for such quantity of such articles or materials as the President deems appropriate. Any person with whom an order is placed pursuant to the provisions of this section shall be advised that such order is placed pursuant to the provisions of this section.

. . . . . .

"(c) In case any person with whom an order is placed pursuant to the provisions of subsection (a) refuses or fails—

. . . . . .

"(2) to fill such order within the period of time prescribed by the President or as soon thereafter as possible as determined by the President;

that used in the National Defense Act of 1916 and the Selective Training and Service Act of 1940, which provided for seizure when a producer "refused" to supply essential defense materials, but not when he "failed" to do so.[13]

These three statutes furnish the guideposts for decision in this case. Prior to seizing the steel mills on April 8 the President had exhausted the mediation procedures of the Defense Production Act through the Wage Stabilization Board. Use of those procedures had failed to avert the impending crisis; however, it had resulted in a 99-day postponement of the strike. The Government argues that this accomplished more than the maximum 80-day waiting period possible under the sanctions of the Taft-Hartley Act, and therefore amounted to compliance with the substance of that Act. Even if one were to accept this somewhat hyperbolic conclusion, the hard fact remains that neither the Defense Production Act nor Taft-Hartley authorized the seizure challenged here, and the Government made no effort to comply with the proce-

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"(3) to produce the kind or quality of articles or materials ordered; or

"(4) to furnish the quantity, kind, and quality of articles or materials ordered at such price as shall be negotiated between such person and the Government agency concerned; or in the event of failure to negotiate a price, to furnish the quantity, kind, and quality of articles or materials ordered at such price as he may subsequently be determined to be entitled to receive under subsection (d);

"the President is authorized to take immediate possession of any plant, mine, or other facility of such person and to operate it, through any Government agency, for the production of such articles or materials as may be required by the Government." 62 Stat. 625, 50 U. S. C. App. (Supp. IV) § 468. The Act was amended in 1951 and redesignated the Universal Military Training and Service Act, but no change was made in this section. 65 Stat. 75.

[13] 39 Stat. 213; 54 Stat. 892.

dures established by the Selective Service Act of 1948, a statute which expressly authorizes seizures when producers fail to supply necessary defense matériel.[14]

For these reasons I concur in the judgment of the Court. As Mr. Justice Story once said: "For the executive department of the government, this court entertain the most entire respect; and amidst the multiplicity of cares in that department, it may, without any violation of decorum, be presumed, that sometimes there may be an inaccurate construction of a law. It is our duty to expound the laws as we find them in the records of state;

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[14] The Government has offered no explanation, in the record, the briefs, or the oral argument, as to why it could not have made both a literal and timely compliance with the provisions of that Act. Apparently the Government could have placed orders with the steel companies for the various types of steel needed for defense purposes, and instructed the steel companies to ship the matériel directly to producers of planes, tanks, and munitions. The Act does not require that government orders cover the entire capacity of a producer's plant before the President has power to seize.

Our experience during World War I demonstrates the speed with which the Government can invoke the remedy of seizing plants which fail to fill compulsory orders. The Federal Enameling & Stamping Co., of McKees Rocks, Pa., was served with a compulsory order on September 13, 1918, and seized on the same day. The Smith & Wesson plant at Springfield, Mass., was seized on September 13, 1918, after the company had failed to make deliveries under a compulsory order issued the preceding week. Communication from Ordnance Office to War Department Board of Appraisers, entitled "Report on Plants Commandeered by the Ordnance Office," Dec. 19, 1918, pp. 3, 4, in National Archives, Records of the War Department, Office of the Chief of Ordnance, O. O. 004.002/260. Apparently the Mosler Safe Co., of Hamilton, Ohio, was seized on the same day on which a compulsory order was issued. *Id.*, at 2; Letter from counsel for Mosler Safe Co. to Major General George W. Goethals, Director of Purchase, Storage and Traffic, War Department, Dec. 9, 1918, p. 1, in National Archives, Records of the War Department, Office of the General Staff, PST Division 400.1202.

and we cannot, when called upon by the citizens of the country, refuse our opinion, however it may differ from that of very great authorities." [15]

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

The President of the United States directed the Secretary of Commerce to take temporary possession of the Nation's steel mills during the existing emergency because "a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field." The District Court ordered the mills returned to their private owners on the ground that the President's action was beyond his powers under the Constitution.

This Court affirms. Some members of the Court are of the view that the President is without power to act in time of crisis in the absence of express statutory authorization. Other members of the Court affirm on the basis of their reading of certain statutes. Because we cannot agree that affirmance is proper on any ground, and because of the transcending importance of the questions presented not only in this critical litigation but also to the powers of the President and of future Presidents to act in time of crisis, we are compelled to register this dissent.

## I.

In passing upon the question of Presidential powers in this case, we must first consider the context in which those powers were exercised.

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[15] *The Orono,* 18 Fed. Cas. No. 10,585 (Cir. Ct. D. Mass. 1812).

Those who suggest that this is a case involving extraordinary powers should be mindful that these are extraordinary times. A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict.

Accepting in full measure its responsibility in the world community, the United States was instrumental in securing adoption of the United Nations Charter, approved by the Senate by a vote of 89 to 2. The first purpose of the United Nations is to "maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, . . . ." [1] In 1950, when the United Nations called upon member nations "to render every assistance" to repel aggression in Korea, the United States furnished its vigorous support.[2] For almost two full years, our armed forces have been fighting in Korea, suffering casualties of over 108,000 men. Hostilities have not abated. The "determination of the United Nations to continue its action in Korea to meet the aggression" has been reaffirmed.[3] Congressional support of the action in Korea has been manifested by provisions for increased military manpower and equipment and for economic stabilization, as hereinafter described.

Further efforts to protect the free world from aggression are found in the congressional enactments of the Truman Plan for assistance to Greece and Turkey [4] and

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[1] 59 Stat. 1031, 1037 (1945); 91 Cong. Rec. 8190 (1945).

[2] U. N. Security Council, U. N. Doc. S/1501 (1950); Statement by the President, June 26, 1950, United States Policy in the Korean Crisis, Dept. of State Pub. (1950), 16.

[3] U. N. General Assembly, U. N. Doc. A/1771 (1951).

[4] 61 Stat. 103 (1947).

the Marshall Plan for economic aid needed to build up the strength of our friends in Western Europe.[5] In 1949, the Senate approved the North Atlantic Treaty under which each member nation agrees that an armed attack against one is an armed attack against all.[6] Congress immediately implemented the North Atlantic Treaty by authorizing military assistance to nations dedicated to the principles of mutual security under the United Nations Charter.[7] The concept of mutual security recently has been extended by treaty to friends in the Pacific.[8]

Our treaties represent not merely legal obligations but show congressional recognition that mutual security for the free world is the best security against the threat of aggression on a global scale. The need for mutual security is shown by the very size of the armed forces outside the free world. Defendant's brief informs us that the Soviet Union maintains the largest air force in the world and maintains ground forces much larger than those presently available to the United States and the countries joined with us in mutual security arrangements. Constant international tensions are cited to demonstrate how precarious is the peace.

Even this brief review of our responsibilities in the world community discloses the enormity of our undertaking. Success of these measures may, as has often been

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[5] 62 Stat. 137 (1948), as amended, 63 Stat. 50 (1949), 64 Stat. 198 (1950).

[6] 63 Stat. 2241, 2252 (1949), extended to Greece and Turkey, S. Exec. E, 82d Cong., 2d Sess. (1952), advice and consent of the Senate granted. 98 Cong. Rec. 930.

[7] 63 Stat. 714 (1949).

[8] S. Execs. A, B, C and D, 82d Cong., 2d Sess. (1952), advice and consent of the Senate granted. 98 Cong. Rec. 2594, 2595, 2605.

observed, dramatically influence the lives of many generations of the world's peoples yet unborn. Alert to our responsibilities, which coincide with our own self-preservation through mutual security, Congress has enacted a large body of implementing legislation. As an illustration of the magnitude of the over-all program, Congress has appropriated $130 billion for our own defense and for military assistance to our allies since the June, 1950, attack in Korea.

In the Mutual Security Act of 1951, Congress authorized "military, economic, and technical assistance to friendly countries to strengthen the mutual security and individual and collective defenses of the free world, . . . ." [9] Over $5\frac{1}{2}$ billion were appropriated for military assistance for fiscal year 1952, the bulk of that amount to be devoted to purchase of military equipment.[10] A request for over $7 billion for the same purpose for fiscal year 1953 is currently pending in Congress.[11] In addition to direct shipment of military equipment to nations of the free world, defense production in those countries relies upon shipment of machine tools and allocation of steel tonnage from the United States.[12]

Congress also directed the President to build up our own defenses. Congress, recognizing the "grim fact . . . that the United States is now engaged in a struggle for survival" and that "it is imperative that we now take those necessary steps to make our strength equal to the peril of the hour," granted authority to draft men into

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[9] 65 Stat. 373 (1951).

[10] 65 Stat. 730 (1951); see H. R. Doc. No. 147, 82d Cong., 1st Sess. 3 (1951).

[11] See H. R. Doc. No. 382, 82d Cong., 2d Sess. (1952).

[12] Hearings before Senate Committee on Foreign Relations on the Mutual Security Act of 1952, 82d Cong., 2d Sess. 565–566 (1952); Hearings before House Committee on Foreign Affairs on the Mutual Security Act of 1952, 82d Cong., 2d Sess. 370 (1952).

the armed forces.[13] As a result, we now have over 3,500,000 men in our armed forces.[14]

Appropriations for the Department of Defense, which had averaged less than $13 billion per year for the three years before attack in Korea, were increased by Congress to $48 billion for fiscal year 1951 and to $60 billion for fiscal year 1952.[15] A request for $51 billion for the Department of Defense for fiscal year 1953 is currently pending in Congress.[16] The bulk of the increase is for military equipment and supplies—guns, tanks, ships, planes and ammunition—all of which require steel. Other defense programs requiring great quantities of steel include the large scale expansion of facilities for the Atomic Energy Commission[17] and the expansion of the Nation's productive capacity affirmatively encouraged by Congress.[18]

Congress recognized the impact of these defense programs upon the economy. Following the attack in Korea, the President asked for authority to requisition property and to allocate and fix priorities for scarce goods. In the Defense Production Act of 1950, Congress granted the powers requested and, *in addition*, granted power to stabilize prices and wages and to provide for settlement

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[13] 65 Stat. 75 (1951); S. Rep. No. 117, 82d Cong., 1st Sess. 3 (1951).

[14] Address by Secretary of Defense Lovett before the American Society of Newspaper Editors, Washington, April 18, 1952.

[15] Fiscal Year 1952, 65 Stat. 423, 760 (1951); F. Y. 1951, 64 Stat. 595, 1044, 1223, 65 Stat. 48 (1950–1951); F. Y. 1950, 63 Stat. 869, 973, 987 (1949); F. Y. 1949, 62 Stat. 647 (1948); F. Y. 1948, 61 Stat. 551 (1947).

[16] See H. R. Rep. No. 1685, 82d Cong., 2d Sess. 2 (1952), on H. R. 7391.

[17] See H. R. Rep. No. 384, 82d Cong., 1st Sess. 5 (1951); 97 Cong. Rec. 13647–13649.

[18] Defense Production Act, Tit. III. 64 Stat. 798, 800 (1950), 65 Stat. 138 (1951).

of labor disputes arising in the defense program.[19] The Defense Production Act was extended in 1951, a Senate Committee noting that in the dislocation caused by the programs for purchase of military equipment "lies the seed of an economic disaster that might well destroy the military might we are straining to build." [20] Significantly, the Committee examined the problem "in terms of just one commodity, steel," and found "a graphic picture of the over-all inflationary danger growing out of reduced civilian supplies and rising incomes." Even before Korea, steel production at levels above theoretical 100% capacity was not capable of supplying civilian needs alone. Since Korea, the tremendous military demand for steel has far exceeded the increases in productive capacity. This Committee emphasized that the shortage of steel, even with the mills operating at full capacity, coupled with increased civilian purchasing power, presented grave danger of disastrous inflation.[21]

The President has the duty to execute the foregoing legislative programs. Their successful execution depends upon continued production of steel and stabilized prices for steel. Accordingly, when the collective bargaining agreements between the Nation's steel producers and their employees, represented by the United Steel Workers, were due to expire on December 31, 1951, and a strike shutting down the entire basic steel industry was threatened, the President acted to avert a complete shutdown of steel production. On December 22, 1951, he certified the dispute to the Wage Stabilization Board, requesting that the Board investigate the dispute and promptly report its recommendation as to fair and equitable terms of settlement. The Union complied with the President's

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[19] Note 18, *supra*, Tits. IV and V.

[20] S. Rep. No. 470, 82d Cong., 1st Sess. 8 (1951).

[21] *Id.*, at 8–9.

request and delayed its threatened strike while the dispute was before the Board. After a special Board panel had conducted hearings and submitted a report, the full Wage Stabilization Board submitted its report and recommendations to the President on March 20, 1952.

The Board's report was acceptable to the Union but was rejected by plaintiffs. The Union gave notice of its intention to strike as of 12:01 a. m., April 9, 1952, but bargaining between the parties continued with hope of settlement until the evening of April 8, 1952. After bargaining had failed to avert the threatened shutdown of steel production, the President issued the following Executive Order:

> "WHEREAS on December 16, 1950, I proclaimed the existence of a national emergency which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made throughout the United Nations and otherwise to bring about a lasting peace; and
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> "WHEREAS American fighting men and fighting men of other nations of the United Nations are now engaged in deadly combat with the forces of aggression in Korea, and forces of the United States are stationed elsewhere overseas for the purpose of participating in the defense of the Atlantic Community against aggression; and
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> "WHEREAS the weapons and other materials needed by our armed forces and by those joined with us in the defense of the free world are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials; and

"WHEREAS steel is likewise indispensable to the carrying out of programs of the Atomic Energy Commission of vital importance to our defense efforts; and

"WHEREAS a continuing and uninterrupted supply of steel is also indispensable to the maintenance of the economy of the United States, upon which our military strength depends; and

"WHEREAS a controversy has arisen between certain companies in the United States producing and fabricating steel and the elements thereof and certain of their workers represented by the United Steel Workers of America, CIO, regarding terms and conditions of employment; and

"WHEREAS the controversy has not been settled through the processes of collective bargaining or through the efforts of the Government, including those of the Wage Stabilization Board, to which the controversy was referred on December 22, 1951, pursuant to Executive Order No. 10233, and a strike has been called for 12:01 A. M., April 9, 1952; and

"WHEREAS a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field; and

"WHEREAS in order to assure the continued availability of steel and steel products during the existing emergency, it is necessary that the United States take possession of and operate the plants, facilities, and other property of the said companies as hereinafter provided:

"NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and laws of the

United States, and as President of the United States and Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

"1. The Secretary of Commerce is hereby authorized and directed to take possession of all or such of the plants, facilities, and other property of the companies named in the list attached hereto, or any part thereof, as he may deem necessary in the interests of national defense; and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation. . . ." [22]

The next morning, April 9, 1952, the President addressed the following Message to Congress:

"*To the Congress of the United States:*

"The Congress is undoubtedly aware of the recent events which have taken place in connection with the management-labor dispute in the steel industry. These events culminated in the action which was taken last night to provide for temporary operation of the steel mills by the Government.

"I took this action with the utmost reluctance. The idea of Government operation of the steel mills is thoroughly distasteful to me and I want to see it ended as soon as possible. However, in the situation which confronted me yesterday, I felt that I could make no other choice. The other alternatives appeared to be even worse—so much worse that I could not accept them.

"One alternative would have been to permit a shut-down in the steel industry. The effects of such a shut-down would have been so immediate and damaging with respect to our efforts to support our Armed Forces and to protect our national security that it made this alternative unthinkable.

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[22] Exec. Order 10340, 17 Fed. Reg. 3139 (1952).

"The only way that I know of, other than Government operation, by which a steel shut-down could have been avoided was to grant the demands of the steel industry for a large price increase. I believed and the officials in charge of our stabilization agencies believed that this would have wrecked our stabilization program. I was unwilling to accept the incalculable damage which might be done to our country by following such a course.

"Accordingly, it was my judgment that Government operation of the steel mills for a temporary period was the least undesirable of the courses of action which lay open. In the circumstances, I believed it to be, and now believe it to be, my duty and within my powers as President to follow that course of action.

"It may be that the Congress will deem some other course to be wiser. It may be that the Congress will feel we should give in to the demands of the steel industry for an exorbitant price increase and take the consequences so far as resulting inflation is concerned.

"It may be that the Congress will feel the Government should try to force the steel workers to continue to work for the steel companies for another long period, without a contract, even though the steel workers have already voluntarily remained at work without a contract for 100 days in an effort to reach an orderly settlement of their differences with management.

"It may even be that the Congress will feel that we should permit a shut-down of the steel industry, although that would immediately endanger the safety of our fighting forces abroad and weaken the whole structure of our national security.

"I do not believe the Congress will favor any of these courses of action, but that is a matter for the Congress to determine.

"It may be, on the other hand, that the Congress will wish to pass legislation establishing specific terms and conditions with reference to the operation of the steel mills by the Government. Sound legislation of this character might be very desirable.

"On the basis of the facts that are known to me at this time, I do not believe that immediate congressional action is essential; but I would, of course, be glad to cooperate in developing any legislative proposals which the Congress may wish to consider.

"If the Congress does not deem it necessary to act at this time, I shall continue to do all that is within my power to keep the steel industry operating and at the same time make every effort to bring about a settlement of the dispute so the mills can be returned to their private owners as soon as possible." [23]

Twelve days passed without action by Congress. On April 21, 1952, the President sent a letter to the President of the Senate in which he again described the purpose and need for his action and again stated his position that "The Congress can, if it wishes, reject the course of action I have followed in this matter." [24] Congress has not so acted to this date.

Meanwhile, plaintiffs instituted this action in the District Court to compel defendant to return possession of the steel mills seized under Executive Order 10340. In this litigation for return of plaintiffs' properties, we assume that defendant Charles Sawyer is not immune from judicial restraint and that plaintiffs are entitled to equitable relief if we find that the Executive Order

[23] Cong. Rec., April 9, 1952, pp. 3962–3963.

[24] Cong. Rec., April 21, 1952, p. 4192.

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under which defendant acts is unconstitutional. We also assume without deciding that the courts may go behind a President's finding of fact that an emergency exists. But there is not the slightest basis for suggesting that the President's finding in this case can be undermined. Plaintiffs moved for a preliminary injunction before answer or hearing. Defendant opposed the motion, filing uncontroverted affidavits of Government officials describing the facts underlying the President's order.

Secretary of Defense Lovett swore that "a work stoppage in the steel industry will result immediately in serious curtailment of production of essential weapons and munitions of all kinds." He illustrated by showing that 84% of the national production of certain alloy steel is currently used for production of military-end items and that 35% of total production of another form of steel goes into ammunition, 80% of such ammunition now going to Korea. The Secretary of Defense stated that: "We are holding the line [in Korea] with ammunition and not with the lives of our troops."

Affidavits of the Chairman of the Atomic Energy Commission, the Secretary of the Interior, defendant as Secretary of Commerce, and the Administrators of the Defense Production Administration, the National Production Authority, the General Services Administration and the Defense Transport Administration were also filed in the District Court. These affidavits disclose an enormous demand for steel in such vital defense programs as the expansion of facilities in atomic energy, petroleum, power, transportation and industrial production, including steel production. Those charged with administering allocations and priorities swore to the vital part steel production plays in our economy. The affidavits emphasize the critical need for steel in our defense program,

the absence of appreciable inventories of steel, and the drastic results of any interruption in steel production.

One is not here called upon even to consider the possibility of executive seizure of a farm, a corner grocery store or even a single industrial plant. Such considerations arise only when one ignores the central fact of this case—that the Nation's entire basic steel production would have shut down completely if there had been no Government seizure. Even ignoring for the moment whatever confidential information the President may possess as "the Nation's organ for foreign affairs," [25] the uncontroverted affidavits in this record amply support the finding that "a work stoppage would immediately jeopardize and imperil our national defense."

Plaintiffs do not remotely suggest any basis for rejecting the President's finding that *any* stoppage of steel production would immediately place the Nation in peril. Moreover, even self-generated doubts that *any* stoppage of steel production constitutes an emergency are of little comfort here. The Union and the plaintiffs bargained for 6 months with over 100 issues in dispute—issues not limited to wage demands but including the union shop and other matters of principle between the parties. At the time of seizure there was not, and there is not now, the slightest evidence to justify the belief that any strike will be of short duration. The Union and the steel companies may well engage in a lengthy struggle. Plaintiffs' counsel tells us that "sooner or later" the mills will operate again. That may satisfy the steel companies and, perhaps, the Union. But our soldiers and our allies will hardly be cheered with the assurance that the ammunition upon which their lives depend will be forthcoming—"sooner or later," or, in other words, "too little and too late."

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[25] *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948), and cases cited.

Accordingly, if the President has any power under the Constitution to meet a critical situation in the absence of express statutory authorization, there is no basis whatever for criticizing the exercise of such power in this case.

## II.

The steel mills were seized for a public use. The power of eminent domain, invoked in this case, is an essential attribute of sovereignty and has long been recognized as a power of the Federal Government. *Kohl* v. *United States,* 91 U. S. 367 (1876). Plaintiffs cannot complain that any provision in the Constitution prohibits the exercise of the power of eminent domain in this case. The Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." It is no bar to this seizure for, if the taking is not otherwise unlawful, plaintiffs are assured of receiving the required just compensation. *United States* v. *Pewee Coal Co.,* 341 U. S. 114 (1951).

Admitting that the Government could seize the mills, plaintiffs claim that the implied power of eminent domain can be exercised only under an Act of Congress; under no circumstances, they say, can that power be exercised by the President unless he can point to an express provision in enabling legislation. This was the view adopted by the District Judge when he granted the preliminary injunction. Without an answer, without hearing evidence, he determined the issue on the basis of his "fixed conclusion . . . that defendant's acts are illegal" because the President's only course in the face of an emergency is to present the matter to Congress and await the final passage of legislation which will enable the Government to cope with threatened disaster.

Under this view, the President is left powerless at the very moment when the need for action may be most pressing and when no one, other than he, is immediately

capable of action. Under this view, he is left powerless because a power not expressly given to Congress is nevertheless found to rest exclusively with Congress.

Consideration of this view of executive impotence calls for further examination of the nature of the separation of powers under our tripartite system of Government.

The Constitution provides:

Art. I,

Section 1. "All legislative Powers herein granted shall be vested in a Congress of the United States, . . . ."

Art. II,

Section 1. "The executive Power shall be vested in a President of the United States of America. . . ."

Section 2. "The President shall be Commander in Chief of the Army and Navy of the United States, . . . ."

"He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . . ."

Section 3. "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; . . . he shall take Care that the Laws be faithfully executed, . . . ."

Art. III,

Section 1. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

The whole of the "executive Power" is vested in the President. Before entering office, the President swears that he "will faithfully execute the Office of President of the

United States, and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States." Art. II, § 1.

This comprehensive grant of the executive power to a single person was bestowed soon after the country had thrown the yoke of monarchy. Only by instilling initiative and vigor in all of the three departments of Government, declared Madison, could tyranny in any form be avoided.[26] Hamilton added: "Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy." [27] It is thus apparent that the Presidency was deliberately fashioned as an office of power and independence. Of course, the Framers created no autocrat capable of arrogating any power unto himself at any time. But neither did they create an automaton impotent to exercise the powers of Government at a time when the survival of the Republic itself may be at stake.

In passing upon the grave constitutional question presented in this case, we must never forget, as Chief Justice Marshall admonished, that the Constitution is "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs," and that "[i]ts means are adequate to its ends." [28] Cases do arise presenting questions which could not have been foreseen by the Framers. In such cases, the Constitution has been treated as a living document adaptable to new situa-

[26] The Federalist, No. XLVIII.

[27] The Federalist, No. LXX.

[28] *McCulloch* v. *Maryland,* 4 Wheat. 316, 415, 424 (1819).

tions.[29] But we are not called upon today to expand the Constitution to meet a new situation. For, in this case, we need only look to history and time-honored principles of constitutional law—principles that have been applied consistently by all branches of the Government throughout our history. It is those who assert the invalidity of the Executive Order who seek to amend the Constitution in this case.

## III.

A review of executive action demonstrates that our Presidents have on many occasions exhibited the leadership contemplated by the Framers when they made the President Commander in Chief, and imposed upon him the trust to "take Care that the Laws be faithfully executed." With or without explicit statutory authorization, Presidents have at such times dealt with national emergencies by acting promptly and resolutely to enforce legislative programs, at least to save those programs until Congress could act. Congress and the courts have responded to such executive initiative with consistent approval.

Our first President displayed at once the leadership contemplated by the Framers. When the national revenue laws were openly flouted in some sections of Pennsylvania, President Washington, without waiting for a call from the state government, summoned the militia and took decisive steps to secure the faithful execution of the laws.[30] When international disputes engendered by the French revolution threatened to involve this country in war, and while congressional policy remained uncertain, Washington issued his Proclamation of Neutrality. Hamilton, whose defense of the Proclamation

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[29] *United States* v. *Classic*, 313 U. S. 299, 315–316 (1941); *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 442–443 (1934).

[30] 4 Annals of Congress 1411, 1413 (1794).

has endured the test of time, invoked the argument that the Executive has the duty to do that which will preserve peace until Congress acts and, in addition, pointed to the need for keeping the Nation informed of the requirements of existing laws and treaties as part of the faithful execution of the laws.[31]

President John Adams issued a warrant for the arrest of Jonathan Robbins in order to execute the extradition provisions of a treaty. This action was challenged in Congress on the ground that no specific statute prescribed the method to be used in executing the treaty. John Marshall, then a member of the House of Representatives, made the following argument in support of the President's action:

> "The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses." [32]

Efforts in Congress to discredit the President for his action failed.[33] Almost a century later, this Court had

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[31] IV Works of Hamilton (Lodge ed. 1904) 432–444.

[32] 10 Annals of Congress 596, 613–614 (1800); also printed in 5 Wheat., App. pp. 3, 27 (1820).

[33] 10 Annals of Congress 619 (1800).

occasion to give its express approval to "the masterly and conclusive argument of John Marshall." [34]

Jefferson's initiative in the Louisiana Purchase, the Monroe Doctrine, and Jackson's removal of Government deposits from the Bank of the United States further serve to demonstrate by deed what the Framers described by word when they vested the whole of the executive power in the President.

Without declaration of war, President Lincoln took energetic action with the outbreak of the War Between the States. He summoned troops and paid them out of the Treasury without appropriation therefor. He proclaimed a naval blockade of the Confederacy and seized ships violating that blockade. Congress, far from denying the validity of these acts, gave them express approval. The most striking action of President Lincoln was the Emancipation Proclamation, issued in aid of the successful prosecution of the War Between the States, but wholly without statutory authority.[35]

In an action furnishing a most apt precedent for this case, President Lincoln without statutory authority directed the seizure of rail and telegraph lines leading to Washington.[36] Many months later, Congress recognized and confirmed the power of the President to seize railroads and telegraph lines and provided criminal penalties for interference with Government operation.[37] This Act did not confer on the President any additional powers of seizure. Congress plainly rejected the view that the President's acts had been without legal sanction until

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[34] *Fong Yue Ting* v. *United States*, 149 U. S. 698, 714 (1893).

[35] See *Prize Cases*, 2 Black 635 (1863); Randall, Constitutional Problems Under Lincoln (1926); Corwin, The President: Office and Powers (1948 ed.), 277–281.

[36] War of the Rebellion, Official Records of the Union and Confederate Armies, Series I, Vol. II (1880), pp. 603–604.

[37] 12 Stat. 334 (1862).

ratified by the legislature. Sponsors of the bill declared that its purpose was only to confirm the power which the President already possessed.[38] Opponents insisted a statute authorizing seizure was unnecessary and might even be construed as limiting existing Presidential powers.[39]

Other seizures of private property occurred during the War Between the States, just as they had occurred during previous wars.[40] In *United States* v. *Russell*, 13 Wall. 623 (1872), three river steamers were seized by Army Quartermasters on the ground of "imperative military necessity." This Court affirmed an award of compensation, stating:

> "Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner.
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> . . . . . .
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> "Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right,

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[38] Senator Wade, Cong. Globe, 37th Cong., 2d Sess. 509 (1862); Rep. Blair, *id.*, at 548.

[39] Senators Browning, Fessenden, Cowan, Grimes, *id.*, at 510, 512, 516, 520.

[40] In 1818, the House Committee on Military Affairs recommended payment of compensation for vessels seized by the Army during the War of 1812. American State Papers, Claims (1834), 649. *Mitchell* v. *Harmony*, 13 How. 115, 134 (1852), involving seizure of a wagon train by an Army officer during the Mexican War, noted that such executive seizure was proper in case of emergency, but affirmed a personal judgment against the officer on the ground that no emergency had been found to exist. The judgment was paid by the United States pursuant to Act of Congress. 10 Stat. 727 (1852).

> and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner." [41]

In *In re Neagle,* 135 U. S. 1 (1890), this Court held that a federal officer had acted in line of duty when he was guarding a Justice of this Court riding circuit. It was conceded that there was no specific statute authorizing the President to assign such a guard. In holding that such a statute was not necessary, the Court broadly stated the question as follows:

> "[The President] is enabled to fulfil the duty of his great department, expressed in the phrase that 'he shall take care that the laws be faithfully executed.'
>
> "Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms,* or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?" [42]

The latter approach was emphatically adopted by the Court.

President Hayes authorized the wide-spread use of federal troops during the Railroad Strike of 1877.[43] President Cleveland also used the troops in the Pullman Strike

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[41] 13 Wall., at 627–628. Such a compensable taking was soon distinguished from the noncompensable taking and destruction of property during the extreme exigencies of a military campaign. *United States* v. *Pacific R. Co.,* 120 U. S. 227 (1887).

[42] 135 U. S., at 64.

[43] Rich, The Presidents and Civil Disorder (1941), 72–86.

of 1895 and his action is of special significance. No statute authorized this action. No call for help had issued from the Governor of Illinois; indeed Governor Altgeld disclaimed the need for supplemental forces. But the President's concern was that federal laws relating to the free flow of interstate commerce and the mails be continuously and faithfully executed without interruption.[44] To further this aim his agents sought and obtained the injunction upheld by this Court in *In re Debs*, 158 U. S. 564 (1895). The Court scrutinized each of the steps taken by the President to insure execution of the "mass of legislation" dealing with commerce and the mails and gave his conduct full approval. Congress likewise took note of this use of Presidential power to forestall apparent obstacles to the faithful execution of the laws. By separate resolutions, both the Senate and the House commended the Executive's action.[45]

President Theodore Roosevelt seriously contemplated seizure of Pennsylvania coal mines if a coal shortage necessitated such action.[46] In his autobiography, President Roosevelt expounded the "Stewardship Theory" of Presidential power, stating that "the executive as subject only to the people, and, under the Constitution, bound to serve the people affirmatively in cases where the Constitution does not explicitly forbid him to render the service." [47] Because the contemplated seizure of the coal mines was based on this theory, then ex-President Taft criticized President Roosevelt in a passage in his book relied upon by the District Court in this case. Taft, Our Chief Magistrate and His Powers (1916), 139–147. In the same book, however, President Taft agreed that

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[44] Cleveland, The Government in the Chicago Strike of 1894 (1913).

[45] 26 Cong. Rec. 7281–7284, 7544–7546 (1894).

[46] Theodore Roosevelt, Autobiography (1916 ed.), 479–491.

[47] *Id.*, at 378.

such powers of the President as the duty to "take Care that the Laws be faithfully executed" could not be confined to "express Congressional statutes." *Id.*, at 88. *In re Neagle, supra,* and *In re Debs, supra,* were cited as conforming with Taft's concept of the office, *id.*, at pp. 88–94, as they were later to be cited with approval in his opinion as Chief Justice in *Myers* v. *United States,* 272 U. S. 52, 133 (1926).[48]

In 1909, President Taft was informed that government-owned oil lands were being patented by private parties at such a rate that public oil lands would be depleted in a matter of months. Although Congress had explicitly provided that these lands were open to purchase by United States citizens, 29 Stat. 526 (1897), the President nevertheless ordered the lands withdrawn from sale "[i]n aid of proposed legislation." In *United States* v. *Midwest Oil Co.,* 236 U. S. 459 (1915), the President's action was sustained as consistent with executive practice throughout our history. An excellent brief was filed in the case by the Solicitor General, Mr. John W. Davis, together with Assistant Attorney General Knaebel, later Reporter for this Court. In this brief, the situation confronting President Taft was described as "an emergency; there was no time to wait for the action of Congress." The brief then discusses the powers of the President under the Constitution in such a case:

> "Ours is a self-sufficient Government within its sphere. (*Ex parte Siebold,* 100 U. S., 371, 395; *in re Debs,* 158 U. S., 564, 578.) 'Its means are adequate to its ends' (*McCulloch* v. *Maryland,* 4

[48] *Humphrey's Executor* v. *United States,* 295 U. S. 602, 626 (1935), disapproved expressions in the *Myers* opinion only to the extent that they related to the President's power to remove members of quasi-legislative and quasi-judicial commissions as contrasted with executive employees.

Wheat., 316, 424), and it is rational to assume that its active forces will be found equal in most things to the emergencies that confront it. While perfect flexibility is not to be expected in a Government of divided powers, and while division of power is one of the principal features of the Constitution, it is the plain duty of those who are called upon to draw the dividing lines to ascertain the essential, recognize the practical, and avoid a slavish formalism which can only serve to ossify the Government and reduce its efficiency without any compensating good. The function of making laws is peculiar to Congress, and the Executive can not exercise that function to any degree. But this is not to say that all of the *subjects* concerning which laws might be made are perforce removed from the possibility of Executive influence. The Executive may act upon things and upon men in many relations which have not, though they might have, been actually regulated by Congress. In other words, just as there are fields which are peculiar to Congress and fields which are peculiar to the Executive, so there are fields which are common to both, in the sense that the Executive may move within them until they shall have been occupied by legislative action. These are not the fields of legislative prerogative, but fields within which the lawmaking power may enter and dominate whenever it chooses. This situation results from the fact that the President is the active agent, not of Congress, but of the Nation. As such he performs the duties which the Constitution lays upon him immediately, and as such, also, he executes the laws and regulations adopted by Congress. He is the agent of the people of the United States, deriving all his powers from them and responsible directly to them. In no

sense is he the agent of Congress. He obeys and executes the laws of Congress, not because Congress is enthroned in authority over him, but because the Constitution directs him to do so.

"Therefore it follows that in ways short of making laws or disobeying them, the Executive may be under a grave constitutional duty to act for the national protection in situations not covered by the acts of Congress, and in which, even, it may not be said that his action is the direct expression of any particular one of the independent powers which are granted to him specifically by the Constitution. Instances wherein the President has felt and fulfilled such a duty have not been rare in our history, though, being for the public benefit and approved by all, his acts have seldom been challenged in the courts. We are able, however, to present a number of apposite cases which were subjected to judicial inquiry."

The brief then quotes from such cases as *In re Debs, supra,* and *In re Neagle, supra,* and continues:

"As we understand the doctrine of the *Neagle case,* and the cases therein cited, it is clearly this: The Executive is authorized to exert *the power of the United States* when he finds this necessary for the protection of the agencies, the instrumentalities, or the property of the Government. This does not mean an authority to disregard the wishes of Congress on the subject, when that subject lies within its control and when those wishes have been expressed, and it certainly does not involve the slightest semblance of a power to legislate, much less to 'suspend' legislation already passed by Congress. It involves the performance of specific acts, not of a

legislative but purely of an executive character—acts which are not in themselves laws, but which presuppose a 'law' authorizing him to perform them. This law is not expressed, either in the Constitution or in the enactments of Congress, but reason and necessity compel that it be implied from the exigencies of the situation.

"In none of the cases which we have mentioned, nor in the cases cited in the extracts taken from the *Neagle case,* was it possible to say that the action of the President was directed, expressly or impliedly, by Congress. The situations dealt with had never been covered by any act of Congress, and there was no ground whatever for a contention that the possibility of their occurrence had ever been specifically considered by the legislative mind. In none of those cases did the action of the President amount merely to the execution of some specific law.

"Neither does any of them stand apart in principle from the case at bar, as involving the exercise of specific constitutional powers of the President in a degree in which this case does not involve them. Taken collectively, the provisions of the Constitution which designate the President as the official who must represent us in foreign relations, in commanding the Army and Navy, in keeping Congress informed of the state of the Union, in insuring the faithful execution of the laws and in recommending new ones, considered in connection with the sweeping declaration that the executive power shall be vested in him, completely demonstrate that his is the watchful eye, the active hand, the overseeing dynamic force of the United States." [49]

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[49] Brief for the United States, No. 278, October Term, 1914, pp. 11, 75–77, 88–90.

This brief is valuable not alone because of the caliber of its authors but because it lays bare in succinct reasoning the basis of the executive practice which this Court approved in the *Midwest Oil* case.

During World War I, President Wilson established a War Labor Board without awaiting specific direction by Congress.[50] With William Howard Taft and Frank P. Walsh as co-chairmen, the Board had as its purpose the prevention of strikes and lockouts interfering with the production of goods needed to meet the emergency. Effectiveness of War Labor Board decision was accomplished by Presidential action, including seizure of industrial plants.[51] Seizure of the Nation's railroads was also ordered by President Wilson.[52]

Beginning with the Bank Holiday Proclamation [53] and continuing through World War II, executive leadership and initiative were characteristic of President Franklin D. Roosevelt's administration. In 1939, upon the outbreak

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[50] National War Labor Board. Bureau of Labor Statistics, Bull. 287 (1921).

[51] *Id.*, at 24–25, 32–34. See also, 2 Official U. S. Bull. (1918), No. 412; 8 Baker, Woodrow Wilson, Life & Letters (1939), 400–402; Berman, Labor Disputes and the President (1924), 125–153; Pringle, The Life and Times of William Howard Taft (1939), 915–925.

[52] 39 Stat. 619, 645 (1916), provides that the President may take possession of any system of transportation in time of war. Following seizure of the railroads by President Wilson, Congress enacted detailed legislation regulating the mode of federal control. 40 Stat. 451 (1918).

When Congress was considering the statute authorizing the President to seize communications systems whenever he deemed such action necessary during the war, 40 Stat. 904 (1918), Senator (later President) Harding opposed on the ground that there was no need for such stand-by powers because, in event of a present necessity, the Chief Executive "ought to" seize communications lines, "else he would be unfaithful to his duties as such Chief Executive." 56 Cong. Rec. 9064 (1918).

[53] 48 Stat. 1689 (1933).

of war in Europe, the President proclaimed a limited national emergency for the purpose of strengthening our national defense.[54] In May of 1941, the danger from the Axis belligerents having become clear, the President proclaimed "an unlimited national emergency" calling for mobilization of the Nation's defenses to repel aggression.[55] The President took the initiative in strengthening our defenses by acquiring rights from the British Government to establish air bases in exchange for overage destroyers.[56]

In 1941, President Roosevelt acted to protect Iceland from attack by Axis powers, when British forces were withdrawn, by sending our forces to occupy Iceland. Congress was informed of this action on the same day that our forces reached Iceland.[57] The occupation of Iceland was but one of "at least 125 incidents" in our history in which Presidents, "without congressional authorization, and in the absence of a declaration of war, [have] ordered the Armed Forces to take action or maintain positions abroad." [58]

Some six months before Pearl Harbor, a dispute at a single aviation plant at Inglewood, California, interrupted a segment of the production of military aircraft. In spite of the comparative insignificance of this work stoppage to total defense production as contrasted with the complete paralysis now theatened by a shutdown of the entire basic steel industry, and even though

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[54] 54 Stat. 2643 (1939).

[55] 55 Stat. 1647 (1941).

[56] 86 Cong. Rec. 11354 (1940) (Message of the President). See 39 Op. Atty. Gen. 484 (1940). Attorney General Jackson's opinion did not extend to the transfer of "mosquito boats," solely because an express statutory prohibition on transfer was applicable.

[57] 87 Cong. Rec. 5868 (1941) (Message of the President).

[58] Powers of the President to Send the Armed Forces Outside the United States, Report prepared by executive department for use of joint committee of Senate Committees on Foreign Relations and Armed Services, 82d Cong., 1st Sess., Committee Print, 2 (1951).

our armed forces were not then engaged in combat, President Roosevelt ordered the seizure of the plant "pursuant to the powers vested in [him] by the Constitution and laws of the United States, as President of the United States of America and Commander in Chief of the Army and Navy of the United States." [59] The Attorney General (Jackson) vigorously proclaimed that the President had the moral duty to keep this Nation's defense effort a "going concern." His ringing moral justification was coupled with a legal justification equally well stated:

> "The Presidential proclamation rests upon the aggregate of the Presidential powers derived from the Constitution itself and from statutes enacted by the Congress.
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> "The Constitution lays upon the President the duty 'to take care that the laws be faithfully executed.' Among the laws which he is required to find means to execute are those which direct him to equip an enlarged army, to provide for a strengthened navy, to protect Government property, to protect those who are engaged in carrying out the business of the Government, and to carry out the provisions of the Lend-Lease Act. For the faithful execution of such laws the President has back of him not only each general law-enforcement power conferred by the various acts of Congress but the aggregate of all such laws plus that wide discretion as to method vested in him by the Constitution for the purpose of executing the laws.
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> "The Constitution also places on the President the responsibility and vests in him the powers of Commander in Chief of the Army and of the Navy. These weapons for the protection of the continued existence of the Nation are placed in his sole com-

[59] Exec. Order 8773, 6 Fed. Reg. 2777 (1941).

> mand and the implication is clear that he should not allow them to become paralyzed by failure to obtain supplies for which Congress has appropriated the money and which it has directed the President to obtain." [60]

At this time, Senator Connally proposed amending the Selective Training and Service Act to authorize the President to seize any plant where an interruption of production would unduly impede the defense effort.[61] Proponents of the measure in no way implied that the legislation would add to the powers already possessed by the President [62] and the amendment was opposed as unnecessary since the President already had the power.[63] The amendment relating to plant seizures was not approved at that session of Congress.[64]

Meanwhile, and also prior to Pearl Harbor, the President ordered the seizure of a shipbuilding company and an aircraft parts plant.[65] Following the declaration of war, but prior to the Smith-Connally Act of 1943, five additional industrial concerns were seized to avert inter-

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[60] See 89 Cong. Rec. 3992 (1943). The Attorney General also noted that the dispute at North American Aviation was Communist inspired and more nearly resembled an insurrection than a labor strike. The relative size of North American Aviation and the impact of an interruption in production upon our defense effort were not described.

[61] 87 Cong. Rec. 4932 (1941). See also S. 1600 and S. 2054, 77th Cong., 1st Sess. (1941).

[62] Reps. May, Whittington; 87 Cong. Rec. 5895, 5972 (1941).

[63] Reps. Dworshak, Feddis, Harter, Dirksen, Hook; 87 Cong. Rec. 5901, 5910, 5974, 5975 (1941).

[64] The plant seizure amendment passed the Senate, but was rejected in the House after a Conference Committee adopted the amendment. 87 Cong. Rec. 6424 (1941).

[65] Exec. Order 8868, 6 Fed. Reg. 4349 (1941); Exec. Order 8928, 6 Fed. Reg. 5559 (1941).

ruption of needed production.[66] During the same period, the President directed seizure of the Nation's coal mines to remove an obstruction to the effective prosecution of the war.[67]

The procedures adopted by President Roosevelt closely resembled the methods employed by President Wilson. A National War Labor Board, like its predecessor of World War I, was created by Executive Order to deal effectively and fairly with disputes affecting defense production.[68] Seizures were considered necessary, upon disobedience of War Labor Board orders, to assure that the mobilization effort remained a "going concern," and to enforce the economic stabilization program.

At the time of the seizure of the coal mines, Senator Connally's bill to provide a statutory basis for seizures and for the War Labor Board was again before Congress. As stated by its sponsor, the purpose of the bill was not to augment Presidential power, but to "let the country know that the Congress is squarely behind the President." [69] As in the case of the legislative recognition of President Lincoln's power to seize, Congress again recognized that the President already had the necessary power, for there was no intention to "ratify" past actions of doubtful validity. Indeed, when Senator Tydings offered an amendment to the Connally bill expressly to confirm and validate the seizure of the coal mines, sponsors of the bill

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[66] Exec. Order 9141, 7 Fed. Reg. 2961 (1942); Exec. Order 9220, 7 Fed. Reg. 6413 (1942); Exec. Order 9225, 7 Fed. Reg. 6627 (1942); Exec. Order 9254, 7 Fed. Reg. 8333 (1942); Exec. Order 9351, 8 Fed. Reg. 8097 (1943).

[67] Exec. Order 9340, 8 Fed. Reg. 5695 (1943).

[68] Exec. Order 9017, 7 Fed. Reg. 237 (1942); 1 Termination Report of the National War Labor Board 5–11.

[69] 89 Cong. Rec. 3807 (1943). Similar views of the President's existing power were expressed by Senators Lucas, Wheeler, Austin and Barkley. *Id.*, at 3885–3887, 3896, 3992.

opposed the amendment as casting doubt on the legality of the seizure and the amendment was defeated.[70] When the Connally bill, S. 796, came before the House, all parts after the enacting clause were stricken and a bill introduced by Representative Smith of Virginia was substituted and passed. This action in the House is significant because the Smith bill did not contain the provisions authorizing seizure by the President but did contain provisions controlling and regulating activities in respect to properties seized by the Government under statute "or otherwise."[71] After a conference, the seizure provisions of the Connally bill, enacted as the Smith-Connally or War Labor Disputes Act of 1943, 57 Stat. 163, were agreed to by the House.

Following passage of the Smith-Connally Act, seizures to assure continued production on the basis of terms recommended by the War Labor Board were based upon that Act as well as upon the President's power under the Constitution and the laws generally. A question did arise as to whether the statutory language relating to "any plant, mine, or facility equipped for the manufacture, production, or mining of any articles or materials"[72] authorized the seizure of properties of Montgomery Ward & Co., a retail department store and mail-order concern. The Attorney General (Biddle) issued an opinion that the President possessed the power to seize Montgomery Ward properties to prevent a work stoppage whether or not the terms of the Smith-Connally Act authorized such a seizure.[73] This opinion was in line with

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[70] 89 Cong. Rec. 3989–3992 (1943).

[71] S. 796, 78th Cong., 1st Sess., §§ 12, 13 (1943), as passed by the House.

[72] 57 Stat. 163, 164 (1943).

[73] 40 Op. Atty. Gen. 312 (1944). See also Hearings before House Select Committee to Investigate Seizure of Montgomery Ward & Co., 78th Cong., 2d Sess. 117–132 (1944).

the views on Presidential powers maintained by the Attorney General's predecessors (Murphy [74] and Jackson [75]) and his successor (Clark [76]). Accordingly, the President ordered seizure of the Chicago properties of Montgomery Ward in April, 1944, when that company refused to obey a War Labor Board order concerning the bargaining representative of its employees in Chicago.[77] In Congress, a Select Committee to Investigate Seizure of the Property of Montgomery Ward & Co., assuming that the terms of the Smith-Connally Act did not cover this seizure, concluded that the seizure "was not only within the constitutional power but was the plain duty of the President." [78] Thereafter, an election determined the bargaining representative for the Chicago employees and the properties were returned to Montgomery Ward & Co. In December, 1944, after continued defiance of a series of War Labor Board orders, President Roosevelt ordered the seizure of Montgomery Ward properties throughout the country.[79] The Court of Appeals for the Seventh Circuit upheld this seizure on statutory grounds and also indicated its disapproval of a lower court's denial of seizure power apart from express statute.[80]

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[74] 39 Op. Atty. Gen. 343, 347 (1939).

[75] Note 60, *supra.*

[76] Letter introduced in Hearings before Senate Committee on Labor and Public Welfare on S. 249, 81st Cong., 1st Sess. 232 (1949) pointing to the "exceedingly great" powers of the President to deal with emergencies even before the Korean crisis.

[77] Exec. Order 9438, 9 Fed. Reg. 4459 (1944).

[78] H. R. Rep. No. 1904, 78th Cong., 2d Sess. 25 (1944) (the Committee divided along party lines).

[79] Exec. Order 9508, 9 Fed. Reg. 15079 (1944).

[80] *United States* v. *Montgomery Ward & Co.*, 150 F. 2d 369 (C. A. 7th Cir. 1945), reversing 58 F. Supp. 408 (N. D. Ill. 1945). See also *Ken-Rad Tube & Lamp Corp.* v. *Badeau,* 55 F. Supp. 193, 197–199 (W. D. Ky. 1944), where the court held that a seizure was proper with or without express statutory authorization.

More recently, President Truman acted to repel aggression by employing our armed forces in Korea.[81] Upon the intervention of the Chinese Communists, the President proclaimed the existence of an unlimited national emergency requiring the speedy build-up of our defense establishment.[82] Congress responded by providing for increased manpower and weapons for our own armed forces, by increasing military aid under the Mutual Security Program and by enacting economic stabilization measures, as previously described.

This is but a cursory summary of executive leadership. But it amply demonstrates that Presidents have taken prompt action to enforce the laws and protect the country whether or not Congress happened to provide in advance for the particular method of execution. At the minimum, the executive actions reviewed herein sustain the action of the President in this case. And many of the cited examples of Presidential practice go far beyond the extent of power necessary to sustain the President's order to seize the steel mills. The fact that temporary executive seizures of industrial plants to meet an emergency have not been directly tested in this Court furnishes not the slightest suggestion that such actions have been illegal. Rather, the fact that Congress and the courts have consistently recognized and given their support to such executive action indicates that such a power of seizure has been accepted throughout our history.

History bears out the genius of the Founding Fathers, who created a Government subject to law but not left subject to inertia when vigor and initiative are required.

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[81] United States Policy in the Korean Crisis (1950), Dept. of State Pub. 3922.

[82] 15 Fed. Reg. 9029 (1950).

## IV.

Focusing now on the situation confronting the President on the night of April 8, 1952, we cannot but conclude that the President was performing his duty under the Constitution to "take Care that the Laws be faithfully executed"—a duty described by President Benjamin Harrison as "the central idea of the office." [83]

The President reported to Congress the morning after the seizure that he acted because a work stoppage in steel production would immediately imperil the safety of the Nation by preventing execution of the legislative programs for procurement of military equipment. And, while a shutdown could be averted by granting the price concessions requested by plaintiffs, granting such concessions would disrupt the price stabilization program also enacted by Congress. Rather than fail to execute either legislative program, the President acted to execute both.

Much of the argument in this case has been directed at straw men. We do not now have before us the case of a President acting solely on the basis of his own notions of the public welfare. Nor is there any question of unlimited executive power in this case. The President himself closed the door to any such claim when he sent his Message to Congress stating his purpose to abide by any action of Congress, whether approving or disapproving his seizure action. Here, the President immediately made sure that Congress was fully informed of the temporary action he had taken only to preserve the legislative programs from destruction until Congress could act.

The absence of a specific statute authorizing seizure of the steel mills as a mode of executing the laws—both the military procurement program and the anti-inflation program—has not until today been thought to prevent

[83] Harrison, This Country of Ours (1897), 98.

the President from executing the laws. Unlike an administrative commission confined to the enforcement of the statute under which it was created, or the head of a department when administering a particular statute, the President is a constitutional officer charged with taking care that a "mass of legislation" be executed. Flexibility as to mode of execution to meet critical situations is a matter of practical necessity. This practical construction of the "Take Care" clause, advocated by John Marshall, was adopted by this Court in *In re Neagle, In re Debs* and other cases cited *supra.* See also *Ex parte Quirin,* 317 U. S. 1, 26 (1942). Although more restrictive views of executive power, advocated in dissenting opinions of Justices Holmes, McReynolds and Brandeis, were emphatically rejected by this Court in *Myers* v. *United States, supra,* members of today's majority treat these dissenting views as authoritative.

There is no statute prohibiting seizure as a method of enforcing legislative programs. Congress has in no wise indicated that its legislation is not to be executed by the taking of private property (subject of course to the payment of just compensation) if its legislation cannot otherwise be executed. Indeed, the Universal Military Training and Service Act authorizes the seizure of *any* plant that fails to fill a Government contract [84] or the properties of *any* steel producer that fails to allocate steel as directed for defense production.[85] And the Defense Production Act authorizes the President to requisition equipment and condemn real property needed without delay in the defense effort.[86] Where Congress authorizes seizure in instances not necessarily crucial to the defense

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[84] 62 Stat. 604, 626 (1948), 50 U. S. C. App. (Supp. IV) § 468 (c).

[85] 62 Stat. 604, 627 (1948), 50 U. S. C. App. (Supp. IV) § 468 (h) (1).

[86] Tit. II, 64 Stat. 798, 799 (1950), as amended, 65 Stat. 138 (1951).

program, it can hardly be said to have disclosed an intention to prohibit seizures where essential to the execution of that legislative program.

Whatever the extent of Presidential power on more tranquil occasions, and whatever the right of the President to execute legislative programs as he sees fit without reporting the mode of execution to Congress, the single Presidential purpose disclosed on this record is to faithfully execute the laws by acting in an emergency to maintain the status quo, thereby preventing collapse of the legislative programs until Congress could act. The President's action served the same purposes as a judicial stay entered to maintain the status quo in order to preserve the jurisdiction of a court. In his Message to Congress immediately following the seizure, the President explained the necessity of his action in executing the military procurement and anti-inflation legislative programs and expressed his desire to cooperate with any legislative proposals approving, regulating or rejecting the seizure of the steel mills. Consequently, there is no evidence whatever of any Presidential purpose to defy Congress or act in any way inconsistent with the legislative will.

In *United States* v. *Midwest Oil Co., supra,* this Court approved executive action where, as here, the President acted to preserve an important matter until Congress could act—even though his action in that case was contrary to an express statute. In this case, there is no statute prohibiting the action taken by the President in a matter not merely important but threatening the very safety of the Nation. Executive inaction in such a situation, courting national disaster, is foreign to the concept of energy and initiative in the Executive as created by the Founding Fathers. The Constitution was itself "adopted in a period of grave emergency. . . . While emergency does not create power, emergency may furnish

the occasion for the exercise of power." [87] The Framers knew, as we should know in these times of peril, that there is real danger in Executive weakness. There is no cause to fear Executive tyranny so long as the laws of Congress are being faithfully executed. Certainly there is no basis for fear of dictatorship when the Executive acts, as he did in this case, only to save the situation until Congress could act.

V.

Plaintiffs place their primary emphasis on the Labor Management Relations Act of 1947, hereinafter referred to as the Taft-Hartley Act, but do not contend that that Act contains any provision prohibiting seizure.

Under the Taft-Hartley Act, as under the Wagner Act, collective bargaining and the right to strike are at the heart of our national labor policy. Taft-Hartley preserves the right to strike in any emergency, however serious, subject only to an 80-day delay in cases of strikes imperiling the national health and safety.[88] In such a case, the President *may* appoint a board of inquiry to report the facts of the labor dispute. Upon receiving that report, the President *may* direct the Attorney General to petition a District Court to enjoin the strike. If the injunction is granted, it may continue in effect for no more than 80 days, during which time the board of inquiry makes further report and efforts are made to settle the dispute. When the injunction is dissolved, the President is directed to submit a report to Congress together with his recommendations.[89]

Enacted after World War II, Taft-Hartley restricts the right to strike against private employers only to a lim-

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[87] *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 425–426 (1934).

[88] See *Bus Employees* v. *Wisconsin Board,* 340 U. S. 383 (1951).

[89] §§ 206–210, Labor Management Relations Act of 1947. 29 U. S. C. (Supp. IV) §§ 176–180.

ited extent and for the sole purpose of affording an additional period of time within which to settle the dispute. Taft-Hartley in no way curbs strikes before an injunction can be obtained and after an 80-day injunction is dissolved.

Plaintiffs admit that the emergency procedures of Taft-Hartley are not mandatory. Nevertheless, plaintiffs apparently argue that, since Congress did provide the 80-day injunction method for dealing with emergency strikes, the President cannot claim that an emergency exists until the procedures of Taft-Hartley have been exhausted. This argument was not the basis of the District Court's opinion and, whatever merit the argument might have had following the enactment of Taft-Hartley, it loses all force when viewed in light of the statutory pattern confronting the President in this case.

In Title V of the Defense Production Act of 1950,[90] Congress stated:

> "It is the intent of Congress, in order to provide for effective price and wage stabilization pursuant to title IV of this Act and to maintain uninterrupted production, that there be effective procedures for the settlement of labor disputes affecting national defense." ( § 501.)

Title V authorized the President to initiate labor-management conferences and to take action appropriate to carrying out the recommendations of such conferences and the provisions of Title V. (§ 502.) Due regard is to be given to collective bargaining practice and stabilization policies and no action taken is to be inconsistent with Taft-Hartley and other laws. (§ 503.) The purpose of these provisions was to authorize the President "to establish a board, commission or other agency, sim-

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[90] 64 Stat. 812, 65 Stat. 132 (1950).

ilar to the War Labor Board of World War II, to carry out the title." [91]

The President authorized the Wage Stabilization Board (WSB), which administers the wage stabilization functions of Title IV of the Defense Production Act, also to deal with labor disputes affecting the defense program.[92] When extension of the Defense Production Act was before Congress in 1951, the Chairman of the Wage Stabilization Board described in detail the relationship between the Taft-Hartley procedures applicable to labor disputes imperiling the national health and safety and the new WSB disputes procedures especially devised for settlement of labor disputes growing out of the needs of the defense program.[93] Aware that a technique separate from Taft-Hartley had been devised, members of Congress attempted to divest the WSB of its disputes powers. These attempts were defeated in the House, were not brought to a vote in the Senate, and the Defense Production Act was extended through June 30, 1952, without change in the disputes powers of the WSB.[94]

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[91] H. R. Rep. No. 3042, 81st Cong., 2d Sess. 35 (1950) (Conference Report). See also S. Rep. No. 2250, 81st Cong., 2d Sess. 41 (1950).

[92] Exec. Order 10161, 15 Fed. Reg. 6105 (1950), as amended, Exec. Order 10233, 16 Fed. Reg. 3503 (1951).

[93] Hearings before the House Committee on Banking and Currency on Defense Production Act Amendments of 1951, 82d Cong., 1st Sess. 305–306, 312–313 (1951).

[94] The Lucas Amendment to abolish the disputes function of the WSB was debated at length in the House, the sponsor of the amendment pointing out the similarity of the WSB functions to those of the War Labor Board and noting the seizures that occurred when War Labor Board orders were not obeyed. 97 Cong. Rec. 8390–8415. The amendment was rejected by a vote of 217 to 113. *Id.*, at 8415. A similar amendment introduced in the Senate was withdrawn. 97 Cong. Rec. 7373–7374. The Defense Production Act was extended without amending Tit. V or otherwise affecting the disputes functions of the WSB. 65 Stat. 132 (1951).

Certainly this legislative creation of a new procedure for dealing with defense disputes negatives any notion that Congress intended the earlier and discretionary Taft-Hartley procedure to be an exclusive procedure.

Accordingly, as of December 22, 1951, the President had a choice between alternate procedures for settling the threatened strike in the steel mills: one route created to deal with peacetime disputes; the other route specially created to deal with disputes growing out of the defense and stabilization program. There is no question of by-passing a statutory procedure because both of the routes available to the President in December were based upon statutory authorization. Both routes were available in the steel dispute. The Union, by refusing to abide by the defense and stabilization program, could have forced the President to invoke Taft-Hartley at that time to delay the strike a maximum of 80 days. Instead, the Union agreed to cooperate with the defense program and submit the dispute to the Wage Stabilization Board.

Plaintiffs had no objection whatever at that time to the President's choice of the WSB route. As a result, the strike was postponed, a WSB panel held hearings and reported the position of the parties and the WSB recommended the terms of a settlement which it found were fair and equitable. Moreover, the WSB performed a function which the board of inquiry contemplated by Taft-Hartley could not have accomplished when it checked the recommended wage settlement against its own wage stabilization regulations issued pursuant to its stabilization functions under Title IV of the Defense Production Act. Thereafter, the parties bargained on the basis of the WSB recommendation.

When the President acted on April 8, he had exhausted the procedures for settlement available to him. Taft-Hartley was a route parallel to, not connected with, the WSB procedure. The strike had been delayed 99

days as contrasted with the maximum delay of 80 days under Taft-Hartley. There had been a hearing on the issues in dispute and bargaining which promised settlement up to the very hour before seizure had broken down. Faced with immediate national peril through stoppage in steel production on the one hand and faced with destruction of the wage and price legislative programs on the other, the President took temporary possession of the steel mills as the only course open to him consistent with his duty to take care that the laws be faithfully executed.

Plaintiffs' property was taken and placed in the possession of the Secretary of Commerce to prevent any interruption in steel production. It made no difference whether the stoppage was caused by a union-management dispute over terms and conditions of employment, a union-Government dispute over wage stabilization or a management-Government dispute over price stabilization. The President's action has thus far been effective, not in settling the dispute, but in saving the various legislative programs at stake from destruction until Congress could act in the matter.

## VI.

The diversity of views expressed in the six opinions of the majority, the lack of reference to authoritative precedent, the repeated reliance upon prior dissenting opinions, the complete disregard of the uncontroverted facts showing the gravity of the emergency and the temporary nature of the taking all serve to demonstrate how far afield one must go to affirm the order of the District Court.

The broad executive power granted by Article II to an officer on duty 365 days a year cannot, it is said, be invoked to avert disaster. Instead, the President must confine himself to sending a message to Congress recommending action. Under this messenger-boy concept of

the Office, the President cannot even act to preserve legislative programs from destruction so that Congress will have something left to act upon. There is no judicial finding that the executive action was unwarranted because there was in fact no basis for the President's finding of the existence of an emergency [95] for, under this view, the gravity of the emergency and the immediacy of the threatened disaster are considered irrelevant as a matter of law.

Seizure of plaintiffs' property is not a pleasant undertaking. Similarly unpleasant to a free country are the draft which disrupts the home and military procurement which causes economic dislocation and compels adoption of price controls, wage stabilization and allocation of materials. The President informed Congress that even a temporary Government operation of plaintiffs' properties was "thoroughly distasteful" to him, but was necessary to prevent immediate paralysis of the mobilization program. Presidents have been in the past, and any man worthy of the Office should be in the future, free to take at least interim action necessary to execute legislative programs essential to survival of the Nation. A sturdy judiciary should not be swayed by the unpleasantness or unpopularity of necessary executive action, but must independently determine for itself whether the President was acting, as required by the Constitution, to "take Care that the Laws be faithfully executed."

As the District Judge stated, this is no time for "timorous" judicial action. But neither is this a time for timorous executive action. Faced with the duty of executing the defense programs which Congress had enacted and the disastrous effects that any stoppage in steel production would have on those programs, the President acted to preserve those programs by seizing the steel mills.

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[95] Compare *Sterling* v. *Constantin,* 287 U. S. 378, 399–401 (1932).

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There is no question that the possession was other than temporary in character and subject to congressional direction—either approving, disapproving or regulating the manner in which the mills were to be administered and returned to the owners. The President immediately informed Congress of his action and clearly stated his intention to abide by the legislative will. No basis for claims of arbitrary action, unlimited powers or dictatorial usurpation of congressional power appears from the facts of this case. On the contrary, judicial, legislative and executive precedents throughout our history demonstrate that in this case the President acted in full conformity with his duties under the Constitution. Accordingly, we would reverse the order of the District Court.

# ROBERTSON *v.* UNITED STATES.

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

No. 388. Argued March 31, 1952.—Decided June 2, 1952.

1. A cash prize received by the winner of a contest in musical composition is "gross income" within the meaning of § 22 (a) of the Internal Revenue Code, and it is not a "gift" excluded from gross income by § 22 (b) (3). Pp. 713–714.
2. In computing under § 107 (b) the tax on such a cash prize for a musical composition, the income should be attributed to the 36 months ending with the close of the year in which it was received—not some earlier period of 36 months during which the taxpayer worked on the composition. Pp. 714–716.

190 F. 2d 680, affirmed.

The District Court held that a cash prize received by the winner of a contest in musical composition was a gift exempted from taxation by § 22 (b)(3) of the Internal Revenue Code. 93 F. Supp. 660. The Court of Appeals reversed. 190 F. 2d 680. This Court granted certiorari. 342 U. S. 896. *Affirmed,* p. 716.

*Samuel E. Blackham* argued the cause for petitioner. With him on the brief was *Clyde D. Sandgren.*

*Marvin E. Frankel* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *Harry Baum.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner is a musician and composer who between the years 1936 and 1939 composed a symphony. In 1945 Henry H. Reichhold, a philanthropist, established a music award offering $25,000, $5,000, and $2,500 for the three

best symphonic works written by native-born composers of this hemisphere. The terms of the offer provided that none of the compositions could be published or publicly performed prior to entry in the contest and that each composition receiving an award would remain the property of the composer except that he would grant the Detroit Orchestra, Inc., (1) all synchronization rights as applied to motion pictures, (2) all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls, and (3) the exclusive right to authorize the first performance of the composition in each of the countries whose citizens were eligible to enter the contest and to designate the publisher of the composition.

Petitioner submitted his symphony and on December 14, 1947, won the $25,000 award. He included that amount in his 1947 income tax return as gross income, claimed the benefits of § 107 (b) of the Internal Revenue Code[1] (26 U. S. C. (1946 ed.) § 107 (b), 53 Stat. 878, as amended), and computed the tax as though the $25,000

[1] Section 107 (b) provides: "For the purposes of this subsection, the term 'artistic work or invention', in the case of an individual, means a literary, musical, or artistic composition of such individual or a patent or copyright covering an invention of or a literary, musical, or artistic composition of such individual, the work on which by such individual covered a period of thirty-six calendar months or more from the beginning to the completion of such composition or invention. If, in the taxable year, the gross income of any individual from a particular artistic work or invention by him is not less than 80 per centum of the gross income in respect of such artistic work or invention in the taxable year plus the gross income therefrom in previous taxable years and the twelve months immediately succeeding the close of the taxable year, the tax attributable to the part of such gross income of the taxable year which is not taxable as a gain from the sale or exchange of a capital asset held for more than 6 months shall not be greater than the aggregate of the taxes attributable to such part had it been received ratably over that part of the period preceding the close of the taxable year but not more than thirty-six calendar months."

had been received ratably during the years 1937, 1938, and 1939. Thereafter he filed a claim for refund on the ground that the award constituted a nontaxable gift.[2] The Commissioner did not allow the claim but determined a deficiency on the ground that the tax should have been computed under § 107 (b) as though the award had been ratably received over the three-year period ending with 1947. Petitioner paid the deficiency, filed a supplemental claim for refund, and brought this suit to obtain it. The District Court held that the award was a gift and not taxable by reason of § 22 (b)(3) of the Internal Revenue Code. The Court of Appeals reversed. 190 F. 2d 680. The case is here on certiorari, 342 U. S. 896, because of the conflict between that decision and *McDermott* v. *Commissioner,* 80 U. S. App. D. C. 176, 150 F. 2d 585, decided by the Court of Appeals for the District of Columbia. And see *Williams* v. *United States,* 114 Ct. Cl. 1, 84 F. Supp. 362.

I.

In the legal sense payment of a prize to a winner of a contest is the discharge of a contractual obligation. The acceptance by the contestants of the offer tendered by the sponsor of the contest creates an enforceable contract. See 6 Corbin on Contracts, § 1489; Restatement, Contracts, § 521. The discharge of legal obligations—the payment for services rendered or consideration paid pursuant to a contract—is in no sense a gift. The case would be different if an award were made in recognition of past achievements or present abilities, or if payment were given not for services (see *Old Colony Trust Co.* v. *Com-*

[2] Section 22 (b) (3) of the Internal Revenue Code provides:

"The following items shall not be included in gross income and shall be exempt from taxation under this chapter: . . .

"The value of property acquired by gift, bequest, devise, or inheritance . . . ."

*missioner,* 279 U. S. 716, 730), but out of affection, respect, admiration, charity or like impulses. Where the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it.

II.

Section 107 (b) [3] defines "artistic work" as the "musical" or "artistic composition" of an individual, "the work on which . . . covered a period of thirty-six calendar months or more from the beginning to the completion" of the composition. In case the gross income from a particular artistic work in the taxable year is not less than a particular percentage (not material here), the tax attributable to the income of the taxable year may be computed as though it had "been received ratably over that part of the period preceding the close of the taxable year but not more than thirty-six calendar months." The question is whether the amount of the prize should be taxed ratably over the 36 months ending with the close of 1947 (the taxable year in which it was received) or over the last 36 months of the period (1937 to 1939) when petitioner wrote the symphony.

The phrase in question, as it originated (H. R. 7378, 77th Cong., 2d Sess., § 128), read "ratably over the period of thirty-six calendar months ending with the close of the taxable year." In that form the present tax would have been computed as the Commissioner contended, *viz.* the tax would be laid over a period of 36 months extending back from the close of the taxable year. The change in wording does not seem to us to have made a change in meaning. The present words "ratably over that part of the period preceding the close of the taxable year but not more than thirty-six calendar months" would on their face seem to refer to a period ending with the close of

[3] See note 1, *supra.*

the taxable year and extending back a maximum of 36 months. That wording was adopted in order to treat the income as though it had "been received ratably over (1) the part of the period of the work which preceded the close of the taxable year, or (2) a period of 36 calendar months, whichever of such periods is the shorter." See S. Rep. No. 1631, 77th Cong., 2d Sess., p. 109. The House Conferees, in agreeing to the change, stated that it "clarifies the language of the House bill." H. R. Conf. Rep. No. 2586, 77th Cong., 2d Sess., p. 43. That history strongly suggests that the purpose was not to change the allowable period of allocation from one ending with the close of the taxable year to one covering any 36 months in the past when the work was done, but to prevent tax reduction by proration of income over a period of work greater than the duration of the work preceding the close of the taxable year. That is the construction given by Treasury Regulations 111, § 29.107–2; [4] and while much more could

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[4] Section 29.107–2 provides in part:

"The method of allocating the gross income from the artistic work or invention to the taxable years in which falls any of the calendar months (not exceeding 36 calendar months) included within the part of the period of work which precedes the close of the current taxable year may be illustrated by the following examples:

"*Example* (*1*). On October 1, 1942, A, an individual, who makes his returns on a calendar year basis and on the basis of cash receipts and disbursements, receives $36,000 in full payment for a musical composition, the work on which was commenced by A on July 10, 1938, and completed on January 29, 1943. Although the period of work covers 55 calendar months, allocations may be made to only the last 36 calendar months included within the part of the period of work which precedes the close of 1942 (the current taxable year). Therefore, $1,000 ($36,000 divided by 36) must be allocated to each of the 36 calendar months preceding January 1, 1943. Accordingly, $12,000 is allocated to 1940, $12,000 to 1941, and $12,000 to 1942 (the current taxable year).

"*Example* (*2*). Assume the same facts as in example (1) except that the period of work was commenced by A on July 1, 1941, and

be said, it seems to us that that construction fits the statutory scheme.

*Affirmed.*

MR. JUSTICE FRANKFURTER, not having heard the argument owing to illness, took no part in the disposition of this case.

MR. JUSTICE JACKSON dissents.

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completed on September 1, 1944. Although the period of work covers 38 calendar months, allocations may be made to only the 18 calendar months which are included within the part of the period of work which precedes the close of 1942 (the current taxable year). Therefore, $2,000 ($36,000 divided by 18) must be allocated to each of 18 calendar months preceding January 1, 1943. Accordingly, $12,000 is allocated to 1941, and $24,000 to 1942 (the current taxable year)."

# KAWAKITA *v.* UNITED STATES.

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

No. 570. Argued April 2–3, 1952.—Decided June 2, 1952.

At petitioner's trial for treason, it appeared that originally he was a native-born citizen of the United States and also a national of Japan by reason of Japanese parentage and law. While a minor, he took the oath of allegiance to the United States; went to Japan for a visit on an American passport; and was prevented by the outbreak of war from returning to this country. During the war, he reached his majority in Japan; changed his registration from American to Japanese; showed sympathy with Japan and hostility to the United States; served as a civilian employee of a private corporation producing war materials for Japan; and brutally abused American prisoners of war who were forced to work there. After Japan's surrender, he registered as an American citizen; swore that he was an American citizen and had not done various acts amounting to expatriation; and returned to this country on an American passport. *Held:* His conviction for treason is affirmed. Pp. 719–745.

1. The evidence was sufficient to support the finding of the jury that he had not renounced or lost his American citizenship at the time of the overt acts charged in the indictment. Pp. 720–732.

(a) In view of petitioner's dual nationality, it cannot be said as a matter of law that his action in registering in the Koseki (a family census register) and changing his registration from American to Japanese amounted to a renunciation of American citizenship within the meaning of § 401 of the Nationality Act. Pp. 722–725.

(b) Nor is such a holding required as a matter of law by the facts that, during the war, he traveled to China on a Japanese passport, used his Koseki entry to obtain work at a prisoner-of-war camp, bowed to the Emperor, and accepted labor draft papers from the Japanese Government. P. 725.

(c) In view of the conflict between petitioner's statements at his trial that he felt no loyalty to the United States from March 1943 to late 1945 and his actions after Japan's defeat (when he

applied for registration as an American citizen and for an American passport), the question whether he had renounced his American citizenship was peculiarly for the jury to determine. Pp. 725–727.

(d) It cannot be said that petitioner was serving in the armed forces of Japan within the meaning of § 401 (c) nor that his status as a civilian employee of a private corporation was so changed by the regimentation of the industry by the Japanese Government that he was performing the duties of an "office, post, or employment under the government" of Japan within the meaning of § 401 (d) of the Nationality Act. Pp. 727–729.

(e) Section 402 creates a rebuttable presumption that a national in petitioner's category expatriates himself when he remains for six months or longer in a foreign state of which he or either of his parents shall have been a national; but that presumption was rebutted by the showing that petitioner was not expatriated under § 401 (c) or (d). P. 730.

(f) If there was any error in the judge's charge to the jury that the only methods of expatriation are those contained in § 401, it was harmless error, since petitioner tendered no question of fact which was inadmissible under § 401 and since the judge charged that he could not be convicted if he honestly believed that he was no longer a citizen of the United States. Pp. 730–732.

2. Notwithstanding his dual nationality and his residence in Japan, petitioner owed allegiance to the United States and can be punished for treasonable acts voluntarily committed. Pp. 732–736.

(a) Since the definition of treason in Art. III, § 3 of the Constitution contains no territorial limitation, an American citizen living beyond the territorial limits of the United States can be guilty of treason against the United States. Pp. 732–733.

(b) Petitioner was held accountable by the jury only for performing acts of hostility toward this country which he was not required by Japan to perform. Pp. 734–735.

(c) An American citizen owes allegiance to the United States wherever he may reside. Pp. 735–736.

3. Each of the overt acts of which petitioner was convicted was properly proven by two witnesses; and each of them showed that petitioner gave aid and comfort to the enemy. Pp. 736–742.

(a) Two overt acts (abusing American prisoners for the purpose of getting more work out of them in producing war materials for the enemy) qualified as overt acts within the constitutional standard of treason, since they gave aid and comfort to the enemy,

though their contribution to the enemy's war effort was minor. Pp. 737–739.

(b) The other six overt acts (cruelty to American prisoners of war) gave aid and comfort to the enemy by helping to make all the prisoners fearful, docile and subservient, reducing the number of guards needed, and requiring less watching—all of which encouraged the enemy and advanced his interests. Pp. 739–742.

(c) The overt acts were sufficiently proven by two witnesses, since each overt act was testified to by at least two witnesses who were present and saw or heard that to which they testified and any disagreement among them was not on what took place but on collateral details. P. 742.

4. The evidence was sufficient to prove that petitioner was guilty of voluntarily "adhering to the enemy." Pp. 742–744.

5. The treasonable actions of petitioner were so flagrant and persistent that it cannot be said that the death sentence imposed by the trial judge was so severe as to be arbitrary. Pp. 744–745.

190 F. 2d 506, affirmed.

In a Federal District Court, petitioner was convicted of treason and sentenced to death. See 96 F. Supp. 824. The Court of Appeals affirmed. 190 F. 2d 506. This Court granted certiorari. 342 U. S. 932. *Affirmed,* p. 745.

*Morris Lavine* and *A. L. Wirin* argued the cause for petitioner. With them on the brief was *Fred Okrand.*

*Oscar H. Davis* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg.*

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner, a national both of the United States and of Japan, was indicted for treason, the overt acts relating to his treatment of American prisoners of war. He was

convicted of treason after a jury trial (see 96 F. Supp. 824) and the judgment of conviction was affirmed. 190 F. 2d 506. The case is here on certiorari. 342 U. S. 932.

*First.* The important question that lies at the threshold of the case relates to expatriation. Petitioner was born in this country in 1921 of Japanese parents who were citizens of Japan. He was thus a citizen of the United States by birth (Amendment XIV, § 1) and, by reason of Japanese law, a national of Japan. See *Hirabayashi* v. *United States,* 320 U. S. 81, 97.

In 1939 shortly before petitioner turned 18 years of age he went to Japan with his father to visit his grandfather. He traveled on a United States passport; and to obtain it he took the customary oath of allegiance. In 1940 he registered with an American consul in Japan as an American citizen. Petitioner remained in Japan, his father returning to this country. In March, 1941, he entered Meiji University and took a commercial course and military training. In April, 1941, he renewed his United States passport, once more taking the oath of allegiance to the United States. During this period he was registered as an alien with the Japanese police. When war was declared, petitioner was still a student at Meiji University. He became of age in 1942 and completed his schooling in 1943, at which time it was impossible for him to return to the United States. In 1943 he registered in the Koseki, a family census register.[1] Petitioner did not join the Japanese Army nor serve as a soldier. Rather, he obtained employment as an interpreter with the Oeyama Nickel Industry Co., Ltd., where he worked until Japan's surrender. He was hired to interpret communications between the Japanese and the

[1] See Blakemore, Recovery of Japanese Nationality as Cause for Expatriation in American Law, 43 Am. J. Int'l L. 441, 449.

prisoners of war who were assigned to work at the mine and in the factory of this company. The treasonable acts for which he was convicted involved his conduct toward American prisoners of war.

In December, 1945, petitioner went to the United States consul at Yokohama and applied for registration as an American citizen. He stated under oath that he was a United States citizen and had not done various acts amounting to expatriation. He was issued a passport and returned to the United States in 1946. Shortly thereafter he was recognized by a former American prisoner of war, whereupon he was arrested, and indicted, and tried for treason.

Petitioner defended at his trial on the ground that he had renounced or abandoned his United States citizenship and was expatriated. Congress has provided by § 401 of the Nationality Act of 1940, 54 Stat. 1137, 1168, as amended, 8 U. S. C. § 801, that a national of the United States may lose his nationality in certain prescribed ways. It provides in relevant part,

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> "(a) Obtaining naturalization in a foreign state . . .; or
>
> "(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or
>
> "(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or
>
> "(d) Accepting, or performing the duties of, any office, post, or employment under the government of a

foreign state or political subdivision thereof for which only nationals of such state are eligible; . . . ."

The court charged that if the jury found that petitioner had lost his American citizenship prior to or during the period specified in the indictment, they must acquit him even if he did commit the overt acts charged in the indictment, since his duty of allegiance would have ceased with the termination of his American citizenship. The court further charged that if the jury should find beyond a reasonable doubt that during the period in question petitioner was an American citizen, he owed the United States the same duty of allegiance as any other citizen. The court also charged that even though the jury found that petitioner was an American citizen during the period in question, they must acquit him if at the time of the overt acts petitioner honestly believed he was no longer a citizen of the United States, for then he could not have committed the overt acts with treasonable intent. The special verdicts of the jury contain, with respect to each overt act as to which petitioner was found guilty, an affirmative answer to an interrogatory that he was at that time "an American citizen owing allegiance to the United States, as charged in the indictment."

Petitioner asks us to hold as a matter of law that he had expatriated himself by his acts and conduct beginning in 1943. He places special emphasis on the entry of his name in the Koseki. Prior to that time he had been registered by the police as an alien. There is evidence that after that time he was considered by Japanese authorities as a Japanese and that he took action which might give rise to the inference that he had elected the Japanese nationality: he took a copy of the Koseki to the police station and had his name removed as an alien; he changed his registration at the University from American to Japanese and his address from California to Japan;

he used the Koseki entry to get a job at the Oeyama camp; he went to China on a Japanese passport (see *United States* v. *Husband,* 6 F. 2d 957, 958); he accepted labor draft papers from the Japanese government; he faced the east each morning and paid his respects to the Emperor.

The difficulty with petitioner's position is that the implications from the acts, which he admittedly performed, are ambiguous. He had a dual nationality, a status long recognized in the law.[2] *Perkins* v. *Elg,* 307 U. S. 325, 344–349. The concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both.

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[2] For discussions of the subject of dual nationality, see *Talbot* v. *Jansen,* 3 Dall. 133, 164–165, 169; *Inglis* v. *Trustees of the Sailor's Snug Harbour,* 3 Pet. 99, 126, 157, 161; *Shanks* v. *Dupont,* 3 Pet. 242, 247, 249; *Perkins* v. *Elg,* 307 U. S. 325, 329, 339, 344–345; *Hirabayashi* v. *United States,* 320 U. S. 81, 97–98; *Savorgnan* v. *United States,* 338 U. S. 491, 500; *United States* v. *Husband,* 6 F. 2d 957, 958; *Dos Reis ex rel. Camara* v. *Nicolls,* 161 F. 2d 860; *Attorney General* v. *Ricketts,* 165 F. 2d 193; *Uyeno* v. *Acheson,* 96 F. Supp. 510, 514–515; *Tomasicchio* v. *Acheson,* 98 F. Supp. 166; *Kondo* v. *Acheson,* 98 F. Supp. 884, 886–887; *Hamamoto* v. *Acheson,* 98 F. Supp. 904, 905; *Boissonnas* v. *Acheson,* 101 F. Supp. 138, 147, 151–152; *Di Girolamo* v. *Acheson,* 101 F. Supp. 380, 382; *Coumas* v. *Superior Court,* 31 Cal. 2d 682, 192 P. 2d 449; *Doyle* v. *Ries,* 208 Minn. 321, 293 N. W. 614; *Ludlam* v. *Ludlam,* 26 N. Y. 356, 376–377; *Lynch* v. *Clarke,* 1 Sandf. Ch. (N. Y.) 583, 659, 677–679; *State ex rel. Phelps* v. *Jackson,* 79 Vt. 504, 520, 65 A. 657, 661; Borchard, Diplomatic Protection of Citizens Abroad, 575–591; Flournoy, Dual Nationality and Election, 30 Yale L. J. 545, 693; Hackworth, Digest of International Law, Vol. III, pp. 352–377; Hyde, International Law (2d ed.), Vol. 2, pp. 1131–1143; Moore, International Law Digest, Vol. III, pp. 518–551; Nielsen, Some Vexatious Questions Relating to Nationality, 20 Col. L. Rev. 840; Oppenheim, International Law (7th ed., Lauterpacht), Vol. I, pp. 606–610; Orfield, The Legal Effects of Dual Nationality, 17 Geo. Wash. L. Rev. 427; Van Dyne, Citizenship of the United States, 24, 34.

The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other. In this setting petitioner's registration in the Koseki might reasonably be taken to mean no more than an assertion of some of the rights which his dual citizenship bestowed on him. The deposition of the Attorney General of Japan states that the entry of a person's name in the Koseki is taken to mean that one has Japanese nationality. But since petitioner already had Japanese nationality, he obviously did not acquire it by the act of registration. The Attorney General of Japan further deposed that all Japanese nationals, whether or not born abroad, are duty bound to Japanese allegiance and that registering in the Koseki is "not necessarily a formal declaration of allegiance but merely a reaffirmation of an allegiance to Japan which already exists." From this it would appear that the registration may have been nothing more than the disclosure of a fact theretofore not made public.

Conceivably it might have greater consequences. In other settings it might be the equivalent of "naturalization" within the meaning of § 401 (a) of the Act or the making of "an affirmation or other formal declaration of allegiance" to Japan within the meaning of § 401 (b). Certainly it was relevant to the issue of expatriation. But we cannot say as a matter of law that it was a renunciation of petitioner's American citizenship. What followed might reasonably be construed to mean no more than recognition of the Japanese citizenship which petitioner had acquired on birth—nationality that was publicly disclosed for the first time in Japan by his registration in the Koseki. Cf. 3 Hackworth, Digest of International Law (1942), p. 373. The changing of his registration at the police station and at the University, so as to conform those records to the public record of his

Japanese nationality, might reasonably mean no more than announcing the fact of his Japanese nationality to the interested authorities.

As we have said, dual citizenship presupposes rights of citizenship in each country. It could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other. For example, when one has a dual citizenship, it is not necessarily inconsistent with his citizenship in one nation to use a passport proclaiming his citizenship in the other. See 3 Hackworth, *supra,* p. 353. Hence the use by petitioner of a Japanese passport on his trip to China, his use of the Koseki entry to obtain work at the Oeyama camp, the bowing to the Emperor, and his acceptance of labor draft papers from the Japanese government might reasonably mean no more than acceptance of some of the incidents of Japanese citizenship made possible by his dual citizenship.

Those acts, to be sure, were colored by various other acts and statements of petitioner. He testified for example that he felt no loyalty to the United States from about March, 1943, to late 1945. There was evidence that he boasted that Japan was winning and would win the war, that he taunted American prisoners of war with General MacArthur's departure from the Philippines, that he expressed his hatred toward things American and toward the prisoners as Americans. That was in 1943 and 1944. This attitude continued into 1945, although in May or June, 1945, shortly before Japan's surrender, he was saying he did not care "which way the war goes because I am going back to the States anyway."

On December 31, 1945, he applied for registration as an American citizen, and in that connection he made an affidavit in which he stated that he had been "temporarily residing" in Japan since August 10, 1939; that he came to

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Japan to study Japanese; that he possessed dual nationality from birth but that his name was not entered in the census register until March 8, 1943; and that he had "never been naturalized, taken an oath of allegiance, or voted as a foreign citizen or subject, or in any way held myself out as such."

The United States foreign service officer concluded that petitioner had overcome the presumption of expatriation. He reported, "In 1943 his possession of Japanese nationality was made a matter of record by the entry of his name into his uncle's Family Census Register. He states that this action was taken under severe pressure by the Japanese police and by his uncle, on whom he was financially dependent after his supply of funds from the U. S. was cut off; this office has reason to believe this statement." These representations led to the issuance of an American passport on which he returned to the United States in 1946.

If petitioner were to be believed in December, 1945, he never once renounced his American citizenship. If what petitioner now says were his thoughts, attitudes, and motives in 1943 and 1944 and in part of 1945, he did intend to renounce his American citizenship. If the latter version were believed by the jury, the signing of the family register, and the changing of his registration at the police station and at the University would assume different significance; those acts might then readily suggest the making of a declaration of allegiance to Japan within the meaning of § 401 (b). If, on the other hand, petitioner were to be believed when in 1945 he stated he had not done acts by which he renounced his American citizenship, then the Koseki incident and the changes in his police and University registration could reasonably be taken as amounting to no more than a public declaration of an established and preexisting fact, *viz.* his Japanese

nationality. We think, in other words, that the question whether petitioner had renounced his American citizenship was on this record peculiarly for the jury to determine. The charge was that the jury must be satisfied beyond a reasonable doubt that during the period specified in the indictment, petitioner was an American citizen. We cannot say there was insufficient evidence for that finding.

Petitioner concedes he did not enter the armed services of Japan within the meaning of § 401 (c) of the Act but claims that during his tour of duty at the Oeyama camp he was "serving in" the Japanese armed services within the statutory meaning of those words. In this connection he also argues that his work in the Oeyama camp was the performance of the duties of an "office, post, or employment under the government" of Japan "for which only nationals of such state are eligible" within the meaning of § 401 (d) of the Act.

The Oeyama Nickel Industry Co., Ltd., was a private company, organized for profit. It was engaged in producing metals used for war under contracts with the Japanese government. In 1944 it was designated by the Japanese government as a munitions corporation and under Japanese law civilian employees were not allowed to change or quit their employment without the consent of the government. The company's mine and factory were manned in part by prisoners of war. They lived in a camp controlled by the Japanese army. Though petitioner took orders from the military, he was not a soldier in the armed services; he wore insignia on his uniform distinguishing him as nonmilitary personnel; he had no duties to perform in relation to the prisoners, except those of an interpreter. His employment was as an interpreter for the Oeyama Nickel Industry Co., Ltd., a private company. The regulation of the company by

the Japanese government, the freezing of its labor force, the assignment to it of prisoners of war under military command were incidents of a war economy. But we find no indication that the Oeyama Company was nationalized or its properties seized and operated by the government. The evidence indicates that it was a part of a regimented industry; but it was an organization operating for private profit under private management. We cannot say that petitioner's status as an employee of a private company was changed by that regimentation of the industry.

It would require a broad and loose construction of "office, post, or employment under the government of a foreign state" as those words are used in § 401 (d) to hold that petitioner had sacrificed his American citizenship by accepting or performing the duties of interpreter. We are thinking not only of this case but of other cases to which § 401 (d) is applicable. We are reluctant to resolve the ambiguity contained in § 401 (d) so as to provide treacherous ground for the loss of the rights of citizenship by the Nisei. As the Court said in *Perkins* v. *Elg, supra,* p. 337, "Rights of citizenship are not to be destroyed by an ambiguity." It would be harsh indeed to hold that a Nisei, marooned in Japan when World War II broke out, would be expatriated merely by working for a private company whose business was supervised and whose labor supply was controlled by the Japanese government in time of war. That would give § 401 (d) a broad, pervasive sweep. Section 401 (d) not only makes acceptance of "any office, post, or employment under the government of a foreign state" the basis of expatriation; it also makes "performing the duties" of any such office, post, or employment a ground for expatriation. One who was drafted for such service would be included, as well as one who volunteered. In time of war that would bring most employees of private companies within the danger

zone in view of the hold which a war economy places on industry and the supervision and control which it asserts. We therefore incline to a construction of the words "under the government of a foreign state" to mean the relationship that public employees have with their government or with the bureaus or corporations which are government owned and controlled. Support for that narrower meaning is found in the legislative history.[3]

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[3] The explanatory comments on the draft code of the Nationality Laws transmitted with the message of the President on June 13, 1938, stated the following as respects § 401 (c) and (d):

"With reference to subsections (c) and (d) attention is called to the following statement in an opinion of Attorney General Williams, dated August 20, 1873 (14 Op. Atty. Gen. 295, 297):

" 'My opinion . . . is that, in addition to domicile and intent to remain, such expressions or acts as amount to a renunciation of United States citizenship and a willingness to submit to or adopt the obligations of the country in which the person resides, *such as accepting public employment,* engaging in military services, etc., may be treated by this Government as expatriation, without actual naturalization. Naturalization is without doubt the highest, but not the only evidence of expatriation.' " (Italics added.) Codification of the Nationality Laws of the United States, 76th Cong., 1st Sess., House Committee Print, p. 67.

Mr. Flournoy, speaking for the State Department at the hearings (see Hearings on H. R. 6127, H. R. 9980, 76th Cong., 1st Sess., pp. 131–132), described the provision that became § 401 (d) in the following way:

"It seems to me the object of that is fairly clear. A foreign state has *some position in its government* which can be held only by its citizens and *an American accepts such a position* and serves the foreign state and loses his American nationality. That is intended particularly for cases of persons of dual nationality, and there are not a great many of those cases. There are not many thousands of them. . . . This is intended particularly for those cases of dual nationality. Say an American is born here and he goes to and is living in Mexico and *he takes a position in the Mexican Government,* that is regarded as equivalent to a choice of his citizenship and he loses his American nationality." (Italics added.)

Section 402 [4] creates a presumption [5] that a national in Kawakita's category who remains six months or longer within a foreign state of which he or either of his parents shall have been a national shall be presumed to have expatriated himself under § 401 (c) or (d). Section 402 does not enlarge § 401 (c) or (d); it creates a rebuttable presumption of expatriation; and when it is shown that the citizen did no act which brought him under § 401 (c) or (d), the presumption is overcome. On that showing the person never loses his American nationality. See *Dos Reis* v. *Nicolls*, 161 F. 2d 860, 868. In other words, once it was shown that petitioner was not expatriated under § 401 (c) or (d), the force of § 402 was spent.

Section 408 provides, "The loss of nationality under this Act shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this Act." The District Court therefore charged

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[4] Section 402 reads as follows:

"A national of the United States who was born in the United States or who was born in any place outside of the jurisdiction of the United States of a parent who was born in the United States, shall be presumed to have expatriated himself under subsection (c) or (d) of section 401, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state, or within any place under control of such foreign state, and such presumption shall exist until overcome whether or not the individual has returned to the United States. Such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, or to an immigration officer of the United States, under such rules and regulations as the Department of State and the Department of Justice jointly prescribe. However, no such presumption shall arise with respect to any officer or employee of the United States while serving abroad as such officer or employee, nor to any accompanying member of his family."

[5] Section 402 was adopted "upon the special recommendation of the War Department with a view to checking the activities of persons regarded as prospective 'fifth columnists.'" 86 Cong. Rec. 11948.

the jury that the only methods of expatriation are those contained in § 401. Petitioner claims that charge was error. He argues that § 408 is applicable only to the loss of nationality "under this Act" and that there are other methods of losing it. He refers to R. S. § 1999, 8 U. S. C. § 800, which survived the Nationality Act of 1940 and is not part of it, and which proclaims the right of expatriation as "a natural and inherent right of all people." [6] We do not undertake to resolve the question for the reason that it is not squarely presented. On this issue of expatriation, petitioner tenders no question of fact which was inadmissible under § 401. Petitioner merely says that "by his conduct" he had "expatriated himself from United States citizenship." But he has failed to show that that issue is narrower than or different from the issue presented on this record under § 401 (b)—the declaration of allegiance to Japan. As we have indicated, the major factual problem on the issue of expatriation revolved around the entry of petitioner's name in the Koseki. All of the other conduct referred to, including the paying of respects to the Emperor and the expressions of hostility to the United States, were relevant and admissible on that issue. If it could not in the eyes of the jury make the

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[6] R. S. § 1999, 8 U. S. C. § 800 provides:

"Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic."

signing of the Koseki and the changes in the registration that followed that event tantamount to renunciation under § 401 (b), it hardly could do so standing alone. Hence, if there was error in the charge, it was harmless.

That conclusion is reinforced by another aspect of the case. Petitioner testified that he believed when he signed the Koseki that he lost his American citizenship. He testified that during the period charged in the indictment he believed that he was no longer an American citizen. The District Court charged that if the jury found (1) defendant had committed any overt act charged in the indictment and (2) he was an American citizen, yet they should not convict if they further found that at the time "the defendant honestly believed that he was no longer a citizen of the United States" since in that event he could not have committed the act with treasonable intent. Under this charge the belief of petitioner that he had renounced his American citizenship was sufficient to acquit if the jury believed him. His belief could not have been made more relevant to the issue of guilt if it had been admitted as proof of expatriation separate and apart from the other grounds specified in § 401 of the Act. Hence even if we assume, *arguendo,* that the court was wrong in charging that § 408 made the grounds specified in § 401 exclusive, the error was harmless.

*Second.* Petitioner contends that a person who has a dual nationality can be guilty of treason only to the country where he resides, not to the other country which claims him as a national. More specifically, he maintains that while petitioner resided in Japan he owed his paramount allegiance to that country and was indeed, in the eyes of our law, an alien enemy.

The argument in its broadest reach is that treason against the United States cannot be committed abroad or in enemy territory, at least by an American with a dual nationality residing in the other country which

claims him as a national. The definition of treason, however, contained in the Constitution contains no territorial limitation. "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. . . ." Art. III, § 3. A substitute proposal containing some territorial limitations was rejected by the Constitutional Convention. See 2 Farrand, The Records of the Federal Convention, pp. 347–348. The Act of April 30, 1790, 1 Stat. 112, which was passed by the first Congress defining the crime of treason likewise contained no territorial limitation; and that legislation is contained in substantially the same form in the present statute. 18 U. S. C. (Supp. IV) § 2381.[7] We must therefore reject the suggestion that an American citizen living beyond the territorial limits of the United States may not commit treason against them. See *Chandler* v. *United States,* 171 F. 2d 921, 929–930; *Burgman* v. *United States,* 88 U. S. App. D. C. 184, 185, 188 F. 2d 637, 640.

One who has a dual nationality will be subject to claims from both nations, claims which at times may be competing or conflicting. The nature of those claims has recently been stated as follows:

> "A person with dual nationality may be subjected to taxes by both states of which he is a national. He is not entitled to protection by one of the two states of which he is a national while in the territorial jurisdiction of the other. Either state not at war with the other may insist on military service when the person is present within its territory. In time

[7] "Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined not less than $10,000; and shall be incapable of holding any office under the United States."

> of war if he supports neither belligerent, both may be aggrieved. If he supports one belligerent, the other may be aggrieved. One state may be suspicious of his loyalty to it and subject him to the disabilities of an enemy alien, including sequestration of his property, while the other holds his conduct treasonable." Orfield, The Legal Effects of Dual Nationality, 17 Geo. Wash. L. Rev. 427, 429.

Dual nationality, however, is the unavoidable consequence of the conflicting laws of different countries. See 3 Hackworth, *supra,* pp. 352 *et seq.* One who becomes a citizen of this country by reason of birth retains it, even though by the law of another country he is also a citizen of it. He can under certain circumstances be deprived of his American citizenship through the operation of a treaty or an act of Congress; he can also lose it by voluntary action. See *Perkins* v. *Elg, supra,* p. 329. But American citizenship, until lost, carries obligations of allegiance as well as privileges and benefits. For one who has a dual status the obligations of American citizenship may at times be difficult to discharge. An American who has a dual nationality may find himself in a foreign country when it wages war on us. The very fact that he must make a livelihood there may indirectly help the enemy nation. In these days of total war manpower becomes critical and everyone who can be placed in a productive position increases the strength of the enemy to wage war. Of course, a person caught in that predicament can resolve the conflict of duty by openly electing one nationality or the other and becoming either an alien enemy of the country where he resides or a national of it alone. Yet, so far as the existing law of this country is concerned, he need not make that choice but can continue his dual citizenship. It has been stated in an administrative ruling of the State Department that a person with a dual citizenship who lives abroad in the other country claiming him

as a national owes an allegiance to it which is paramount to the allegiance he owes the United States.[8] That is a far cry from a ruling that a citizen in that position owes no allegiance to the United States. Of course, an American citizen who is also a Japanese national living in Japan has obligations to Japan necessitated by his residence there. There might conceivably be cases where the mere nonperformance of the acts complained of would be a breach of Japanese law. He may have employment which requires him to perform certain acts. The compulsion may come from the fact that he is drafted for the job or that his conduct is demanded by the laws of Japan. He may be coerced by his employer or supervisor or by the force of circumstances to do things which he has no desire or heart to do. That was one of petitioner's defenses in this case. Such acts—if done voluntarily and willfully—might be treasonable. But if done under the compulsion of the job or the law or some other influence, those acts would not rise to the gravity of that offense. The trial judge recognized the distinction in his charge when he instructed the jury to acquit petitioner if he did not do the acts willingly or voluntarily "but so acted only because performance of the duties of his employment required him to do so or because of other coercion or compulsion." In short, petitioner was held accountable by the jury only for performing acts of hostility toward this country which he was not required by Japan to perform.

If he can retain that freedom and still remain an American citizen, there is not even a minimum of allegiance which he owes to the United States while he resides in the enemy country. That conclusion is hostile to the concept of citizenship as we know it, and it must be rejected. One who wants that freedom can get it by

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[8] Abstract of Passport Laws and Precedents, Passport Division Office Instructions, Code No. 1.6, May 19, 1941.

renouncing his American citizenship. He cannot turn it into a fair-weather citizenship, retaining it for possible contingent benefits but meanwhile playing the part of the traitor. An American citizen owes allegiance to the United States wherever he may reside.

Circumstances may compel one who has a dual nationality to do acts which otherwise would not be compatible with the obligations of American citizenship. An American with a dual nationality who is charged with playing the role of the traitor may defend by showing that force or coercion compelled such conduct. The jury rejected that version of the facts which petitioner tendered. He is therefore forced to maintain that, being a national and a resident of Japan, he owed no allegiance to the United States even though he was an American citizen. That proposition we reject.

*Third.* Article III, § 3 of the Constitution provides, "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

So far as material here, the crime thus consists of two elements—adhering to the enemy; and giving him aid and comfort. See *Cramer* v. *United States,* 325 U. S. 1, 29. One may think disloyal thoughts and have his heart on the side of the enemy. Yet if he commits no act giving aid and comfort to the enemy, he is not guilty of treason. He may on the other hand commit acts which do give aid and comfort to the enemy and yet not be guilty of treason, as for example where he acts impulsively with no intent to betray. Two witnesses are required not to the disloyal and treacherous intention but to the same overt act. See *Cramer* v. *United States, supra,* pp. 30, 31.

The jury found petitioner guilty of eight overt acts.[9] One overt act alone, properly proved, would be sufficient to sustain the conviction, all other elements of the crime of treason being established. Since the jury returned special verdicts and findings as to each of the eight overt acts, we could not upset the judgment of conviction, unless all eight were insufficient. See *Haupt* v. *United States,* 330 U. S. 631, 641. We conclude, however, that each of the eight overt acts was properly proved.

Each of these related to his treatment of American prisoners of war at the Oeyama camp. These prisoners were mostly from Bataan and were in weakened condition on their arrival. All were below normal weight; many of them were suffering from disease; most of them were unfit for work. They were assigned to work either in the factory or at the mine of the Oeyama Company. They were under the supervision of the Japanese army. Petitioner was a civilian interpreter, as we have said. There was evidence that he had no authority and no duties, as respects the prisoners, except as an interpreter. Yet the record shows a long, persistent, and continuous course of conduct directed against the American prisoners and going beyond any conceivable duty of an interpreter.

After the American prisoners arrived, the Japanese authorities raised the quota of ore which they were expected to produce each day. The quota had been between 120 and 165 carloads a day; now it was increased to 200. A part of petitioner's conduct was swearing at the prisoners, beating them, threatening them, and punishing them for not working faster and harder, for failing to fill their quotas, for resting, and for slowing down.

There were two overts acts in this category. Overt act (a) as alleged in the indictment and developed at the

[9] The form of interrogatory which the jury answered affirmatively to each of the eight overt acts is printed in *United States* v. *Kawakita,* 96 F. Supp. 824, 851–852.

trial was that in May, 1945, petitioner kicked a prisoner named Toland who was ill, because he slowed down in lifting pieces of ore rocks from the tracks at the factory to keep the tracks clear. Toland had suffered a dizzy spell and slowed down. Petitioner told him to get to work and thereupon kicked him, causing him to fall flat and to cut his face and hand. Another prisoner wanted to pick Toland up; but petitioner would not let him. Overt act (j) as alleged in the indictment and developed at the trial was that in May, 1945, petitioner struck a prisoner named Armellino, who was weak and emaciated, in order to make him carry more lead. Armellino had been carrying only one bucket of lead. Petitioner thereupon struck him, causing him to fall. When he got up, petitioner forced him to carry two buckets, pushing him along.

Each of these acts was aimed at getting more work out of the prisoners—work that produced munitions of war for the enemy, or so the jury might have concluded. The increased efforts charged in overt acts (a) and (j) were small; the contribution to the war effort of the enemy certainly was minor, not crucial. Harboring the spy in *Haupt* v. *United States, supra,* was also insignificant in the total war effort of Germany during the recent war. Yet it was a treasonable act. It is the nature of the act that is important. The act may be unnecessary to a successful completion of the enemy's project; it may be an abortive attempt; it may in the sum total of the enemy's effort be a casual and unimportant step. But if it gives aid and comfort to the enemy at the immediate moment of its performance, it qualifies as an overt act within the constitutional standard of treason. As Chief Justice Marshall said in *Ex parte Bollman,* 4 Cranch 75, 126, "If war be actually levied, . . . all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general

conspiracy, are to be considered as traitors." These two overt acts, if designed to speed up Japan's war production, plainly gave aid and comfort to the enemy in the constitutional sense.

The other overt acts were acts of cruelty to American prisoners of war.

Overt act (b) as alleged in the indictment and developed at the trial was that one Grant, an American prisoner, had been seen by a Japanese sentry coming out of the Red Cross storeroom with a package of cigarettes. He was thereupon thrown into a cesspool by a Japanese sergeant, ordered out, and knocked back repeatedly. While Grant was in the cesspool, petitioner hit him over the head with a wooden pole or sword, told him to squat down, and tried to force him to sit in the water. When Grant was taken from the pool, he was blue, his teeth were chattering, and he could not straighten up.

Overt act (c) as alleged in the indictment and developed at the trial was that in December, 1944, petitioner and Japanese guards lined up about 30 American prisoners and, as punishment for making articles of clothing out of blankets, struck them and forced them to strike each other. Petitioner hit prisoners who, he thought, did not hit each other hard enough.

Overt act (d) as alleged in the indictment and developed at the trial was that petitioner imposed cruelty on O'Connor, an American prisoner, who was sick and had stolen Red Cross supplies. He was knocked into the cesspool by Japanese soldiers and then repeatedly hit and thrown back into the pool by them and by petitioner, with the result that O'Connor temporarily lost his reason.

Overt act (g) as alleged in the indictment and developed at the trial was that in July or August, 1945, a Japanese sergeant compelled a work detail of American prisoners, who had returned early, to run around a quadrangle. Petitioner forced two of the Americans, who

were unable to run fast because of illness, to run the course an additional four and six times respectively. Petitioner threw pebbles and sod at them to make them run faster.

Overt act (i) as alleged in the indictment and developed at the trial was that in December, 1944, petitioner ordered one Carter, an American prisoner of war, to carry a heavy log up an ice-covered slope at the mine. When Carter slipped, fell, and was injured, petitioner although he knew Carter was badly hurt and needed attention delayed his removal back to camp for approximately five hours.

Overt act (k) as alleged in the indictment and developed at the trial was that in the spring or summer of 1945 petitioner participated in the inhuman punishment of one Shaffer, an American prisoner of war. Shaffer was forced to kneel on bamboo sticks on a platform with a bamboo stick inside the joints of his knees, and to keep his arms above his head holding a bucket of water and later a log. When Shaffer became tired and bent his elbows, petitioner would strike him. When Shaffer leaned over and spilled some water, petitioner would take the bucket, throw the water on Shaffer, and have the bucket refilled. Then Shaffer was required to hold up a log. It fell on him, causing a gash. After the wound was treated, petitioner placed bamboo sticks on the ground and once more made Shaffer kneel on them and go through the same performance.

As we have said, petitioner was not required by his employment to inflict punishment on the prisoners. His duties regarding the prisoners related solely to the role of interpreter. His acts of cruelty toward the prisoners were over and beyond the call of duty of his job, or so the jury might have found. We cannot say as a matter of law that petitioner did these acts under compulsion. He seeks, however, to find protection under Japanese municipal law. It is difficult to see how that argument helps

petitioner. The source of the law of treason is the Constitution. If an American citizen is a traitor by the constitutional definition, he gains no immunity because the same acts may have been unlawful under the law of the country where the acts were performed. Treason is a separate offense; treason can be committed by one who scrupulously observes the laws of other nations; and his acts may be nonetheless treasonable though the same conduct amounts to a different crime. It would take a long chapter to relate the numerous acts that supplement the crime of treason and build different and lesser crimes out of the same or related acts. See *Cramer* v. *United States, supra,* p. 45. But no matter the reach of the legislative power in defining other crimes, the constitutional requirements for treason remain the same. The crime of treason can be taken out of the Constitution by the processes of amendment; but there is no other way to modify or alter it.

The jury found that each of the six overt acts of cruelty actually gave aid and comfort to the enemy. We agree. These were not acts innocent and commonplace in appearance and gaining treasonable significance only by reference to other evidence, as in *Cramer* v. *United States, supra.* They were acts which showed more than sympathy with the enemy, more than a lack of zeal in the American cause, more than a breaking of allegiance to the United States. They showed conduct which actually promoted the cause of the enemy. They were acts which tended to strengthen the enemy and advance its interests. These acts in their setting would help make all the prisoners fearful, docile, and subservient. Because of these punishments the prisoners would be less likely to be troublesome; they would need fewer guards; they would require less watching. These acts would tend to give the enemy the "heart and courage to go on with the war." That was the test laid down by Lord Chief Justice Treby

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in Trial of Captain Vaughan, 13 How. St. Tr. 485, 533. It is a sufficient measure of the overt act required by the Constitution. *Cramer* v. *United States, supra,* pp. 28, 29, 34. All of the overt acts tended to strengthen Japan's war efforts; all of them encouraged the enemy and advanced its interests.

Petitioner contends that the overt acts were not sufficiently proved by two witnesses. Each witness who testified to an overt act was, however, an eye-witness of the commission of that act. They were present and saw or heard that to which they testified. In some instances there was a variance as to details. Thus overt act (b) was testified to by thirteen witnesses. They did not all agree as to the exact date when the overt act occurred, whether in April, May, or June, 1945. But they all agreed that it did take place, that Grant was the victim, and that it happened between 3 and 6 o'clock in the afternoon; and most of them agreed that petitioner struck Grant. The Court of Appeals concluded, and we agree, that the disagreement among the witnesses was not on what took place but on collateral details. "While two witnesses must testify to the same act, it is not required that their testimony be identical." *Haupt* v. *United States, supra,* p. 640. There is no doubt that as respects each of the eight overt acts the witnesses were all talking about the same incident and were describing the same conduct on petitioner's part.

*Fourth.* Petitioner challenges the sufficiency of the evidence to show the second element in the crime of treason—adhering to the enemy. The two-witness requirement does not extend to this element. *Cramer* v. *United States, supra,* p. 31. Intent to betray must be inferred from conduct. It may be inferred from the overt acts themselves (*Cramer* v. *United States, supra,* p. 31), from the defendant's own statements of his attitudes toward

the war effort (*Haupt* v. *United States, supra,* p. 642), and from his own professions of loyalty to Japan.

Evidence of what petitioner said during this period concerning the war effort and his professions of loyalty, if believed by the jury, leaves little doubt of his traitorous intent. "It looks like MacArthur took a run-out powder on you boys"; "The Japanese were a little superior to your American soldiers"; "You Americans don't have no chance. We will win the war." "Well, you guys needn't be interested in when the war will be over because you won't go back; you will stay here and work. I will go back to the States because I am an American citizen"; "We will kill all you prisoners right here anyway, whether you win the war or lose it. You will never get to go back to the States"; "I will be glad when all of the Americans is dead, and then I can go home and live happy." These are some of the statements petitioner made aligning himself with the Japanese cause. There was also evidence that he said that the prisoners would never go back to their wives and their families, that Japan would win the war and that he would return to the United States as an important man, that Japan would win if it took 100 years, that the Japanese were superior to the Americans and if the American Army had Japanese officers, they could whip the world, that there were more American boys who would be available to do the work, if the present prisoners were too weak to work. And on the day the work at the camp ended after Japan surrendered he commented, "You American bastards will be well fed" or "you will be getting fat from now on."

There was evidence that in May or June, 1945, petitioner said, "It don't make a damn to me which way the war goes because I am going back to the States anyway." At the trial he said he felt no loyalty to the United States during the period from March 1943 to December 1945,

and that he intended to do everything he could to help Japan. He also testified that the first loyalty he felt to the United States, following the entry of his name in the Koseki, was when he applied for registration as an American citizen in December, 1945, and once more took the oath of allegiance. Yet we have already seen that in connection with that application he conceded his dual nationality and the continuance of his American citizenship during his entire stay in Japan.

If the versions of petitioner's words and conduct at the Oeyama camp, testified to by the various witnesses, were believed, the traitorous intent would be shown by overwhelming evidence. Petitioner indeed conceded at the trial that he felt no loyalty to the United States at this time and had thrown his lot in with Japan. Yet at the end of the war he had taken the oath of allegiance to the United States, claiming he had been a United States citizen all along. The issue of intent to betray, like the citizenship issue, was plainly one for the jury to decide. We would have to reject all the evidence adverse to petitioner and accept as the truth his protestations when the shadow of the hangman's noose was on him in order to save him from the finding that he did have the intent to betray. That finding of the jury was based on its conclusion that what he did was done willingly and voluntarily and not because the duty of his office or any coercion compelled him to do it. The finding that he had an uncoerced and voluntary purpose was amply supported by the evidence. Therefore the second element of the crime of treason was firmly established.

Other alleged errors are pressed upon us. But they are either insubstantial or so adequately disposed of by the Court of Appeals that we give them no notice, with one exception and that relates to the severity of the sentence. At the time of these offenses Congress had provided that one who is guilty of treason "shall suffer death; or, at

the discretion of the court, shall be imprisoned not less than five years and fined not less than $10,000, . . . and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States." [10] The trial judge imposed the death sentence. The argument is that that sentence was so severe as to be arbitrary. It was, however, within the statutory limits. Whether a sentence may be so severe and the offense so trivial that an appellate court should set it aside is a question we need not reach. The flagrant and persistent acts of petitioner gave the trial judge such a leeway in reaching a decision on the sentence that we would not be warranted in interfering. Cf. *Blockburger* v. *United States*, 284 U. S. 299, 305.

*Affirmed.*

MR. JUSTICE FRANKFURTER, not having heard the argument, owing to illness, took no part in the disposition of the case.

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

MR. CHIEF JUSTICE VINSON, with whom MR. JUSTICE BLACK and MR. JUSTICE BURTON join, dissenting.

The threshold question in this case is whether petitioner renounced his United States citizenship and became expatriated by reason of acts committed in Japan during the War. Prior to 1943, petitioner was regarded by Japanese authorities as an enemy alien. In March, 1943, petitioner gave official notice of his allegiance to Japan by having his name registered in the family Koseki. Thereafter, petitioner had his name removed from police

[10] 18 U. S. C. (1946 ed.) § 2. For the present version see note 7, *supra*.

records as an enemy alien, secured employment subject to military control at a munitions plant, traveled to China on a Japanese passport, and prayed daily for the Emperor's health and a Japanese victory. These facts and petitioner's heinous treatment of American prisoners of war, recited in the opinion of the Court, convince us that petitioner, for over two years, was consistently demonstrating his allegiance to Japan, not the United States. As a matter of law, he expatriated himself as well as that can be done.

Petitioner's statements that he was still a citizen of the United States—made in order to obtain a United States passport after Japan had lost the War—cannot restore citizenship renounced during the War. Because we conclude, on this record, that petitioner's whole course of conduct was inconsistent with retention of United States citizenship, we would reverse petitioner's conviction of treason against the United States.

# ON LEE *v.* UNITED STATES.

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

No. 543. Argued April 24, 1952.—Decided June 2, 1952.

While petitioner was at large on bail pending his trial in a federal court on federal narcotics charges, an old acquaintance and former employee, who, unknown to petitioner, was a federal "undercover agent" and had a radio transmitter concealed on his person, entered the customer's room of petitioner's laundry and engaged petitioner in a conversation. Self-incriminating statements, made by petitioner during this conversation and a later conversation on a sidewalk with the same "undercover agent," were listened to on a radio receiver outside the laundry by another federal agent, who testified concerning them, over petitioner's objection, at the trial in which petitioner was convicted. *Held:*

1. The conduct of the federal agents did not amount to such a search and seizure as is proscribed by the Fourth Amendment. Pp. 750–753.

(a) The undercover agent committed no trespass when he entered petitioner's place of business, and his subsequent conduct did not render the entry a trespass *ab initio*. Pp. 751–753.

(b) The doctrine of trespass *ab initio* is applicable only as a rule of liability in civil actions, not where the right of the Government to make use of evidence in a criminal prosecution is involved. P. 752.

(c) The contentions that the undercover man's entrance was a trespass because consent was obtained by fraud, and that the other agent was a trespasser because by means of the radio receiver outside the laundry he overheard what went on inside, must be rejected. Pp. 752–753.

(d) Decisions relating to problems raised where tangible property is unlawfully seized are inapposite in the field of mechanical or electronic devices designed to overhear or intercept conversation, at least where access to the listening post was not obtained by illegal methods. P. 753.

(e) Even if the Court were to overturn its ruling that wiretapping is outside the ban of the Fourth Amendment, *Olmstead* v.

*United States*, 277 U. S. 438, petitioner would not be aided, since his case cannot be treated as one involving wiretapping. Pp. 753–754.

2. The facts do not show a violation of § 605 of the Federal Communications Act, since there was no interference with any communications facility that petitioner possessed or was entitled to use, nor was petitioner sending messages to anyone or using a system of communications within the Act. P. 754.

3. The evidence should not have been excluded as a means of disciplining law enforcement officers. *McNabb* v. *United States*, 318 U. S. 332, distinguished. Pp. 754–758.

193 F. 2d 306, affirmed.

Petitioner was convicted in the District Court of federal offenses. The Court of Appeals affirmed. 193 F. 2d 306. This Court granted certiorari. 342 U. S. 941. *Affirmed*, p. 758.

*Gilbert S. Rosenthal* argued the cause for petitioner. With him on the brief was *Henry K. Chapman.*

*Robert S. Erdahl* argued the cause for the United States. With him on the brief were *Solicitor General Perlman* and *Assistant Attorney General McInerney.*

Mr. Justice Jackson delivered the opinion of the Court.

Petitioner was convicted on a two-count indictment, one charging the substantive offense of selling a pound of opium in violation of 21 U. S. C. §§ 173 and 174, the other conspiring to sell the opium in violation of 18 U. S. C. § 371. The Court of Appeals sustained the conviction by a divided court.[1] We granted certiorari.[2]

The questions raised by petitioner have been considered but only one is of enough general interest to merit discussion. That concerns admission in evidence of two conversations petitioner had, while at large on bail pend-

[1] 193 F. 2d 306.

[2] 342 U. S. 941.

ing trial, with one Chin Poy. The circumstances are these:

Petitioner, On Lee, had a laundry in Hoboken. A customers' room opened on the street, back of it was a room for ironing tables, and in the rear were his living quarters. Chin Poy, an old acquaintance and former employee, sauntered in and, while customers came and went, engaged the accused in conversation in the course of which petitioner made incriminating statements. He did not know that Chin Poy was what the Government calls "an undercover agent" and what petitioner calls a "stool pigeon" for the Bureau of Narcotics. Neither did he know that Chin Poy was wired for sound, with a small microphone in his inside overcoat pocket and a small antenna running along his arm. Unbeknownst to petitioner, an agent of the Narcotics Bureau named Lawrence Lee had stationed himself outside with a receiving set properly tuned to pick up any sounds the Chin Poy microphone transmitted. Through the large front window Chin Poy could be seen and through the receiving set his conversation, in Chinese, with petitioner could be heard by agent Lee. A few days later, on the sidewalks of New York, another conversation took place between the two, and damaging admissions were again "audited" by agent Lee.

For reasons left to our imagination, Chin Poy was not called to testify about petitioner's incriminating admissions. Against objection,[3] however, agent Lee was al-

[3] It seems probable that petitioner failed to properly object to agent Lee's testimony. Shortly after agent Lee began to testify, petitioner's counsel addressed the court: ". . . I would like to enter a general objection to testimony by this witness of conversations alleged to have been had between Agent Gim and Gong not in the hearing of the defendant on trial or in his presence." This objection is not even addressed to the testimony describing the conversation between On Lee and Chin Poy. Later, when agent

lowed to relate the conversations as heard with aid of his receiving set. Of this testimony, it is enough to say that it was certainly prejudicial if its admission was improper.

Petitioner contends that this evidence should have been excluded because the manner in which it was ob-

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Lee started to describe the conversation between On Lee and Chin Poy, petitioner's counsel said, "That is objected to." At best this is a general objection which is insufficient to preserve such a specific claim as violation of a constitutional provision in obtaining the evidence. Wigmore on Evidence, § 18 (C) (1). Some jurisdictions recognize an exception to the rule that an overruled general objection cannot avail proponent on appeal in the case where it appears on the face of the evidence that it is admissible for no purpose whatever, or where the nature of the precise specific objection which could be made is readily discernible. *Sparks* v. *Territory of Oklahoma,* 146 F. 371. But this exception is generally confined to the cases where such evidence was plainly irrelevant. Where, as in this case, the objection relies on collateral matter to show inadmissibility, and in addition the exclusionary rule to be relied on involves interpretation of the Constitution, the orthodox rule of evidence requiring specification of the objection is buttressed by the uniform policy requiring constitutional questions to be raised at the earliest possible stage in the litigation.

To call the objection a general one is to put it in the light most favorable to petitioner; later colloquy between counsel and court indicates that the intended ground of that objection was irrelevance. There were in addition motions to dismiss the indictment on each count, and to exclude certain other testimony, but no reference to the testimony here in question at the motion stage. There was no motion for a new trial, but there was a motion to set aside the verdict—but still no mention of the search-and-seizure argument for exclusion. There is not even any mention of it in the statement of points to be relied on in the Court of Appeals. The Court of Appeals, however, does treat it fully, presumably under Rule 52 (b) of the Rules of Criminal Procedure, allowing the appellate court to notice "plain error." Though we think the Court of Appeals would have been within its discretion in refusing to consider the point, their having passed on it leads us to treat the merits also.

tained violates both the search-and-seizure provisions of the Fourth Amendment,[4] and § 605 of the Federal Communications Act (47 U. S. C. § 605); [5] and, if not rejected on those grounds, we should pronounce it inadmissible anyway under the judicial power to require fair play in federal law enforcement.

The conduct of Chin Poy and agent Lee did not amount to an unlawful search and seizure such as is proscribed by the Fourth Amendment. In *Goldman* v. *United States,* 316 U. S. 129, we held that the action of federal agents in placing a detectaphone on the outer wall of defendant's hotel room, and thereby overhearing conversations held within the room, did not violate the Fourth Amendment. There the agents had earlier committed a trespass in order to install a listening device within the room itself. Since the device failed to work, the Court expressly reserved decision as to the effect on the search-and-seizure question of a trespass in that situation. Petitioner in the instant case has seized upon that dictum, apparently on the assumption that the presence of a radio set would automatically bring him within the reservation if he can show a trespass.

But petitioner cannot raise the undecided question, for here no trespass was committed. Chin Poy entered a place of business with the consent, if not by the implied

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[4] "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." U. S. Const., Amend. IV.

[5] ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ."

invitation, of the petitioner. Petitioner contends, however, that Chin Poy's subsequent "unlawful conduct" vitiated the consent and rendered his entry a trespass *ab initio*.

If we were to assume that Chin Poy's conduct was unlawful and consider this argument as an original proposition, it is doubtful that the niceties of tort law initiated almost two and a half centuries ago by the case of the *Six Carpenters,* 8 Coke 146 (a), cited by petitioner, are of much aid in determining rights under the Fourth Amendment. But petitioner's argument comes a quarter of a century too late: this contention was decided adversely to him in *McGuire* v. *United States,* 273 U. S. 95, 98, 100, where Mr. Justice Stone, speaking for a unanimous Court, said of the doctrine of trespass *ab initio:* "This fiction, obviously invoked in support of a policy of penalizing the unauthorized acts of those who had entered under authority of law, has only been applied as a rule of liability in civil actions against them. Its extension is not favored." He concluded that the Court would not resort to "a fiction whose origin, history, and purpose do not justify its application where the right of the government to make use of evidence is involved." This was followed in *Zap* v. *United States,* 328 U. S. 624, 629.

By the same token, the claim that Chin Poy's entrance was a trespass because consent to his entry was obtained by fraud must be rejected. Whether an entry such as this, without any affirmative misrepresentation, would be a trespass under orthodox tort law is not at all clear. See Prosser on Torts, § 18. But the rationale of the *McGuire* case rejects such fine-spun doctrines for exclusion of evidence. The further contention of petitioner that agent Lee, outside the laundry, was a trespasser because by these aids he overheard what went on inside verges on the frivolous. Only in the case of physical entry, either

by force, as in *McDonald* v. *United States,* 335 U. S. 451, by unwilling submission to authority, as in *Johnson* v. *United States,* 333 U. S. 10, or without any express or implied consent, as in *Nueslein* v. *District of Columbia,* 73 App. D. C. 85, 115 F. 2d 690, would the problem left undecided in the *Goldman* case be before the Court.

Petitioner relies on cases relating to the more common and clearly distinguishable problems raised where tangible property is unlawfully seized. Such unlawful seizure may violate the Fourth Amendment, even though the entry itself was by subterfuge or fraud rather than force. *United States* v. *Jeffers,* 342 U. S. 48; *Gouled* v. *United States,* 255 U. S. 298 (the authority of the latter case is sharply limited by *Olmstead* v. *United States,* 277 U. S. 438, at 463). But such decisions are inapposite in the field of mechanical or electronic devices designed to overhear or intercept conversation, at least where access to the listening post was not obtained by illegal methods.

Petitioner urges that if his claim of unlawful search and seizure cannot be sustained on authority, we reconsider the question of Fourth Amendment rights in the field of overheard or intercepted conversations. This apparently is upon the theory that since there was a radio set involved, he could succeed if he could persuade the Court to overturn the leading case holding wiretapping to be outside the ban of the Fourth Amendment, *Olmstead* v. *United States,* 277 U. S. 438, and the cases which have followed it. We need not consider this, however, for success in this attempt, which failed in *Goldman* v. *United States,* 316 U. S. 129, would be of no aid to petitioner unless he can show that his situation should be treated as wiretapping. The presence of a radio set is not sufficient to suggest more than the most attenuated analogy to wiretapping. Petitioner was talking confidentially and indiscreetly with one he trusted, and he

was overheard. This was due to aid from a transmitter and receiver, to be sure, but with the same effect on his privacy as if agent Lee had been eavesdropping outside an open window. The use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions. It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the Fourth Amendment here.

Nor do the facts show a violation of § 605 of the Federal Communications Act. Petitioner had no wires and no wireless. There was no interference with any communications facility which he possessed or was entitled to use. He was not sending messages to anybody or using a system of communications within the Act. *Goldstein* v. *United States,* 316 U. S. 114.

Finally, petitioner contends that even though he be overruled in all else, the evidence should be excluded as a means of disciplining law enforcement officers. Cf. *McNabb* v. *United States,* 318 U. S. 332. In *McNabb,* however, we held that, where defendants had been unlawfully detained *in violation of the federal statute requiring prompt arraignment before a commissioner,* a confession made during the detention would be excluded as evidence in federal courts even though not inadmissible on the ground of any otherwise involuntary character. But here neither agent nor informer violated any federal law; and violation of state law, even had it been shown here, as it was not, would not render the evidence

obtained inadmissible in federal courts. *Olmstead* v. *United States,* 277 U. S. 438, at 468.

In order that constitutional or statutory rights may not be undermined, this Court has on occasion evolved or adopted from the practice of other courts exclusionary rules of evidence going beyond the requirements of the constitutional or statutory provision. *McNabb* v. *United States, supra; Weeks* v. *United States,* 232 U. S. 383. In so doing, it has, of course, departed from the common-law rule under which otherwise admissible evidence was not rendered inadmissible by the fact that it had been illegally obtained. Such departures from the primary evidentiary criteria of relevancy and trustworthiness must be justified by some strong social policy. In discussing the extension of such rules, and the creation of new ones, it is well to remember the remarks of Mr. Justice Stone in *McGuire* v. *United States,* 273 U. S. 95, at 99: "A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule."

Rules of evidence, except where prescribed by statute, are formulated by the courts to some extent, as "a question of sound policy in the administration of the law." *Zucker* v. *Whitridge,* 205 N. Y. 50, 65, 98 N. E. 209, 213. Courts which deal with questions of evidence more frequently than we do have found it unwise to multiply occasions when the attention of a trial court in a criminal case must be diverted from the issue of the defendant's guilt to the issue of someone else's misconduct in obtaining evidence. They have considered that "The underlying principle obviously is that the court, when engaged in trying a criminal cause, will not take notice of the manner in which witnesses have possessed themselves of papers, or other articles of personal property, which

are material and properly offered in evidence." *People* v. *Adams,* 176 N. Y. 351, 358, 68 N. E. 636, 638. However, there is a procedure in federal court by which defendant may protect his right in advance of trial to have returned to him evidence unconstitutionally obtained. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. But since we hold here that there was no violation of the Constitution, such a remedy could not be invoked. Exclusion would have to be based on a policy which placed the penalizing of Chin Poy's breach of confidence above ordinary canons of relevancy. For On Lee's statements to Chin Poy were admissions against interest provable against him as an exception to the hearsay rule. The normal manner of proof would be to call Chin Poy and have him relate the conversation. We can only speculate on the reasons why Chin Poy was not called. It seems a not unlikely assumption that the very defects of character and blemishes of record which made On Lee trust him with confidences would make a jury distrust his testimony. Chin Poy was close enough to the underworld to serve as bait, near enough the criminal design so that petitioner would embrace him as a confidante, but too close to it for the Government to vouch for him as a witness. Instead, the Government called agent Lee. We should think a jury probably would find the testimony of agent Lee to have more probative value than the word of Chin Poy.

Society can ill afford to throw away the evidence produced by the falling out, jealousies, and quarrels of those who live by outwitting the law. Certainly no one would foreclose the turning of state's evidence by denizens of the underworld. No good reason of public policy occurs to us why the Government should be deprived of the benefit of On Lee's admissions because he made them to a confidante of shady character.

The trend of the law in recent years has been to turn away from rigid rules of incompetence, in favor of admitting testimony and allowing the trier of fact to judge the weight to be given it. As this Court has pointed out: " 'Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors. But the last fifty years have wrought a great change in these respects, and to-day the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction.' " *Funk* v. *United States,* 290 U. S. 371, 376.

The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are "dirty business" may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions. But to the extent that the argument for exclusion departs from such orthodox evidentiary canons as relevancy and credibility, it rests solely on the proposition that the Government shall be arbitrarily penalized for the low morals of its informers. However unwilling we as individuals may be to approve conduct such as that of Chin Poy, such disapproval must not be thought to justify a social policy of the magnitude necessary to arbitrarily exclude otherwise relevant evidence. We think the administration of justice is better served if stratagems such as we have here are regarded as raising,

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not questions of law, but issues of credibility. We cannot say that testimony such as this shall, as a matter of law, be refused all hearing.

*Judgment affirmed.*

MR. JUSTICE BLACK believes that in exercising its supervisory authority over criminal justice in the federal courts (see *McNabb* v. *United States*, 318 U. S. 332, 341) this Court should hold that the District Court should have rejected the evidence here challenged.

MR. JUSTICE FRANKFURTER, dissenting.

The law of this Court ought not to be open to the just charge of having been dictated by the "odious doctrine," as Mr. Justice Brandeis called it, that the end justifies reprehensible means. To approve legally what we disapprove morally, on the ground of practical convenience, is to yield to a short-sighted view of practicality. It derives from a preoccupation with what is episodic and a disregard of long-run consequences. The method by which the state chiefly exerts an influence upon the conduct of its citizens, it was wisely said by Archbishop William Temple, is "the moral qualities which it exhibits in its own conduct."

Loose talk about war against crime too easily infuses the administration of justice with the psychology and morals of war. It is hardly conducive to the soundest employment of the judicial process. Nor are the needs of an effective penal code seen in the truest perspective by talk about a criminal prosecution's not being a game in which the Government loses because its officers have not played according to rule. Of course criminal prosecution is more than a game. But in any event it should not be deemed to be a dirty game in which "the dirty business" of criminals is outwitted by "the dirty business" of law officers. The contrast between morality professed

by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a hot-water faucet.

It is a quarter century since this Court, by the narrowest margin, refused to put wiretapping beyond the constitutional pale where a fair construction of the Fourth Amendment should properly place it. Since then, instead of going from strength to strength in combatting crime, we have gone from inefficiency to inefficiency, from corruption to corruption. The moral insight of Mr. Justice Brandeis unerringly foresaw this inevitability. "The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions." *Olmstead* v. *United States,* 277 U. S. 438, 471, 474. The circumstances of the present case show how the rapid advances of science are made available for that police intrusion into our private lives against which the Fourth Amendment of the Constitution was set on guard.

It is noteworthy that, although this Court deemed wiretapping not outlawed by the Constitution, Congress outlawed it legislatively by the Communications Act of 1934, 48 Stat. 1064, 1103, 47 U. S. C. § 605; *Nardone* v. *United States,* 302 U. S. 379; 308 U. S. 338. What is perhaps even more noteworthy is its pervasive disregard in practice by those who as law officers owe special obedience to law. What is true of the federal Act against wiretapping and its violations is widely true of related state legislation and its disobedience. See Westin, The Wire-Tapping Problem, 52 Col. L. Rev. 165 (1952). Few

sociological generalizations are more valid than that lawlessness begets lawlessness.

The members of this Court who so vigorously urged that wiretapping is within the clear scope of the prohibition of the Fourth Amendment were no sentimentalists about crime or criminals. Mr. Justice Holmes, Mr. Justice Brandeis, Mr. Justice Butler and Mr. Chief Justice Stone were no softies. In all matters of social policy we have to choose, and it was the hardy philosophy of life that his years in the Army of the Potomac taught him that led Mr. Justice Holmes to deem it "a less evil that some criminals should escape than that the Government should play an ignoble part." *Olmstead* v. *United States, supra,* at 470.

Suppose it be true that through "dirty business" it is easier for prosecutors and police to bring an occasional criminal to heel. It is most uncritical to assume that unless the Government is allowed to practice "dirty business" crime would become rampant or would go unpunished.

In the first place, the social phenomena of crime are imbedded in the texture of our society. Equally deep-seated are the causes of all that is sordid and ineffective in the administration of our criminal law. These are outcroppings, certainly in considerable part, of modern industrialism and of the prevalent standards of the community, related to the inadequacy in our day of early American methods and machinery for law enforcement and to the small pursuit of scientific inquiry into the causes and treatment of crime.

Of course we cannot wait on the slow progress of the sociological sciences in illuminating so much that is still dark. Nor should we relax for a moment vigorous enforcement of the criminal law until society, by its advanced civilized nature, will beget an atmosphere and environment in which crime will shrink to relative insig-

nificance. My deepest feeling against giving legal sanction to such "dirty business" as the record in this case discloses is that it makes for lazy and not alert law enforcement. It puts a premium on force and fraud, not on imagination and enterprise and professional training. The third degree, search without warrant, wiretapping and the like, were not tolerated in what was probably the most successful administration in our time of the busiest United States Attorney's office. This experience under Henry L. Stimson in the Southern District of New York, compared with happenings elsewhere, doubtless planted in me a deep conviction that these short-cuts in the detection and prosecution of crime are as self-defeating as they are immoral.

Sir James Fitzjames Stephen brings significant testimony on this point:

> "During the discussions which took place on the Indian Code of Criminal Procedure in 1872 some observations were made on the reasons which occasionally lead native police officers to apply torture to prisoners. An experienced civil officer observed, 'There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence.' This was a new view to me, but I have no doubt of its truth." 1 Stephen, A History of the Criminal Law of England (1883), 442, note. Compare §§ 25 and 26 of the Indian Evidence Act (1872).

And Fitzjames Stephen, who acted on this experience in drawing the Indian Evidence Act, was no softie, either before he became a judge or on the bench.

Accordingly I adhere to the views expressed in *Goldman* v. *United States,* 316 U. S. 129, 136, that the *Olmstead* case should be overruled for the reasons set forth

in the dissenting opinions in that case. These views have been strongly underlined by the steady increase of lawlessness on the part of law officers, even after Congress has forbidden what the dissenters in *Olmstead* found the Constitution to forbid.

Even on the basis of the prior decisions of this Court, however, I feel bound to dissent. The Court seems not content with calling a halt at the place it had reached on what I deem to be the wrong road. As my brother BURTON shows, the Court now pushes beyond the lines of legality heretofore drawn. Such encouragement to lazy, immoral conduct by the police does not bode well for effective law enforcement. Nor will crime be checked by such means.

MR. JUSTICE DOUGLAS, dissenting.

The Court held in *Olmstead* v. *United States,* 277 U. S. 438, over powerful dissents by Mr. Justice Holmes, Mr. Justice Brandeis, Mr. Justice Butler, and Chief Justice Stone that wire tapping by federal officials was not a violation of the Fourth and Fifth Amendments. Since that time the issue has been constantly stirred by those dissents and by an increasing use of wire tapping by the police. Fourteen years later in *Goldman* v. *United States,* 316 U. S. 129, the issue was again presented to the Court. I joined in an opinion of the Court written by Mr. Justice Roberts, which adhered to the *Olmstead* case, refusing to overrule it. Since that time various aspects of the problem have appeared again and again in the cases coming before us. I now more fully appreciate the vice of the practices spawned by *Olmstead* and *Goldman.* Reflection on them has brought new insight to me. I now feel that I was wrong in the *Goldman* case. Mr. Justice Brandeis in his dissent in *Olmstead* espoused the cause of privacy—the right to be let alone. What he wrote is an

historic statement of that point of view. I cannot improve on it.

> "When the Fourth and Fifth Amendments were adopted, 'the form that evil had theretofore taken,' had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry. Protection against such invasion of 'the sanctities of a man's home and the privacies of life' was provided in the Fourth and Fifth Amendments by specific language. *Boyd* v. *United States,* 116 U. S. 616, 630. But 'time works changes, brings into existence new conditions and purposes.' Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.
>
> "Moreover, 'in the application of a constitution, our contemplation cannot be only of what has been but of what may be.' The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. 'That

places the liberty of every man in the hands of every petty officer' was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed 'subversive of all the comforts of society.' Can it be that the Constitution affords no protection against such invasions of individual security?

. . . . .

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

. . . . .

"Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." 277 U. S., *supra,* at 473–474, 478–479.

That philosophy is applicable not only to a detectaphone placed against the wall or a mechanical device designed to record the sounds from telephone wires but also to the "walky-talky" radio used in the present case. The nature of the instrument that science or engineering develops is not important. The controlling, the decisive factor is the invasion of privacy against the command of the Fourth and Fifth Amendments.

I would reverse this judgment. It is important to civil liberties that we pay more than lip service to the view that this manner of obtaining evidence against people is "dirty business" (see Mr. Justice Holmes, dissenting, *Olmstead* v. *United States, supra,* p. 470).

MR. JUSTICE BURTON, with whom MR. JUSTICE FRANKFURTER concurs, dissenting.

I agree with the dissenting opinion below that what Lee overheard by means of a radio transmitter surreptitiously introduced and operating, without warrant or consent, *within* petitioner's premises, should not have been admitted in evidence. The Fourth Amendment's protection against unreasonable searches and seizures is not limited to the seizure of tangible things. It extends to intangibles, such as spoken words. In applying the exclusionary rule of *Weeks* v. *United States,* 232 U. S. 383, we are primarily concerned with where and how the evidence is seized rather than what the evidence is. Cf. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *United States* v. *Jeffers,* 342 U. S. 48; *Nueslein* v. *District of Columbia,* 73 App. D. C. 85, 115 F. 2d 690.

It seems clear that if federal officers without warrant or permission enter a house, under conditions amounting to unreasonable search, and there conceal themselves, the conversations they thereby overhear are inadmissible in a federal criminal action. It is argued that, in the instant case, there was no illegal entry because petitioner

consented to Chin Poy's presence. This overlooks the fact that Chin Poy, without warrant and without petitioner's consent, took with him the concealed radio transmitter to which agent Lee's receiving set was tuned. For these purposes, that amounted to Chin Poy surreptitiously bringing Lee with him.

This Court has held generally that, in a federal criminal trial, a federal officer may testify to what he sees or hears take place within a house or room which he has no warrant or permission to enter, provided he sees or hears it outside of those premises. *Olmstead* v. *United States,* 277 U. S. 438. Cf. *Hester* v. *United States,* 265 U. S. 57. This holds true even where the officer supplements his hearing with a hearing aid, detectaphone or other device outside the premises. This merely enables him to hear more distinctly, where he is, what reaches him *there* from wherever it may come. He and his hearing aid pick up the sounds outside of, rather than within, the protected premises. *Goldman* v. *United States,* 316 U. S. 129.

In the instant case, Chin Poy, who was lawfully in petitioner's room, could have testified as to what he, himself, saw or heard there. Yet, if he had been there unlawfully or surreptitiously, without warrant or consent, under conditions amounting to an unreasonable search, he should not be permitted, in this proceeding, to testify even to that. Cf. *Gouled* v. *United States,* 255 U. S. 298; *Nueslein* v. *District of Columbia, supra.* Similarly, if Lee, under like conditions, without warrant and without authority, entered the room with Chin Poy and, while concealed, overheard petitioner's conversation with Chin Poy, Lee's testimony should be excluded. In substance, that is what took place here. Lee's overhearing of petitioner's statements was accomplished through Chin Poy's surreptitious introduction, within petitioner's laundry, of Lee's concealed radio transmitter which, without petition-

er's knowledge or consent, *there* picked up petitioner's conversation and transmitted it to Lee outside the premises. The presence of the transmitter, for this purpose, was the presence of Lee's ear. While this test draws a narrow line between what is admissible and what is not, it is a clearly ascertainable line. It is determined by where the "effects" are seized or, as here, where the words are picked up. In this case the words were picked up without warrant or consent *within* the constitutionally inviolate "house" of a person entitled to protection there against unreasonable searches and seizures of his person, house, papers and effects. It is inevitable that the line be narrow between, on the one hand, the constitutional right of a person to be free from unreasonable searches and seizures and, on the other, the need for the effective prosecution of crime. Drawing the line is a continuing process. The important thing is that the direction of the line that emerges from successive cases be clear.

# BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* HOWARD ET AL.

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

No. 458. Argued April 22, 1952.—Decided June 9, 1952.

Petitioner union is an exclusively white union which acts under the Railway Labor Act as bargaining representative for railroad trainmen. By threat of a strike, it forced petitioner railroad to agree not to permit Negro "train porters" to perform any of the duties of brakemen. As a result, the railroad took steps to discharge Negro "train porters" and replace them with white brakemen. Respondent, a member of a group of Negro "train porters" who for many years had satisfactorily performed the duties of brakemen and had their own separate union as their bargaining representative, brought a class suit in a Federal District Court for a judgment declaring the agreement void and enjoining the railroad from carrying it out. *Held:*

1. The Railway Labor Act prohibits bargaining agents who enjoy the advantages of its provisions from using their position and power to destroy Negro workers' jobs in order to bestow them on white workers. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192. Pp. 769–774.

2. The District Court has the jurisdiction and power to issue the injunction necessary to protect these Negro workers from the racial discrimination practiced against them. Pp. 774–775.

(a) Since this dispute involves the validity of a contract, not its meaning, it cannot be resolved by interpretation of a bargaining agreement so as to give exclusive jurisdiction to the Railway Adjustment Board under *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239. P. 774.

(b) Nor does this dispute hinge on the proper craft classification of the "train porters" so as to call for settlement by the National Mediation Board under *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297. P. 774.

(c) Nor is the issuance of an injunction in this case prohibited by the Norris-LaGuardia Act. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192; *Graham* v. *Brotherhood of Firemen*, 338 U. S. 232. P. 774.

3. On remand, the District Court should permanently enjoin the petitioner union and railroad from use of the contract or any other similar discriminatory bargaining device to oust the Negro "train porters" from their jobs. P. 775.

191 F. 2d 442, affirmed.

In a suit to enjoin enforcement of a bargaining agreement between a railroad and a trainmen's union on the ground that it discriminated against Negro "train porters," the District Court denied most of the relief prayed for, on the ground that the National Mediation Board and the National Railroad Adjustment Board had exclusive jurisdiction of the dispute under the Railway Labor Act. 72 F. Supp. 695. The Court of Appeals reversed this holding. 191 F. 2d 442. This Court granted certiorari. 342 U. S. 940. *Affirmed and remanded to the District Court,* p. 775.

*Charles R. Judge* argued the cause for petitioners. With him on the brief was *Wayland K. Sullivan.*

*Joseph C. Waddy* and *Victor Packman* argued the cause for Howard, respondent. With them on the brief was *Henry D. Espy.*

*Eugene G. Nahler, James L. Homire, Cornelius H. Skinker, Jr.* and *Alvin J. Baumann* submitted on brief for the St. Louis-San Francisco Railway Co., respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case raises questions concerning the power of courts to protect Negro railroad employees from loss of their jobs under compulsion of a bargaining agreement which, to avoid a strike, the railroad made with an exclusively white man's union. Respondent Simon Howard, a Frisco[1] train employee for nearly forty years,

[1] St. Louis-San Francisco Railway Company and its subsidiary St. Louis-San Francisco & Texas Railway Company.

brought this action on behalf of himself and other colored employees similarly situated.

In summary the complaint alleged: Negro employees such as respondent constituted a group called "train porters" although they actually performed all the duties of white "brakemen"; the Brotherhood of Railroad Trainmen, bargaining representative of "brakemen" under the Railway Labor Act,[2] had for years used its influence in an attempt to eliminate Negro trainmen and get their jobs for white men who, unlike colored "train porters," were or could be members of the Brotherhood; on March 7, 1946, the Brotherhood finally forced the Frisco to agree to discharge the colored "train porters" and fill their jobs with white men who, under the agreement, would do less work but get more pay. The complaint charged that the Brotherhood's "discriminatory action" violated the train porters' rights under the Railway Labor Act and under the Constitution; that the agreement was void because against public policy, prejudicial to the public interest, and designed to deprive Negro trainmen of their right to earn a livelihood because of their race or color. The prayers were that the court adjudge and decree that the contract was void and unenforceable for the reasons stated; that the Railroad be "enjoined from discontinuing the jobs known as Train Porters" and "from hiring white Brakemen to replace or displace plaintiff and other Train Porters as planned in accordance with said agreement."

The facts as found by the District Court, affirmed with emphasis by the Court of Appeals, substantially established the truth of the complaint's material allegations. These facts showed that the Negro train porters had for a great many years served the Railroad with loyalty, integrity and efficiency; that "train porters" do all the work

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[2] 44 Stat. 577, as amended, 48 Stat. 1185, 45 U. S. C. §§ 151 *et seq.*

of brakemen;[3] that the Government administrator of railroads during World War I had classified them as brakemen and had required that they be paid just like white brakemen; that when the railroads went back to their owners, they redesignated these colored brakemen as "train porters," "left their duties untouched," and forced them to accept wages far below those of white "brakemen" who were Brotherhood members; that for more than a quarter of a century the Brotherhood and other exclusively white rail unions had continually carried on a program of aggressive hostility to employment of Negroes for train, engine and yard service; that the agreement of March 7, 1946, here under attack, provides that train porters shall no longer do any work "generally recognized as brakeman's duties"; that while this agreement did not in express words compel discharge of "train porters," the economic unsoundness of keeping them after transfer of their "brakemen" functions made complete abolition of the "train porter" group inevitable; that two days after "the Carriers reluctantly, and as a result of the strike threats" signed the agreement, they notified train porters that "Under this agreement we will, effective April 1, 1946, discontinue all train porter positions." Accordingly, respondent Howard, and others, were personally notified to turn in their switch keys, lanterns, markers and other brakemen's equipment, and notices of job vacancies were posted to be bid in by white brakemen only.

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[3] In addition to doing all the work done by ordinary brakemen, train porters have been required to sweep the coaches and assist passengers to get on and off the trains. As the Court of Appeals noted, "These aisle-sweeping and passenger-assisting tasks, however, are simply minor and incidental, occupying only, as the record shows, approximately five per cent of a train porter's time." 191 F. 2d 442, 444.

The District Court held that the complaint raised questions which Congress by the Railway Labor Act had made subject to the exclusive jurisdiction of the National Mediation Board and the National Railroad Adjustment Board. 72 F. Supp. 695. The Court of Appeals reversed this holding.[4] It held that the agreement, as construed and acted upon by the Railroad, was an "attempted predatory appropriation" of the "train porters' " jobs, and was to this extent illegal and unenforceable. It therefore ordered that the Railroad must keep the "train porters" as employees; it permitted the Railroad and the Brotherhood to treat the contract as valid on condition that the Railroad would recognize the colored "train porters" as members of the craft of "brakemen" and that the Brotherhood would fairly represent them as such. 191 F. 2d 442. We granted certiorari. 342 U. S. 940.

While different in some respects, the basic pattern of racial discrimination in this case is much the same as that we had to consider in *Steele* v. *L. & N. R. Co.*, 323 U. S. 192. In this case, as was charged in the *Steele* case, a Brotherhood acting as a bargaining agent under the Railway Labor Act has been hostile to Negro employees, has discriminated against them, and has forced the Railroad to make a contract which would help Brotherhood members take over the jobs of the colored "train porters."

There is a difference in the circumstances of the two cases, however, which it is contended requires us to deny the judicial remedy here that was accorded in the *Steele*

[4] One part of the District Court's order was affirmed. The Court of Appeals held that the District Court had properly enjoined the Railroad from abolishing the position of "train porters" under the notices given, on the ground that these notices were insufficient to meet the requirements of § 2, Seventh, and § 6 of the Railway Labor Act. The view we take makes it unnecessary for us to consider this question.

case. That difference is this: Steele was admittedly a locomotive fireman although not a member of the Brotherhood of Locomotive Firemen and Enginemen which under the Railway Labor Act was the exclusive bargaining representative of the entire craft of firemen. We held that the language of the Act imposed a duty on the craft bargaining representative to exercise the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against any of them. Failure to exercise this duty was held to give rise to a cause of action under the Act. In this case, unlike the *Steele* case, the colored employees have for many years been treated by the carriers and the Brotherhood as a separate class for representation purposes and have in fact been represented by another union of their own choosing. Since the Brotherhood has discriminated against "train porters" instead of minority members of its own "craft," it is argued that the Brotherhood owed no duty at all to refrain from using its statutory bargaining power so as to abolish the jobs of the colored porters and drive them from the railroads. We think this argument is unsound and that the opinion in the *Steele* case points to a breach of statutory duty by this Brotherhood.

As previously noted, these train porters are threatened with loss of their jobs because they are not white and for no other reason. The job they did hold under its old name would be abolished by the agreement; their color alone would disqualify them for the old job under its new name. The end result of these transactions is not in doubt; for precisely the same reasons as in the *Steele* case "discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations." *Steele* v. *L. & N. R. Co., supra,* at 203, and cases there cited. Cf. *Shelley*

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v. *Kraemer,* 334 U. S. 1. The Federal Act thus prohibits bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers. And courts can protect those threatened by such an unlawful use of power granted by a federal act.

Here, as in the *Steele* case, colored workers must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act. For no adequate administrative remedy can be afforded by the National Railroad Adjustment or Mediation Board. The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in *Slocum* v. *Delaware, L. & W. R. Co.,* 339 U. S. 239. This dispute involves the validity of the contract, not its meaning. Nor does the dispute hinge on the proper craft classification of the porters so as to call for settlement by the National Mediation Board under our holding in *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297. For the contention here with which we agree is that the racial discrimination practiced is unlawful, whether colored employees are classified as "train porters," "brakemen," or something else. Our conclusion is that the District Court has jurisdiction and power to issue necessary injunctive orders notwithstanding the provisions of the Norris-LaGuardia Act.[5] We need add nothing to what was said about inapplicability of that Act in the *Steele* case and in *Graham* v. *Brotherhood of Firemen,* 338 U. S. 232, 239–240.

Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers. We agree with the Court of Appeals that the District

[5] 47 Stat. 70, 29 U. S. C. §§ 101 *et seq.*

Court had jurisdiction to protect these workers from the racial discrimination practiced against them. On remand, the District Court should permanently enjoin the Railroad and the Brotherhood from use of the contract or any other similar discriminatory bargaining device to oust the train porters from their jobs. In fashioning its decree the District Court is left free to consider what provisions are necessary to afford these employees full protection from future discriminatory practices of the Brotherhood. However, in drawing its decree, the District Court must bear in mind that *disputed* questions of reclassification of the craft of "train porters" are committed by the Railway Labor Act to the National Mediation Board. *Switchmen's Union* v. *National Mediation Board, supra.*

The judgment of the Court of Appeals reversing that of the District Court is affirmed, and the cause is remanded to the District Court for further proceedings in accordance with this opinion.

*It is so ordered.*

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

The right of the Brotherhood to represent railroad employees existed before the Railway Labor Act was passed. The Act simply protects the employees when this right of representation is exercised. If a labor organization is designated by a majority of the employees in a craft or class as bargaining representative for that craft or class and is so recognized by the carrier, that labor organization has a duty to represent in good faith all workers of the craft. *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192, 202. In the *Steele* case, the complainant was a locomotive fireman; his duties were wholly those of a fireman. The Brotherhood in that case represented the "firemen's craft," but would not admit Steele as a mem-

ber because he was a Negro. As the legal representative of his craft of firemen, the Brotherhood made a contract with the carrier that discriminated against him because of his race. This Court held the contract invalid. It would have been the same if the Brotherhood had discriminated against him on some other ground, unrelated to race. It was the Brotherhood's duty "to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent." *Steele, supra,* at 199.

In the instant case the Brotherhood has never purported to represent the train porters. The train porters have never requested that the Brotherhood represent them. Classification of the job of "train porter" was established more than forty years ago and has never been disputed. At that time, the principal duties of the train porters were cleaning the cars, assisting the passengers, and helping to load and unload baggage; only a small part of the duties were those of brakemen, who were required to have higher educational qualifications. As early as 1921, the train porters organized a separate bargaining unit through which they have continuously bargained with the carrier here involved; they now have an existing contract with this carrier. Although the carriers gradually imposed upon the train porters more of the duties of brakemen until today most of their duties are those of brakemen, they have never been classified as brakemen.

The majority does not say that the train porters are brakemen and therefore the Brotherhood must represent them fairly, as was held in *Steele.* Whether they belong to the Brotherhood is not determinative of the latter's duties of representation, if it represents the craft of brakemen and if the train porters are brakemen. Steele was not a member of the Brotherhood of Locomotive Firemen and Enginemen and could not be because of race—the same reason that the train porters cannot belong to the

Brotherhood of Trainmen. But Steele was a fireman, while the train porters are not brakemen.

The Brotherhood stoutly opposes the contention that it is the representative of the train porters. For the Court so to hold would be to fly in the face of the statute (45 U. S. C. § 152, Ninth) and the holding of this Court in *General Committee* v. *Missouri-K.-T. R. Co.*, 320 U. S. 323, 334–336.* The majority avoids the dispute in terms but embraces it in fact by saying it is passing on the validity of the contract. If this is true, it is done at the instance of persons for whom the Brotherhood was not contracting and was under no duty to contract. The train porters had a duly elected bargaining representative, which fact operated to exclude the Brotherhood from representing the craft. *Steele, supra,* at 200; *Virginian R. Co.* v. *System Federation,* 300 U. S. 515, 548.

The majority reaches out to invalidate the contract, not because the train porters are brakemen entitled to

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*"Nor does § 2, Second make justiciable what otherwise is not. It provides that 'All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.' As we have already pointed out, § 2, Ninth, after providing for a certification by the Mediation Board of the particular craft or class representative, states that 'the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act.'

. . . . . .

"It is clear from the legislative history of § 2, Ninth that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees. H. Rep. No. 1944, *supra,* p. 2; S. Rep. No. 1065, 73d Cong., 2d Sess., p. 3. However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them."

fair representation by the Brotherhood, but because they are Negroes who were discriminated against by the carrier at the behest of the Brotherhood. I do not understand that private parties such as the carrier and the Brotherhood may not discriminate on the ground of race. Neither a state government nor the Federal Government may do so, but I know of no applicable federal law which says that private parties may not. That is the whole problem underlying the proposed Federal Fair Employment Practices Code. Of course, this Court by sheer power can say this case is *Steele,* or even lay down a code of fair employment practices. But sheer power is not a substitute for legality. I do not have to agree with the discrimination here indulged in to question the legality of today's decision.

I think there was a dispute here between employees of the carrier as to whether the Brotherhood was the representative of the train porters, and that this is a matter to be resolved by the National Mediation Board, not the courts. I would remand this case to the District Court to be dismissed as nonjusticiable.

# ISBRANDTSEN COMPANY, INC. *v.* JOHNSON.

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

No. 493. Argued April 23, 1952.—Decided June 9, 1952.

In an admiralty proceeding by a seaman against his employer to recover wages earned on a merchant vessel of United States registry, the employer may not set off against the seaman's wages its expenditures for the medical care and hospitalization of another member of the crew necessitated by injuries unjustifiably inflicted on him by the seaman during the voyage on which the wages were earned. Pp. 780–789.

(a) Congress has preempted the area relating to deductions and set-offs based on derelictions of duty as against a seaman's claim to his wages and, in effect, has excluded all of them except those which it has listed affirmatively. Pp. 781–789.

(b) Assuming that this seaman's unjustified attack upon another member of the crew amounted to a breach of general discipline, it hardly amounted to "willful disobedience to any lawful command at sea" within the meaning of R. S. § 4596, Fourth. P. 788.

(c) Assuming that it caused expense to his employer, it hardly amounted to "willfully damaging the vessel" or "any of the stores or cargo" within the meaning of R. S. § 4596, Seventh. P. 788.

190 F. 2d 991, affirmed.

In an admiralty proceeding by a seaman against his employer to recover wages earned on a merchant vessel of United States registry, the District Court disallowed his employer's counterclaim. 91 F. Supp. 872. The Court of Appeals affirmed. 190 F. 2d 991. This Court granted certiorari. 342 U. S. 940. *Affirmed,* p. 789.

*Mark D. Alspach* argued the cause for petitioner. With him on the brief was *Thomas E. Byrne, Jr.*

*William M. Alper* argued the cause for respondent. With him on the brief were *Abraham E. Freedman* and *Charles Lakatos.*

MR. JUSTICE BURTON delivered the opinion of the Court.

The question before us arises in an admiralty proceeding by a seaman against his employer to recover wages earned on a merchant vessel of United States registry. The question is whether the employer may set off against the seaman's wages its expenditures for the medical care and hospitalization of another member of the crew necessitated by injuries inflicted on him by the seaman, without justification, during the voyage on which the wages were earned. For the reasons hereafter stated we hold that it may not do so.

In 1948, respondent, Johnson, was employed by petitioner, Isbrandtsen Company, Inc., as a messman on a foreign voyage of a vessel of United States registry, chartered by petitioner. On April 21, while the vessel was on its course in the Pacific, Johnson, without justification, stabbed Brandon, another member of the crew. He injured Brandon so severely that petitioner found it necessary to divert its vessel from its course in order to hospitalize Brandon on the Island of Tonga. Johnson makes no claim for wages earned after April 21. However, when discharged in Philadelphia, May 31, 1948, Johnson claimed $439.27 as earned wages due him above all deductions, without making allowance for any expenditures made by petitioner for the care or hospitalization of Brandon. When petitioner refused to pay Johnson anything, he filed a libel and complaint in the United States District Court to recover the balance due on his earned wages, plus interest, transportation to Seattle (his port of signing on) and double wages for each day of unlawful delay in the payment of the sum due.[1] Petitioner set up a counterclaim of $2,500, later reduced to $1,691.55, for

[1] Under R. S. § 4529, as amended, 30 Stat. 756, 38 Stat. 1164, 46 U. S. C. § 596. See note 7, *infra*.

expenses and losses caused it by Johnson's attack on Brandon.[2] It contended also that the nature of this defense demonstrated the existence of sufficient statutory cause for its delay in making payment.

The District Court disallowed petitioner's counterclaim and entered judgment for respondent's earned wages and transportation allowance, plus interest and costs. It disallowed respondent's claim for double wages.[3] 91 F. Supp. 872. Petitioner appealed but the Court of Appeals affirmed. 190 F. 2d 991. We granted certiorari because the decision below presents an important question of maritime law not heretofore determined by this Court. 342 U. S. 940.

Petitioner cites several early lower court decisions which allowed a set-off against a seaman's suit for wages. These were largely rendered before the Shipping Commissioners Act of 1872 or rendered later without discussion of that or subsequent legislation.[4] We are convinced, however, that the legislation passed by Congress for the protection of seamen, beginning in 1872, has now covered this field. Petitioner's set-off is not prescribed,

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[2] The latter sum is the stipulated amount of petitioner's expenditures for hospitalization, medical care, repatriation and subsistence of Brandon, plus petitioner's expenses for the diversion of its vessel to Tonga, including pilotage, manifests, harbor dues, fuel consumed and food for the crew.

[3] See *Collie* v. *Fergusson,* 281 U. S. 52.

[4] For the Shipping Commissioners Act, see 17 Stat. 262 *et seq.,* Tit. LIII, R. S. §§ 4501–4612, 46 U. S. C., c. 18, §§ 541–713. The Act of July 20, 1790, 1 Stat. 131, in effect prior to 1872, was a limited forerunner of the expansive remedial legislation that followed. It did not attempt to cover the field to an extent comparable to that done by the later legislation. Accordingly, decisions rendered before 1872, recognizing an employer's right of recoupment against seamen's wages under general maritime law, are not authoritative guides today. The early cases are reviewed in 1 Norris, The Law of Seamen (1951), 378–391.

recognized or permitted by such legislation. So far as that legislation goes, such a set-off is not available as a defense against a seaman's claim for earned wages. R. S. § 4547, 30 Stat. 756, 46 U. S. C. § 604. On the other hand, the absence of such authorization for the employer to set off such a counterclaim does not preclude it from seeking to collect the claim otherwise.

For the purposes of this case, we may assume that petitioner owed Brandon the legal duty to provide him with the medical care and hospitalization which it provided and also owed him the duty to divert its vessel from its course to secure his hospitalization at Tonga. *Aguilar* v. *Standard Oil Co.,* 318 U. S. 724, 730, 732–736. See *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 375; *Alpha S. S. Corp.* v. *Cain,* 281 U. S. 642; *Jamison* v. *Encarnacion,* 281 U. S. 635. Also, we may assume, without deciding, that respondent owed petitioner an obligation to reimburse petitioner for the expense which he thus thrust upon it by his unjustified attack upon a fellow seaman.

Whenever congressional legislation in aid of seamen has been considered here since 1872, this Court has emphasized that such legislation is largely remedial and calls for liberal interpretation in favor of the seamen. The history and scope of the legislation is reviewed in *Aguilar* v. *Standard Oil Co.,* 318 U. S. 724, 727–735, and notes. "Our historic national policy, both legislative and judicial, points the other way [from burdening seamen]. Congress has generally sought to safeguard seamen's rights." *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, 246. "[T]he maritime law by inveterate tradition has made the ordinary seaman a member of a favored class. He is a 'ward of the admiralty,' often ignorant and helpless, and so in need of protection against himself as well as others. . . . Discrimination may thus be rational in respect of remedies for wages." *Warner* v. *Goltra,* 293 U. S.

155, 162; *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 375, 377; *Wilder* v. *Inter-Island Navigation Co.,* 211 U. S. 239, 246–248; *Patterson* v. *Bark Eudora,* 190 U. S. 169; *Brady* v. *Daly,* 175 U. S. 148, 155–157. "The ancient characterization of seamen as 'wards of admiralty' is even more accurate now than it was formerly." *Robertson* v. *Baldwin,* 165 U. S. 275, 287;[5] *Harden* v. *Gordon,* 11 Fed. Cas. No. 6,047, 2 Mason (Cir. Ct. Rep.) 541, 556.

Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident. No rule of construction precludes giving a natural meaning to legislation like this that obviously is of a remedial, beneficial and amendatory character. It should be interpreted so as to effect its purpose. Marine legislation, at least since the Shipping Commissioners Act of June 7, 1872, 17 Stat. 262, should be construed to make effective its design to change the general maritime law so as to improve the lot of seamen. "The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure." *Jamison* v. *Encarnacion,* 281 U. S. 635, 640; *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 437, 440.

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[5] That appraisal was reaffirmed in *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 377. Current testimony is added by the following statement:

"In my dealings with seamen, a class with whom I come in frequent contact, I find that they are perhaps better educated and better dressed than their fellows of a century ago, but, in general, as improvident and prone to the extremes of trust and suspicion as their forebears who ranged the seas, but withal a likeable lot." 1 Norris, The Law of Seamen (1951), Preface.

The direction of the current of maritime legislation long has been evident on its face.

> "In this country these notions were reflected early, and have since been expanded, in legislation designed to secure the comfort and health of seamen aboard ship, hospitalization at home and care abroad. . . . The legislation . . . gives no ground for making inferences adverse to the seaman or restrictive of his rights. . . . Rather it furnishes the strongest basis for regarding them broadly, when an issue concerning their scope arises, and particularly when it relates to the general character of relief the legislation was intended to secure." *Aguilar* v. *Standard Oil Co.,* 318 U. S. 724, 728–729.

In the specific area of a seaman's right to collect his earned wages promptly upon discharge, § 61 of the Shipping Commissioners Act provided that "no wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; . . . ." 17 Stat. 276, R. S. § 4536, 38 Stat. 1169, 46 U. S. C. § 601. The full force of this became evident when this Court, in 1908, interpreted "attachment" and "arrestment" to mean that the Act prohibits the seizure of a seaman's earned wages even by levying execution against them to collect valid judgments. *Wilder* v. *Inter-Island Navigation Co.,* 211 U. S. 239; see 1 Norris, The Law of Seamen (1951), 347–350.

Congressional legislation now touches nearly every phase of a seaman's life. It concerns itself with his personal safety, comfort and health in many ways not necessary to review here. It deals specifically with his shipping articles and the payment to him of his wages. It insures generally a partial payment to him of his wages at each port where his vessel loads or delivers cargo. It

insures the payment to him of the balance of those wages upon completion of his voyage or shortly after his discharge.[6] It deals explicitly with the final payment of wages.[7] It describes "forfeitures" which lawfully may be deducted from a seaman's wages "for the benefit of the

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[6] In harbors of the United States this applies even to seamen on foreign vessels. R. S. § 4530, 30 Stat. 756, 38 Stat. 1165, 41 Stat. 1006, 46 U. S. C. § 597. Except as expressly provided by statute, no seaman may be paid in advance or may give up to others his personal right to his wages or his remedies for their recovery. 23 Stat. 55–56, 30 Stat. 763–764, 33 Stat. 308, 38 Stat. 1168–1169, 41 Stat. 1006, 53 Stat. 794, 64 Stat. 1081, 1239, 46 U. S. C. § 599, and 46 U. S. C. (Supp. IV) § 599 (b)(g); R. S. § 4535, 46 U. S. C. § 600. His wages are not subject to attachment or arrestment except for limited provisions for the support of a wife or minor children; allotments to relatives are restricted. R. S. § 4536, 17 Stat. 276, 38 Stat. 1169, 46 U. S. C. § 601. Payments in foreign ports are safeguarded through United States Consuls. R. S. §§ 4580, 4581, 4583, 23 Stat. 54–55, 30 Stat. 759, 38 Stat. 1185, 46 U. S. C. §§ 682, 683, 685.

[7] "Sec. 4529. The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage." R. S. § 4529, as amended, 38 Stat. 1164–1165, 46 U. S. C. § 596.

master or owner by whom the wages are payable." [8] These provisions for the return of wages to the employer are remedial, rather than penal, in their nature. See Crawford, The Construction of Statutes (1940), 106.

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[8] "SEC. 4596. Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows:

"First. For desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned.

"Second. For neglecting or refusing without reasonable cause to join his vessel or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel's sailing from any port, either at the commencement or during the progress of the voyage, or for absence at any time without leave and without sufficient reason from his vessel and from his duty, not amounting to desertion, by forfeiture from his wages of not more than two days' pay or sufficient to defray any expenses which shall have been properly incurred in hiring a substitute.

"Third. For quitting the vessel without leave, after her arrival at the port of her delivery and before she is placed in security, by forfeiture from his wages of not more than one month's pay.

"Fourth. For willful disobedience to any lawful command at sea, by being, at the option of the master, placed in irons until such disobedience shall cease, and upon arrival in port by forfeiture from his wages of not more than four days' pay, or, at the discretion of the court, by imprisonment for not more than one month.

"Fifth. For continued willful disobedience to lawful command or continued willful neglect of duty at sea, by being, at the option of the master, placed in irons, on bread and water, with full rations every fifth day, until such disobedience shall cease, and upon arrival in port by forfeiture, for every twenty-four hours' continuance of such disobedience or neglect, of a sum of not more than twelve days' pay, or by imprisonment for not more than three months, at the discretion of the court.

"Sixth. For assaulting any master, mate, pilot, engineer, or staff officer, by imprisonment for not more than two years.

"Seventh. For willfully damaging the vessel, or embezzling or willfully damaging any of the stores or cargo, by forfeiture out of his wages of a sum equal in amount to the loss thereby sustained, and

In keeping with the spirit of such legislation and the need for clear rules governing the computation of the balance due each seaman upon his discharge, it is reasonable to hold that only such deductions and set-offs for derelictions in the performance of his duties shall be allowed against his wages as are recognized in the statutes. Other claims against him may be valid but their collection must be sought through other means.[9] The appropriateness of this solution is emphasized in the case of unliquidated counterclaims. Petitioner's unliquidated claim

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also, at the discretion of the court, by imprisonment for not more than twelve months.

"Eighth. For any act of smuggling for which he is convicted and whereby loss or damage is occasioned to the master or owner, he shall be liable to pay such master or owner such a sum as is sufficient to reimburse the master or owner for such loss or damage, and the whole or any part of his wages may be retained in satisfaction or on account of such liability, and he shall be liable to imprisonment for a period of not more than twelve months." R. S. § 4596, as amended, 38 Stat. 1166, 53 Stat. 1147, 46 U. S. C. § 701.

Special provision is made for forfeitures incident to desertion. They are to be applied "in the first instance, in payment of the expenses occasioned by such desertion, to the master or owner of the vessel from which the desertion has taken place . . . ." The balance is to be paid by the master or owner to a government official to be disposed of in the same manner as in the case of a deceased seaman. "In all other cases of forfeiture of wages, the forfeiture shall be for the benefit of the master or owner by whom the wages are payable." R. S. § 4604, 46 U. S. C. § 706.

Certain expenses unjustifiably forced upon his employer by a seaman are expressly made chargeable against his earned wages: Unjustified inspections of seaworthiness of the vessel, R. S. § 4562, 46 U. S. C. § 659; unjustified surveys of provisions and water, R. S. § 4566, as amended, 30 Stat. 758, 46 U. S. C. § 663; part of cost of securing conviction of seaman for offenses committed on the voyage, R. S. § 4605, 46 U. S. C. § 707.

[9] "The above sections [46 U. S. C. §§ 596, 597, 600, 601, 682, 683 and 685] look towards payment to the seaman by his employer, at the termination of the employment, of all of his earned wages, without

was first estimated at $2,500. It now has been fixed at $1,691.55. The factors making up such a claim are largely within the control and knowledge of the employer alone and it easily could wipe out every cent of a seaman's earned wages.

There is little substance to the suggestion that the expenses at issue can be brought within the statutorily recognized "forfeitures." Assuming that Johnson's attack amounted to a breach of general discipline, it hardly amounted to "willful disobedience to any lawful command at sea . . . ." R. S. § 4596, Fourth.[10] Assuming that it caused expense to petitioner, it hardly amounted to "willfully damaging the vessel . . . or . . . any of the stores or cargo . . . ." R. S. § 4596, Seventh.[11]

From this, we conclude that Congress has preempted the area relating to deductions and set-offs based upon derelictions of duty as against a seaman's claim to his

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any deductions except those which are expressly authorized by statute.

. . . . .

"While it is the general rule that a seaman discharged in a foreign port is entitled to receive his wages 'without any deduction whatever' of claims against him whether of his employer or of third parties, there are exceptions recognized by the maritime law and now embodied in statutes." *Shilman* v. *United States,* 164 F. 2d 649, 650–651; and see *Chambers* v. *Moore McCormack Lines,* 182 F. 2d 747; *Eldridge* v. *Isbrandtsen Co.,* 89 F. Supp. 718. Cf. *Oldfield* v. *The Arthur P. Fairfield,* 176 F. 2d 429.

[10] See note 8, *supra.*

[11] See note 8, *supra.* Johnson's attack also was not an assault on "any master, mate, pilot, engineer, or staff officer" of the vessel. R. S. § 4596, Sixth, note 8, *supra.* Such an assault may lead to imprisonment of the offender but it entails no "forfeiture." If no "forfeiture" may be set off against a seaman's wages for expenses resulting to his employer from his assault upon a superior officer, there is little basis to imply congressional approval of a set-off against his wages to cover expenses resulting from his assault upon a fellow member of the crew not his superior.

wages. Congress has gone so far in expressly listing such deductions and set-offs that it is a fair inference that those not listed may not be made. It thus remains for the courts to determine only what are the deductions or set-offs for derelictions of duty that are listed by Congress, rather than to determine which of the deductions or set-offs once known to the general maritime law Congress has failed to exclude. Congress, in effect, has excluded all of them except those which it has listed affirmatively.[12]

Accordingly, the judgment is

*Affirmed.*

MR. JUSTICE JACKSON dissents.

[12] For comparable reasons, petitioner's counterclaim may not be set off against the allowance made to respondent for transportation to his port of signing on. That allowance is proportionately as important to him and to his welfare as is the balance due him for earned wages.

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# LELAND *v.* OREGON.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 176. Argued January 29, 1952.—Decided June 9, 1952.

In a criminal prosecution in an Oregon state court on an indictment for murder in the first degree, appellant pleaded not guilty and gave notice of his intention to prove insanity. Oregon statutes required him to prove his insanity beyond a reasonable doubt and made a "morbid propensity" no defense. Appellant was found guilty by a jury and was sentenced to death. *Held:* These statutes did not deprive appellant of life and liberty without due process of law in violation of the Fourteenth Amendment of the Federal Constitution. Pp. 791–802.

1. The trial judge's instructions to the jury, and the charge as a whole, made it clear that the burden was upon the State to prove all the necessary elements of guilt, of the lesser degrees of homicide as well as of the offense charged in the indictment. Pp. 793–796.

2. The rule announced in *Davis* v. *United States*, 160 U. S. 469, that an accused is "entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing the crime," established no constitutional doctrine but only the rule to be followed in federal courts. P. 797.

3. Between the Oregon rule requiring the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt, and the rule in effect in some twenty states, which places the burden on the accused to establish his insanity by a preponderance of the evidence or some similar measure of persuasion, there is no difference of such magnitude as to be significant in determining the constitutional question here presented. P. 798.

4. That a practice is followed by a large number of states is not conclusive as to whether it accords with due process, but may be considered in determining whether it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." P. 798.

5. The instant case is not one in which it is sought to enforce against the State a right which has been held to be secured to defendants in federal courts by the Bill of Rights. Pp. 798–799.

6. Oregon's policy with respect to the burden of proof on the issue of sanity cannot be said to violate generally accepted concepts of basic standards of justice. P. 799.

7. *Tot* v. *United States,* 319 U. S. 463, does not require a different conclusion from that here reached. P. 799.

8. The contention that the instructions to the jury in this case may have confused the jury as to the distinction between the State's burden of proving premeditation and the other elements of the crime charged and appellant's burden of proving insanity, cannot be sustained. P. 800.

9. Due process is not violated by the Oregon statute which provides that a "morbid propensity to commit prohibited acts, existing in the mind of a person, who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor." Pp. 800–801.

10. The "irresistible impulse" test of legal sanity is not "implicit in the concept of ordered liberty"; and due process does not require the State to adopt that test rather than the "right and wrong" test. Pp. 800–801.

11. The trial court's refusal to require the district attorney to make one of appellant's confessions available to his counsel before trial did not deny due process in the circumstances of this case. Pp. 801–802.

190 Ore. 598, 227 P. 2d 785, affirmed.

Appellant's conviction of murder, challenged as denying him due process in violation of the Fourteenth Amendment, was affirmed by the State Supreme Court. 190 Ore. 598, 227 P. 2d 785. On appeal to this Court, *affirmed,* p. 802.

*Thomas H. Ryan* argued the cause for appellant. With him on the brief was *Harold L. Davidson.*

*J. Raymond Carskadon* and *Charles Eugene Raymond* argued the cause for appellee. With them on the brief was *George Neuner,* Attorney General of Oregon.

Mr. Justice Clark delivered the opinion of the Court.

Appellant was charged with murder in the first degree. He pleaded not guilty and gave notice of his intention to prove insanity. Upon trial in the Circuit Court of

Multnomah County, Oregon, he was found guilty by a jury. In accordance with the jury's decision not to recommend life imprisonment, appellant received a sentence of death. The Supreme Court of Oregon affirmed. 190 Ore. 598, 227 P. 2d 785. The case is here on appeal. 28 U. S. C. § 1257 (2).

Oregon statutes required appellant to prove his insanity beyond a reasonable doubt and made a "morbid propensity" no defense.[1] The principal questions in this appeal are raised by appellant's contentions that these statutes deprive him of his life and liberty without due process of law as guaranteed by the Fourteenth Amendment.

The facts of the crime were revealed by appellant's confessions, as corroborated by other evidence. He killed a fifteen-year-old girl by striking her over the head several times with a steel bar and stabbing her twice with a hunting knife. Upon being arrested five days later for the theft of an automobile, he asked to talk with a homicide officer, voluntarily confessed the murder, and directed the police to the scene of the crime, where he pointed out the location of the body. On the same day, he signed a full confession and, at his own request, made another in his own handwriting. After his indictment, counsel were appointed to represent him. They have done so with diligence in carrying his case through three courts.

One of the Oregon statutes in question provides:

> "When the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt . . . ." [2]

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[1] Ore. Comp. Laws, 1940, §§ 26–929, 23–122.

[2] *Id.*, § 26–929.

Appellant urges that this statute in effect requires a defendant pleading insanity to establish his innocence by disproving beyond a reasonable doubt elements of the crime necessary to a verdict of guilty, and that the statute is therefore violative of that due process of law secured by the Fourteenth Amendment. To determine the merit of this challenge, the statute must be viewed in its relation to other relevant Oregon law and in its place in the trial of this case.

In conformity with the applicable state law,[3] the trial judge instructed the jury that, although appellant was charged with murder in the first degree, they might determine that he had committed a lesser crime included in that charged. They were further instructed that his plea of not guilty put in issue every material and necessary element of the lesser degrees of homicide, as well as of the offense charged in the indictment. The jury could have returned any of five verdicts:[4] (1) guilty of murder in the first degree, if they found beyond a reasonable doubt that appellant did the killing purposely and with deliberate and premeditated malice; (2) guilty of murder in the second degree, if they found beyond a reasonable doubt that appellant did the killing purposely and maliciously, but without deliberation and premeditation; (3) guilty of manslaughter, if they found beyond a reasonable doubt that appellant did the killing without malice or deliberation, but upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible; (4) not guilty, if, after a careful considera-

[3] *Id.*, §§ 26–947, 26–948.

[4] Six possible verdicts were listed in the instructions, guilty of murder in the first degree being divided into two verdicts: with, and without, recommendation of life imprisonment as the penalty. Since the jury in this case did not recommend that punishment, the death sentence was automatically invoked under Oregon law. *Id.*, § 23–411.

tion of all the evidence, there remained in their minds a reasonable doubt as to the existence of any of the necessary elements of each degree of homicide; and (5) not guilty by reason of insanity, if they found beyond a reasonable doubt that appellant was insane at the time of the offense charged. A finding of insanity would have freed appellant from responsibility for any of the possible offenses. The verdict which the jury determined—guilty of first degree murder—required the agreement of all twelve jurors; a verdict of not guilty by reason of insanity would have required the concurrence of only ten members of the panel.[5]

It is apparent that the jury might have found appellant to have been mentally incapable of the premeditation and deliberation required to support a first degree murder verdict or of the intent necessary to find him guilty of either first or second degree murder, and yet not have found him to have been legally insane. Although a plea of insanity was made, the prosecution was required to prove beyond a reasonable doubt every element of the crime charged, including, in the case of first degree murder, premeditation, deliberation, malice and intent.[6] The trial court repeatedly emphasized this requirement in its charge to the jury.[7] Moreover, the judge directed the jury as follows:

> "I instruct you that the evidence adduced during this trial to prove defendant's insanity shall be considered and weighed by you, with all other evidence,

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[5] The agreement of ten jurors would also have been sufficient for a verdict of not guilty, a verdict of guilty of second degree murder, or a verdict of guilty of manslaughter. R. 333–334.

[6] Ore. Comp. Laws, 1940, §§ 23–401, 23–414, 26–933; cf. *State* v. *Butchek*, 121 Ore. 141, 253 P. 367, 254 P. 805 (1927).

[7] R. 321, 323, 324, 330, 331, 332.

whether or not you find defendant insane, in regard to the ability of the defendant to premeditate, form a purpose, to deliberate, act wilfully, and act maliciously; and if you find the defendant lacking in such ability, the defendant cannot have committed the crime of murder in the first degree.

"I instruct you that should you find the defendant's mental condition to be so affected or diseased to the end that the defendant could formulate no plan, design, or intent to kill in cool blood, the defendant has not committed the crime of murder in the first degree." [8]

These and other instructions, and the charge as a whole, make it clear that the burden of proof of guilt, and of all the necessary elements of guilt, was placed squarely upon the State. As the jury was told, this burden did not shift, but rested upon the State throughout the trial, just as, according to the instructions, appellant was presumed to be innocent until the jury was convinced beyond a reasonable doubt that he was guilty.[9] The jurors were to consider separately the issue of legal sanity *per se*—an issue

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[8] R. 330. Again:

"I instruct you that to constitute murder in the first degree, it is necessary that the State prove beyond a reasonable doubt, and to your moral certainty, that the defendant's design or plan to take life was formed and matured in cool blood and not hastily upon the occasion.

"I instruct you that in determining whether or not the defendant acted purposely and with premeditated and deliberated malice, it is your duty to take into consideration defendant's mental condition and all factors relating thereto, and that even though you may not find him legally insane, if, in fact, his mentality was impaired, that evidence bears upon these factors, and it is your duty to consider this evidence along with all the other evidence in the case." R. 332.

[9] R. 321, 324.

set apart from the crime charged, to be introduced by a special plea and decided by a special verdict.[10] On this issue appellant had the burden of proof under the statute in question here.

By this statute, originally enacted in 1864,[11] Oregon adopted the prevailing doctrine of the time—that, since most men are sane, a defendant must prove his insanity to avoid responsibility for his acts. That was the rule announced in 1843 in the leading English decision in *M'Naghten's Case:*

> "[T]he jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and . . . to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing . . . ." [12]

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[10] Ore. Comp. Laws, 1940, § 26–846 (requiring notice of purpose to show insanity as defense); *id.*, § 26–955 (providing for verdict of not guilty by reason of insanity and consequent commitment to asylum by judge). After defining legal insanity, the trial court instructed the jury:

"In this case, evidence has been introduced relating to the mental capacity and condition of the defendant . . . at the time [the girl] is alleged to have been killed, and *if* you are satisfied beyond a reasonable doubt that the defendant killed her in the manner alleged in the indictment, or within the lesser degrees included therein, *then* you are to consider the mental capacity of the defendant at the time the homicide is alleged to have been committed." R. 327 (emphasis supplied).

[11] Deady's Gen. Laws of Ore., 1845–1864, Code of Crim. Proc., § 204.

[12] 10 Cl. & Fin. 200, 210 (H. L., 1843).

This remains the English view today.[13] In most of the nineteenth-century American cases, also, the defendant was required to "clearly" prove insanity,[14] and that was probably the rule followed in most states in 1895,[15] when *Davis* v. *United States* was decided. In that case this Court, speaking through Mr. Justice Harlan, announced the rule for federal prosecutions to be that an accused is "entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime." [16] In reaching that conclusion, the Court observed:

> "The views we have expressed are supported by many adjudications that are entitled to high respect. If such were not the fact, we might have felt obliged to accept the general doctrine announced in some of the above cases; for it is desirable that there be uniformity of rule in the administration of the criminal law in governments whose constitutions equally recognize the fundamental principles that are deemed essential for the protection of life and liberty." [17]

The decision obviously establishes no constitutional doctrine, but only the rule to be followed in federal courts. As such, the rule is not in question here.

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[13] Stephen, Digest of the Criminal Law (9th ed., Sturge, 1950), 6; cf. *Sodeman* v. *The King*, [1936] W. N. 190 (P. C.); see *Woolmington* v. *Director of Public Prosecutions*, [1935] A. C. 462, 475.

[14] Weihofen, Insanity as a Defense in Criminal Law (1933), 151–155. "Clear proof" was sometimes interpreted to mean proof beyond a reasonable doubt, *e. g.*, *State* v. *De Rancé*, 34 La. Ann. 186 (1882), and sometimes to mean proof by a preponderance of the evidence, *e. g.*, *Hurst* v. *State*, 40 Tex. Cr. R. 383, 50 S. W. 719 (1899).

[15] See Wharton, Criminal Evidence (9th ed. 1884), §§ 336–340.

[16] 160 U. S. 469, 484 (1895); see *Hotema* v. *United States*, 186 U. S. 413 (1902); *Matheson* v. *United States*, 227 U. S. 540 (1913).

[17] *Id.*, at 488.

Today, Oregon is the only state that requires the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt. Some twenty states, however, place the burden on the accused to establish his insanity by a preponderance of the evidence or some similar measure of persuasion.[18] While there is an evident distinction between these two rules as to the quantum of proof required, we see no practical difference of such magnitude as to be significant in determining the constitutional question we face here. Oregon merely requires a heavier burden of proof. In each instance, in order to establish insanity as a complete defense to the charges preferred, the accused must prove that insanity. The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U. S. 97, 105 (1934).

Nor is this a case in which it is sought to enforce against the states a right which we have held to be secured to defendants in federal courts by the Bill of Rights. In *Davis* v. *United States, supra,* we adopted a rule of procedure for the federal courts which is contrary to that of

[18] Weihofen lists twelve states as requiring proof by a preponderance of the evidence, four as requiring proof "to the satisfaction of the jury," two which combine these formulae, one where by statute the defense must be "clearly proved to the reasonable satisfaction of the jury," one where it has been held that the jury must "believe" the defendant insane, and one where the quantum of proof has not been stated by the court of last resort, but which appears to follow the preponderance rule. Weihofen, Insanity as a Defense in Criminal Law (1933), 148–151, 172–200. Twenty-two states, including Oregon, are mentioned as holding that the accused has the burden of proving insanity, at least by a preponderance of the evidence, in 9 Wigmore, Evidence (3d ed. 1940 and Supp. 1951), § 2501.

Oregon. But "[i]ts procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." *Snyder* v. *Massachusetts, supra,* at 105. "The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. . . . An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review." MR. JUSTICE FRANKFURTER, concurring in *Malinski* v. *New York,* 324 U. S. 401, 417 (1945). We are therefore reluctant to interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice.

Nothing said in *Tot* v. *United States,* 319 U. S. 463 (1943), suggests a different conclusion. That decision struck down a specific presumption created by congressional enactment. This Court found that the fact thus required to be presumed had no rational connection with the fact which, when proven, set the presumption in operation, and that the statute resulted in a presumption of guilt based only upon proof of a fact neither criminal in itself nor an element of the crime charged. We have seen that, here, Oregon required the prosecutor to prove beyond a reasonable doubt every element of the offense charged. Only on the issue of insanity as an absolute bar to the charge was the burden placed upon appellant. In all English-speaking courts, the accused is obliged to introduce proof if he would overcome the presumption of sanity.[19]

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[19] Weihofen, Insanity as a Defense in Criminal Law (1933), 161; 9 Wigmore, Evidence (3d ed. 1940), § 2501.

It is contended that the instructions may have confused the jury as to the distinction between the State's burden of proving premeditation and the other elements of the charge and appellant's burden of proving insanity. We think the charge to the jury was as clear as instructions to juries ordinarily are or reasonably can be, and, with respect to the State's burden of proof upon all the elements of the crime, the charge was particularly emphatic. Juries have for centuries made the basic decisions between guilt and innocence and between criminal responsibility and legal insanity upon the basis of the facts, as revealed by all the evidence, and the law, as explained by instructions detailing the legal distinctions, the placement and weight of the burden of proof, the effect of presumptions, the meaning of intent, etc. We think that to condemn the operation of this system here would be to condemn the system generally. We are not prepared to do so.

Much we have said applies also to appellant's contention that due process is violated by the Oregon statute providing that a "morbid propensity to commit prohibited acts, existing in the mind of a person, who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor." [20] That statute amounts to no more than a legislative adoption of the "right and wrong" test of legal insanity in preference to the "irresistible impulse" test.[21] Knowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions.[22] The science of psychiatry has made tremendous strides

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[20] Ore. Comp. Laws, 1940, § 23–122.

[21] *State* v. *Garver,* 190 Ore. 291, 225 P. 2d 771 (1950); *State* v. *Wallace,* 170 Ore. 60, 131 P. 2d 222 (1942); *State* v. *Hassing,* 60 Ore. 81, 118 P. 195 (1911).

[22] Weihofen, Insanity as a Defense in Criminal Law (1933), 15, 64–68, 109–147.

since that test was laid down in *M'Naghten's Case*,[23] but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law.[24] Moreover, choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility.[25] This whole problem has evoked wide disagreement among those who have studied it. In these circumstances it is clear that adoption of the irresistible impulse test is not "implicit in the concept of ordered liberty." [26]

Appellant also contends that the trial court's refusal to require the district attorney to make one of appellant's confessions available to his counsel before trial was contrary to due process. We think there is no substance in this argument. This conclusion is buttressed by the absence of any assignment of error on this ground in appellant's motion for a new trial. Compare *Avery* v. *Alabama*, 308 U. S. 444, 452 (1940). While it may be the better practice for the prosecution thus to exhibit a confession, failure to do so in this case in no way denied appellant a fair trial. The record shows that the confession was produced in court five days before appellant rested his case. There was ample time both for counsel and expert witnesses to study the confession. In addition the trial judge offered further time for that purpose but it

[23] 10 Cl. & Fin. 200 (H. L., 1843).

[24] Compare *Fisher* v. *United States*, 328 U. S. 463, 475–476 (1946).

[25] See *Holloway* v. *United States*, 80 U. S. App. D. C. 3, 148 F. 2d 665 (1945); Glueck, Mental Disorder and the Criminal Law (1925); Hall, Mental Disease and Criminal Responsibility, 45 Col. L. Rev. 677 (1945); Keedy, Insanity and Criminal Responsibility, 30 Harv. L. Rev. 535, 724 (1917).

[26] *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937).

was refused. There is no indication in the record that appellant was prejudiced by the inability of his counsel to acquire earlier access to the confession.

*Affirmed.*

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

However much conditions may have improved since 1905, when William H. (later Mr. Chief Justice) Taft expressed his disturbing conviction "that the administration of the criminal law in all the states in the Union (there may be one or two exceptions) is a disgrace to our civilization" (Taft, The Administration of Criminal Law, 15 Yale L. J. 1, 11), no informed person can be other than unhappy about the serious defects of present-day American criminal justice. It is not unthinkable that failure to bring the guilty to book for a heinous crime which deeply stirs popular sentiment may lead the legislature of a State, in one of those emotional storms which on occasion sweep over our people, to enact that thereafter an indictment for murder, following attempted rape, should be presumptive proof of guilt and cast upon the defendant the burden of proving beyond a reasonable doubt that he did not do the killing. Can there be any doubt that such a statute would go beyond the freedom of the States, under the Due Process Clause of the Fourteenth Amendment, to fashion their own penal codes and their own procedures for enforcing them? Why is that so? Because from the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of jurors. It is the duty of the Government to establish his guilt beyond a rea-

sonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of "due process." Accordingly there can be no doubt, I repeat, that a State cannot cast upon an accused the duty of establishing beyond a reasonable doubt that his was not the act which caused the death of another.

But a muscular contraction resulting in a homicide does not constitute murder. Even though a person be the immediate occasion of another's death, he is not a deodand to be forfeited like a thing in the medieval law. Behind a muscular contraction resulting in another's death there must be culpability to turn homicide into murder.

The tests by which such culpability may be determined are varying and conflicting. One does not have to echo the scepticism uttered by Brian, C. J., in the fifteenth century, that "the devil himself knoweth not the mind of men" to appreciate how vast a darkness still envelopes man's understanding of man's mind. Sanity and insanity are concepts of incertitude. They are given varying and conflicting content at the same time and from time to time by specialists in the field. Naturally there has always been conflict between the psychological views absorbed by law and the contradictory views of students of mental health at a particular time. At this stage of scientific knowledge it would be indefensible to impose upon the States, through the due process of law which they must accord before depriving a person of life or liberty, one test rather than another for determining criminal culpability, and thereby to displace a State's own choice of such a test, no matter how backward it may be in the light of the best scientific canons. Inevitably, the legal tests for determining the mental state on which criminal culpability is to be based are in strong conflict in our forty-

eight States. But when a State has chosen its theory for testing culpability, it is a deprivation of life without due process to send a man to his doom if he cannot prove beyond a reasonable doubt that the physical events of homicide did not constitute murder because under the State's theory he was incapable of acting culpably.

This does not preclude States from utilizing common sense regarding mental irresponsibility for acts resulting in homicide—from taking for granted that most men are sane and responsible for their acts. That a man's act is not his, because he is devoid of that mental state which begets culpability, is so exceptional a situation that the law has a right to devise an exceptional procedure regarding it. Accordingly, States may provide various ways for dealing with this exceptional situation by requiring, for instance, that the defense of "insanity" be specially pleaded, or that he on whose behalf the claim of insanity is made should have the burden of showing enough to overcome the assumption and presumption that normally a man knows what he is about and is therefore responsible for what he does, or that the issue be separately tried, or that a standing disinterested expert agency advise court and jury, or that these and other devices be used in combination. The laws of the forty-eight States present the greatest diversity in relieving the prosecution from proving affirmatively that a man is sane in the way it must prove affirmatively that the defendant is the man who pulled the trigger or struck the blow. Such legislation makes no inroad upon the basic principle that the State must prove guilt, not the defendant innocence, and prove it to the satisfaction of a jury beyond a reasonable doubt.

For some unrecorded reason, Oregon is the only one of the forty-eight States that has made inroads upon that principle by requiring the accused to prove beyond a reasonable doubt the absence of one of the essential elements for the commission of murder, namely, culpability

for his muscular contraction. Like every other State, Oregon presupposes that an insane person cannot be made to pay with his life for a homicide, though for the public good he may of course be put beyond doing further harm. Unlike every other State, however, Oregon says that the accused person must satisfy a jury beyond a reasonable doubt that, being incapable of committing murder, he has not committed murder.

Such has been the law of Oregon since 1864. That year the Code of Criminal Procedure defined murder in the conventional way, but it also provided: "When the commission of the act charged as a crime is proven, and the defence sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt . . . ." General Laws of Oregon, 1845–1864, p. 441 *et seq.*, §§ 502, 204. The latter section, through various revisions, is the law of Oregon today and was applied in the conviction under review.

Whatever tentative and intermediate steps experience makes permissible for aiding the State in establishing the ultimate issues in a prosecution for crime, the State cannot be relieved, on a final show-down, from proving its accusation. To prove the accusation it must prove each of the items which in combination constitute the offense. And it must make such proof beyond a reasonable doubt. This duty of the State of establishing every fact of the equation which adds up to a crime, and of establishing it to the satisfaction of a jury beyond a reasonable doubt is the decisive difference between criminal culpability and civil liability. The only exception is that very limited class of cases variously characterized as *mala prohibita* or public torts or enforcement of regulatory measures. See *United States* v. *Dotterweich,* 320 U. S. 277; *Morissette* v. *United States,* 342 U. S. 246. Murder is not a *malum prohibitum* or a public tort or the object of regulatory legislation. To suggest that the legal oddity by

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which Oregon imposes upon the accused the burden of proving beyond reasonable doubt that he had not the mind capable of committing murder is a mere difference in the measure of proof, is to obliterate the distinction between civil and criminal law.

It is suggested that the jury were charged not merely in conformity with this requirement of Oregon law but also in various general terms, as to the duty of the State to prove every element of the crime charged beyond a reasonable doubt, including in the case of first degree murder, "premeditation, deliberation, malice and intent." Be it so. The short of the matter is that the Oregon Supreme Court sustained the conviction on the ground that the Oregon statute "casts upon the defendant the burden of proving the defense of insanity beyond a reasonable doubt." *State* v. *Leland,* 190 Ore. 598, 638, 227 P. 2d 785, 802. To suggest, as is suggested by this Court but not by the State court, that, although the jury was compelled to act upon this requirement, the statute does not offend the Due Process Clause because the trial judge also indulged in a farrago of generalities to the jury about "premeditation, deliberation, malice and intent," is to exact gifts of subtlety that not even judges, let alone juries, possess. See *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 223–224. If the Due Process Clause has any meaning at all, it does not permit life to be put to such hazards.

To deny this mode of dealing with the abuses of insanity pleas and with unedifying spectacles of expert testimony, is not to deprive Oregon of the widest possible choice of remedies for circumventing such abuses. The multiform legislation prevailing in the different States evinces the great variety of the experimental methods open to them for dealing with the problems raised by insanity defenses in prosecutions for murder.

To repeat the extreme reluctance with which I find a constitutional barrier to any legislation is not to mouth a threadbare phrase. Especially is deference due to the policy of a State when it deals with local crime, its repression and punishment. There is a gulf, however narrow, between deference to local legislation and complete disregard of the duty of judicial review which has fallen to this Court by virtue of the limits placed by the Fourteenth Amendment upon State action. This duty is not to be escaped, whatever I may think of investing judges with the power which the enforcement of that Amendment involves.

## CASEY ET AL. *v.* UNITED STATES.

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

No. 379. Submitted March 3, 1952.—Decided June 9, 1952.

In this case, in which conflicting views as to the facts on the controlling issue and the inferences to be drawn from them would have to be resolved, the Solicitor General's confession of error, leaving the way open for a new trial, is accepted, and the judgment of conviction is reversed as to all the petitioners.

191 F. 2d 1, reversed.

*F. M. Reischling* submitted on brief for petitioners.

*Solicitor General Perlman, Assistant Attorney General McInerney, James L. Morrisson, Beatrice Rosenberg* and *Murry Lee Randall* submitted on brief for the United States.

PER CURIAM.

The controlling claim in this case is that there was an unreasonable search and seizure of evidence, the admission of which vitiated the convictions. Before determining these issues conflicting views as to the facts in this case and the inferences to be drawn from them would have to be resolved. The Solicitor General confesses error and asks that the judgment below should be reversed as to all the petitioners, leaving of course the way open for a new trial. To accept in this case his confession of error would not involve the establishment of any precedent.

Accordingly we reverse the judgment as to all the petitioners.

*Reversed.*

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

I do not believe we should take our law from the Department of Justice or from any other litigant. The rea-

sons why the Department of Justice confesses error in a case may be wholly honorable. For example, those in the Solicitor General's office may be honestly converted to the point of view which their colleagues opposed below. I assume that is true in the present case. But I also know that litigants usually have selfish purposes. What the motivation behind a particular confession of error may be will seldom be known. We cannot become a party to it without serving the unknown cause of the litigant.

The practice in cases in which the Solicitor General confesses error was settled by *Young* v. *United States,* 315 U. S. 257 (1942). When the Government confessed error on Young's petition for certiorari, the confession was not accepted but, instead, the petition was granted and the case set down for argument. 314 U. S. 595 (1941). In the unanimous opinion of the Court, two Justices not participating, the function of this Court upon the Government's confession of error was described with particularity:

> "The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed. See *Parlton* v. *United States,* 75 F. 2d 772. The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as to that of the enforcing officers. Furthermore, our judg-

ments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties. Cf. *Rex* v. *Wilkes,* 4 Burr. 2527, 2551, 98 Eng. Rep. 327; *State* v. *Green,* 167 Wash. 266, 9 P. 2d 62." 315 U. S., at 258–259.

As a result, the Court proceeded to examine the errors urged by petitioner and, upon consideration of the record, reversed the judgment of the Court of Appeals.[1]

The principles announced in *Young* v. *United States, supra,* were expressly reaffirmed in *Gibson* v. *United States,* 329 U. S. 338, 344 (1946); cf. *Marino* v. *Ragen,* 332 U. S. 561, 562 (1947).[2] Moreover, the practice of this Court in cases in which the Solicitor General confesses error has followed the *Young* rule. Unlike today's *per curiam,* our recent *per curiam* orders and opinions have been careful to note that our reversal of a court of appeals judgment is based upon consideration of the record, not blind acceptance of a confession of error.[3]

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[1] During the same term of Court as *Young* v. *United States, supra,* the Government also confessed error in *Weber* v. *United States.* The Court granted certiorari, 314 U. S. 600 (1941), heard argument, and affirmed the Court of Appeals judgment by an equally divided Court. 315 U. S. 787 (1942).

[2] In *Upshaw* v. *United States,* 335 U. S. 410 (1948), the Government had confessed error in the Court of Appeals for the District of Columbia. That court, adhering to its precedent in *Parlton* v. *United States,* 64 App. D. C. 169, 75 F. 2d 772 (1935) (cited with approval in *Young* v. *United States, supra,* at 259), conducted an independent examination of the errors confessed. 83 U. S. App. D. C. 207, 168 F. 2d 167 (1948). This Court reversed in a 5–4 decision without suggesting that the Court of Appeals had erred in considering the merits of the Government's position.

[3] *Cates* v. *Haderlein,* 342 U. S. 804 (1951); *Chiarella* v. *United States,* 341 U. S. 946 (1951); *Ryles* v. *United States,* 336 U. S. 949 (1949); *Bellaskus* v. *Crossman,* 335 U. S. 840 (1948); *Fogel* v. *United States,* 335 U. S. 865 (1948); *Wixman* v. *United States,* 335 U. S. 874 (1948); *Mogall* v. *United States,* 333 U. S. 424 (1948).

We sit in this case not to enforce the requests of the Department of Justice but to review the action of a lower court. Here the Court of Appeals ruled that petitioners had no standing to complain of the search. That ruling is questionable in view of the intervening decision of this Court in *United States* v. *Jeffers,* 342 U. S. 48. But the confession of error is not limited to that ruling. The Department of Justice now maintains that the District Court was in error in ruling in the Government's favor on the issue of search and seizure.

The facts are not in dispute. The only question is the reach of our decision in *Carroll* v. *United States,* 267 U. S. 132. That decision states a principle of constitutional law. Until it is reversed or modified, it prescribes a rule for the courts to apply according to their best lights, not according to the desires of either the prosecution or the defense.

Since the Court of Appeals did not reach that issue when the case was before it, we should at the very least remand the case to it for consideration of that question. If we are to decide it, we should do so only after full exploration of the facts and the law. Whatever action we take is a precedent.

I cannot state too strongly my belief that if the courts are to retain their independence, they must decide cases taken on the merits. A confession of error by a litigant is, of course, an important factor to take into account in studying a record.[4] It may disclose an intervening decision on a question of law that undermines the lower

[4] Similarly, the fact that the Solicitor General does not oppose the granting of a petition for certiorari is entitled to respect, see, *e. g., Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 36 (1950). But it has never followed that we should automatically grant certiorari because of the Government's consent to such action. *E. g., Community Services, Inc.* v. *United States,* 342 U. S. 932 (1952) (certiorari denied); *Dollar* v. *United States,* 342 U. S. 910, (1952) (certiorari denied).

court's conclusion; it may disclose perjury by an important witness or newly discovered evidence; it may disclose other factors which weaken the conclusion of the lower court. Or it may disclose a maneuver to save one case at the expense of another.[5] Once we accept a confession of error at face value and make it the controlling and decisive factor in our decision, we no longer administer a system of justice under a government of laws.

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[5] The Ninth Circuit Court of Appeals affirmed a treason conviction, one ground of affirmance being that the methods of expatriation listed in the Nationality Act of 1940, 54 Stat. 1168, were exclusive. *Kawakita* v. *United States,* 190 F. 2d 506, 511–514 (1951). We granted certiorari, 342 U. S. 932, and affirmed the Court of Appeals without resolving the question. 343 U. S. 717. The Solicitor General urged in support of the conviction that the expatriation procedures of the Nationality Act were exclusive.

In the District of Columbia Circuit, a judgment denying a claim of citizenship was affirmed, one ground of affirmance being that methods of expatriation listed in the Nationality Act of 1940 were not exclusive. *Mandoli* v. *Acheson,* 193 F. 2d 920, 922 (1952). In his memorandum in response to the *Mandoli* petition for certiorari, the Solicitor General, adhering to his position in *Kawakita,* asserted that this ground of the Court of Appeals decision in this case is "clearly erroneous."

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 812 and 901 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 MARCH 24 THROUGH JUNE 9, 1952.

### March 24, 1952.

*Per Curiam Decision.*

No. 619. Propst et al. *v.* Board of Educational Lands and Funds of Nebraska et al. Appeal from the United States District Court for the District of Nebraska. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *James J. Fitzgerald* for appellants. Reported below: 103 F. Supp. 457.

*Miscellaneous Orders.*

No. 649. Ray, Chairman of the State Democratic Executive Committee of Alabama, *v.* Blair. The application for a stay is granted and it is ordered that the judgments and mandates of the Circuit Court and Supreme Court of Alabama be, and they are hereby, stayed pending further consideration and disposition of the case by this Court. The petition for writ of certiorari to the Supreme Court of Alabama is granted and the case is assigned for argument on Monday, March 31, next, at the head of the call for that day. Argument is to be directed to the application for stay as well as the merits. Mr. Justice Black took no part in the consideration or decision of these applications. *James J. Mayfield, Marx Leva* and *Louis F. Oberdorfer* for petitioner. Reported below: 257 Ala. ——, 57 So. 2d 395.

No. 396. Commissioner of Internal Revenue *v.* Tourtelot et al. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit dismissed on motion of counsel for petitioner. *Solicitor General Perlman* for petitioner. Reported below: 189 F. 2d 167.

No. 358, Misc. VanHorn *v.* Robinson, Warden. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois, dismissed on motion of petitioner.

No. 218, Misc. Antrobus *v.* United States. C. A. 3d Cir. Application for bail denied. Certiorari also denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *Edward S. Szukelewicz* for the United States. Reported below: 191 F. 2d 969.

No. 337, Misc. Van Eps *v.* Michigan. Supreme Court of Michigan. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 335, Misc. Dodd *v.* Steele, Warden;
No. 346, Misc. Van Newkirk *v.* McNeill, Superintendent;
No. 350, Misc. Pardee *v.* Michigan;
No. 355, Misc. Koenig *v.* Cranor, Superintendent;
No. 364, Misc. Williams *v.* Eidson, Warden; and
No. 374, Misc. Farley *v.* Skeen, Warden. Motions for leave to file petitions for writs of habeas corpus denied.

No. 353, Misc. Gloria O Towing Corp. *v.* Byers, U. S. District Judge. Motion for leave to file petition for writ of prohibition and/or mandamus denied. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit also denied. *Edmund F. Lamb* for petitioner. *Robert S. Erskine* for respondent.

No. 352, Misc. Johnson *v.* Utah; and
No. 360, Misc. Bozell *v.* United States. Applications denied.

*Certiorari Granted.* (*See also No. 649, supra.*)

No. 334. GORDON, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, *v.* HEIKKINEN. C. A. 8th Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. Reported below: 190 F. 2d 16.

No. 300, Misc. UNITED STATES EX REL. SMITH *v.* BALDI, SUPERINTENDENT. C. A. 3d Cir. Certiorari granted. *Thomas D. McBride* for petitioner. Reported below: 192 F. 2d 540.

No. 333, Misc. BROWN *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 Misc. Nos. 218, 337 and 353, supra.*)

No. 508. ALBO TRADING CORP. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Horace S. Whitman* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for the United States. Reported below: 120 Ct. Cl. 65.

No. 509. VOLK *v.* UNITED STATES. Court of Claims. Certiorari denied. *Horace S. Whitman* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for the United States. Reported below: 120 Ct. Cl. 57.

No. 538. GREGORY ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL. C. A. 6th Cir. Certiorari denied. *Solicitor General Perlman* for petitioners. *C. S. Landrum* and *H. T. Lively* for the Louisville & Nashville Railroad

Co.; and *Robert E. Hogan, Clarence M. Mulholland, Edward J. Hickey, Jr.* and *Richard R. Lyman* for System Federation No. 91, Railway Employes' Department of A. F. of L., et al., respondents. Reported below: 191 F. 2d 856.

No. 550. Soltero *v.* Descartes, Treasurer of Puerto Rico, et al. C. A. 1st Cir. Certiorari denied. *F. Fernandez Cuyar* for petitioner. *Victor Gutierrez Franqui,* Attorney General of Puerto Rico, and *J. B. Fernandez Badillo,* Assistant Attorney General, for respondents. Reported below: 192 F. 2d 755.

No. 554. Sineiro *v.* United States. C. A. 3d Cir. Certiorari denied. *Harry Polikoff* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Robert S. Erdahl* for the United States. Reported below: 193 F. 2d 136.

No. 556. Lawson, Administrator, *v.* United States. C. A. 2d Cir. Certiorari denied. *Charles H. Lawson, pro se. Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Benjamin Forman* for the United States. Reported below: 192 F. 2d 479.

No. 562. Jewell, Chief Overseer of Church of the Living God, *v.* Davies, U. S. District Judge. C. A. 6th Cir. Certiorari denied. *Wallace J. Baker, Sr.* for petitioner. *Albert Williams* for respondent. Reported below: 192 F. 2d 670.

No. 564. General Shoe Corp. *v.* National Labor Relations Board. C. A. 6th Cir. Certiorari denied. *Cecil Sims* for petitioner. *Solicitor General Perlman, George J. Bott, David P. Findling, Mozart G. Ratner* and *Irving M. Herman* for respondent. Reported below: 192 F. 2d 504.

No. 566. ROSENBLUM ET AL., DOING BUSINESS AS MODERN MANNER CLOTHES, *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. *Copal Mintz* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Ralph S. Spritzer* and *W. T. Kelley* for respondent. Reported below: 192 F. 2d 392.

No. 571. CRANK ET AL. *v.* GREER, TRUSTEE, ET AL. Supreme Court of Arkansas. Certiorari denied. *Ned Stewart* for Crank et al.; and *Otto Atchley* and *Robert S. Vance* for the Texas & Pacific Railway Co., petitioners. *A. F. House* for respondents. Reported below: 219 Ark. 425, 243 S. W. 2d 13.

No. 573. CHAPMAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Acting Assistant Attorney General Slack, A. F. Prescott* and *Louise Foster* for respondent. Reported below: 191 F. 2d 816.

No. 576. GENERAL AMERICAN TRANSPORTATION CORP. *v.* INDIANA HARBOR BELT RAILROAD CO. ET AL. C. A. 7th Cir. Certiorari denied. *Edward P. Morse* and *Arthur W. Clement* for petitioner. *R. S. Outlaw* and *Thos. J. Barnett* for respondents. Reported below: 191 F. 2d 865.

No. 596. SOUTHWEST STONE CO. *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. C. A. 5th Cir. Certiorari denied. *Frank A. Leffingwell* for petitioner. *O. O. Touchstone* for respondent. Reported below: 192 F. 2d 395.

No. 613. VAN DOORN ET AL. *v.* HENIG, TRUSTEE IN BANKRUPTCY. C. A. 3d Cir. Certiorari denied. *Bertram K. Wolfe* for petitioners. *Paul T. Huckin* for respondent. Reported below: 192 F. 2d 574.

No. 533. FOSTER ET AL. *v.* GENERAL MOTORS CORP. C. A. 7th Cir. Certiorari denied. *Thomas M. Cooley, II,* for petitioners. *Hubert Hickam* and *Thomas M. Scanlon* for respondent. Reported below: 191 F. 2d 907.

No. 553. ADAMOWSKI ET AL. *v.* BARD, U. S. DISTRICT JUDGE, ET AL. C. A. 3d Cir. Certiorari denied. *Paul M. Goldstein* and *Herman Moskowitz* for petitioners. *Thomas E. Byrne, Jr.* for Blumberg et al., respondents. Reported below: 193 F. 2d 578.

No. 163, Misc. THOMAS *v.* DUFFY, WARDEN. Supreme Court of California. Certiorari denied. *A. J. Zirpoli* for petitioner. *Edmund G. Brown,* Attorney General of California, and *Clarence A. Linn,* Assistant Attorney General, for respondent.

No. 190, Misc. STREWL *v.* MCGRATH, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: 89 U. S. App. D. C. 183, 191 F. 2d 347.

No. 238, Misc. ADAMS *v.* WATERS, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: —— Okla. Cr. ——, 237 P. 2d 914.

No. 241, Misc. HARRIGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Harold L. Turk* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States.

No. 252, Misc. SHOTKIN *v.* ATCHISON, TOPEKA & SANTA FE RAILROAD CO. ET AL. Supreme Court of Colorado. Certiorari denied. *Walter F. Dodd* for petitioner. Reported below: 124 Colo. 141, 235 P. 2d 990.

No. 387. REMINGTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Dissenting memorandum filed by MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS concurs. As to the legal significance of a denial of the petition for writ of certiorari, MR. JUSTICE FRANKFURTER refers to his memoranda in *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, and *Agoston* v. *Pennsylvania*, 340 U. S. 844. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *William C. Chanler* and *Joseph L. Rauh, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert L. Stern* and *Beatrice Rosenberg* for the United States. Reported below: 191 F. 2d 246.

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

A federal district court grand jury indicted petitioner for perjury. A petit jury convicted him. The Court of Appeals reversed but refused to order the indictment dismissed. 191 F. 2d 246. Petitioner is now seeking certiorari, claiming that the indictment should have been dismissed. The majority now denies his petition. I think we should grant and consider two questions the petitioner presents. These questions challenge the fairness of the prosecutorial methods used to obtain and to sustain the indictment.

The first challenge is:

> "The Circuit Court of Appeals erred:
>
> "In failing to dismiss the indictment on the ground that the foreman of the indicting grand jury, at the very time the indictment was returned, was the financial and literary collaborator of the chief prosecution witness in a book-publishing venture whose success depended upon the defendant's indictment."

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The second challenge is:

> "The United States Attorney deliberately withheld information concerning the collaboration of Bentley and Brunini from defendant's counsel and then sought to suppress the evidence when it became known to defendant's counsel from other sources."

Governmental conduct here charged is abhorrent to a fair administration of justice. It approaches the type of practices unanimously condemned by this Court as a violation of due process of law in *Mooney* v. *Holohan,* 294 U. S. 103. For this reason I have felt constrained to depart from my custom and give reasons for my vote to grant certiorari in this case.

No. 284, Misc. ALEXANDER *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *Louis C. Friedman* for petitioner. *Theodore D. Parsons,* Attorney General of New Jersey, for respondent. Reported below: 7 N. J. 585, 83 A. 2d 441.

No. 286, Misc. BUNDY *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: 90 U. S. App. D. C. ——, 193 F. 2d 694.

No. 291, Misc. TYLER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James T. Wright* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 90 U. S. App. D. C. ——, 193 F. 2d 24.

No. 296, Misc. RASH *v.* PEOPLES DEPOSIT BANK & TRUST CO., EXECUTOR, ET AL. C. A. 6th Cir. Certiorari denied. *J. A. Edge* for petitioner. *Leslie W. Morris* for respondents. Reported below: 192 F. 2d 470.

No. 303, Misc. UNITED STATES EX REL. MILLS *v.* REING, U. S. MARSHAL. C. A. 3d Cir. Certiorari denied. *James T. Wright* and *David Levinson* for petitioner. Reported below: 191 F. 2d 297.

No. 316, Misc. PEYTON *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for the United States. Reported below: 120 Ct. Cl. 722, 100 F. Supp. 823.

No. 318, Misc. BAXTER *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied. Reported below: 368 Pa. 629, 84 A. 2d 186.

No. 327, Misc. FREEMAN *v.* RAILROAD RETIREMENT BOARD. C. A. 5th Cir. Certiorari denied. *Lewis L. Scott* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Samuel D. Slade* and *Herman Marcuse* for respondent. Reported below: 192 F. 2d 51.

No. 332, Misc. VEGA *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman* for the United States, respondent. Reported below: 191 F. 2d 921.

No. 341, Misc. BYERS *v.* UNITED STATES ET AL. Court of Claims. Certiorari denied. Reported below: 121 Ct. Cl. 40.

No. 343, Misc. CANNADY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 347, Misc. FEELEY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 354, Misc. WINTERS *v.* BURKE, WARDEN. Supreme Court of Wisconsin. Certiorari denied.

No. 356, Misc. KEMMERER *v.* FRISBIE, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 362, Misc. FERGUSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 410 Ill. 87, 101 N. E. 2d 522.

No. 365, Misc. HIBBS *v.* WATERS, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied.

No. 367, Misc. IN RE MULVEY. Supreme Court of Michigan. Certiorari denied.

No. 375, Misc. TRAINA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 376, Misc. ROBERTS *v.* FRISBIE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 377, Misc. STINGLEY *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 380, Misc. JOHNSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 389, Misc. WILBURN *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied. Reported below: 40 Wash. 2d 38, 240 P. 2d 563.

No. 390, Misc. SIMON *v.* SUPREME COURT OF CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 398, Misc. LOSINGER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Reported below: 331 Mich. 490, 50 N. W. 2d 137.

*Rehearing Denied.*

No. 430. COMMUNITY SERVICES, INC. *v.* UNITED STATES, 342 U. S. 932; and

No. 488. HEAGNEY *v.* BROOKLYN EASTERN DISTRICT TERMINAL, 342 U. S. 920. Petitions for rehearing denied.

No. 497. ILLINOIS ET AL. *v.* UNITED STATES ET AL., 342 U. S. 930. Motion of certain parties to join in the petition for rehearing denied. Petition for rehearing denied.

No. 298, Misc. BYERS ET AL. *v.* UNITED STATES, 342 U. S. 931. Rehearing denied.

MARCH 25, 1952.

*Miscellaneous Order.*

No. 649. RAY, CHAIRMAN OF THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA, *v.* BLAIR. The motion of respondent to vacate or modify the stay order of March 24, 1952, *ante,* p. 901, is denied. MR. JUSTICE BLACK took no part in the consideration or decision of this motion.

MARCH 31, 1952.

*Per Curiam Decisions.*

No. 529. DOWNEY *v.* BECK. 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 is vacated and the case is remanded to the Court of Appeals for further consideration in the light of *Beck* v. *West Coast Life Ins. Co.,* decided by the Supreme Court of California on March 21, 1952, 38 Cal. 2d 643, 241 P. 2d 544. *Morris Lavine* for petitioner. *Thomas S. Tobin* for respondent. Reported below: 191 F. 2d 150.

No. 635. ANDERSON ET AL. *v.* JORDAN, SECRETARY OF STATE OF CALIFORNIA. Appeal from the Supreme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. See *MacDougall* v. *Green,* 335 U. S. 281 (1948); *Colegrove* v. *Green,* 328 U. S. 549 (1946); *Wood* v. *Broom,* 287 U. S. 1 (1932). MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. *John W. Preston* for appellants. *Edmund G. Brown,* Attorney General of California, and *Leonard M. Friedman,* Deputy Attorney General, for appellee.

*Miscellaneous Orders.*

No. 577. BIGGS *v.* PLEBANEK ET AL. Motion for judgment and costs denied. Petition for writ of certiorari to the Supreme Court of Illinois also denied.

No. 578. BIGGS *v.* SCHWARTZ ET AL. Petition for injunction, for judgment, and other relief denied. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit also denied.

No. 342, Misc. ALLOWAY *v.* SIMPSON, SUPERINTENDENT. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 391, Misc. HARRIS *v.* TEXAS. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied. Petition for allowance of appeal also denied.

No. 385, Misc. BAILEY *v.* EIDSON, WARDEN;
No. 388, Misc. CURLANIS *v.* UNITED STATES;
No. 392, Misc. PFISTER *v.* WELCH, SUPERINTENDENT; and
No. 402, Misc. IN RE SHENKIN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 400, Misc. ELLIOTT *v.* MICHIGAN. Petition for judgment denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 383, Misc. RYAN *v.* THOSE STATES OF THE UNITED STATES USING VOTING MACHINES FOR NATIONAL AND ALL OTHER ELECTIONS. Petition denied.

No. 414, Misc. UNITED STATES EX REL. YOUNG *v.* SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION. Application for bail denied. *Isadore Englander* for petitioner. *Solicitor General Perlman* for respondent.

*Certiorari Granted.* (*See also No. 529, supra.*)

No. 559. UNITED STATES *v.* BELL AIRCRAFT CORP. Court of Claims. Certiorari granted. *Solicitor General Perlman* for the United States. *Ansley W. Sawyer* and *William M. Aiken* for respondent. Reported below: 120 Ct. Cl. 398, 100 F. Supp. 661.

No. 324, Misc. BROCK *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari granted. *Robert S. Cahoon* for petitioner. *Harry McMullan,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent. Reported below: 234 N. C. 390, 67 S. E. 2d 282.

*Certiorari Denied. (See also Nos. 577 and 578, and Misc. Nos. 342 and 391, supra.)*

No. 510. WARFEL *v.* UNITED STATES. Court of Claims. Certiorari denied. *Martin Gendel* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 120 Ct. Cl. 270, 98 F. Supp. 340.

No. 575. SCHNEIDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Jacob W. Friedman* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Robert S. Erdahl* for the United States. Reported below: 192 F. 2d 498.

No. 584. LYNCH *v.* GRUBER ET UX. Supreme Court of Washington. Certiorari denied. *Walter F. Dodd* and *Frank S. Ketcham* for petitioner. Reported below: 39 Wash. 2d 99, 234 P. 2d 529.

No. 585. MAYRATH *v.* HUTCHINSON MANUFACTURING CO. C. A. 10th Cir. Certiorari denied. *Thomas E. Scofield* for petitioner. *Theodore S. Kenyon* and *Wesley E. Brown* for respondent. Reported below: 192 F. 2d 110.

No. 587. INGERSOLL-RAND COMPANY ET AL. *v.* BLACK & DECKER MANUFACTURING CO. C. A. 4th Cir. Certiorari denied. *Frank B. Ober, Stephen H. Philbin* and

*C. Blake Townsend* for petitioners. *Thomas W. Y. Clark* and *Albert R. Golrick* for respondent. Reported below: 192 F. 2d 270.

No. 592. FAIRBANKS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Joseph D. Taylor* for petitioner. *Solicitor General Perlman* and *Acting Assistant Attorney General Slack* for respondent. Reported below: 191 F. 2d 680.

No. 603. MACFARLANE *v.* PACIFIC MUTUAL LIFE INSURANCE CO. C. A. 7th Cir. Certiorari denied. *Claude D. Stout* for petitioner. *Leon B. Lamfrom* and *A. J. Engelhard* for respondent. Reported below: 192 F. 2d 193.

No. 608. BURKS *v.* COLONIAL LIFE & ACCIDENT INSURANCE CO. C. A. 5th Cir. Certiorari denied. *J. J. Flynt, Jr.* and *Wallace Miller, Jr.* for petitioner. *S. Augustus Black* for respondent. Reported below: 192 F. 2d 643.

No. 615. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. *v.* WHITE. Supreme Court of Missouri. Certiorari denied. *R. S. Outlaw* and *Walter R. Mayne* for petitioner. *William H. DeParcq* for respondent. Reported below: 244 S. W. 2d 26.

No. 328, Misc. STORY *v.* HUNTER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 193 F. 2d 874.

No. 348, Misc. VILES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 193 F. 2d 776.

No. 371, Misc. CHESSMAN *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. Peti-

tioner *pro se*. *Edmund G. Brown,* Attorney General of California, and *Frank W. Richards,* Deputy Attorney General, for respondents. Reported below: 38 Cal. 2d 166, 238 P. 2d 1001.

No. 372, Misc. UNITED STATES EX REL. JELLISON *v.* WARDEN OF THE NEW JERSEY STATE PRISON. C. A. 3d Cir. Certiorari denied. *Louis Auerbacher, Jr.* for petitioner. *Richard J. Congleton* and *C. William Caruso* for respondent. Reported below: 192 F. 2d 816.

No. 378, Misc. UNITED STATES EX REL. SMITH *v.* WARDEN OF THE NEW JERSEY STATE PRISON. C. A. 3d Cir. Certiorari denied. *Edward J. Gilhooly* for petitioner. *Richard J. Congleton* and *C. William Caruso* for respondent. Reported below: 192 F. 2d 816.

No. 379, Misc. UNITED STATES EX REL. BUNK *v.* WARDEN OF THE NEW JERSEY STATE PRISON. C. A. 3d Cir. Certiorari denied. *James L. McKenna* for petitioner. *Richard J. Congleton* and *C. William Caruso* for respondent. Reported below: 192 F. 2d 816.

No. 382, Misc. MILLAGE *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 386, Misc. HAGERMAN *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 244 S. W. 2d 49.

No. 393, Misc. MCCOY *v.* FRISBIE, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 399, Misc. MARSHALL *v.* SUPREME COURT OF CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 140, Misc. FLETCHER *v.* FLOURNOY ET AL. Court of Appeals of Maryland. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. Reported below: —— Md. ——, 81 A. 2d 232.

No. 321, Misc. PRESTON *v.* TEXAS. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied for the reason that the application therefor was not made within the time provided by law. Rule 38½ of the Rules of the Supreme Court. *Arthur J. Mandell* for petitioner. *Price Daniel,* Attorney General of Texas, and *Calvin B. Garwood, Jr.,* Assistant Attorney General, for respondent. Reported below: 155 Tex. Cr. R. ——, 242 S. W. 2d 436.

No. 351, Misc. HURLEY *v.* CITY OF ATLANTA. Court of Appeals of Georgia. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Daniel Duke* for petitioner. *J. C. Murphy* and *Henry L. Bowden* for respondent. Reported below: 83 Ga. App. 879, 65 S. E. 2d 44.

*Rehearing Denied.*

No. 261, October Term, 1949. COBB *v.* COMMISSIONER OF INTERNAL REVENUE, 338 U. S. 832. Motion for leave to file second petition for rehearing denied.

No. 85. PERKINS *v.* BENGUET CONSOLIDATED MINING CO. ET AL., 342 U. S. 437; and

No. 272, Misc. ROBINSON *v.* ILLINOIS, 342 U. S. 929. Petitions for rehearing denied.

No. 141, Misc. EAGLE *v.* CHERNEY ET AL., 342 U. S. 873. Second petition for rehearing denied.

APRIL 7, 1952.

*Per Curiam Decisions.*

No. 442. BRUNNER *v.* UNITED STATES. Certiorari, 342 U. S. 917, to the United States Court of Appeals for the Ninth Circuit. Argued April 2, 1952. Decided April 7, 1952. *Per Curiam:* Judgment reversed. *Blau* v. *United States,* 340 U. S. 159. MR. JUSTICE REED and MR. JUSTICE DOUGLAS dissent. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case. *William B. Esterman* and *A. L. Wirin* argued the cause and filed a brief for petitioner. *J. F. Bishop* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney, Robert W. Ginnane* and *Robert S. Erdahl.* Reported below: 190 F. 2d 167.

No. 461. GREENBERG *v.* UNITED STATES. Certiorari, 342 U. S. 917, to the United States Court of Appeals for the Third Circuit. Argued April 2, 1952. Decided April 7, 1952. *Per Curiam:* Judgment reversed. *Hoffman* v. *United States,* 341 U. S. 479. MR. JUSTICE REED and MR. JUSTICE BURTON dissent. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case. *Frederick Bernays Wiener* argued the cause for petitioner. With him on the brief was *Jacob Kossman. Max H. Goldschein* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *John R. Wilkins.* Reported below: 192 F. 2d 201.

*Certiorari Granted.*

No. 638. UNITED STATES *v.* REYNOLDS ET AL. C. A. 3d Cir. Certiorari granted. *Solicitor General Perlman* for the United States. *Charles J. Biddle* for respondents. Reported below: 192 F. 2d 987.

*Certiorari Denied.*

No. 586. Olin Industries, Inc., Winchester Repeating Arms Company Division, *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *Benjamin E. Gordon, Maurice Epstein* and *Allan Seserman* for petitioner. *Solicitor General Perlman, George J. Bott, David P. Findling, Mozart G. Ratner* and *Frederick U. Reel* for respondent. Reported below: 192 F. 2d 799.

No. 589. Seitz et al. *v.* Choctaw and Chickasaw Nations et al. C. A. 10th Cir. Certiorari denied. *Louis A. Fischl* for petitioners. *Solicitor General Perlman* filed a memorandum for the United States, respondent. Reported below: 193 F. 2d 456.

No. 594. Lewis et al. *v.* Railroad Retirement Board. Supreme Court of Alabama. Certiorari denied. *Erle Pettus, Jr.* for petitioners. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for respondent. Reported below: 256 Ala. 430, 54 So. 2d 777.

No. 595. Woolley *v.* Michigan. Supreme Court of Michigan. Certiorari denied. *Roger H. Nielsen* and *Alfonso A. Magnotta* for petitioner. *Frank G. Millard,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara* for respondent.

No. 599. Sanger *v.* Plomb Tool Co. C. A. 9th Cir. Certiorari denied. *Robert W. Kenny* for petitioner. *Homer I. Mitchell* for respondent. *Solicitor General Perlman* filed a memorandum for the United States, as *amicus curiae,* supporting the petition. Reported below: 193 F. 2d 260.

No. 607. STANOLIND OIL & GAS CO. *v.* WEST EDMOND HUNTON LIME UNIT. C. A. 10th Cir. Certiorari denied. *W. W. Heard* for petitioner. *T. Murray Robinson* for respondent. Reported below: 193 F. 2d 818.

No. 620. BROWN & BIGELOW *v.* B. B. PEN CO. C. A. 8th Cir. Certiorari denied. *Lawrence C. Kingsland, Edmund C. Rogers* and *Estill E. Ezell* for petitioner. *Lewis E. Lyon* for respondent. Reported below: 191 F. 2d 939.

No. 622. PRESTON *v.* CONTINENTAL OIL CO., INC. C. A. 10th Cir. Certiorari denied. *Kenneth C. West, Hugh Lynch, Jr.* and *O. B. Martin* for petitioner. *R. O. Wilson* and *D. A. Richardson* for respondent. Reported below: 193 F. 2d 496.

No. 567. DELAWARE & HUDSON CO. ET AL. *v.* BOSTON RAILROAD HOLDING CO. ET AL.; and

No. 593. MAGENIS ET AL. *v.* BOSTON RAILROAD HOLDING CO. ET AL. Supreme Judicial Court of Massachusetts. The motion for leave to file brief of Dayton P. Haigney and associates as *amici curiae* or to obtain consideration of a brief as Co-Parties Petitioner is denied. Certiorari denied. *Hugh D. McLellan* for the Delaware & Hudson Co., petitioner in No. 567. *William T. Griffin* and *Henry Cohen* for petitioners in No. 593. *John L. Hall* and *Richard Wait* for the New York, New Haven & Hartford Railroad Co., respondent. Reported below: No. 567, 328 Mass. 63, 102 N. E. 2d 67.

No. 588. RICHARDSON *v.* BRITTON, DEPUTY COMMISSIONER, DISTRICT OF COLUMBIA COMPENSATION DISTRICT, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Richard L.*

*Merrick* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Samuel D. Slade* and *Herman Marcuse* for Britton, respondent. Reported below: 89 U. S. App. D. C. 391, 192 F. 2d 423.

No. 606. Von Hardenberg et al. *v.* McGrath, Attorney General. Supreme Court of Illinois. Certiorari denied. Mr. Justice Clark took no part in the consideration or decision of this application. *Roland Towle* for petitioners. *Solicitor General Perlman, Assistant Attorney General Baynton, Herman Smith, James D. Hill* and *George B. Searls* for respondent. Reported below: 410 Ill. 354, 102 N. E. 2d 335.

*Rehearing Denied.*

No. 143. Sutton *v.* Leib, 342 U. S. 402;

No. 317. Day-Brite Lighting, Inc. *v.* Missouri, 342 U. S. 421;

No. 349. First National Bank of Chicago, Executor, *v.* United Air Lines, Inc., 342 U. S. 396;

No. 514. Leishman *v.* General Motors Corp., 342 U. S. 943;

No. 515. Wyche et al. *v.* United States, 342 U. S. 943;

No. 520. Central Railroad Co. of New Jersey *v.* Director, Division of Tax Appeals of the Department of the Treasury, 342 U. S. 936;

No. 523. Illinois ex rel. Loughry *v.* Board of Education of Chicago, 342 U. S. 944;

No. 540. Cox *v.* Peters et al., 342 U. S. 936;

No. 544. Richards *v.* United States, 342 U. S. 946; and

No. 287, Misc. Mulkey *v.* United States Court of Appeals for the Sixth Circuit, 342 U. S. 949. Petitions for rehearing denied.

APRIL 21, 1952.

*Per Curiam Decisions.*

No. 395. RICHFIELD OIL CORP. *v.* UNITED STATES. Appeal from the United States District Court for the Southern District of California. Argued April 1–2, 1952. Decided April 21, 1952. *Per Curiam:* The Court is of the opinion that the issues raised by this appeal are substantially the same as those decided in *Standard Oil Co.* v. *United States,* 337 U. S. 293 (1949). Accordingly, the judgment of the District Court is affirmed. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, MR. JUSTICE JACKSON, and MR. JUSTICE BURTON, while adhering to their views expressed in *Standard Oil Co.* v. *United States, supra,* join in affirming the judgment of the District Court in this case. MR. JUSTICE FRANKFURTER, not having heard the argument, owing to illness, took no part in the consideration or decision of this case. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Robert E. Paradise* argued the cause for appellant. With him on the brief was *William J. DeMartini. Assistant Attorney General Morison* argued the cause for the United States. With him on the brief were *Solicitor General Perlman, James L. Morrisson* and *J. Roger Wollenberg.* Reported below: 99 F. Supp. 280.

No. 78. VON MOLTKE *v.* GILLIES, SUPERINTENDENT. Certiorari, 342 U. S. 810, to the United States Court of Appeals for the Sixth Circuit. Argued January 28, 1952. Decided April 21, 1952. *Per Curiam:* Judgment affirmed by an equally divided Court. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *G. Leslie Field,* acting under appointment by the Court, argued the cause and filed a brief for petitioner. *Beatrice Rosenberg* argued the cause for respondent. With her

on the brief were *Solicitor General Perlman* and *Assistant Attorney General McInerney*. Reported below: 189 F. 2d 56.

No. 665. AUTO TRANSPORTS, INC. ET AL. *v.* UNITED STATES 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. *James W. Wrape, Glenn M. Elliott* and *L. Karlton Mosteller* for Auto Transports, Inc.; and *Henry M. Hogan* and *Walter R. Frizzell* for General Motors Corporation, appellants. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission, appellees. Reported below: 101 F. Supp. 132.

No. 671. BALTIMORE STEAM PACKET CO. *v.* VIRGINIA; and

No. 672. NORFOLK, BALTIMORE & CAROLINA LINE, INC. *v.* VIRGINIA. Appeals from the Supreme Court of Appeals of Virginia. *Per Curiam:* The motion to dismiss is granted and the appeals are dismissed. *Tazewell Taylor, Jr.* for appellant in No. 671. *John W. Oast, Jr.* for appellant in No. 672. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, and *Henry T. Wickham*, Assistant Attorney General, for appellee. Reported below: 193 Va. 55, 68 S. E. 2d 137.

*Miscellaneous Orders.*

No. 456. UNITED STATES *v.* HENNING ET AL. This case is restored to the docket for reargument.

No. 395, Misc. NOR WOODS *v.* KING ET AL. Supreme Court of California. Certiorari denied. Motion for leave to file petition for writ of mandate also denied.

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No. 543. ON LEE *v.* UNITED STATES. Motion for leave to file brief of Joseph Steinberg and Donald Steinberg, as *amici curiae,* denied. Memorandum filed by MR. JUSTICE FRANKFURTER with a statement by MR. JUSTICE BLACK.

Memorandum of MR. JUSTICE FRANKFURTER.

The rule governing the filing of *amici* briefs clearly implies that such briefs should be allowed to come before the Court not merely on the Court's exercise of judgment in each case. On the contrary, it presupposes that the Court may have the aid of such briefs if the parties consent. For the Solicitor General to withhold consent automatically in order to enable this Court to determine for itself the propriety of each application is to throw upon the Court a responsibility that the Court has put upon all litigants, including the Government, preserving to itself the right to accept an *amicus* brief in any case where it seems unreasonable for the litigants to have withheld consent. If all litigants were to take the position of the Solicitor General, either no *amici* briefs (other than those that fall within the exceptions of Rule 27) would be allowed, or a fair sifting process for dealing with such applications would be nullified and an undue burden cast upon the Court. Neither alternative is conducive to the wise disposition of the Court's business. The practice of the Government amounts to an endeavor, I am bound to say, to transfer to the Court a responsibility that by the rule properly belongs to the Government. The circumstances of the application in this case illustrate the unfairness resulting from persisting in the Government's practice, in disregard of Rule 27.

MR. JUSTICE BLACK concurs in the foregoing views, but desires to state that he is of the opinion that the Court's rule regarding the filing of briefs *amici curiae* should be liberalized.

No. 397, Misc. TATE *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 394, Misc. HOUSE *v.* HIATT, WARDEN;

No. 412, Misc. PULLINS *v.* ALVIS, WARDEN, ET AL.;

No. 421, Misc. THOMPSON *v.* ROBINSON, WARDEN; and

No. 428, Misc. BURKHOLDER *v.* ARIZONA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 419, Misc. BYERS *v.* FEDERAL BAR ASSOCIATION; and

No. 429, Misc. IN RE KING. Applications denied.

*Certiorari Granted.*

No. 645. GULF RESEARCH & DEVELOPMENT CO. ET AL. *v.* LEAHY, U. S. DISTRICT JUDGE, ET AL. C. A. 3d Cir. Certiorari granted. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Leonard S. Lyon* and *Thomas Cooch* for petitioners. *Worthington Campbell, E. Ennalls Berl* and *Mark N. Donohue* for respondents. Reported below: 193 F. 2d 302.

No. 646. CARDOX CORPORATION *v.* C-O-TWO FIRE EQUIPMENT CO. C. A. 7th Cir. Certiorari granted. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *George I. Haight, Andrew J. Dallstream* and *Fredric H. Stafford* for petitioner. *R. Morton Adams, Irving Herriott* and *Edward T. Connors* for respondent. Reported below: 194 F. 2d 410.

No. 203, Misc. BAUMET ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari granted. Petitioners *pro se*. *Solicitor General Perlman* filed a memorandum for the

United States, respondent, stating that the Government does not oppose the granting of a writ of certiorari in this case. *George G. Gallantz* for Peters, Executrix, respondent. Reported below: 191 F. 2d 194.

*Certiorari Denied.* (*See also Misc. Nos. 395 and 397, supra.*)

No. 580. Central Hide & Rendering Co. *v.* United States. Court of Claims. Certiorari denied. *E. E. Blakely* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Samuel D. Slade* for the United States. Reported below: 121 Ct. Cl. 436.

No. 583. Hoptowit et al. *v.* Seufert Brothers Co. Supreme Court of Oregon. Certiorari denied. *Kenneth R. L. Simmons* for petitioners. *T. Leland Brown* for respondent. Reported below: 193 Ore. 317, 237 P. 2d 949.

No. 598. Martini *v.* United States et al. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Samuel D. Slade* and *Herman Marcuse* for the United States. Reported below: 192 F. 2d 649.

No. 600. Florida Dehydration Co. *v.* United States. Court of Claims. Certiorari denied. *Llewellyn A. Luce* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Samuel D. Slade* and *Benjamin Forman* for the United States. Reported below: 121 Ct. Cl. 89, 101 F. Supp. 361.

No. 602. Amoroso *v.* Commissioner of Internal Revenue. C. A. 1st Cir. Certiorari denied. *Sumner W. Elton* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *Lee A. Jackson* for respondent. Reported below: 193 F. 2d 583.

No. 604. HANDZIK *v.* ILLINOIS EX REL. DICKERSON. Supreme Court of Illinois. Certiorari denied. *Frederick J. Bertram* for petitioner. Reported below: 410 Ill. 295, 102 N. E. 2d 340.

No. 609. HARVEY ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Bernard Margolius* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Robert S. Erdahl* for the United States. Reported below: 90 U. S. App. D. C. —, 193 F. 2d 928.

No. 614. KELHAM ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Leon de Fremery* for petitioners. *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *Hilbert P. Zarky* for respondent. Reported below: 192 F. 2d 785.

No. 618. MAJOR *v.* PHILLIPS-JONES CORPORATION. C. A. 2d Cir. Certiorari denied. *Milton E. Mermelstein* for petitioner. *Eugene Frederick Roth* for respondent. Reported below: 192 F. 2d 186.

No. 627. STRAUB ET AL. *v.* SAMPSELL, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. *Charles K. Chapman* and *Alan E. Gray* for petitioners. *Thos. S. Tobin* for respondent. Reported below: 194 F. 2d 228.

No. 628. ROCCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Charles J. Margiotti* and *Vincent M. Casey* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 193 F. 2d 1008.

No. 629. TISHMAN REALTY & CONSTRUCTION CO., INC. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. *Eugene Eisenmann* for petitioner. *Solicitor General Perlman, Assistant Attorney General Underhill, Roger P. Marquis* and *John C. Harrington* for the United States. Reported below: 193 F. 2d 180.

No. 631. SIMONI *v.* D'IPPOLITO. Supreme Court of New Jersey. Certiorari denied. *Samuel Miles Fink* for petitioner. *Edwin J. McDermott* for respondent. Reported below: 8 N. J. 271, 84 A. 2d 708.

No. 632. SMITHDEAL ET AL., EXECUTORS, ET AL. *v.* ATLANTIC GREYHOUND CORP. C. A. 4th Cir. Certiorari denied. *Roy L. Deal* for petitioners. *B. S. Womble, W. P. Sandridge* and *Oscar L. Shewmake* for respondent. Reported below: 192 F. 2d 453.

No. 633. WHITE *v.* FITZPATRICK, COLLECTOR OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *John A. Danaher* and *Muriel S. Paul* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack, Lee A. Jackson* and *Melva M. Graney* for respondent. Reported below: 193 F. 2d 398.

No. 634. TUREK *v.* PENNSYLVANIA RAILROAD CO. Supreme Court of Pennsylvania. Certiorari denied. *Joseph Matusow* for petitioner. *Philip Price* and *Hugh B. Cox* for respondent. Reported below: 369 Pa. 341, 85 A. 2d 845.

No. 636. BAXTER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Irving K. Baxter* for petitioner.

No. 653. Loew's Incorporated et al. *v.* Milgram et al. C. A. 3d Cir. Certiorari denied. *Wm. A. Schnader, Bernard G. Segal* and *Abraham L. Freedman* for petitioners. *Albert M. Cohen* for respondents. Reported below: 192 F. 2d 579.

No. 524. Chemical Bank & Trust Co., Trustee, *v.* Group of Institutional Investors;

No. 525. Alleghany Corporation *v.* Group of Institutional Investors;

No. 526. Missouri Pacific Railroad Company 5¼% Secured Serial Bondholders Committee *v.* Group of Institutional Investors;

No. 527. Farwell et al. *v.* Group of Institutional Investors; and

No. 528. Missouri Pacific Railroad Co. *v.* Group of Institutional Investors. C. A. 8th Cir. Certiorari denied. Mr. Justice Black is of the opinion that the petitions should be granted. Mr. Justice Frankfurter will file a memorandum with the Clerk. [See *post,* p. 982.] *Emmet McCaffery* for petitioner in No. 524. *Adrian L. Foley* and *Edmund O'Hare* for petitioner in No. 525. *William H. Biggs* for petitioner in No. 526. *Lucien Hilmer* for petitioners in No. 527. *Burton K. Wheeler* and *Robert G. Seaks* for petitioner in No. 528. *Charles W. McConaughy* for the Group of Institutional Investors; *Sanford H. E. Freund* for the Protective Committee for General Mortgage Bondholders; and *Leonard P. Moore* and *Clair B. Hughes* for the Manufacturers Trust Co., Trustee, respondents. Reported below: 191 F. 2d 265.

No. 582. Maxwell *v.* Arkansas. Supreme Court of Arkansas. Certiorari denied. *W. Harold Flowers* and *Ruth C. Flowers* for petitioner. Reported below: 219 Ark. 513, 243 S. W. 2d 377.

No. 601. Erie Forge Co. *v.* United States. C. A. 3d Cir. Certiorari denied. Mr. Justice Douglas and Mr. Justice Jackson are of the opinion certiorari should be granted. *Leo Brady* and *W. Pitt Gifford* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack, Lee A. Jackson* and *Irving I. Axelrad* for the United States. Reported below: 191 F. 2d 627.

No. 616. White et al. *v.* United States et al. C. A. 5th Cir. Certiorari denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion certiorari should be granted. The Chief Justice took no part in the consideration or decision of this application. *Robert Ash* for petitioners. *Solicitor General Perlman, Acting Assistant Attorney General Slack, John Lockley* and *John R. Benney* for respondents. Reported below: 194 F. 2d 215.

No. 369, Misc. Krupnick *v.* United States. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 193 F. 2d 554.

No. 381, Misc. Di Silvestro *v.* Gray, Administrator of Veterans Affairs. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Baldridge, Samuel D. Slade* and *Benjamin Forman* for respondent. Reported below: 90 U. S. App. D. C. ——, 194 F. 2d 355.

No. 403, Misc. Ephraim *v.* Illinois. Supreme Court of Illinois. Certiorari denied. Reported below: 411 Ill. 118, 103 N. E. 2d 363.

No. 404, Misc. WELLS *v.* ROBINSON, WARDEN, ET AL. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 406, Misc. HARRIS *v.* SWENSON, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: —— Md. ——, 86 A. 2d 168.

No. 410, Misc. WASHBURN *v.* UTECHT, WARDEN. Supreme Court of Minnesota. Certiorari denied. Reported below: —— Minn. ——, 51 N. W. 2d 657.

No. 415, Misc. ZEE *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 416, Misc. BLACK *v.* MOORE, WARDEN, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 417, Misc. JOHNSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 411 Ill. 248, 103 N. E. 2d 355.

No. 423, Misc. PORTER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

*Rehearing Denied.*

No. 201, October Term, 1950. SACHER ET AL. *v.* UNITED STATES, *ante*, p. 1. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 300, October Term, 1950. HALLINAN *v.* UNITED STATES, 341 U. S. 952. Motion for leave to file second petition for rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this motion.

No. 234. UNITED STATES *v.* THOMAS, 342 U. S. 850. Motion for leave to file petition for rehearing denied.

No. 165. BUCK ET AL. *v.* CALIFORNIA, *ante*, p. 99;

No. 555. MORTGAGE FINANCE CORP. ET AL. *v.* WATSON, REAL ESTATE COMMISSIONER, 342 U. S. 938;

No. 309, Misc. FREAPANE *v.* ILLINOIS, 342 U. S. 956; and

No. 340, Misc. RIPPE, EXECUTRIX, *v.* STAHLHUTH ET AL., 342 U. S. 956. Petitions for rehearing denied.

APRIL 28, 1952.

*Per Curiam Decision.*

No. 687. NEWMAN *v.* MURPHY, WARDEN. Appeal from the Supreme Court of New York, Appellate Division, Fourth Judicial Department. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. Petitioner *pro se*. *Nathaniel L. Goldstein*, Attorney General of New York, *Wendell P. Brown*, Solicitor General, and *Herman N. Harcourt*, Assistant Attorney General, for respondent. Reported below: 279 App. Div. 627, 108 N. Y. S. 2d 970.

*Miscellaneous Orders.*

No. 9, Original. TEXAS *v.* NEW MEXICO ET AL. Argued April 21, 1952. Decided April 28, 1952. The motion for leave to file the complaint is granted and process is ordered to issue returnable within 60 days. *Eugene T. Edwards* argued the cause for the plaintiff. With him on the brief were *Price Daniel*, Attorney General of Texas, and *Jesse P. Luton, Jr.* and *K. B. Watson*, Assistant Attorneys General. *Jean S. Breitenstein* argued the cause for the defendants. On the brief were *Joe L. Martinez*, Attorney General, and *Fred E. Wilson*, Special Assistant Attorney General, for the State of New Mexico, and

*Martin A. Threet* and *D. A. Macpherson, Jr.* for the Middle Rio Grande Conservancy District et al., defendants. *Solicitor General Perlman* filed a memorandum for the United States, as *amicus curiae,* asserting that the Government is an indispensable party to this action.

No. 321, Misc. PRESTON *v.* TEXAS. The petition for rehearing is granted and the order entered March 31, 1952, *ante,* p. 917, denying certiorari on the ground that the application therefor was not made within the time provided by law is vacated. Upon consideration of the petition for writ of certiorari, certiorari to the Court of Criminal Appeals of Texas is denied. *Arthur J. Mandell* for petitioner. *Price Daniel,* Attorney General of Texas, and *Calvin B. Garwood, Jr.,* Assistant Attorney General, for respondent.

No. 446, Misc. IN RE WHITNEY. Motion for leave to file petition for writ of mandamus denied.

No. 448, Misc. MCGARY *v.* STEELE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

*Certiorari Granted.*

No. 617. KWONG HAI CHEW *v.* COLDING ET AL. C. A. 2d Cir. Certiorari granted. *Carl S. Stern* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Kenneth C. Shelver* for Shaughnessy, respondent. Reported below: 192 F. 2d 1009.

*Certiorari Denied.* (*See also No. 321, Misc., supra.*)

No. 561. TOBIN, SECRETARY OF LABOR, *v.* ALMA MILLS. C. A. 4th Cir. Certiorari denied. *Solicitor General Perlman* and *William S. Tyson* for petitioner. *Pinckney L. Cain* for respondent. Reported below: 192 F. 2d 133.

No. 639. ZAMLOCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Leo R. Friedman* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 193 F. 2d 889.

No. 640. BANGOR & AROOSTOOK RAILROAD CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. *Joseph M. Jones* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *Irving I. Axelrad* for respondent. Reported below: 193 F. 2d 827.

No. 641. MORGAN *v.* GRIFFITH REALTY CO. C. A. 10th Cir. Certiorari denied. *James M. Barnes* for petitioner. Reported below: 192 F. 2d 597.

No. 642. LYNCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *C. W. Halverson* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *Robert N. Anderson* for the United States. Reported below: 192 F. 2d 718.

No. 654. GINSBURG *v.* BLACK ET AL.; and

No. 655. GINSBURG *v.* FIRST NATIONAL BANK OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. *John W. Cragun* for petitioner. *Guy A. Gladson* for Black et al., and *Frank L. Paul* for the First National Bank of Chicago, respondents. Reported below: 192 F. 2d 823, 826.

No. 656. HOUSTON & NORTH TEXAS MOTOR FREIGHT LINES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Carl L. Phinney* and *Sam R. Sayers* for petitioner. *Solicitor General Perlman, George J. Bott, David P. Findling, Mozart G. Ratner* and *Frederick U. Reel* for respondent. Reported below: 193 F. 2d 394.

No. 657. Atlantic Coast Line Railroad Co. *v.* Freeman, Administratrix. C. A. 5th Cir. Certiorari denied. *Peyton D. Bibb* and *Charles Cook Howell* for petitioner. *G. Ernest Jones, Jr.* and *G. Ernest Jones, Sr.* for respondent. Reported below: 193 F. 2d 217.

No. 661. King et al. *v.* Streit et al. Supreme Court of Florida. Certiorari denied. *Claude Pepper, W. G. Ward* and *T. J. Blackwell* for petitioners. *Robert H. Anderson* for respondents. Reported below: 54 So. 2d 522.

No. 299, Misc. Iva Ikuko Toguri d'Aquino *v.* United States. C. A. 9th Cir. The motion for leave to file brief of Milton J. Jarvis and others, as *amici curiae,* is denied. Certiorari also denied. Mr. Justice Clark took no part in the consideration or decision of these applications. *Wayne M. Collins, George Olshausen* and *Marvel Shore* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 192 F. 2d 338.

No. 322, Misc. Mahler *v.* Frisbie, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 193 F. 2d 319.

No. 339, Misc. Supero *v.* Illinois. Supreme Court of Illinois. Certiorari denied.

No. 396, Misc. Williams *v.* United Brotherhood of Carpenters & Joiners et al. C. A. 6th Cir. Certiorari denied. *Sheldon D. Clark* and *Stanley U. Robinson, Jr.* for petitioner. *Jerome N. Curtis, Harry N. Routzohn* and *Edward J. Schweid* for respondents. Reported below: 191 F. 2d 860.

No. 426, Misc. LATIMER *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 430, Misc. SMITH *v.* CALIFORNIA. District Court of Appeal of California, First District. Certiorari denied.

No. 432, Misc. BARR *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 433, Misc. DAVIS *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 437, Misc. DAVENPORT ET AL. *v.* WATERS, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: —— Okla. Cr. ——, 241 P. 2d 429.

No. 438, Misc. PINKOS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 445, Misc. O'NEILL *v.* ROBINSON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 465, Misc. EDWARDS *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Reported below: 157 Ohio St. 175, 105 N. E. 2d 259.

*Rehearing Granted.* (*See No. 321, Misc., supra.*)

*Rehearing Denied.*

No. 43. HARISIADES *v.* SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION; and

No. 264. COLEMAN *v.* MCGRATH, ATTORNEY GENERAL, ET AL., 342 U. S. 580. Petitions for rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

No. 173. LYKES *v.* UNITED STATES, *ante*, p. 118;

No. 331. FRISBIE, WARDEN, *v.* COLLINS, 342 U. S. 519;

No. 533. FOSTER ET AL. *v.* GENERAL MOTORS CORP., *ante*, p. 906;

No. 541. RISS & CO., INC. *v.* UNITED STATES ET AL., 342 U. S. 937;

No. 573. CHAPMAN *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 905;

No. 619. PROPST ET AL. *v.* BOARD OF EDUCATIONAL LANDS AND FUNDS OF NEBRASKA ET AL., *ante*, p. 901;

No. 163, Misc. THOMAS *v.* DUFFY, WARDEN, *ante*, p. 906;

No. 218, Misc. ANTROBUS *v.* UNITED STATES, *ante*, p. 902;

No. 348, Misc. VILES *v.* UNITED STATES, *ante*, p. 915;

No. 371, Misc. CHESSMAN *v.* CALIFORNIA ET AL., *ante*, p. 915; and

No. 400, Misc. ELLIOTT *v.* MICHIGAN, *ante*, p. 913. Petitions for rehearing denied.

No. 252, Misc. SHOTKIN *v.* ATCHISON, TOPEKA & SANTA FE RAILROAD CO. ET AL., *ante*, p. 906. Rehearing denied. MR. JUSTICE BLACK is of the opinion the petition should be granted.

MAY 3, 1952.

No. 744. YOUNGSTOWN SHEET & TUBE CO. ET AL. *v.* SAWYER; and

No. 745. SAWYER, SECRETARY OF COMMERCE, *v.* YOUNGSTOWN SHEET & TUBE CO. ET AL. On petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* Certiorari granted. MR. JUSTICE BURTON, with whom MR. JUSTICE FRANKFURTER concurred, voted to deny certiorari, and filed a memorandum expressing their reasons

therefor. The cases are assigned for argument on Monday, May 12, next.

The order of the District Court entered April 30, 1952, is hereby stayed pending disposition of these cases by this Court. It is further ordered, as a provision of this stay, that Charles S. Sawyer, Secretary of Commerce (respondent in No. 744 and petitioner in No. 745), take no action to change any term or condition of employment while this stay is in effect unless such change is mutually agreed upon by the steel companies (petitioners in No. 744 and respondents in No. 745) and the bargaining representatives of the employees.

Memorandum by MR. JUSTICE BURTON, with whom MR. JUSTICE FRANKFURTER concurred:

The first question before this Court is that presented by the petitions for a writ of certiorari by-passing the Court of Appeals. The constitutional issue which is the subject of the appeal deserves for its solution all of the wisdom that our judicial process makes available. The need for soundness in the result outweighs the need for speed in reaching it. The Nation is entitled to the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals. Little time will be lost and none will be wasted in seeking it. The time taken will be available also for constructive consideration by the parties of their own positions and responsibilities. Accordingly, I would deny the petitions for certiorari and thus allow the case to be heard by the Court of Appeals. Such action would eliminate the consideration here of the terms of the stay of the order of the District Court heretofore issued by the Court of Appeals. However, certiorari being granted here, I join in all particulars in the order of this Court, now issued, staying that of the District Court.

*John C. Gall* and *John J. Wilson* for the Youngstown Sheet & Tube Co. et al.; *Luther Day, Edmund L. Jones, Howard Boyd, John C. Gall* and *T. F. Patton* for the Republic Steel Corp.; *Charles H. Tuttle* and *Joseph P. Tumulty, Jr.* for the Armco Steel Corp. et al.; *Bruce Bromley* and *E. Fontaine Broun* for the Bethlehem Steel Co. et al.; *John C. Bane, Jr., H. Parker Sharp* and *Sturgis Warner* for the Jones & Laughlin Steel Corp.; *John W. Davis, Theodore Kiendl, John Lord O'Brian, Roger M. Blough, Porter R. Chandler* and *Howard C. Westwood* for the United States Steel Co.; and *Randolph W. Childs, Edgar S. McKaig* and *James Craig Peacock* for E. J. Lavino & Co., petitioners in No. 744 and respondents in No. 745. *Solicitor General Perlman* for Sawyer, Secretary of Commerce. *Arthur J. Goldberg* and *Thomas E. Harris* filed a brief for the United Steelworkers of America, C. I. O., as *amicus curiae,* with regard to the issuance of a stay. Reported below: 90 U. S. App. D. C. —, 197 F. 2d 582.

MAY 5, 1952.

*Per Curiam Decisions.*

No. 682. JOHN DEERE PLOW CO. *v.* FRANCHISE TAX BOARD OF CALIFORNIA. Appeal from the Supreme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Butler Bros.* v. *McColgan,* 315 U. S. 501. *Arthur H. Kent* and *Valentine Brookes* for appellant. *Edmund G. Brown,* Attorney General of California, and *James E. Sabine,* Deputy Attorney General, for appellee. Reported below: 38 Cal. 2d 214, 238 P. 2d 569.

No. 684. HEISLER *v.* BOARD OF REVIEW, BUREAU OF UNEMPLOYMENT COMPENSATION. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dis-

miss is granted and the appeal is dismissed for the want of a substantial federal question. *Leo Pfeffer* for appellant. *C. William O'Neill,* Attorney General of Ohio, *Joseph S. Gill,* First Assistant Attorney General, *John W. Hardwick,* Assistant Attorney General, and *Robert E. Leach,* Chief Counsel, for appellee. Reported below: 156 Ohio St. 395, 102 N. E. 2d 601.

*Miscellaneous Orders.*

No. 434, Misc. TABOR *v.* HOOPER, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

No. 443, Misc. PAPPAS *v.* WELCH, SUPERINTENDENT, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 452, Misc. MARINGER *v.* MCGEE, DIRECTOR OF CORRECTIONS, ET AL. Application denied.

No. 455, Misc. MARROW *v.* ROBINSON, WARDEN. Motion for leave to file petition for writ of mandamus denied.

No. 461, Misc. WRIGHT *v.* NYGAARD, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

*Certiorari Granted.*

No. 644. CITY OF CHICAGO *v.* WILLETT COMPANY. Supreme Court of Illinois. Certiorari granted. *L. Louis Karton* and *Arthur Magid* for petitioner. *Charles Dana Snewind* for respondent. Reported below: See 409 Ill. 480, 101 N. E. 2d 205.

No. 652. UNITED STATES *v.* CARDIFF. C. A. 9th Cir. Certiorari granted. *Solicitor General Perlman* for the United States. Reported below: 194 F. 2d 686.

No. 658. UNITED STATES EX REL. CHAPMAN, SECRETARY OF THE INTERIOR, *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 659. VIRGINIA REA ASSOCIATION ET AL. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 4th Cir. Certiorari granted. *Gregory Hankin* for the Secretary of the Interior. *Robert Whitehead* for petitioners in No. 659. *Bradford Ross, Willard W. Gatchell, Howard E. Wahrenbrock* and *Reuben Goldberg* for the Federal Power Commission; and *T. Justin Moore* and *Patrick A. Gibson* for the Virginia Electric & Power Co., respondents. Reported below: 191 F. 2d 796.

*Certiorari Denied.*

No. 625. COLLEGE HOMES, INC. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner by Alden Chas. Palmer, its President. *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Benjamin Forman* for the United States.

No. 630. BURFORD-TOOTHAKER TRACTOR CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *Fred S. Ball, Jr.* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *Carlton Fox* for respondent. Reported below: 192 F. 2d 633.

No. 637. UNITED STATES *v.* ATKINS. C. A. 5th Cir. Certiorari denied. *Solicitor General Perlman* for the United States. *William H. Bronson* for respondent. Reported below: 191 F. 2d 951.

No. 648. BRADLEY MINING CO. *v.* BOICE. C. A. 9th Cir. Certiorari denied. *John Parks Davis, Oscar W. Worthwine* and *Arthur B. Dunne* for petitioner. *William H. Langroise* for respondent. Reported below: 194 F. 2d 80.

No. 660. PRINCIPALE *v.* ASSOCIATED GAS & ELECTRIC CO. ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Allen E. Throop* for Associated Gas & Electric Co. et al., respondents. Reported below: 192 F. 2d 1016.

No. 663. PADUCAH NEWSPAPERS, INC. ET AL. *v.* WISE. Court of Appeals of Kentucky. Certiorari denied. *Herbert S. Thatcher* for petitioners. *James G. Wheeler* for respondent. Reported below: 247 S. W. 2d 989.

No. 664. STALLSWORTH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Julius Lucius Echeles* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 193 F. 2d 870.

No. 667. BARNES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *W. M. Nicholson* and *Porter B. Byrum* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 192 F. 2d 466.

No. 674. TWENTIETH CENTURY-FOX FILM CORP. ET AL. *v.* BROOKSIDE THEATRE CORP. C. A. 8th Cir. Certiorari denied. *John F. Caskey, Byron Spencer* and *William E. Kemp* for petitioners. *William G. Boatright* for respondent. Reported below: 194 F. 2d 846.

No. 675. HOGAN ET AL. *v.* WILLIAMS ET AL. C. A. 5th Cir. Certiorari denied. *M. Neil Andrews* for petitioners. *Harry M. Wilson* for respondents. Reported below: 193 F. 2d 220.

No. 258, Misc. WALEY *v.* SWOPE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 289, Misc. BOWEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 192 F. 2d 515.

No. 302, Misc. SULLIVAN *v.* MCGEE, DIRECTOR OF CORRECTIONS. Supreme Court of California. Certiorari denied.

No. 413, Misc. DARCY *v.* HEINZE, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Edmund G. Brown*, Attorney General of California, *Clarence A. Linn*, Assistant Attorney General, and *Doris M. Maier*, Deputy Attorney General, for respondent. Reported below: 194 F. 2d 664.

No. 418, Misc. BUTZ *v.* CIRCUIT COURT OF RANDOLPH COUNTY, ILLINOIS, ET AL. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 425, Misc. DOVICO *v.* NEW YORK. Supreme Court of New York, Appellate Division, Fourth Department. Certiorari denied. Reported below: 279 App. Div. 621, 107 N. Y. S. 2d 571.

No. 427, Misc. JONES *v.* CITY OF NORFOLK. Supreme Court of Nebraska. Certiorari denied.

No. 431, Misc. KELEHER *v.* KELEHER. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* for petitioner. *Alvin L. Newmyer* for respondent. Reported below: 89 U. S. App. D. C. 266, 192 F. 2d 601.

No. 435, Misc. KRUSE *v.* STANLEY. C. A. 2d Cir. Certiorari denied.

No. 436, Misc. TASHKOFF *v.* HUDSPETH, WARDEN, ET AL. Supreme Court of Kansas. Certiorari denied.

*Rehearing Denied.*

No. 465, Misc. EDWARDS *v.* OHIO, *ante,* p. 936. Rehearing denied. Motion for stay of execution also denied.

MAY 12, 1952.

*Per Curiam Decisions.*

No. 666. SINGLETON *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Greenberg* v. *United States,* 343 U. S. 918; *Hoffman* v. *United States,* 341 U. S. 479. THE CHIEF JUSTICE and MR. JUSTICE REED dissent. MR. JUSTICE DOUGLAS dissents from the action of the Court in reversing without oral argument. *Lemuel B. Schofield* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 193 F. 2d 464.

No. 722. TOM'S EXPRESS, INC. ET AL. *v.* DIVISION OF STATE HIGHWAY PATROL, DEPARTMENT OF HIGHWAYS, OF OHIO. Appeal from the United States District Court for the Southern District of Ohio. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. MR. JUSTICE REED and MR. JUSTICE DOUGLAS dissent. *Taylor C. Burneson* and *J. E. Simpson* for appellants. Reported below: —— F. Supp. ——.

No. 731. SHEIN ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of New Jersey. *Per Curiam:* The motion of Jack Garrett Scott for leave to withdraw his appearance as counsel for the appellants is granted. The judgment is affirmed. Appellants *pro se. Solicitor General Perlman, Daniel W. Knowlton* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission;

and *John R. Norris* and *Frank Thompson, Jr.* for the Interstate Common Carrier Council of Maryland, Inc., appellees. Reported below: 102 F. Supp. 320.

*Miscellaneous Orders.*

No. 334. GORDON, OFFICER IN CHARGE, IMMIGRATION AND NATURALIZATION SERVICE, *v.* HEIKKINEN. The motion of petitioner to vacate and remand is denied.

No. 460, Misc. JONES *v.* ALVIS, WARDEN, ET AL. Motion for leave to file petition for writ of mandamus denied.

*Certiorari Granted.* (*See No. 666, supra.*)

*Certiorari Denied.*

No. 605. JOHNSON *v.* PORTLAND TRUST & SAVINGS BANK. Supreme Court of Washington. Certiorari denied. Petitioner *pro se*. *Clarence D. Phillips* for respondent. Reported below: 39 Wash. 2d 960, 235 P. 2d 819.

No. 650. HARKNESS *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 651. HARKNESS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Philip S. Ehrlich, Albert A. Axelrod* and *R. J. Hecht* for petitioners. *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *Harry Baum* for respondent. Reported below: 193 F. 2d 655.

No. 668. BLACKFORD ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Kenneth C. West* and *Walter A. Raymond* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 195 F. 2d 896.

No. 326, Misc. LEVITON ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. Memorandum filed by MR. JUSTICE FRANKFURTER. *Sidney Feldshuh* for Leviton; *John Logan O'Donnell* for Markowitz; and *David E. Scoll* for Blumenfeld, petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Murry Lee Randall* for the United States. Reported below: 193 F. 2d 848.

Memorandum of MR. JUSTICE FRANKFURTER.

This seems to me to be another instance where it becomes helpful to an understanding of the exercise of the Court's discretionary jurisdiction in granting or denying certiorari, to indicate the kind of question that did not commend itself to at least four Justices as appropriate for review by this Court. Several questions were raised by the petition for certiorari. It suffices to indicate the nature of only one, which can be most helpfully conveyed by giving the views of the Court of Appeals and of the dissenting opinion. 193 F. 2d 848.

Speaking for that court, Judge Clark, with the concurrence of Chief Judge Swan, stated the matter thus:

"The third incident involved a newspaper article in the New York Times, December 14, 1949. This account falsely reported that the indictment covered some $9,500 worth of barbed wire; that Field, a Customs Bureau visa clerk who had received the eleventh and last fraudulent export declaration in this case and who was an important witness for the government, had been offered a $200 bribe by Leviton to suppress this evidence (Leviton had in fact purchased $44 worth of clothing as a gift for Field); and that the defendants were part of a much larger 'ring.' A copy of the newspaper containing the article was found in

the jury room. We do not think, however, that such a report, erroneous as it was, made a fair trial impossible. The judge gave very explicit instructions that the contents of the article were to be disregarded and went on to point out how the offenses set forth in the indictment differed from those described in the article. Trial by newspaper may be unfortunate, but it is not new and, unless the court accepts the standard judicial hypothesis that cautioning instructions are effective, criminal trials in the large metropolitan centers may well prove impossible. United States v. Keegan, supra, 2 Cir., 141 F.2d at page 258. Citations of the reporting media for contempt by publication are rare and the Supreme Court has stated that their activities in reporting criminal trials do not deprive the accused of a fair trial unless there is a 'clear and present danger' that such will result. See Ex parte Craig, 2 Cir., 282 F. 138, affirmed 263 U.S. 255, 44 S.Ct. 103, 68 L.Ed. 293; Baltimore Radio Show v. State, Md., 67 A.2d 497, certiorari denied, with opinion by Frankfurter, J., Maryland v. Baltimore Radio Show, 338 U.S. 912, 70 S.Ct. 252, 94 L.Ed. 562; Note, 59 Yale L. J. 534. Such was not the showing here." *Id.*, at 857.

Judge Frank in dissent took this view of the question:

"On the second day of trial, the prosecutor held a 'press conference' after court. He told the newspaper reporters of matters which (so he later advised the court) they promised not to print. In the next morning's New York Times, there appeared a story, told with typical journalistic vigor, about 'export racketeers' who 'poured $500,000 of commodities into European and South African black markets.' The significance of the newspaper story was this: It professed to recount the testimony of a witness that Leviton, over the phone, had offered him a $200 bribe to withdraw from customs files a fraudulent declara-

tion. The article detailed the attempted bribe, the meeting place for its completion and the substitution of a $44 gift of shirts for the originally-offered $200. This most damaging story of the $200 bribe is wholly unsupported by the evidence. Accordingly, had the prosecutor written letters to the jurors retelling this story, of course we would reverse. He did the equivalent. For it is outrightly conceded that the Times reporter learned this tale from the prosecutor, and that four copies of the newspaper article were found in the jury-room on the third day of the trial.

"My colleagues admit that 'trial by newspaper' is unfortunate. But they dismiss it as an unavoidable curse of metropolitan living (like, I suppose, crowded subways). They rely on the old 'ritualistic admonition' to purge the record. The futility of that sort of exorcism is notorious. As I have elsewhere observed, it is like the Mark Twain story of the little boy who was told to stand in a corner and not to think of a white elephant. Justice Jackson, in his concurring opinion in Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790, said that, 'The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction. See Skidmore v. Baltimore & Ohio R. Co., 2 Cir., 167 F.2d 54.' Cf. People v. Carborano, 301 N.Y. 39, 42–43, 92 N.E.2d 871; People v. Robinson, 273 N.Y. 438, 445–446, 8 N.E. 2d 25.

"I think the technique particularly objectionable and ineffective here for two reasons. (1) The story was a direct result of confidential disclosures by a government officer, the prosecutor, of not-in-the-record matters, and was not merely the accidental garbling of a confused reporter. (2) The article was no statement of opinion or editorial, but a professed account of court-room evidence

calculated to confuse and mislead juror-readers. In such cases, courts recognize that, for all practical purposes, defendants are deprived of their constitutional rights to confront witnesses, cross-examine and contradict them, and object to evidence as irrelevant or incompetent—in short all the elements of a fair trial. Last year, two Supreme Court Justices advocated in a concurring opinion the reversal of a conviction upon the ground that an officer of the court had released to the local press information about confessions of the defendants never introduced at the trial. Shepherd v. Florida, 341 U.S. 50, 71 S.Ct. 549, 95 L.Ed. 740.

"I cannot see the relevance here of cases, to which my colleagues refer, applying the 'clear and present danger' test to contempts by newspapers for articles relative to pending trials (incidentally, all non-jury trials). That test has been employed only when the newspaper itself was threatened with criminal punishment for the publication. It certainly should not be carried over to a case like this one where convicted defendants may well have been prejudiced by a newspaper article. In such a case, the 'clear and present danger' test would bar reversals for all but the most flagrantly scurrilous or deceptive newspaper attacks. Courts, in reversing convictions for trial-by-newspaper, have always recognized that printed matter may be prejudicial enough to require a new trial without evidencing so depraved an attitude of the publisher as to support a contempt citation. United States v. Ogden, D.C.E.D. Pa., 105 F. 371, 374.

"In the instant case, the newspaper and reporter, if cited for contempt, would doubtless urge as a defense that the story came from the prosecutor, an 'officer of the court.' That very fact, however, underscores the gravity of the error here." *Id.*, at 865–866.

No. 673. TURNEY *v.* HOME INSURANCE CO. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Joseph J. Biunno, John W. Ansell* and *Charles B. Niebling* for respondent. Reported below: 192 F. 2d 1023.

No. 680. WINGER, ADMINISTRATOR, *v.* MCCULLOUGH TRANSFER CO. Court of Appeals of Ohio, Seventh Judicial District. Certiorari denied. *David C. Haynes* for petitioner. *Richard W. Galiher* for respondent.

No. 685. FURLONG ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Frank J. McAdams, Jr.* for petitioners. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 194 F. 2d 1.

No. 676. BERGER *v.* MCGRATH, ATTORNEY GENERAL. 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. *Raoul Berger, pro se*. *Solicitor General Perlman, Assistant Attorney General Baynton, James D. Hill, George B. Searls* and *Irwin A. Siebel* for respondent. Reported below: 90 U. S. App. D. C. —, 195 F. 2d 775.

No. 678. LIVANOS ET AL. *v.* PATERAS ET AL. C. A. 4th Cir. Certiorari denied. *Jacob L. Morewitz* for petitioners. *Thomas M. Johnston* for respondents. Reported below: 192 F. 2d 319.

No. 401, Misc. WILSON ET AL. *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied. *Reuben G. Lenske* for petitioners.

No. 424, Misc. MONTGOMERY *v.* EIDSON, WARDEN, ET AL. Supreme Court of Missouri. Certiorari denied.

No. 282, Misc. PATTERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *John D. Cofer* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 192 F. 2d 631.

No. 447, Misc. SKLADD *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 454, Misc. COGDELL *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. Reported below: 193 Tenn. 261, 246 S. W. 2d 5.

No. 458, Misc. JOHNSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 459, Misc. WELLS *v.* DUSTMANN. Supreme Court of Illinois. Certiorari denied.

No. 462, Misc. OKULCZYK *v.* ILLINOIS. Circuit Court of Will County, Illinois. Certiorari denied.

No. 468, Misc. TAYLOR *v.* SMITH, SECRETARY OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 478, Misc. LARSON *v.* CRANOR, WARDEN. Supreme Court of Washington. Certiorari denied. Petitioner *pro se*. *Smith Troy,* Attorney General of Washington, for respondent.

*Rehearing Denied.*

No. 443. UNITED STATES *v.* SPECTOR, *ante,* p. 169. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 514. LEISHMAN *v.* GENERAL MOTORS CORP., 342 U. S. 943. Second petition for rehearing denied.

No. 195. RUTKIN *v.* UNITED STATES, *ante*, p. 130;

No. 373. STROBLE *v.* CALIFORNIA, *ante*, p. 181;

No. 584. LYNCH *v.* GRUBER ET UX., *ante*, p. 914;

No. 303, Misc. UNITED STATES EX REL. MILLS *v.* REING, U. S. MARSHAL, *ante*, p. 909;

No. 381, Misc. DI SILVESTRO *v.* GRAY, ADMINISTRATOR OF VETERANS AFFAIRS, *ante*, p. 930; and

No. 446, Misc. IN RE WHITNEY, *ante*, p. 933. Petitions for rehearing denied.

## MAY 19, 1952.

*Miscellaneous Order.*

No. 744. YOUNGSTOWN SHEET & TUBE CO. ET AL. *v.* SAWYER; and

No. 745. SAWYER, SECRETARY OF COMMERCE, *v.* YOUNGSTOWN SHEET & TUBE CO. ET AL. The motions for leave to file briefs of American Legion Post No. 88 and Everett S. Layman, as *amici curiae*, are denied.

*Certiorari Denied.*

No. 683. SMITH *v.* JONES, COLLECTOR OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *Ram Morrison* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack* and *A. F. Prescott* for respondent. Reported below: 193 F. 2d 381.

No. 686. MOSS, TRUSTEE IN BANKRUPTCY, *v.* MAY. C. A. 8th Cir. Certiorari denied. *D. D. Panich* for petitioner. *A. F. House* and *Harry E. Meek* for respondent. Reported below: 194 F. 2d 133.

No. 692. Ring Construction Corp. *v.* United States. Court of Claims. Certiorari denied. *Josiah E. Brill* and *Robert A. Littleton* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for the United States. Reported below: 121 Ct. Cl. 604, 102 F. Supp. 569.

No. 717. Osborne et al. *v.* Purdome, Sheriff. Supreme Court of Missouri. Certiorari denied. *John T. Barker* for Osborne et al.; and *Amos T. Hall* for Cabbell, petitioners. *John W. Oliver* and *Horace F. Blackwell, Jr.* for respondent. Reported below: 244 S. W. 2d 1005.

No. 727. Air Products, Inc. *v.* Boston Metals Co. C. A. 4th Cir. Certiorari denied. *James P. Burns, James J. Shanley* and *Benjamin C. Howard* for petitioner. *John Vaughan Groner, Simon E. Sobeloff* and *Clarence D. Kerr* for respondent. Reported below: 193 F. 2d 535.

No. 732. Sears, Roebuck & Co. *v.* Broughton. C. A. 6th Cir. Certiorari denied. *Murray Seasongood* and *Lester A. Jaffe* for petitioner. *John T. Diederich* for respondent. Reported below: 195 F. 2d 95.

No. 232, Misc. Rutledge *v.* Hudspeth, Warden, et al. Supreme Court of Kansas. Certiorari denied. Reported below: 171 Kan. 738, 237 P. 2d 250.

No. 384, Misc. Fentress *v.* Smyth, Superintendent. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 441, Misc. Beecher *v.* Leavenworth State Bank et al. C. A. 9th Cir. Certiorari denied. Reported below: 192 F. 2d 10.

No. 444, Misc. COLLINS *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 451, Misc. BUZZIE *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 453, Misc. BEECHER *v.* LEAVENWORTH STATE BANK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 191 F. 2d 812.

No. 472, Misc. RUTLEDGE *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied.

*Rehearing Denied.*

No. 426. UNITED STATES *v.* HOOD ET AL., *ante*, p. 148;

No. 575. SCHNEIDER *v.* UNITED STATES, *ante*, p. 914; and

No. 445, Misc. O'NEILL *v.* ROBINSON, WARDEN, *ante*, p. 936. Petitions for rehearing denied.

MAY 26, 1952.

*Per Curiam Decision.*

No. 752. MIZER ET AL. *v.* KANSAS-BOSTWICK IRRIGATION DISTRICT NO. 2 ET AL. 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. *Martin B. Dickinson* for appellants. *A. B. Mitchell* for appellees. Reported below: 172 Kan. 157, 239 P. 2d 370.

*Miscellaneous Order.*

No. 476, Misc. BARNES *v.* HUNTER, WARDEN. Motions for leave to file petitions for writs of habeas corpus and certiorari denied.

*Certiorari Granted.*

No. 610. UNITED STATES *v.* CALTEX (PHILIPPINES), INCORPORATED ET AL. Court of Claims. Certiorari granted. *Solicitor General Perlman* for the United States. *Leo T. Kissam* and *Henry J. Kiernan* for Caltex (Philippines), Inc., and *Albert R. Connelly* and *George S. Collins* for the Shell Company et al., respondents. Reported below: 120 Ct. Cl. 518, 100 F. Supp. 970.

No. 306, Misc. EDELMAN *v.* CALIFORNIA. Superior Court of Los Angeles County, Appellate Department, California. Certiorari granted. *A. L. Wirin, Fred Okrand* and *Arthur Garfield Hays* for petitioner. *Ray L. Chesebro* and *Bourke Jones* for respondent.

*Certiorari Denied.* (*See also No. 476, Misc., supra.*)

No. 568. S. S. W., INCORPORATED ET AL. *v.* AIR TRANSPORT ASSOCIATION OF AMERICA ET AL.; and

No. 591. AIR TRANSPORT ASSOCIATION OF AMERICA ET AL. *v.* S. S. W., INCORPORATED ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Warren E. Miller* and *John F. Clagett* for petitioners in No. 568. *Howard C. Westwood* for petitioners in No. 591, *Ernest W. Jennes* for American Airlines, Inc., *Charles H. Murchison* for Capital Airlines, Inc., *Hardy K. Maclay* for Colonial Airlines, Inc., *C. Edward Leasure* for Northwest Airlines, Inc., *Leonard P. Moore, Charles Pickett* and *William Caverly* for Transcontinental & Western Air, Inc., and *Leo Tierney* and *James Francis Reilly* for United Air Lines, Inc., also petitioners in No. 591. *Jo V. Morgan, Jr.* for Braniff Airways, Inc., respondent. Reported below: 89 U. S. App. D. C. 273, 191 F. 2d 658.

No. 679. CHOCTAW NATION *v.* UNITED STATES. Court of Claims. Certiorari denied. *Grady Lewis* and *W. F.*

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*Semple* for petitioner. *Solicitor General Perlman* and *Assistant Attorney General Underhill* for the United States. Reported below: 120 Ct. Cl. 734, 100 F. Supp. 318.

No. 689. Weiner *v.* Reconstruction Finance Corporation. C. A. 2d Cir. Certiorari denied. *I. H. Wachtel* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Morton Hollander* for respondent. Reported below: 192 F. 2d 760.

No. 693. Birnbaum et al., doing business as Birnbaum & Co., *v.* Newport Steel Corp. et al. C. A. 2d Cir. Certiorari denied. *Nathan B. Kogan* for petitioners. *A. Donald MacKinnon* and *Rebecca M. Cutler* for the Wilport Company; and *Arthur H. Dean* and *Howard T. Milman* for Feldmann, respondents. Reported below: 193 F. 2d 461.

No. 694. Biggs *v.* Spader et al. Supreme Court of Illinois, and Superior Court of Cook County, Illinois. Certiorari denied. Reported below: See 411 Ill. 42, 103 N. E. 2d 104.

No. 695. Northern Trust Co., Executor, *v.* United States. C. A. 7th Cir. Certiorari denied. *Horace Dawson* for petitioner. *Solicitor General Perlman, Acting Assistant Attorney General Slack, A. F. Prescott* and *Morton K. Rothschild* for the United States. Reported below: 193 F. 2d 127.

No. 696. Elgin, Joliet & Eastern Railway Co. *v.* O'Donnell, Administratrix. C. A. 7th Cir. Certio-

rari denied. *Harlan L. Hackbert* for petitioner. *Joseph D. Ryan* and *Louis P. Miller* for respondent. Reported below: 193 F. 2d 348.

No. 697. General Armature & Manufacturing Co. *v.* National Labor Relations Board. C. A. 3d Cir. Certiorari denied. *Marvin C. Wahl* and *Blanche Genauer Wahl* for petitioner. *Solicitor General Perlman, George J. Bott, David P. Findling, Mozart G. Ratner, Dominick L. Manoli* and *Thomas F. Maher* for respondent. Reported below: 192 F. 2d 316.

No. 699. Imboden *v.* United States. C. A. 6th Cir. Certiorari denied. *Stanley U. Robinson, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 194 F. 2d 508.

No. 711. American Crystal Sugar Co. *v.* Mandeville Island Farms, Inc. et al. C. A. 9th Cir. Certiorari denied. *Louis W. Myers* and *Pierce Works* for petitioner. *Stanley M. Arndt* and *Guy Richards Crump* for respondents. Reported below: 195 F. 2d 622.

No. 715. California Paving Co. et al. *v.* Smith et al. C. A. 9th Cir. Certiorari denied. *Arthur P. Shapro* and *August B. Rothschild* for petitioners. *M. Mitchell Bourquin* for respondents. Reported below: 193 F. 2d 647.

No. 723. Kimmell et al. *v.* White. C. A. 9th Cir. Certiorari denied. *Ford W. Harris* for petitioner. *Fred H. Schauer* for respondent. Reported below: 193 F. 2d 744.

No. 738. PATENT SCAFFOLDING CO., INC. *v.* UP-RIGHT, INC. ET AL. C. A. 9th Cir. Certiorari denied. *C. P. Goepel* and *Stuart N. Updike* for petitioner. *Oscar A. Mellin* and *Jack E. Hursh* for respondents. Reported below: 194 F. 2d 457.

No. 361, Misc. FURUSHO *v.* ACHESON, SECRETARY OF STATE. C. A. 9th Cir. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Perlman* for respondent.

No. 498, Misc. STORY *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *Zachariah Hicklin Douglas* for petitioner. Reported below: 53 So. 2d 920.

*Rehearing Denied.*

No. 78. VON MOLTKE *v.* GILLIES, SUPERINTENDENT, *ante,* p. 922; and

No. 395. RICHFIELD OIL CORP. *v.* UNITED STATES, *ante,* p. 922. Petitions for rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

No. 654. GINSBURG *v.* BLACK ET AL.; and

No. 655. GINSBURG *v.* FIRST NATIONAL BANK OF CHICAGO ET AL., *ante,* p. 934. Rehearing denied.

No. 665. AUTO TRANSPORTS, INC. ET AL. *v.* UNITED STATES ET AL., *ante,* p. 923. The motions for leave to file briefs of Contract Carrier Conference, American Trucking Associations, Inc.; and Complete Auto Transport et al., as *amici curiae,* are denied. Rehearing also denied.

No. 299, Misc. IVA IKUKO TOGURI D'AQUINO *v.* UNITED STATES, *ante,* p. 935. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

No. 309, Misc. FREAPANE *v.* ILLINOIS, 342 U. S. 956. Second petition for rehearing denied.

No. 322, Misc. MAHLER *v.* FRISBIE, WARDEN, *ante*, p. 935;

No. 397, Misc. TATE *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL., *ante*, p. 925; and

No. 416, Misc. BLACK *v.* MOORE, WARDEN, ET AL., *ante*, p. 931. Petitions for rehearing denied.

No. 395, Misc., October Term, 1950. BOZELL *v.* UNITED STATES, 341 U. S. 927. Second petition for rehearing denied.

JUNE 2, 1952.

*Per Curiam Decisions.*

No. 688. HAYS FINANCE CO., INC. ET AL. *v.* BAILEY, STATE TAX COLLECTOR. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Ross R. Barnett, P. Z. Jones, Malcolm B. Montgomery* and *Garner W. Green* for appellants. *Hubert Slaton Lipscomb* for appellee. Reported below: 214 Miss. ——, 56 So. 2d 76.

No. 771. DIXIE BROKERAGE & GUARANTY COMPANY OF JACKSON, INC. ET AL. *v.* BAILEY, STATE TAX COLLECTOR. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question pursuant to the stipulation of counsel to abide the judgment in No. 688, *Hays Finance Co.* v. *Bailey*, decided this day, *supra*. *G. Garland Lyell* and *Garner W. Green* for appellants. *Hubert Slaton Lipscomb* for appellee. Reported below: 214 Miss. ——, 55 So. 2d 438.

No. 707. GELLING *v.* TEXAS. Appeal from the Court of Criminal Appeals of Texas. *Per Curiam:* The judgment is reversed. See *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, and *Winters* v. *New York,* 333 U. S. 507. *Robert H. Park, Herbert Wechsler, Philip J. O'Brien, Jr.* and *Sidney Schreiber* for appellant. *Price Daniel,* Attorney General of Texas, and *E. Jacobson,* Assistant Attorney General, for appellee. Reported below: 156 Tex. Cr. R. —, 247 S. W. 2d 95.

MR. JUSTICE FRANKFURTER, concurring in the judgment of reversal.

The appellant here was convicted under an ordinance of the city of Marshall, Texas, for exhibiting a picture after being denied a license by the local Board of Censors, and the conviction was affirmed by the Court of Criminal Appeals of Texas. The ordinance authorizes a local Board of Censors to deny a license for the showing of a motion picture, which the Board is "of the opinion" is "of such character as to be prejudicial to the best interests of the people of said City," and makes the showing of a picture without a license a misdemeanor. This ordinance offends the Due Process Clause of the Fourteenth Amendment on the score of indefiniteness. See my concurring opinion in *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 507; and *Winters* v. *Wilson,* 333 U. S. 507.

MR. JUSTICE DOUGLAS, concurring.

The appellant was convicted under an ordinance of the city of Marshall, Texas, for exhibiting a picture after being denied permission to do so by the local Board of Censors. The conviction was affirmed by the Court of Criminal Appeals of Texas. The ordinance authorizes a local Board of Censors to deny permission for the showing of a motion picture, which in the opinion of the Board is "of such character as to be prejudicial to the best interests of the people of said City," and it makes

the showing of a picture after refusal of permission a misdemeanor.

The evil of prior restraint, condemned by *Near* v. *Minnesota,* 283 U. S. 697, in the case of newspapers and by *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, in the case of motion pictures, is present here in flagrant form. If a board of censors can tell the American people what it is in their best interests to see or to read or to hear (cf. *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451), then thought is regimented, authority substituted for liberty, and the great purpose of the First Amendment to keep uncontrolled the freedom of expression defeated.

No. 760. PIZZA *v.* LYONS, COMMISSIONER OF CORRECTIONS, ET AL.; and

No. 766. COUNTY TRANSPORTATION CO., INC. *v.* NEW YORK. Appeals from the Court of Appeals of New York. *Per Curiam:* The appeals are dismissed for the want of a substantial federal question. *Henry K. Chapman* for appellant in No. 760. *Edward R. Brumley* for appellant in No. 766. *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *Herman N. Harcourt,* Assistant Attorney General, for appellees in No. 760. *Lawrence E. Walsh* for appellee in No. 766. Reported below: No. 760, 303 N. Y. 736, 103 N. E. 2d 345; No. 766, 303 N. Y. 391, 103 N. E. 2d 421.

*Miscellaneous Orders.*

No. 470, Misc. GLENN *v.* MANNING, SUPERINTENDENT;

No. 474, Misc. LACEY *v.* EIDSON, WARDEN;

No. 477, Misc. ANDERSON *v.* TEETS, WARDEN; and

No. 501, Misc. GRANT *v.* GEORGIA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 497, Misc. ROACH *v.* SUPREME COURT OF INDIANA. Motion for leave to file petition for writ of mandate denied.

*Certiorari Granted.*

No. 677. NATHANSON, TRUSTEE, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari granted. *Henry Friedman* for petitioner. *Solicitor General Perlman, George J. Bott, David P. Findling, Mozart G. Ratner* and *Frederick U. Reel* for respondent. Reported below: 194 F. 2d 248.

No. 721. LLOYD A. FRY ROOFING CO. *v.* WOOD ET AL., AS ARKANSAS PUBLIC SERVICE COMMISSION. Supreme Court of Arkansas. Certiorari granted. *James W. Wrape* and *Glenn M. Elliott* for petitioner. *Eugene R. Warren* for respondents. Reported below: 219 Ark. 553, 244 S. W. 2d 147.

No. 725. STEELE ET AL. *v.* BULOVA WATCH CO., INC. C. A. 5th Cir. Certiorari granted. *W. L. Matthews* for petitioners. *Maury Maverick, Sanford H. Cohen* and *Isidor Ostroff* for respondent. Reported below: 194 F. 2d 567.

No. 736. MONTGOMERY BUILDING & CONSTRUCTION TRADES COUNCIL ET AL. *v.* LEDBETTER ERECTION CO., INC. Supreme Court of Alabama. Certiorari granted. *J. Albert Woll, Herbert S. Thatcher, James A. Glenn* and *Earl McBee* for petitioners. *Jack Crenshaw* and *Files Crenshaw* for respondent. *Solicitor General Perlman, George J. Bott, David P. Findling, Mozart G. Ratner* and *Bernard Dunau* filed a brief for the National Labor Relations Board, as *amicus curiae,* supporting the petition. Reported below: 256 Ala. 678, 57 So. 2d 112.

No. 734. F. W. Woolworth Co. *v.* Contemporary Arts, Inc. C. A. 1st Cir. Certiorari granted, limited to the question presented by the application of § 101 (b) of Title 17 of the United States Code to this case. *Martin A. Schenck* and *Kenneth W. Greenawalt* for petitioner. *Cedric W. Porter* for respondent. Reported below: 193 F. 2d 162.

No. 405, Misc. Wottle, Administrator, *v.* Atchison, Topeka & Santa Fe Railway Co. C. A. 10th Cir. Certiorari granted. *John L. Laskey* for petitioner. *E. C. Iden* and *R. S. Outlaw* for respondent. Reported below: 193 F. 2d 628.

*Certiorari Denied.*

No. 611. Consolidated Gas Electric Light & Power Co. of Baltimore *v.* Pennsylvania Water & Power Co. et al.; and

No. 612. Public Service Commission of Maryland *v.* Pennsylvania Water & Power Co. et al. C. A. 4th Cir. Certiorari denied. *Harry N. Baetjer, Alfred P. Ramsey, G. Kenneth Reiblich* and *John Henry Lewin* for petitioner in No. 611. *Charles D. Harris* for petitioner in No. 612. *William J. Grove* and *Thomas M. Kerrigan* for the Pennsylvania Public Utility Commission; and *Wilkie Bushby* and *James Piper* for the Pennsylvania Water & Power Co., respondents. *Solicitor General Perlman* and *Bradford Ross* filed a memorandum for the Federal Power Commission, as *amicus curiae,* supporting the petitions. Reported below: 194 F. 2d 89.

No. 690. Continental Illinois National Bank & Trust Co., Executor, *v.* United States. Court of Claims. Certiorari denied. *Harry D. Ruddiman* and *John W. Gaskins* for petitioner. *Solicitor General Perl-*

*man, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Morton Liftin* for the United States. Reported below: 121 Ct. Cl. 203, 101 F. Supp. 755.

No. 691. Southern Furniture Manufacturing Co. *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *Gessner T. McCorvey* for petitioner. *Solicitor General Perlman, George J. Bott, David P. Findling, Mozart G. Ratner* and *Bernard Dunau* for respondent. Reported below: 194 F. 2d 59.

No. 698. Arthur *v.* Standard Engineering Co. 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. 399, 193 F. 2d 903.

No. 700. Ryan *v.* Illinois. Supreme Court of Illinois. Certiorari denied. *Ralph S. McFarland* and *C. Vernon Thompson* for petitioner. Reported below: 410 Ill. 486, 103 N. E. 2d 116.

No. 701. Gordon *v.* Bergin, Adjutant General of the Army. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William E. Leahy, William J. Hughes, Jr.* and *Clara L. Longstreth* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Morton Hollander* for respondent. Reported below: 90 U. S. App. D. C. ——, 193 F. 2d 367.

No. 702. Chapman, Secretary of the Interior, et al. *v.* Santa Fe Pacific Railroad Co. et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Solicitor General Perlman*

for petitioners. *Frederick Bernays Wiener* and *Lawrence Cake* for respondents. Reported below: 90 U. S. App. D. C. —, — F. 2d —.

No. 704. MORAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Henry G. Singer* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 194 F. 2d 623.

No. 706. SAFEWAY STORES, INC. *v.* ARNALL, DIRECTOR OF PRICE STABILIZATION. United States Emergency Court of Appeals. Certiorari denied. *Elisha Hanson, Arthur B. Hanson* and *Garland Clarke* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge* and *Paul A. Sweeney* for respondent. Reported below: 195 F. 2d 319.

No. 712. MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION *v.* COHEN, EXECUTRIX. C. A. 8th Cir. Certiorari denied. *Henry I. Eager* and *Philip E. Horan* for petitioner. Reported below: 194 F. 2d 232.

No. 713. SCOTT *v.* HARMAN. C. A. 6th Cir. Certiorari denied. *John J. Mahoney* for petitioner. *Aubrey A. Wendt* and *Warren H. F. Schmieding* for respondent. Reported below: 195 F. 2d 916.

No. 716. MAY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Ralph S. McFarland* and *C. Vernon Thompson* for petitioner. Reported below: 410 Ill. 618, 103 N. E. 2d 127.

No. 718. DWORSKY ET AL., DOING BUSINESS AS NORTH UNION CO., ET AL. *v.* WARNER, TRUSTEE IN BANKRUPTCY. C. A. 8th Cir. Certiorari denied. *Melvin H. Siegel* for

petitioners. *William C. Green* for respondent. Reported below: 194 F. 2d 277.

No. 719. United Electrical, Radio & Machine Workers of America et al. *v.* Westinghouse Electric Corp. et al. C. A. 3d Cir. Certiorari denied. *Arthur Kinoy* and *Frank J. Donner* for petitioners. *John C. Bane, Jr.* for the Westinghouse Electric Corporation, and *Benjamin C. Sigal* for the International Union of Electrical, Radio & Machine Workers (CIO) et al., respondents. Reported below: 194 F. 2d 770.

No. 724. Hamilton Foundry & Machine Co. *v.* International Molders & Foundry Workers Union of North America (AFL) et al. C. A. 6th Cir. Certiorari denied. *John B. Hollister* for petitioner. *Robert A. Wilson* for respondents. Reported below: 193 F. 2d 209.

No. 733. Moses *v.* United States. C. A. 7th Cir. Certiorari denied. *Alfred E. Roth* and *Charles Dana Snewind* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *John R. Wilkins* for the United States. Reported below: 194 F. 2d 756.

No. 743. Sholl et al. *v.* Cadwallader. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *George A. Chadwick, Jr.* for petitioners. *Ralph F. Berlow* for respondent. Reported below: 90 U. S. App. D. C. ——, 196 F. 2d 14.

No. 749. Overseas Tankship Corp. *v.* Keen. C. A. 2d Cir. Certiorari denied. *Peter Keber* for petitioner. *Henry Fogler* for respondent. Reported below: 194 F. 2d 515.

No. 703. STUART LABORATORIES, INC. ET AL. *v.* UNION CARBIDE & CARBON CORP. C. A. 3d Cir. Certiorari denied. *Thomas Turner Cooke* for petitioners. *Richard Russell Wolfe* for respondent. Reported below: 194 F. 2d 823.

No. 708. ARMSTRONG *v.* WAR CONTRACTS PRICE ADJUSTMENT BOARD. United States Court of Appeals for the District of Columbia Circuit. Motion to substitute the United States as party respondent granted. Certiorari denied. *William F. Kelly* and *P. J. J. Nicolaides* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Morton Liftin* for respondent. Reported below: 90 U. S. App. D. C. —, 194 F. 2d 875.

No. 714. UNION CARBIDE & CARBON CORP. *v.* GRAVER TANK & MFG. CO., INC. ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *John T. Cahill, James A. Fowler, Jr.* and *Richard Russell Wolfe* for petitioner. *Casper W. Ooms, John F. Oberlin, Thomas V. Koykka* and *James R. Stewart* for respondents. Reported below: 196 F. 2d 103.

No. 368, Misc. MELLOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 192 F. 2d 1020.

No. 387, Misc. ODDO *v.* SWOPE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 193 F. 2d 492.

No. 408, Misc. BOWLES *v.* INDIANA. Supreme Court of Indiana. Certiorari denied.

No. 409, Misc. WELDON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia

Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States.

No. 420, Misc. BARBEAU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *George B. Grigsby* and *Harold J. Butcher* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Murry Lee Randall* for the United States. Reported below: 193 F. 2d 945.

No. 457, Misc. LAWSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 411 Ill. 358, 104 N. E. 2d 262.

No. 463, Misc. HEARN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 194 F. 2d 647.

No. 464, Misc. KROMAREK *v.* NORTH DAKOTA. Supreme Court of North Dakota. Certiorari denied. Reported below: 78 N. D. —, 52 N. W. 2d 713.

No. 467, Misc. KELLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States.

No. 471, Misc. COLLAZO *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Leo A. Rover* and *Sidney S. Sachs* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 90 U. S. App. D. C. —, 196 F. 2d 573.

No. 473, Misc. MITCHELL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 411 Ill. 407, 104 N. E. 2d 285.

No. 480, Misc. STORY *v.* WATERS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 195 F. 2d 734.

No. 481, Misc. LINDSEY *v.* WATSON ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 482, Misc. CIHA *v.* MAJOR, JUDGE, U. S. COURT OF APPEALS. C. A. 7th Cir. Certiorari denied.

No. 487, Misc. CASONE *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *Grover N. McCormick* for petitioner. *Roy H. Beeler,* Attorney General of Tennessee, and *Nat Tipton* and *Knox Bigham,* Assistant Attorneys General, for respondent. Reported below: 193 Tenn. 303, 246 S. W. 2d 22.

No. 490, Misc. MILLS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 193 F. 2d 174.

No. 491, Misc. LEVY *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Gilbert E. Harris* for Cytron et al., respondents.

No. 505, Misc. DAVIS *v.* ELLIS ET AL. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 156 Tex. Cr. R. ——, 248 S. W. 2d 133.

No. 483, Misc. ROSS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Application for stay of execution also denied. MR. JUSTICE DOUGLAS is

of the opinion certiorari should be granted. *Thomas H. Dent* for petitioner. *Price Daniel,* Attorney General of Texas, and *Calvin B. Garwood, Jr.,* Assistant Attorney General, for respondent. Reported below: 156 Tex. Cr. R. ——, 246 S. W. 2d 884.

*Rehearing Denied.*

No. 468. COHEN *v.* UNITED STATES, 342 U. S. 947;

No. 586. OLIN INDUSTRIES, INC., WINCHESTER REPEATING ARMS COMPANY DIVISION, *v.* NATIONAL LABOR RELATIONS BOARD, *ante,* p. 919;

No. 601. ERIE FORGE CO. *v.* UNITED STATES, *ante,* p. 930;

No. 625. COLLEGE HOMES, INC. *v.* UNITED STATES, *ante,* p. 941; and

No. 636. BAXTER *v.* NEW YORK, *ante,* p. 928. Petitions for rehearing denied.

No. 252, Misc. SHOTKIN *v.* ATCHISON, TOPEKA & SANTA FE RAILROAD CO. ET AL., *ante,* p. 906. Second petition for rehearing denied.

No. 258, Misc. WALEY *v.* SWOPE, WARDEN, *ante,* p. 942. Rehearing denied.

JUNE 9, 1952.

*Per Curiam Decisions.*

No. 517. MCGEE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* EKBERG. Certiorari, 342 U. S. 952, to the United States Court of Appeals for the Ninth Circuit. Argued April 28, 1952. Decided June 9, 1952. *Per Curiam:* The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the petition for

writ of habeas corpus upon the ground that the cause is moot. *Doris H. Maier,* Deputy Attorney General of California, argued the cause for petitioners. With her on the brief were *Edmund G. Brown,* Attorney General, and *Clarence A. Linn,* Assistant Attorney General. *Allan L. Sapiro* argued the cause and filed a brief for respondent. Reported below: 194 F. 2d 178.

No. 759. Brotherhood of Locomotive Firemen and Enginemen et al. *v.* United States. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The orders of the District Court are vacated and the case is remanded to that court with directions to dismiss the complaint upon the ground that the cause is moot. *Clifford D. O'Brien, Ruth Weyand, Harold C. Heiss, Charles W. Phillips* and *V. C. Shuttleworth* for petitioners. *Solicitor General Perlman* for the United States.

No. 788. Eight O'Clock Club et al. *v.* Buder et al. Appeal from the Supreme Court of Michigan. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *John C. Howard* for appellants. *Frank G. Millard,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for appellees. Reported below: 332 Mich. 412, 52 N. W. 2d 165.

No. 790. Ross et al. *v.* Harris, Postmaster, et al. Appeal from the United States District Court for the Southern District of California. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Harold Judson* for appellants. *Solicitor General Perlman* for the United States.

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No. 235, Misc. WILLIAMS *v.* ILLINOIS. On petition for writ of certiorari to the Supreme Court of Illinois. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Illinois Supreme Court for further proceedings. *Jennings* v. *Illinois,* 342 U. S. 104. Petitioner *pro se. Ivan A. Elliott,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 485, Misc. HOFFMAN *v.* CIRCUIT COURT OF WINNEBAGO COUNTY, ILLINOIS. On petition for writ of certiorari to the Circuit Court of Winnebago County, Illinois. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Circuit Court of Winnebago County for further consideration in the light of the response filed by the Attorney General of Illinois to the application for the writ. Petitioner *pro se. Ivan A. Elliott,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

*Miscellaneous Orders.*

No. 44. KEDROFF ET AL. *v.* SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA. Appeal from the Court of Appeals of New York. Argued February 1, 1952. This case is ordered restored to the docket for reargument. In view of the opinion, concurring opinion, dissent, judgment and remittitur of the Court of Appeals of New York concerning the status of the Patriarchate in Russia, counsel are requested to include in their presentation a discussion of whether the judgment may be sustained on state grounds. *Philip Adler* argued the cause and filed a brief for appellants. *Ralph Montgomery Arkush* argued the cause and filed a brief for appellees. Reported below: 302 N. Y. 1, 96 N. E. 2d 56.

No. 626. DANIELS ET AL. *v.* ALLEN, WARDEN (certiorari granted, 342 U. S. 941), argued April 28, 1952;

No. 643. SPELLER *v.* ALLEN, WARDEN (certiorari granted, 342 U. S. 953), argued April 29, 1952;

No. 670. BROWN *v.* ALLEN, WARDEN (certiorari granted, 343 U. S. 903), argued April 29, 1952; and

No. 669. UNITED STATES EX REL. SMITH *v.* BALDI, SUPERINTENDENT (certiorari granted, 343 U. S. 903), argued April 29–30, 1952. These cases are ordered restored to the docket for reargument and are assigned for hearing at the head of the call for Monday, October 13th.

No. 353, October Term, 1950. LAND ET AL. *v.* DOLLAR ET AL., 340 U. S. 884. It is ordered that petitioners' motion for leave to file a motion for reconsideration of the denial of certiorari be continued on the docket.

No. 623. PEREZ *v.* CALIFORNIA ET AL.;

No. 233, Misc. PIANEZZI *v.* HEINZE, WARDEN; and

No. 484, Misc. ROBINSON *v.* LOUISIANA. Consideration of the applications for writs of certiorari in these cases is deferred pending further action in the case of *Dixon* v. *Duffy*, No. 79, October Term, 1951, *ante*, p. 393.

No. 440, Misc. TAYLOR *v.* STEELE, SUPERINTENDENT. C. A. 8th Cir. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney, Robert S. Erdahl* and *John R. Wilkins* for respondent. Reported below: 194 F. 2d 864.

No. 500, Misc. FORTUNE *v.* HARRIS, SUPERINTENDENT. Court of Appeals of New York. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 5, Original, October Term, 1950. NEW JERSEY *v.* NEW YORK ET AL. The motion of the defendant, City of New York, for leave to file petition to modify the decree entered herein May 25, 1931, 283 U. S. 805, and the motion of defendant, State of New York, for leave to file memorandum in support of the petition are granted. *Theodore D. Parsons,* Attorney General of New Jersey, and *Robert Peacock,* Deputy Attorney General, for complainant. *Nathaniel L. Goldstein,* Attorney General, *Wendell P. Brown,* Solicitor General, and *Edward L. Ryan,* for the State of New York; and *Denis M. Hurley, John P. McGrath* and *Richard H. Burke* for the City of New York, defendants. *Robert E. Woodside,* Attorney General, *George G. Chandler, Bernard G. Segal, Wm. A. Schnader* and *Harry F. Stambaugh* for the State of Pennsylvania, intervenor.

No. 5, Original, October Term, 1950. NEW JERSEY *v.* NEW YORK ET AL. The petition of the defendant, City of New York, for modification of the decree entered herein May 25, 1931, 283 U. S. 805, the memorandum of the defendant, State of New York, and the answers to the petition filed by the State of New Jersey and the Commonwealth of Pennsylvania, are referred to Kurt F. Pantzer, Esquire, of Indianapolis, Indiana, as a Special Master, with directions and authority to proceed to a consideration of the issues involved and to report to the Court with all convenient speed his recommendations in respect of the amendment of the decree, if any.

No. 495, Misc. LEWIS ET AL. *v.* UNITED GAS PIPE LINE CO. C. A. 5th Cir. Certiorari denied. Motion for leave to file petition for writs of mandamus and prohibition also denied. Reported below: 194 F. 2d 1005.

No. 492, Misc. TINNIN *v.* HEINZE, WARDEN; and

No. 514, Misc. ROBERTS *v.* MCGEE, DIRECTOR. Motions for leave to file petitions for writs of habeas corpus denied.

No. 496, Misc. CROSS *v.* ILLINOIS;

No. 510, Misc. IN RE LIQUOR CONTROL COMMISSION OF CONNECTICUT; and

No. 511, Misc. IN RE NEWSTEAD. Motions for leave to file petitions for writs of mandamus denied. *William L. Beers,* Deputy Attorney General of Connecticut, for petitioner in No. 510.

*Certiorari Granted. (See also No. 759, and Misc. Nos. 235 and 485, supra.)*

No. 730. SCHWARTZ *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari granted. *Maury Hughes* for petitioner. *Price Daniel,* Attorney General of Texas, and *Calvin B. Garwood, Jr.,* Assistant Attorney General, for respondent. Reported below: —— Tex. Cr. R. ——, 246 S. W. 2d 174.

No. 729. JOHNSON, ADMINISTRATRIX, *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. C. A. 2d Cir. Certiorari granted, limited to the issue raised as to the application of Rule 50 (b) of the Rules of Civil Procedure. *Jacquin Frank* for petitioner. *Edward R. Brumley* for respondent. Reported below: 194 F. 2d 194.

No. 741. PUBLIC SERVICE COMMISSION OF UTAH ET AL. *v.* WYCOFF COMPANY, INC. C. A. 10th Cir. Certiorari granted. Counsel are requested to discuss on briefs and oral argument the question whether a single judge had jurisdiction to hear and determine this case in view of 28 U. S. C. § 2281. *C. W. Ferguson* for the Public Serv-

ice Commission of Utah, and *D. A. Skeen* for Seamons et al., petitioners. *Harold S. Shertz* for respondent. Reported below: 195 F. 2d 252.

No. 597. MANDOLI *v.* ACHESON, SECRETARY OF STATE. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Jack Wasserman, Gaspare Cusumano* and *Harry Meisel* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Robert G. Maysack* filed a memorandum for respondent. Reported below: 90 U. S. App. D. C. —, 193 F. 2d 920.

No. 746. SANFORD *v.* KEPNER. C. A. 3d Cir. Certiorari granted. *J. Preston Swecker* for petitioner. *Wilmer Mechlin, Hugh M. Morris, George R. Ericson* and *William D. Denson* for respondent. Reported below: 195 F. 2d 387.

No. 753. ARROWSMITH ET AL., EXECUTORS, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari granted. *George R. Sherriff* for petitioners. *Solicitor General Perlman* filed a memorandum for respondent. Reported below: 193 F. 2d 734.

No. 305, Misc. TINDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Murry Lee Randall* for the United States. Reported below: 193 F. 2d 720.

*Certiorari Denied.* (*See also Misc. Nos. 440, 495 and 500, supra.*)

No. 624. CADDEN *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. *Vincent J. Hargadon* for

petitioner. *J. D. Buckman, Jr.*, Attorney General of Kentucky, and *Squire N. Williams, Jr.*, Assistant Attorney General, for respondent. Reported below: 242 S. W. 2d 409.

No. 705. RAMSEY ET AL., TRUSTEES, *v.* UNITED STATES. Court of Claims. Certiorari denied. *William Ritche* for petitioners. *Solicitor General Perlman* for the United States. Reported below: See 121 Ct. Cl. 426.

No. 720. BRENNAN ET AL. *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD CO. ET AL.; and

No. 728. SWITCHMEN'S UNION OF NORTH AMERICA ET AL. *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD CO. ET AL. Court of Appeals of New York. Certiorari denied. *Thomas J. McKenna* for petitioners in No. 720 and Brotherhood of Railroad Trainmen, respondent in No. 728. *Harold C. Heiss* for petitioners in No. 728. *Rowland L. Davis, Jr.* for the Delaware, Lackawanna & Western Railroad Co., respondent. Reported below: 303 N. Y. 411, 103 N. E. 2d 532.

No. 735. HY-V COMPANY, INC. *v.* CAMPBELL SOUP CO. United States Court of Customs and Patent Appeals. Certiorari denied. *Thomas L. Mead, Jr., Francis C. Browne, William E. Schuyler, Jr.* and *Andrew B. Beveridge* for petitioner. *Ellis W. Leavenworth, Leslie D. Taggart* and *Tracy R. V. Fike* for respondent. Reported below: 39 C. C. P. A. (Pat.) 777, 193 F. 2d 338.

No. 737. CHOURNOS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Shirley P. Jones* for petitioner. *Solicitor General Perlman, Assistant Attorney General Underhill, Roger P. Marquis* and *John C. Harrington* for the United States. Reported below: 193 F. 2d 321.

No. 739. LAUCHLI, TRUSTEE, *v.* HARTMAN ET AL. C. A. 8th Cir. Certiorari denied. *Kenneth Teasdale* for petitioner. *R. Forder Buckley* for respondents. Reported below: 194 F. 2d 787.

No. 740. MORAN TOWING & TRANSPORTATION CO., INC. *v.* EMPRESA HONDURENA DE VAPORES ET AL. C. A. 5th Cir. Certiorari denied. *Selim B. Lemle* for petitioner. *Solicitor General Perlman, Assistant Attorney General Baldridge, Paul A. Sweeney* and *Leavenworth Colby* for the United States, respondent. Reported below: 194 F. 2d 629.

No. 762. BLOCK *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. *Francis P. O'Neill* 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: —— Colo. ——, 240 P. 2d 512.

No. 763. SHACKELL *v.* MARZALL, COMMISSIONER OF PATENTS. United States Court of Customs and Patent Appeals. Certiorari denied. Petitioner *pro se. Solicitor General Perlman* for respondent. Reported below: 39 C. C. P. A. (Pat.) 847, 194 F. 2d 720.

No. 774. OXNARD CANNERS, INC. ET AL. *v.* BRADLEY. C. A. 9th Cir. Certiorari denied. *C. P. Goepel* for petitioners. *Oscar A. Mellin* and *Jack E. Hursh* for respondent. Reported below: 194 F. 2d 655.

No. 779. AMERICAN TOBACCO CO. ET AL. *v.* HADJIPATERAS ET AL. C. A. 2d Cir. Certiorari denied. *Henry N. Longley* and *John W. R. Zisgen* for petitioners. *Barent*

*Ten Eyck* for Hadjipateras et al.; and *Roscoe H. Hupper* and *Ray Rood Allen* for the Hellenic Lines, Ltd., respondents. Reported below: 194 F. 2d 449.

No. 814. GOLDBLATT ET AL. *v.* ZAMORE, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 2d Cir. Certiorari denied. *George J. Rudnick* for petitioners. *Max Schwartz* for Zamore, respondent. Reported below: 194 F. 2d 933.

No. 776. CARDOX CORPORATION *v.* ARMSTRONG COALBREAK CO. C. A. 7th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Edward R. Johnston, George I. Haight, Andrew J. Dallstream* and *Fredric H. Stafford* for petitioner. *Bernard A. Schroeder* and *Eugene C. Knoblock* for respondent. Reported below: 194 F. 2d 376.

No. 246, Misc. EATON *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se.* *J. E. Taylor,* Attorney General of Missouri, and *Gordon P. Weir,* Assistant Attorney General, for respondent.

No. 407, Misc. LIVOLSI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 193 F. 2d 574.

No. 411, Misc. BRADFORD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *John R. Wilkins* for the United States. Reported below: 194 F. 2d 197.

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No. 422, Misc. HAMILTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 194 F. 2d 1011.

No. 442, Misc. BEAL *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 449, Misc. PENNSYLVANIA EX REL. SAWCHAK *v.* ASHE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. *Paul J. Winschel* for petitioner.

No. 450, Misc. MURRAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 193 F. 2d 647.

No. 466, Misc. SCHUYLER *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. 475, Misc. AYERS *v.* PARRY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 192 F. 2d 181.

No. 479, Misc. BERNSTEIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Solicitor General Perlman, Assistant Attorney General McInerney, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 195 F. 2d 517.

No. 486, Misc. LAWRENCE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Albert A. Stern* for petitioner. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 90 U. S. App. D. C. —, 196 F. 2d 48.

No. 488, Misc. TAYLOR *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 489, Misc. GALLOWAY *v.* INDIANA ET AL. Criminal Court of Marion County, Indiana. Certiorari denied.

No. 493, Misc. COOPER *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied.

No. 494, Misc. MONAGHAN *v.* BURKE, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 499, Misc. HOWELL *v.* HANN, WARDEN. Supreme Court of Nebraska. Certiorari denied.

No. 502, Misc. CHASE *v.* CRANOR, SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 503, Misc. HEWLETT *v.* CALIFORNIA. District Court of Appeal of California, First Appellate District. Certiorari denied. Reported below: 108 Cal. App. 2d 358, 239 P. 2d 150.

No. 513, Misc. BRINK *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 524. CHEMICAL BANK & TRUST CO., TRUSTEE, *v.* GROUP OF INSTITUTIONAL INVESTORS;

No. 525. ALLEGHANY CORPORATION *v.* GROUP OF INSTITUTIONAL INVESTORS;

No. 526. MISSOURI PACIFIC RAILROAD COMPANY 5¼% SECURED SERIAL BONDHOLDERS COMMITTEE *v.* GROUP OF INSTITUTIONAL INVESTORS;

No. 527. FARWELL ET AL. *v.* GROUP OF INSTITUTIONAL INVESTORS; and

No. 528. MISSOURI PACIFIC RAILROAD CO. *v.* GROUP OF INSTITUTIONAL INVESTORS.

Memorandum of MR. JUSTICE FRANKFURTER, in connection with the denial of the petitions for writs of certiorari.*

Reference to the opinion in *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, makes it unnecessary to indicate the reasons which preclude the Court from stating, however briefly, the grounds for denial of petitions for certiorari. Selective notations of dissent from such denials would not correctly reflect the operation of the certiorari process. That would require notation not only of all dissents when petitions are denied. It would equally require public recording of dissents from the granting of petitions. Due regard for all these factors touching the administration of our certiorari jurisdiction has determined my unbroken practice not to note dissent from the Court's disposition of petitions for certiorari.

But it has seemed to me appropriate to indicate from time to time the issues that are involved in a litigation for which review has been sought and denied. These cases, arising out of the long-drawn-out Missouri Pacific reorganization, present another such instance. The

*[Reporter's Note: The petitions for writs of certiorari in these cases were denied on April 21, 1952, *ante*, p. 929. This memorandum was filed on June 9, 1952.]

denial of these petitions for certiorari does not definitively close the door for relief to security holders who claim forfeiture of their rights. The current Interstate Commerce Commission plan for the reorganization of the Missouri Pacific system has not been consummated. It may never be consummated. If carried to the stage of confirmation by the lower courts, review may again be sought here, perhaps with the benefit of additional light. But as the matter stands, two great questions are in controversy; they are questions for which the Congress has not authorized the Interstate Commerce Commission to give final answers.

The reorganization plan sustained by the lower court involves the forfeiture of existing securities of vast proportions. The Commission's plan also eliminates existing corporations and directs financial power into new channels. These far-reaching consequences are based on the Commission's predictions of the future. One is not remotely unmindful of the relevant elements and their meaning on which judgment in such matters must be based, nor of the diffidence with which courts should sit in judgment upon the Commission's conclusions, by reminding that the Reorganization Act of 1933 (§ 77 of the Bankruptcy Act), 47 Stat. 1467, 1474, as amended, did subject to judicial review the determinations of the Commission and the processes which underlie them.

In three years (1940, 1944, and 1949) the Commission has proposed forfeiture plans on the basis of estimates of future earnings of the three component parts of the Missouri Pacific lines. The estimates on which the Commission based its proposals to strike down hundreds of millions of dollars of securities were the same in 1944 as in 1940. In 1949, the Commission recognized that the 1940 and 1944 estimates and forfeiture proposals were unsound, to the extent of millions of dollars.

In the eleven years since the Commission first proposed forfeiture on the basis of estimates of future earnings in this case, the actual earnings of each of the three component parts of the Missouri Pacific lines have exceeded those estimates. Two of the three have earned, in those eleven years, more than twice as much as the estimates; one earned almost fifty percent more than the estimate.

For the system as a whole, the actual earnings of the eleven post-estimate years averaged $18,000,000 per year more than the estimate on which the Commission's forfeiture plan was based. For every million dollars of underestimate of future earnings the Commission's forfeiture proposals would unjustly destroy twenty to twenty-five million dollars of securities. (For the basis of this calculation see my opinion in *Bondholders, Inc.* v. *Powell,* 342 U. S. 921.) The error indicated by the eleven years of actual earnings suggests that the Commission undervalued the property in 1940 and 1944 by $360,000,000 to $450,000,000.

In 1949, when the Commission adopted higher estimates for each of the three components of the Missouri Pacific lines and for the system as a whole, the Commission doubled the 1940 and 1944 estimates of the future earnings of one of the three parts of the Missouri Pacific system. But the actual earnings of each of the three years since the 1949 estimate substantially exceeded even that doubled estimate. Similarly, though the Commission in 1949 substantially increased the 1940 and 1944 estimates for the other two components of the system, their actual earnings for the three ensuing years were, in the case of one of these two sections of the system, double the Commission's 1949 estimate, and, in the other, 48 percent above the 1949 estimate.

On the basis of the record of actual earnings so far available, the indicated error in the Commission's 1949

increased estimates of future annual earnings is $11,500,000; this sum, multiplied twenty to twenty-five times, in accordance with the Commission's procedures in determining the amount of forfeitures in railroad reorganizations, implies a wiping out, under the 1949 plan, of $230,000,000 to $287,500,000 of junior security holder interests.

Besides the rights which the Commission has thrice deemed valueless, it has proposed to substitute securities less valuable than what bondholders at present own. The total stated amount of Missouri Pacific system bonds, stocks, and accumulated, unpaid interest and preferred dividends, whose owners would suffer what amounts to partial or entire forfeiture, exceeds three quarters of a billion dollars.

Of these, the Missouri Pacific preferred and common stock, the two junior securities owned by the public, may be considered in connection with the estimates on which the Commission in its 1949 plan proposes to forfeit one in large part and the other entirely. The present preferred stock has a par value of $100 per share; in addition, as the Commission and the lower courts have noted, accumulated dividends (now approximately $150 per share) must be taken into account. As to each share, having this aggregate lawful claim of $250 of participation in the railroad's property, the Commission's plan would wipe out as valueless some $207, and allow $43 as of some value. At the present dividend rate, the Commission's finding in effect assumes that the Missouri Pacific system can earn on its present preferred stock not more than $2.15 per share. The actual earnings on this stock, in the eleven years since the Commission first began to issue its plans for the Missouri Pacific, have been $17 per share per year, or eight times the increased estimate made by the Commission in 1949. In the three

years since the Commission ruled that the present preferred stock has a value of only $43 per share the company has earned more than $43 on each share.

As to the Missouri Pacific common stock: in 1940, 1944, and 1949 the Commission ruled that this stock is without value—*i. e.,* that the railroad system will in the years subsequent to the making of the estimates be unable to earn one cent on its common stock. The actual earnings on each share of this stock, in the eleven years since the Commission first declared it valueless, have averaged $10 a year.

It might be expected that when the Commission has, at three different periods, made estimates of future earnings for each of three component portions of a railroad system, as well as for the system as a whole, and in effect for various classes of its securities, some of the errors inevitable in each of the numerous estimates would be overestimates and some would be underestimates. In this Missouri Pacific proceeding, the Commission's errors have invariably been underestimates—for the system as a whole, for each part of the system, for different classes of securities, in 1940, again in 1944, and once again in 1949.

This picture is of course drawn with a broad brush. Many other factors would enter into the whole fiscal story of estimated earnings, actual earnings, miscalculations, foreseeable factors left out of account, unforeseeable factors, etc., etc. They would not affect the essentials here indicated—the uniformity of erroneous guessing, the invalid assumptions of such guessing, the tenuous nature of the process whereby vast interests were adversely affected, the inadequate basis for exercising the judicial scrutiny demanded by Act of Congress, etc., etc., etc. Even more than did the Seaboard situation the whole record in the Missouri Pacific reorganization proves "not the mischance of a mere guess. It calls into ques-

tion the whole process of dealing with this problem. . . . 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." [*Bondholders, Inc.* v. *Powell,* 342 U. S. 921, 926.]

No. 506, Misc. DODD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Solicitor General Perlman, Assistant Attorney General McInerney* and *Beatrice Rosenberg* for the United States. Reported below: 196 F. 2d 190.

No. 507, Misc. GREEN *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. *Tyrah Ernest Maholm* for petitioner. Reported below: 230 Ind. 400, 103 N. E. 2d 429.

No. 512, Misc. JAMES *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 516, Misc. WILLIAMS *v.* ROBINSON, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 517, Misc. DOMAKO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 9 N. J. 443, 88 A. 2d 606.

No. 518, Misc. CARPENTER *v.* ERIE RAILROAD CO. C. A. 3d Cir. Certiorari denied.

*Rehearing Denied.*

No. 35. CARLSON ET AL. *v.* LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE; and

No. 136. BUTTERFIELD, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE, *v.* ZYDOK, 342 U. S. 524. Petition for rehearing denied. The motion of petitioner Carlson to stay issuance of the mandate, insofar as applicable to him, pending his trial in *United States* v. *Schneiderman et al.*, is granted to permit his attendance at his trial which is now in progress in the United States District Court for the Southern District of California. This stay will be automatically dissolved when Carlson's case is submitted to the jury or when it is finally decided by the trial court, whichever is the sooner. MR. CHIEF JUSTICE VINSON, MR. JUSTICE REED, and MR. JUSTICE MINTON dissent from the order granting the stay.

No. 118. BEAUHARNAIS *v.* ILLINOIS, *ante*, p. 250;

No. 717. OSBORNE ET AL. *v.* PURDOME, SHERIFF, *ante*, p. 953;

No. 722. TOM'S EXPRESS, INC. ET AL. *v.* DIVISION OF STATE HIGHWAY PATROL, DEPARTMENT OF HIGHWAYS, OF OHIO, *ante*, p. 944;

No. 232, Misc. RUTLEDGE *v.* HUDSPETH, WARDEN, ET AL., *ante*, p. 953;

No. 472, Misc. RUTLEDGE *v.* HUDSPETH, WARDEN, *ante*, p. 954;

No. 289, Misc. BOWEN *v.* UNITED STATES, *ante*, p. 943;

No. 326, Misc. LEVITON ET AL. *v.* UNITED STATES, *ante*, p. 946;

No. 427, Misc. JONES *v.* CITY OF NORFOLK, *ante*, p. 943; and

No. 447, Misc. SKLADD *v.* MICHIGAN, *ante*, p. 951. Petitions for rehearing denied.

No. 75. MOFFETT, EXECUTRIX, *v.* COMMERCE TRUST CO. ET AL., 342 U. S. 818. Motion for leave to file a second petition for rehearing denied.

No. 542. CREAMETTE COMPANY *v.* CONLIN ET AL., 342 U. S. 945. Motion for leave to file petition for rehearing denied.

No. 30, Misc. ASPERO *v.* MEMPHIS AND SHELBY COUNTY BAR ASSN., 342 U. S. 836. Motion for leave to file a second petition for rehearing denied.

## STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1949, 1950, AND 1951

| | ORIGINAL | | | APPELLATE | | | MISCELLANEOUS | | | TOTALS | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Terms | 1949 | 1950 | 1951 | 1949 | 1950 | 1951 | 1949 | 1950 | 1951 | 1949 | 1950 | 1951 |
| Number of cases on dockets | 13 | 13 | 9 | 867 | 783 | 827 | 568 | 539 | 532 | 1,448 | 1,335 | 1,368 |
| Number disposed of during terms | 0 | 5 | 0 | 757 | 687 | 714 | 551 | 524 | 508 | 1,308 | 1,216 | 1,222 |
| Number remaining on dockets | 13 | 8 | 9 | 110 | 96 | 113 | 17 | 15 | 24 | 140 | 119 | 146 |

| | TERMS | | |
|---|---|---|---|
| | 1949 | 1950 | 1951 |
| Distribution of cases disposed of during terms: | | | |
| Original cases | 0 | 5 | 0 |
| Appellate cases on merits | 201 | 192 | 196 |
| Petitions for certiorari | 556 | 495 | 518 |
| Miscellaneous docket applications | 551 | 524 | 508 |

| | TERMS | | |
|---|---|---|---|
| | 1949 | 1950 | 1951 |
| Distribution of cases remaining on dockets: | | | |
| Original cases | 13 | 8 | 9 |
| Appellate cases on merits | 52 | 40 | 52 |
| Appeals not acted on | ------ | ------ | 5 |
| Petitions for certiorari | 58 | 56 | 56 |
| Miscellaneous docket applications | 17 | 15 | 24 |

JUNE 10, 1952.

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**I. In General.**

1. *Reviewable decision—Preliminary injunction.*—Cause as ripe for determination of constitutional question though it had proceeded no further than preliminary injunction stage. Youngstown Sheet & Tube Co. v. Sawyer, 579.

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