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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1952

OPINIONS FROM MARCH 9 THROUGH JUNE 1, 1953
DECISIONS PER CURIAM AND ORDERS FROM
MARCH 9 THROUGH JUNE 15, 1953

WALTER WYATT
REPORTER OF DECISIONS

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JUSTICES
OF THE
SUPREME COURT
DURING THE TIME OF THESE REPORTS.

FRED M. VINSON, Chief Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
ROBERT H. JACKSON, Associate Justice.
HAROLD H. BURTON, Associate Justice.
TOM C. CLARK, Associate Justice.
SHERMAN MINTON, Associate Justice.

HERBERT BROWNELL, Jr., Attorney General.
ROBERT L. STERN, Acting Solicitor General.*
HAROLD B. WILLEY, Clerk.
WALTER WYATT, Reporter of Decisions.
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*During the period covered by this volume, the duties of the office of Solicitor General were performed by Mr. Robert L. Stern, First Assistant to the Solicitor General, who signed government briefs and appeared as "Acting Solicitor General." See also 344 U. S. IV, note 4.

SUPREME COURT OF THE UNITED STATES.

Allotment of Justices.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, section 42, and that such allotment be entered of record, viz:

For the District of Columbia Circuit, Fred M. Vinson, Chief Justice.

For the First Circuit, Felix Frankfurter, Associate Justice.

For the Second Circuit, Robert H. Jackson, Associate Justice.

For the Third Circuit, Harold H. Burton, Associate Justice.

For the Fourth Circuit, Fred M. Vinson, Chief Justice.

For the Fifth Circuit, Hugo L. Black, Associate Justice.

For the Sixth Circuit, Stanley Reed, Associate Justice.

For the Seventh Circuit, Sherman Minton, Associate Justice.

For the Eighth Circuit, Tom C. Clark, Associate Justice.

For the Ninth Circuit, William O. Douglas, Associate Justice.

For the Tenth Circuit, Tom C. Clark, Associate Justice.

October 14, 1949.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1952.

UNITED STATES *v.* REYNOLDS ET AL.

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

No. 21. Argued October 21, 1952.—Decided March 9, 1953.

A military aircraft on a flight to test secret electronic equipment crashed and certain civilian observers aboard were killed. Their widows sued the United States under the Tort Claims Act and moved under Rule 34 of the Federal Rules of Civil Procedure for production of the Air Force's accident investigation report and statements made by surviving crew members during the investigation. The Secretary of the Air Force filed a formal claim of privilege, stating that the matters were privileged against disclosure under Air Force regulations issued under R. S. § 161 and that the aircraft and its personnel were "engaged in a highly secret mission." The Judge Advocate General filed an affidavit stating that the material could not be furnished "without seriously hampering national security"; but he offered to produce the surviving crew members for examination by plaintiffs and to permit them to testify as to all matters except those of a "classified nature." *Held:* In this case, there was a valid claim of privilege under Rule 34; and a judgment based under Rule 37 on refusal to produce the documents subjected the United States to liability to which Congress did not consent by the Tort Claims Act. Pp. 2–12.

(a) As used in Rule 34, which compels production only of matters "not privileged," the term "not privileged" refers to "privileges" as that term is understood in the law of evidence. P. 6.

(b) When the Secretary lodged his formal claim of privilege, he invoked a privilege against revealing military secrets which is well established in the law of evidence. Pp. 6–7.

(c) When a claim of privilege against revealing military secrets is invoked, the courts must decide whether the occasion for invoking the privilege is appropriate, and yet do so without jeopardizing the security which the privilege was meant to protect. Pp. 7–8.

(d) When the formal claim of privilege was filed by the Secretary, under circumstances indicating a reasonable possibility that military secrets were involved, there was a sufficient showing of privilege to cut off further demand for the documents on the showing of necessity for its compulsion that had been made. P. 10.

(e) In this case, the showing of necessity was greatly minimized by plaintiffs' rejection of the Judge Advocate General's offer to make the surviving crew members available for examination. P. 11.

(f) The doctrine in the criminal field that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free has no application in a civil forum where the Government is not the moving party but is a defendant only on terms to which it has consented. P. 12.

192 F. 2d 987, reversed.

In a suit under the Tort Claims Act, the District Court entered judgment against the Government. 10 F. R. D. 468. The Court of Appeals affirmed. 192 F. 2d 987. This Court granted certiorari. 343 U. S. 918. *Reversed and remanded,* p. 12.

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

Charles J. Biddle argued the cause for respondents. With him on the brief was *Francis Hopkinson.*

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

These suits under the Tort Claims Act [1] arise from the death of three civilians in the crash of a B–29 aircraft at

[1] 28 U. S. C. §§ 1346, 2674.

Waycross, Georgia, on October 6, 1948. Because an important question of the Government's privilege to resist discovery [2] is involved, we granted certiorari. 343 U. S. 918.

The aircraft had taken flight for the purpose of testing secret electronic equipment, with four civilian observers aboard. While aloft, fire broke out in one of the bomber's engines. Six of the nine crew members and three of the four civilian observers were killed in the crash.

The widows of the three deceased civilian observers brought consolidated suits against the United States. In the pretrial stages the plaintiffs moved, under Rule 34 of the Federal Rules of Civil Procedure,[3] for production of the Air Force's official accident investigation report and the statements of the three surviving crew members, taken in connection with the official investigation. The Government moved to quash the motion, claiming that these matters were privileged against disclosure pursuant

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[2] Federal Rules of Civil Procedure, Rule 34.

[3] "Rule 34. *Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.* Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26 (b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

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to Air Force regulations promulgated under R. S. § 161.[4] The District Judge sustained plaintiffs' motion, holding that good cause for production had been shown.[5] The claim of privilege under R. S. § 161 was rejected on the premise that the Tort Claims Act, in making the Government liable "in the same manner" as a private individual,[6] had waived any privilege based upon executive control over governmental documents.

Shortly after this decision, the District Court received a letter from the Secretary of the Air Force, stating that "it has been determined that it would not be in the public interest to furnish this report. . . ." The court allowed a rehearing on its earlier order, and at the rehearing the Secretary of the Air Force filed a formal "Claim of Privilege." This document repeated the prior claim based generally on R. S. § 161, and then stated that the Government further objected to production of the documents "for the reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force." An affidavit of the Judge Advocate General, United States Air Force, was also filed

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[4] 5 U. S. C. § 22:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

Air Force Regulation No. 62-7 (5)(b) provides:

"Reports of boards of officers, special accident reports, or extracts therefrom will not be furnished or made available to persons outside the authorized chain of command without the specific approval of the Secretary of the Air Force."

[5] 10 F. R. D. 468.

[6] 28 U. S. C. § 2674:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

with the court, which asserted that the demanded material could not be furnished "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." The same affidavit offered to produce the three surviving crew members, without cost, for examination by the plaintiffs. The witnesses would be allowed to refresh their memories from any statement made by them to the Air Force, and authorized to testify as to all matters except those of a "classified nature."

The District Court ordered the Government to produce the documents in order that the court might determine whether they contained privileged matter. The Government declined, so the court entered an order, under Rule 37 (b)(2)(i),[7] that the facts on the issue of negligence would be taken as established in plaintiffs' favor. After a hearing to determine damages, final judgment was entered for the plaintiffs. The Court of Appeals affirmed,[8] both as to the showing of good cause for production of the documents, and as to the ultimate disposition of the case as a consequence of the Government's refusal to produce the documents.

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[7] "Rule 37. *Refusal to Make Discovery: Consequences.*

. . . . . .

"(b) Failure to Comply With Order.

. . . . . .

"(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey . . . an order made under Rule 34 to produce any document . . ., the court may make such orders in regard to the refusal as are just, and among others the following:

"(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; . . . ."

[8] 192 F. 2d 987.

We have had broad propositions pressed upon us for decision. On behalf of the Government it has been urged that the executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest.[9] Respondents have asserted that the executive's power to withhold documents was waived by the Tort Claims Act. Both positions have constitutional overtones which we find it unnecessary to pass upon, there being a narrower ground for decision. *Touhy* v. *Ragen,* 340 U. S. 462 (1951); *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U. S. 549, 574–585 (1947).

The Tort Claims Act expressly makes the Federal Rules of Civil Procedure applicable to suits against the United States.[10] The judgment in this case imposed liability upon the Government by operation of Rule 37, for refusal to produce documents under Rule 34. Since Rule 34 compels production only of matters "not privileged," the essential question is whether there was a valid claim of privilege under the Rule. We hold that there was, and that, therefore, the judgment below subjected the United States to liability on terms to which Congress did not consent by the Tort Claims Act.

We think it should be clear that the term "not privileged," as used in Rule 34, refers to "privileges" as that term is understood in the law of evidence. When the Secretary of the Air Force lodged his formal "Claim of Privilege," he attempted therein to invoke the privilege against revealing military secrets, a privilege which is well

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[9] While claim of executive power to suppress documents is based more immediately upon R. S. § 161 (see *supra,* note 4), the roots go much deeper. It is said that R. S. § 161 is only a legislative recognition of an inherent executive power which is protected in the constitutional system of separation of power.

[10] 28 U. S. C. (1946 ed.) § 932; *United States* v. *Yellow Cab Co.,* 340 U. S. 543, 553 (1951).

established in the law of evidence.[11] The existence of the privilege is conceded by the court below,[12] and, indeed, by the most outspoken critics of governmental claims to privilege.[13]

Judicial experience with the privilege which protects military and state secrets has been limited in this country.[14] English experience has been more extensive, but still relatively slight compared with other evidentiary privileges.[15] Nevertheless, the principles which control the application of the privilege emerge quite clearly from the available precedents. The privilege belongs to the Government and must be asserted by it; it can neither be claimed [16] nor waived [17] by a private party. It is not to be lightly invoked.[18] There must be a formal claim

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[11] *Totten* v. *United States,* 92 U. S. 105, 107 (1875); *Firth Sterling Steel Co.* v. *Bethlehem Steel Co.,* 199 F. 353 (D. C. E. D. Pa. 1912); *Pollen* v. *Ford Instrument Co.,* 26 F. Supp. 583 (D. C. E. D. N. Y. 1939); *Cresmer* v. *United States,* 9 F. R. D. 203 (D. C. E. D. N. Y. 1949); see *Bank Line* v. *United States,* 68 F. Supp. 587 (D. C. S. D. N. Y. 1946), 163 F. 2d 133 (C. A. 2d Cir. 1947). 8 Wigmore on Evidence (3d ed.) § 2212*a,* p. 161, and § 2378 (g)(5), at pp. 785 *et seq.;* 1 Greenleaf on Evidence (16th ed.) §§ 250–251; Sanford, Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments, 3 Vanderbilt L. Rev. 73, 74–75 (1949).

[12] 192 F. 2d 987, 996.

[13] See Wigmore, *op. cit. supra,* note 11.

[14] See cases cited *supra,* note 11.

[15] Most of the English precedents are reviewed in the recent case of *Duncan* v. *Cammell, Laird & Co.,* [1942] A. C. 624.

[16] *Firth Sterling Steel Co.* v. *Bethlehem Steel Co.,* 199 F. 353 (D. C. E. D. Pa. 1912).

[17] *In re Grove,* 180 F. 62 (C. A. 3d Cir. 1910).

[18] Marshall, C. J., in the *Aaron Burr* trial, I Robertson's Reports 186: "That there may be matter, the production of which the court would not require, is certain . . . . What ought to be done, under such circumstances, presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country."

of privilege, lodged by the head of the department which has control over the matter,[19] after actual personal consideration by that officer.[20] The court itself must determine whether the circumstances are appropriate for the claim of privilege,[21] and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.[22] The latter requirement is the only one which presents real difficulty. As to it, we find it helpful to draw upon judicial experience in dealing with an analogous privilege, the privilege against self-incrimination.

The privilege against self-incrimination presented the courts with a similar sort of problem. Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses. Indeed, in the earlier stages

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[19] *Firth* case, *supra,* note 16.

[20] "The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced . . . ." *Duncan* v. *Cammell, Laird & Co.,* [1942] A. C. 624, 638.

[21] *Id.,* at p. 642:

"Although an objection validly taken to production, on the ground that this would be injurious to the public interest, is conclusive, it is important to remember that *the decision ruling out such documents is the decision of the judge.* . . . It is the judge who is in control of the trial, not the executive . . . ." (Emphasis supplied.)

[22] *Id.,* at pp. 638–642; cf. the language of this Court in *Hoffman* v. *United States,* 341 U. S. 479, 486 (1951), speaking of the analogous hazard of probing too far in derogation of the claim of privilege against self-incrimination:

"However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, *he would be compelled to surrender the very protection which the privilege is designed to guarantee.*" (Emphasis supplied.)

of judicial experience with the problem, both extremes were advocated, some saying that the bare assertion by the witness must be taken as conclusive, and others saying that the witness should be required to reveal the matter behind his claim of privilege to the judge for verification.[23] Neither extreme prevailed, and a sound formula of compromise was developed. This formula received authoritative expression in this country as early as the *Burr* trial.[24] There are differences in phraseology, but in substance it is agreed that the court must be satisfied from all the evidence and circumstances, and "from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman* v. *United States,* 341 U. S. 479, 486–487 (1951).[25] If the court is so satisfied, the claim of the privilege will be accepted without requiring further disclosure.

Regardless of how it is articulated, some like formula of compromise must be applied here. Judicial control over the evidence in a case cannot be abdicated to the

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[23] Compare the expressions of Rolfe, B. and Wilde, C. J. in *Regina* v. *Garbett,* 2 Car. & K. 474, 492 (1847); see 8 Wigmore on Evidence (3d ed.) § 2271.

[24] I Robertson's Reports 244:

"When a question is propounded, it belongs to the court to consider and to decide, whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it *may* criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims."

[25] *Brown* v. *United States,* 276 U. S. 134 (1928); *Mason* v. *United States,* 244 U. S. 362 (1917).

caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense. Experience in the past war has made it common knowledge that air power is one of the most potent weapons in our scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power. It is equally apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests. On the record before the trial court it appeared that this accident occurred to a military plane which had gone aloft to test secret electronic equipment. Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.

Of course, even with this information before him, the trial judge was in no position to decide that the report was privileged until there had been a formal claim of privilege. Thus it was entirely proper to rule initially that petitioner had shown probable cause for discovery of the documents. Thereafter, when the formal claim of privilege was filed by the Secretary of the Air Force, under

circumstances indicating a reasonable possibility that military secrets were involved, there was certainly a sufficient showing of privilege to cut off further demand for the documents on the showing of necessity for its compulsion that had then been made.

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.[26] *A fortiori,* where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail. Here, necessity was greatly minimized by an available alternative, which might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege. By their failure to pursue that alternative, respondents have posed the privilege question for decision with the formal claim of privilege set against a dubious showing of necessity.

There is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident. Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets. Respondents were given a reasonable opportunity to do just that, when petitioner formally offered to make the surviving crew members available for examination. We think that offer should have been accepted.

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[26] See *Totten* v. *United States,* 92 U. S. 105 (1875), where the very subject matter of the action, a contract to perform espionage, was a matter of state secret. The action was dismissed on the pleadings without ever reaching the question of evidence, since it was so obvious that the action should never prevail over the privilege.

Respondents have cited us to those cases in the criminal field, where it has been held that the Government can invoke its evidentiary privileges only at the price of letting the defendant go free.[27] The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented.

The decision of the Court of Appeals is reversed and the case will be remanded to the District Court for further proceedings consistent with the views expressed in this opinion.

Reversed and remanded.

MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, and MR. JUSTICE JACKSON dissent, substantially for the reasons set forth in the opinion of Judge Maris below. 192 F. 2d 987.

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[27] *United States* v. *Andolschek*, 142 F. 2d 503 (C. A. 2d Cir. 1944); *United States* v. *Beekman*, 155 F. 2d 580 (C. A. 2d Cir. 1946).

ALSTATE CONSTRUCTION CO. *v.* DURKIN, SECRETARY OF LABOR.

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

No. 296. Argued February 2–3, 1953.—Decided March 9, 1953.

Petitioner produces in Pennsylvania a road-surfacing mixture made from materials bought or quarried in Pennsylvania. Most of it is used in Pennsylvania on interstate roads and railroads and on the improvement of facilities for companies producing goods for interstate commerce. *Held:* Petitioner's employees who do not work on the roads themselves but are engaged in the production of the road-surfacing mixture for the uses shown are engaged in the "production of goods for commerce" and are within the coverage of the Fair Labor Standards Act. Pp. 13–17.
195 F. 2d 577, affirmed.

The District Court enjoined petitioner from violating the overtime and record-keeping provisions of the Fair Labor Standards Act. 95 F. Supp. 585. The Court of Appeals affirmed. 195 F. 2d 577. This Court granted certiorari. 344 U. S. 895. *Affirmed,* p. 17.

Samuel A. Schreckengaust, Jr. argued the cause for petitioner. With him on the brief was *Gilbert Nurick.*

Bessie Margolin argued the cause for respondent. With her on the brief were *Solicitor General Cummings* and *William S. Tyson.*

Charles A. Horsky, W. Crosby Roper, Jr. and *Amy Ruth Mahin* filed a brief for the National Sand & Gravel Association, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

Section 7 (a) of the Fair Labor Standards Act requires employers to pay each employee covered by the Act not less than one and one-half times his regular pay rate for

every hour worked in excess of a forty-hour week; § 11 (c) requires employers to keep appropriate employment records.[1] Employees covered are defined as those "engaged in commerce or in the production of goods for commerce." We have held that employees repairing interstate roads or railroads are "engaged in commerce" within the meaning of that clause of § 7 (a).[2] The question presented in this case is whether employees who work off such roads in the production of materials to repair them are engaged "in the production of goods for commerce" within the meaning of § 7 (a).

The Wage and Hour Administrator sued in District Court to enjoin the petitioner Alstate Construction Company from violating the overtime and record-keeping provisions of the Act. The District Court found: Alstate is a Pennsylvania road contractor that reconstructs and repairs roads, railroads, parkways and like facilities in that state. The company also manufactures at three Pennsylvania plants a bituminous concrete road surfacing mixture called amesite made from materials either bought or quarried in Pennsylvania. Most of it is applied to Pennsylvania roads either by Alstate's own employees or by Alstate's customers. Eighty-five and one-half percent of Alstate's work here involved was done on interstate roads, railroads, or for Pennsylvania companies producing goods for interstate commerce, and 14½% was done on projects that did not relate to interstate commerce. Alstate made no attempt to segregate payments to its employees on the basis of whether their work involved interstate or intrastate activities.

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[1] 52 Stat. 1060, as amended, 63 Stat. 910, 912–913, 29 U. S. C. §§ 207 (a), 211 (c).

[2] *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *Pedersen* v. *Fitzgerald Construction Co.*, 318 U. S. 740, reversing 288 N. Y. 687, 43 N. E. 2d 83, on the authority of *Overstreet* v. *North Shore Corp.*, *supra*.

The District Court held that all of Alstate's employees were covered by the Act and granted the injunction prayed. 95 F. Supp. 585. The Court of Appeals for the Third Circuit affirmed, holding that those employees of Alstate who worked on roads were "in commerce," and that its "off-the-road" plant employees were producing road materials "for commerce." 195 F. 2d 577. On similar facts, the Court of Appeals for the Eighth Circuit applied the Act to "off-the-road" employees. *Tobin* v. *Johnson,* 198 F. 2d 130. An opposite result was reached by the Tenth Circuit in *E. C. Schroeder Co.* v. *Clifton,* 153 F. 2d 385, and the Supreme Court of Pennsylvania in *Thomas* v. *Hempt Bros.,* 371 Pa. 383, 89 A. 2d 776. To settle this question we granted certiorari in this and the *Hempt Bros.* case. 344 U. S. 895.

Amesite is produced in Pennsylvania for use on Pennsylvania roads. None of it is manufactured with a purpose to ship it across state lines. For this reason, so Alstate contends, amesite is not produced "for commerce." Obviously, acceptance of this contention would require us to read "production of goods for commerce" as though written "production of goods for transportation in commerce"—that is, across state lines. Such limiting language did appear in the bill as it passed the Senate,[3] but Congress left it out of the Act as passed. Of course production of "goods" for the purpose of shipping them across state lines is production "for commerce." But we could not hold—consistently with *Overstreet* v. *North Shore Corp.,* 318 U. S. 125, and *Pedersen* v. *Fitzgerald Construction Co.,* 318 U. S. 740—that the only way to produce goods "for commerce" is to produce them for transportation across state lines.

In the *Overstreet* and *Pedersen* cases, *supra,* we had to decide whether employees engaged in repairing inter-

[3] 81 Cong. Rec. 7957.

state roads and railroads were "in commerce." In *Overstreet* we pointed out that interstate roads and railroads are indispensable "instrumentalities" in the carriage of persons and goods that move in interstate commerce. We then held that because roads and railroads are in law and in fact integrated and indispensable parts of our system of commerce among the states, employees repairing them are "in commerce." Consequently he who serves interstate highways and railroads serves commerce. By the same token he who produces goods for these indispensable and inseparable parts of commerce produces goods for commerce. We therefore conclude that Alstate's off-the-road employees were covered by the Act because engaged in "production of goods for commerce."

It is contended that we should not construe the Act as covering the "off-the-road" employees because it was given a contrary interpretation by its administrators from 1938 until 1945. During these first years after the Act's passage the administrator did take such a position. But more experience with the Act together with judicial construction of its scope [4] convinced its administrators that the first interpretation was unjustifiably narrow. He therefore publicly announced that off-the-road employees like these were protected by the Act. The new interpretation was reported to congressional committees on a number of occasions. Interested employers severely criticized the administrator's changes. Specific amendments were urged to neutralize his interpretation. Such neutralizing amendments were suggested to congressional committees by the National Sand and Gravel Association which has filed a brief before

[4] *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654, affirmed *sub nom. Atlantic Co.* v. *Walling*, 131 F. 2d 518; *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751; *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689; *Chapman* v. *Home Ice Co.*, 136 F. 2d 353.

us as *amicus curiae*.[5] Instead of adopting any of the suggestions to undermine the administrator's interpretation, Congress in a 1949 amendment to the Fair Labor Standards Act provided that all past orders, regulations and interpretations of the administrator should remain in effect "except to the extent that any such order, regulation, interpretation, . . . may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator . . . ." [6]

We decline to repudiate an administrative interpretation of the Act which Congress refused to repudiate after being repeatedly urged to do so.

There is an objection to the scope of the injunction, but we are satisfied with the Court of Appeals' treatment of this contention.

Affirmed.

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

The Court reasons that if the man who is building or repairing an interstate highway is "engaged in commerce," the one who carries cement and gravel to him from a nearby pit is "engaged in the production of goods for commerce." Yet if that is true, how about the men who produce the tools for those who carry the cement and gravel or those who furnish the materials to make the tools used in producing the cement and gravel? Each would be essential to the highway worker "engaged in commerce." Yet the circle gets amazingly large once we say that "the production of goods for commerce" includes the "production of goods for those engaged in commerce." Cf. *McLeod* v. *Threlkeld*, 319 U. S. 491.

[5] See for illustration Hearings before Subcommittee No. 4 of House Committee on Education and Labor on H. R. 40, 80th Cong., 1st Sess. 1374–1375.

[6] 63 Stat. 910, 920.

A person who is maintaining or repairing interstate transportation facilities is "engaged in commerce." *Overstreet* v. *North Shore Corp.*, 318 U. S. 125. A person who is creating articles destined for the channels of interstate commerce and all others who have such a close and immediate connection with the process as to be an essential or necessary part of it are engaged in "the production of goods for commerce." See *Kirschbaum Co.* v. *Walling*, 316 U. S. 517. If those who serve those "engaged in commerce" are also included, a large measure of cases affecting commerce are brought into the Act. Yet the history of the Act shows that no such extension of the federal domain was intended. See *Kirschbaum Co.* v. *Walling, supra*, pp. 522–523. If those whose activities are necessary or essential to support those who are "engaged in commerce" are to be brought under the Act, I think an amendment of the Act would be necessary.

THOMAS *v.* HEMPT BROTHERS.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 410. Argued February 3, 1953.—Decided March 9, 1953.

Petitioner sued respondent for overtime pay, liquidated damages and counsel fees under §§ 6, 7 and 16 (b) of the Fair Labor Standards Act, alleging that he was employed in producing road-building materials in Pennsylvania which were sold for use in Pennsylvania by an interstate road, railroad and airport and other customers who used them on projects which "aided the flow of commerce." *Held:* A judgment for respondent on the ground that petitioner had failed to state a cause of action under the Act is reversed on the authority of *Alstate Construction Co.* v. *Durkin, ante,* p. 13. Pp. 19–21.

371 Pa. 383, 89 A. 2d 776, reversed.

The Supreme Court of Pennsylvania sustained a trial court's judgment for respondent. 371 Pa. 383, 89 A. 2d 776. This Court granted certiorari. 344 U. S. 895. *Reversed and remanded,* p. 21.

Henry C. Kessler, Jr. argued the cause for petitioner. With him on the brief was *Richard W. Galiher.*

James H. Booser argued the cause for respondent. With him on the brief were *Sterling G. McNees* and *Robert L. Myers, Jr.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner Thomas sued the respondent Hempt Brothers in a Pennsylvania Court of Common Pleas to recover overtime wages, liquidated damages, and counsel fees under the provisions of §§ 6, 7 and 16 (b) of the Fair Labor Standards Act.* The complaint alleged these facts: Hempt Brothers operate a stone quarry in Penn-

*52 Stat. 1060, as amended, 63 Stat. 910, 29 U. S. C. §§ 206, 207, 216 (b).

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sylvania, use the stone in manufacturing cement mixtures, and then haul these mixtures in trucks to customers. Their customers were the Pennsylvania Turnpike, the Pennsylvania Railroad Company, an airport, an army depot, and a navy depot, all located within the state of Pennsylvania. The concrete was processed for use by these customers on Pennsylvania projects. The Railroad used its concrete for repair and maintenance of its roadbeds over which were operated interstate passenger and freight trains. The Turnpike used its concrete for laying and building "a highway which handles the flow of commerce between the states." The airport used concrete to build and erect landing fields to accommodate the flow of airplanes in interstate commerce. Other purchasers used their concrete on "projects which aided the flow of commerce, as will be proven by Plaintiff when he has his day in Court." Thomas was employed in producing and handling the quarry and concrete products.

On these allegations the Supreme Court of Pennsylvania sustained the trial court's judgment for Hempt Brothers entered on the ground that the complaint failed to show a recoverable cause of action under the Fair Labor Standards Act. 371 Pa. 383, 89 A. 2d 776. And see 62 Pa. D. & C. 618, 626 (1948); and 74 Pa. D. & C. 213, 218 (1950). In sustaining dismissal of the complaint the State Supreme Court recognized that its holding was in conflict with that of the Third Circuit in *Tobin* v. *Alstate Construction Co.*, 195 F. 2d 577. We granted certiorari because of this conflict. 344 U. S. 895.

We have today affirmed the Court of Appeals' judgment in the *Alstate* case, *ante*, p. 13. The reasons we gave for affirming that case require that this case be reversed because the state courts erred in holding that the complaint failed to set out a good cause of action under the Fair Labor Standards Act. Accordingly the

judgment of the Supreme Court of Pennsylvania is reversed and the cause remanded to that court for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS dissent for the reasons stated in the dissenting opinion in No. 296, *Alstate Construction Co.* v. *Durkin, ante,* p. 17.

UNITED STATES *v.* KAHRIGER.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 167. Argued December 16–17, 1952.—Decided March 9, 1953.

Provisions of the Revenue Act of 1951, 26 U. S. C. §§ 3285–3294, levy an occupational tax of $50 per year on persons engaged in the business of accepting wagers; require such persons to register with the Collector of Internal Revenue; and penalize failure to pay the tax and to register. *Held:*

1. The tax is a valid exercise of the federal taxing power and is not unconstitutional as an infringement by the Federal Government on the police powers reserved to the states by the Tenth Amendment. Pp. 23–31.

(a) The fact that the tax has a regulatory effect upon wagering, and brings about a result that is beyond the direct legislative power of Congress, does not render it invalid. Pp. 26–31.

(b) The registration requirements are valid as in aid of a revenue purpose. Pp. 31–32.

2. The tax provisions do not contravene the privilege against self-incrimination guaranteed by the Fifth Amendment. Pp. 31–33.

(a) The privilege against self-incrimination relates only to past acts, not to future acts that may or may not be committed. P. 32.

(b) Under the registration provisions, a person subject to the tax is not compelled to confess to acts already committed; he is merely informed that in order to engage in the business of wagering in the future he must fulfill certain conditions. Pp. 32–33.

3. The statute is not violative of the Due Process Clause on the ground that the classification is arbitrary because some wagering transactions are excluded, nor on the ground that the statutory definitions are vague. Pp. 33–34.

105 F. Supp. 322, reversed.

An information charging appellee with willful failure to pay the occupational tax imposed by 26 U. S. C. § 3290 and to register therefor as required by 26 U. S. C. § 3291, was dismissed by the District Court, on the ground that

the statute was unconstitutional. 105 F. Supp. 322. The Government appealed directly to this Court under 18 U. S. C. § 3731. *Reversed,* p. 34.

Robert L. Stern argued the cause for the United States. With him on the brief were *Solicitor General Cummings, Assistant Attorney General Murray* and *Beatrice Rosenberg. Philip B. Perlman,* then Solicitor General, was on the Statement as to Jurisdiction.

Jacob Kossman argued the cause and filed a brief for appellee.

Archie Elledge and *Joe W. Johnson* filed a brief for Penn et al., as *amici curiae,* supporting appellee.

MR. JUSTICE REED delivered the opinion of the Court.

The issue raised by this appeal is the constitutionality of the occupational tax provisions of the Revenue Act of 1951,[1] which levy a tax on persons engaged in the business of accepting wagers, and require such persons to register with the Collector of Internal Revenue. The unconstitutionality of the tax is asserted on two grounds.

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[1] 26 U. S. C. (Supp. V) § 3285:

"(a) Wagers.

"There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

. . . . . .

"(d) Persons liable for tax.

"Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

"(e) Exclusions from tax.

"No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and

First, it is said that Congress, under the pretense of exercising its power to tax has attempted to penalize illegal intrastate gambling through the regulatory features of the Act (26 U. S. C. (Supp. V) § 3291) and has thus infringed the police power which is reserved to the states. Secondly, it is urged that the registration provisions of the tax violate the privilege against self-incrimination and are arbitrary and vague, contrary to the guarantees of the Fifth Amendment.

The case comes here on appeal, in accordance with 18 U. S. C. § 3731, from the United States District Court

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(2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267."

26 U. S. C. (Supp. V) § 3290:

"A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable."

26 U. S. C. (Supp. V) § 3291:

"(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

"(1) his name and place of residence;

"(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

"(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person."

26 U. S. C. (Supp. V) § 3294:

"(a) Failure to pay tax.

"Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

. . . . .

"(c) Willful violations.

"The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter."

for the Eastern District of Pennsylvania, where an information was filed against appellee alleging that he was in the business of accepting wagers and that he willfully failed to register for and pay the occupational tax in question. Appellee moved to dismiss on the ground that the sections upon which the information was based were unconstitutional. The District Court sustained the motion on the authority of our opinion in *United States* v. *Constantine,* 296 U. S. 287. The court reasoned that while "the subject matter of this legislation so far as revenue purposes is concerned is within the scope of Federal authorities," the tax was unconstitutional in that the information called for by the registration provisions was "peculiarly applicable to the applicant from the standpoint of law enforcement and vice control," and therefore the whole of the legislation was an infringement by the Federal Government on the police power reserved to the states by the Tenth Amendment. *United States* v. *Kahriger,* 105 F. Supp. 322, 323.

The result below is at odds with the position of the seven other district courts which have considered the matter,[2] and, in our opinion, is erroneous.

In the term following the *Constantine* opinion, this Court pointed out in *Sonzinsky* v. *United States,* 300 U. S. 506, at 513 (a case involving a tax on a "limited class" of objectionable firearms alleged to be prohibitory in effect and "to disclose unmistakably the legislative

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[2] *United States* v. *Smith,* 106 F. Supp. 9 (D. C. S. D. Cal.); *United States* v. *Nadler,* 105 F. Supp. 918 (D. C. N. D. Cal.); *United States* v. *Forrester,* 105 F. Supp. 136 (D. C. N. D. Ga.); *United States* v. *Robinson,* 107 F. Supp. 38 (D. C. E. D. Mich.); *United States* v. *Arnold, Jordan, and Wingate,* No. 478 (D. C. E. D. Va.), September 18, 1952; *United States* v. *Penn,* No. 2021 (D. C. M. D. N. C.), May 1952; *Combs* v. *Snyder,* 101 F. Supp. 531 (D. D. C.), affirmed, 342 U. S. 939.

purpose to regulate rather than to tax"), that the subject of the tax in *Constantine* was "described or treated as criminal by the taxing statute." The tax in the *Constantine* case was a special additional excise tax of $1,000, placed only on persons who carried on a liquor business in violation of state law. The wagering tax with which we are here concerned applies to all persons engaged in the business of receiving wagers, regardless of whether such activity violates state law.

The substance of respondent's position with respect to the Tenth Amendment is that Congress has chosen to tax a specified business which is not within its power to regulate. The precedents are many upholding taxes similar to this wagering tax as a proper exercise of the federal taxing power. In the *License Tax Cases,* 5 Wall. 462, the controversy arose out of indictments for selling lottery tickets and retailing liquor in various states without having first obtained and paid for a license under the Internal Revenue Act of Congress. The objecting taxpayers urged that Congress could not constitutionally tax or regulate activities carried on within a state. P. 470. The Court pointed out that Congress had "no power of regulation nor any direct control" (5 Wall., at 470, 471) over the business there involved. The Court said that, if the licenses were to be regarded as by themselves giving authority to carry on the licensed business, it might be impossible to reconcile the granting of them with the Constitution. P. 471.

> "But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within State limits, they give none, and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor

> the power to impose penalties for non-payment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalites under national law, if he pays it." *Id.*, at 471.

Appellee would have us say that, because there is legislative history [3] indicating a congressional motive to suppress wagering, this tax is not a proper exercise of such taxing power. In the *License Tax Cases, supra*, it was admitted that the federal license "discouraged" the activities. The intent to curtail and hinder, as well as tax, was also manifest in the following cases, and in each of them the tax was upheld: *Veazie Bank* v. *Fenno,* 8 Wall. 533 (tax on paper money issued by state banks); *McCray* v. *United States,* 195 U. S. 27, 59 (tax on colored oleomargarine); *United States* v. *Doremus,* 249 U. S. 86, and *Nigro* v. *United States,* 276 U. S. 332 (tax on narcotics); *Sonzinsky* v. *United States,* 300 U. S. 506 (tax on firearms); *United States* v. *Sanchez,* 340 U. S. 42 (tax on marihuana).

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[3] There are suggestions in the debates that Congress sought to hinder, if not prevent, the type of gambling taxed. See 97 Cong. Rec. 6892:

"Mr. HOFFMAN of Michigan. Then I will renew my observation that it might if properly construed be considered an additional penalty on the illegal activities.

"Mr. COOPER. Certainly, and we might indulge the hope that the imposition of this type of tax would eliminate that kind of activity." 97 Cong. Rec. 12236: "If the local official does not want to enforce the law and no one catches him winking at the law, he may keep on winking at it, but when the Federal Government identifies a law violator, and the local newspaper gets hold of it, and the local church organizations get hold of it, and the people who do want the law enforced get hold of it, they say, 'Mr. Sheriff, what about it? We understand that there is a place down here licensed to sell liquor.' He says, 'Is that so? I will put him out of business.' "

It is conceded that a federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed. Nor is the tax invalid because the revenue obtained is negligible. Appellee, however, argues that the sole purpose of the statute is to penalize only illegal gambling in the states through the guise of a tax measure. As with the above excise taxes which we have held to be valid, the instant tax has a regulatory effect. But regardless of its regulatory effect, the wagering tax produces revenue. As such it surpasses both the narcotics and firearms taxes which we have found valid.[4]

It is axiomatic that the power of Congress to tax is extensive and sometimes falls with crushing effect on businesses deemed unessential or inimical to the public welfare, or where, as in dealings with narcotics, the collection of the tax also is difficult. As is well known, the constitutional restraints on taxing are few. "Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity." *License Tax Cases, supra,* at 471.[5] The remedy for excessive taxation is in the hands of Congress, not the courts. *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548. Speaking of the creation of the Bank of the United States, as an instrument for carrying out federal fiscal policies,

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[4] One of the indicia which appellee offers to support his contention that the wagering tax is not a proper revenue measure is that the tax amount collected under it was $4,371,869, as compared with an expected amount of $400,000,000 a year. The figure of $4,371,869, however, is relatively large when it is compared with the $3,501 collected under the tax on adulterated and process or renovated butter and filled cheese, the $914,910 collected under the tax on narcotics, including marihuana and special taxes, and the $28,911 collected under the tax on firearms, transfer and occupational taxes. (Summary of Internal Revenue Collections, released by Bureau of Internal Revenue, October 3, 1952.)

[5] But see the argument for defendant in the *Child Labor Tax Case,* 259 U. S. 20, 30.

this Court said in *McCulloch* v. *Maryland*, 4 Wheat. 316, 423:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

The difficulty of saying when the power to lay uniform taxes is curtailed, because its use brings a result beyond the direct legislative power of Congress, has given rise to diverse decisions. In that area of abstract ideas, a final definition of the line between state and federal power has baffled judges and legislators.

While the Court has never questioned the above-quoted statement of Mr. Chief Justice Marshall in the *McCulloch* case, the application of the rule has brought varying holdings on constitutionality. Where federal legislation has rested on other congressional powers, such as the Necessary and Proper Clause or the Commerce Clause, this Court has generally sustained the statutes, despite their effect on matters ordinarily considered state concern. When federal power to regulate is found, its exercise is a matter for Congress.[6] Where Congress has employed the

[6] *McCulloch* v. *Maryland*, 4 Wheat. 316, 424, upheld the creation of a bank under the necessary and proper clause. *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548, depends partly on the alternate ground of

taxing clause a greater variation in the decisions has resulted. The division in this Court has been more acute. Without any specific differentiation between the power to tax and other federal powers, the indirect results from the exercise of the power to tax have raised more doubts. This is strikingly illustrated by the shifting course of adjudication in taxation of the handling of narcotics.[7] The tax ground in the *Veazie Bank* case, *supra,* recognized that

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the federal power to provide money for circulation. *In re Rapier,* 143 U. S. 110, the use of the mails by papers that advertised the Louisiana Lottery was barred. The *Lottery Case,* 188 U. S. 321, approved the same result through the commerce power. That power was enough to bar transportation of pictures of prize fights, *Weber* v. *Freed,* 239 U. S. 325; to seize contraband eggs after shipment had ended, *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 56; and to bar transportation of women for immoral purposes, *Caminetti* v. *United States,* 242 U. S. 470. While in *United States* v. *Butler,* 297 U. S. 1, 68, 73, a use of a tax for regulation was disapproved, an enactment that resulted in regulation under the Commerce Clause met judicial favor. *Mulford* v. *Smith,* 307 U. S. 38, 47; *Wickard* v. *Filburn,* 317 U. S. 111. *Hill* v. *Wallace,* 259 U. S. 44, 67, and *Trusler* v. *Crooks,* 269 U. S. 475, based on taxation, held taxes that regulated the grain markets were unconstitutional as an interference with state power. In *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, regulations based on the Commerce Clause were upheld. The departure from this line of decisions in *Hammer* v. *Dagenhart,* 247 U. S. 251, was reversed in *United States* v. *Darby,* 312 U. S. 100, 115–124, where we said:

"Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause." *Id.,* at 115. "The power of Congress over interstate commerce . . . extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Id.,* at 118.

[7] *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 402; *United States* v. *Doremus,* 249 U. S. 86; *Linder* v. *United States,* 268 U. S. 5; *Nigro* v. *United States,* 276 U. S. 332.

strictly state governmental activities, such as the right to pass laws, were beyond the federal taxing power.[8] That case allowed a tax, however, that obliterated from circulation all state bank notes. A reason was that "the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers." *Id.*, at 548. The tax cases cited above in the third preceding paragraph followed that theory. It is hard to understand why the power to tax should raise more doubts because of indirect effects than other federal powers.[9]

Penalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation have caused this Court to declare the enactments invalid.[10] Unless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power.[11] All the provisions of this excise are adapted to the collection of a valid tax.

Nor do we find the registration requirements of the wagering tax offensive. All that is required is the filing of names, addresses, and places of business. This is quite general in tax returns.[12] Such data are directly and inti-

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[8] Cf. *New York* v. *United States,* 326 U. S. 572, 582, 587–588.

[9] Cf. *McCulloch* v. *Maryland,* 4 Wheat., at 422.

[10] *Child Labor Tax Case,* 259 U. S. 20, 34, 38; *Hill* v. *Wallace,* 259 U. S. 44, 63, 70; *United States* v. *Constantine,* 296 U. S. 287.

[11] But see *Linder* v. *United States,* 268 U. S. 5, 18; *Trusler* v. *Crooks,* 269 U. S. 475.

[12] 26 U. S. C. § 2011 *et seq.*, require registration by tobacco manufacturers, dealers and peddlers of the "name, or style, place of residence, trade, or business, and the place where such trade or business is to be carried on." 26 U. S. C. § 2810 requires the possessor of distilling apparatus to register "the particular place where such still or distilling apparatus is set up . . . the owner thereof, his place of residence . . . ." See also 26 U. S. C. § 3270.

mately related to the collection of the tax and are "obviously supportable as in aid of a revenue purpose." *Sonzinsky* v. *United States,* 300 U. S. 506, at 513. The registration provisions make the tax simpler to collect.

Appellee's second assertion is that the wagering tax is unconstitutional because it is a denial of the privilege against self-incrimination as guaranteed by the Fifth Amendment.

Since appellee failed to register for the wagering tax, it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law is called for. In *United States* v. *Sullivan,* 274 U. S. 259, defendant was convicted of refusing to file an income tax return. It was assumed that his income "was derived from business in violation of the National Prohibition Act." *Id.,* at 263. "As the defendant's income was taxed, the statute of course required a return. See *United States* v. *Sischo,* 262 U. S. 165. In the decision that this was contrary to the Constitution we are of opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." 274 U. S., at 263.

Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or may not be committed. 8 Wigmore (3d ed., 1940) § 2259*c*. If respondent wishes to take wagers subject to excise taxes under § 3285, *supra,* he must pay an occupational tax and register. Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order

to engage in the business of wagering in the future he must fulfill certain conditions.[13]

Finally, we consider respondent's contention that the order of dismissal was correct because a conviction under the sections in question would violate the Due Process Clause because the classification is arbitrary and the statutory definitions are vague.[14] The applicable definitions are 26 U. S. C. (Supp. V) § 3285 (b), (d) and (e).[15] The arbitrariness is said to arise from discrimination because some wagering activities are excluded. The Constitution does not require that a tax statute cover all phases

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[13] Cf. *Davis* v. *United States*, 328 U. S. 582, 590; *Shapiro* v. *United States*, 335 U. S. 1, 35; see *E. Fougera & Co.* v. *City of New York*, 224 N. Y. 269, 281, 120 N. E. 642, 644.

[14] These defenses are open under the demurrer to facts alleged in the indictment and the judgment of dismissal although the opinion of the District Court relied only upon usurpation of state police power by the federal enactment. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 330. Compare *United States* v. *Beacon Brass Co.*, 344 U. S. 43.

[15] 26 U. S. C. (Supp. V) § 3285:

"(b) Definitions.

"For the purposes of this chapter—

"(1) The term 'wager' means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

"(2) The term 'lottery' includes the numbers-game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual."

of a taxed or licensed business.[16] Respondent predicates vagueness of the statute upon the use, in defining the subject of the tax, of the description "engaged in the business" of wagering and "usually" in § 3285 (b)(2). We have no doubt the definitions make clear the activities covered and excluded.

Reversed.

MR. JUSTICE JACKSON, concurring.

I concur in the judgment and opinion of the Court, but with such doubt that if the minority agreed upon an opinion which did not impair legitimate use of the taxing power I probably would join it. But we deal here with important and contrasting values in our scheme of government, and it is important that neither be allowed to destroy the other.

On the one hand, the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." This has been broadly construed to confer immunity not only "in any criminal case" but in any federal inquiry where the information might be useful later to convict of a federal crime. Extension of the immunity doctrines to the federal power to inquire as to income derived from violation of state penal laws would create a large number of immunities from reporting which would vary from state to state. Moreover, the immunity can be claimed without being established, otherwise one would be required to prove guilt to avoid admitting it. Sweeping and undiscriminating application of the immunity doctrines to taxation would almost give the taxpayer an option to refuse to report, as it now gives witnesses a virtual option to refuse to testify. The Fifth Amendment should not be con-

[16] *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584.

strued to impair the taxing power conferred by the original Constitution, and especially by the Sixteenth Amendment, further than is absolutely required.

Of course, all taxation has a tendency, proportioned to its burdensomeness, to discourage the activity taxed. One cannot formulate a revenue-raising plan that would not have economic and social consequences. Congress may and should place the burden of taxes where it will least handicap desirable activities and bear most heavily on useless or harmful ones. If Congress may tax one citizen to the point of discouragement for making an honest living, it is hard to say that it may not do the same to another just because he makes a sinister living. If the law-abiding must tell all to the tax collector, it is difficult to excuse one because his business is law-breaking. Strangely enough, Fifth Amendment protection against self-incrimination has been refused to business as against inquisition by the regulatory power, *Shapiro* v. *United States,* 335 U. S. 1, in what seemed to me a flagrant violation of it. See dissenting opinion, *id.,* at 70.

But here is a purported tax law which requires no reports and lays no tax except on specified gamblers whose calling in most states is illegal. It requires this group to step forward and identify themselves, not because they, like others, have income, but because of its source. This is difficult to regard as a rational or good-faith revenue measure, despite the deference that is due Congress. On the contrary, it seems to be a plan to tax out of existence the professional gambler whom it has been found impossible to prosecute out of existence. Few pursuits are entitled to less consideration at our hands than professional gambling, but the plain unwelcome fact is that it continues to survive because a large and influential part of our population patronizes and protects it.

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The United States has a system of taxation by confession. That a people so numerous, scattered and individualistic annually assesses itself with a tax liability, often in highly burdensome amounts, is a reassuring sign of the stability and vitality of our system of self-government. What surprised me in once trying to help administer these laws was not to discover examples of recalcitrance, fraud or self-serving mistakes in reporting, but to discover that such derelictions were so few. It will be a sad day for the revenues if the good will of the people toward their taxing system is frittered away in efforts to accomplish by taxation moral reforms that cannot be accomplished by direct legislation. But the evil that can come from this statute will probably soon make itself manifest to Congress. The evil of a judicial decision impairing the legitimate taxing power by extreme constitutional interpretations might not be transient. Even though this statute approaches the fair limits of constitutionality, I join the decision of the Court.

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

The Fifth Amendment declares that no person "shall be compelled in any criminal case to be a witness against himself." The Court nevertheless here sustains an Act which requires a man to register and confess that he is engaged in the business of gambling. I think this confession can provide a basis to convict him of a federal crime for having gambled before registration without paying a federal tax. 26 U. S. C. (Supp. V) §§ 3285, 3290, 3291, 3294. Whether or not the Act has this effect, I am sure that it creates a squeezing device contrived to put a man in federal prison if he refuses to confess himself into a state prison as a violator of state gambling

laws.* The coercion of confessions is a common but justly criticized practice of many countries that do not have or live up to a Bill of Rights. But we have a Bill of Rights that condemns coerced confessions, however refined or legalistic may be the technique of extortion. I would hold that this Act violates the Fifth Amendment. See my dissent in *Feldman* v. *United States,* 322 U. S. 487, 494–503.

MR. JUSTICE FRANKFURTER, dissenting.

The Court's opinion manifests a natural difficulty in reaching its conclusion. Constitutional issues are likely to arise whenever Congress draws on the taxing power not to raise revenue but to regulate conduct. This is so, of course, because of the distribution of legislative power as between the Congress and the State Legislatures in the regulation of conduct.

To review in detail the decisions of this Court, beginning with *Veazie Bank* v. *Fenno,* 8 Wall. 533, dealing with this ambivalent type of revenue enactment, would be to rehash the familiar. Two generalizations may, however, safely be drawn from this series of cases. Congress may make an oblique use of the taxing power in relation to activities with which Congress may deal directly, as for instance, commerce between the States. Thus, if the dissenting views of Mr. Justice Holmes in *Hammer* v. *Dagenhart,* 247 U. S. 251, 277, had been the decision of the Court, as they became in *United States* v. *Darby,* 312 U. S. 100, the effort to deal with the problem of child labor through an assertion of the taxing power

*In Pennsylvania, where this defendant is accused of having gambled, such conduct is a crime punishable by "separate or solitary" imprisonment. Purdon's Pa. Stat. Ann., 1945, Tit. 18, §§ 4601, 4602, 4603.

in the statute considered in *Child Labor Tax Case,* 259 U. S. 20, would by the latter case have been sustained. However, when oblique use is made of the taxing power as to matters which substantively are not within the powers delegated to Congress, the Court cannot shut its eyes to what is obviously, because designedly, an attempt to control conduct which the Constitution left to the responsibility of the States, merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure.

Concededly the constitutional questions presented by such legislation are difficult. On the one hand, courts should scrupulously abstain from hobbling congressional choice of policies, particularly when the vast reach of the taxing power is concerned. On the other hand, to allow what otherwise is excluded from congressional authority to be brought within it by casting legislation in the form of a revenue measure could, as so significantly expounded in the *Child Labor Tax Case, supra,* offer an easy way for the legislative imagination to control "any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with . . . ." *Child Labor Tax Case,* at 38. I say "significantly" because Mr. Justice Holmes and two of the Justices who had joined his dissent in *Hammer* v. *Dagenhart,* McKenna and Brandeis, JJ., agreed with the opinion in the *Child Labor Tax Case.* Issues of such gravity affecting the balance of powers within our federal system are not susceptible of comprehensive statement by smooth formulas such as that a tax is nonetheless a tax although it discourages the activities taxed, or that a tax may be imposed although it may effect ulterior ends. No such phrase, however fine and well-worn, enables one to decide the concrete case.

What is relevant to judgment here is that, even if the history of this legislation as it went through Congress

did not give one the libretto to the song, the context of the circumstances which brought forth this enactment—sensationally exploited disclosures regarding gambling in big cities and small, the relation of this gambling to corrupt politics, the impatient public response to these disclosures, the feeling of ineptitude or paralysis on the part of local law-enforcing agencies—emphatically supports what was revealed on the floor of Congress, namely, that what was formally a means of raising revenue for the Federal Government was essentially an effort to check if not to stamp out professional gambling.

A nominal taxing measure must be found an inadmissible intrusion into a domain of legislation reserved for the States not merely when Congress requires that such a measure is to be enforced through a detailed scheme of administration beyond the obvious fiscal needs, as in the *Child Labor Tax Case, supra.* That is one ground for holding that Congress was constitutionally disrespectful of what is reserved to the States. Another basis for deeming such a formal revenue measure inadmissible is presented by this case. In addition to the fact that Congress was concerned with activity beyond the authority of the Federal Government, the enforcing provision of this enactment is designed for the systematic confession of crimes with a view to prosecution for such crimes under State law.

It is one thing to hold that the exception, which the Fifth Amendment makes to the duty of a witness to give his testimony when relevant to a proceeding in a federal court, does not include the potential danger to that witness of possible prosecution in a State court, *Brown* v. *Walker,* 161 U. S. 591, 606, and, conversely, that the Fifth Amendment does not enable States to give immunity from use in federal courts of testimony given in a State court. *Feldman* v. *United States,* 322 U. S. 487.

It is a wholly different thing to hold that Congress, which cannot constitutionally grapple directly with gambling in the States, may compel self-incriminating disclosures for the enforcement of State gambling laws, merely because it does so under the guise of a revenue measure obviously passed not for revenue purposes. The motive of congressional legislation is not for our scrutiny, provided only that the ulterior purpose is not expressed in ways which negative what the revenue words on their face express and which do not seek enforcement of the formal revenue purpose through means that offend those standards of decency in our civilization against which due process is a barrier.

I would affirm this judgment.

MR. JUSTICE DOUGLAS, while not joining in the entire opinion, agrees with the views expressed herein that this tax is an attempt by the Congress to control conduct which the Constitution has left to the responsibility of the States.

UNITED STATES *v.* RUMELY.

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

No. 87. Argued December 11–12, 1952.—Decided March 9, 1953.

Respondent was secretary of an organization which, among other things, engaged in the sale of books of a political nature. He refused to disclose to a committee of Congress the names of those who made bulk purchases of these books for further distribution, and was convicted under R. S. § 102, as amended, which provides penalties for refusal to give testimony or to produce relevant papers "upon any matter" under congressional inquiry. Under the resolution empowering it to function, the Committee was "authorized and directed to conduct a study and investigation of (1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote, or retard legislation." *Held:* The Committee was without power to exact the information sought from respondent. Pp. 42–48.

(a) To construe the resolution as authorizing the Committee to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, would raise doubts of constitutionality in view of the prohibition of the First Amendment. P. 46.

(b) The phrase "lobbying activities" in the resolution is to be construed as lobbying in the commonly accepted sense of "representations made directly to the Congress, its members, or its committees"; and not as extending to attempts "to saturate the thinking of the community." P. 47.

(c) The scope of the resolution defining respondent's duty to answer must be ascertained as of the time of his refusal and cannot be enlarged by subsequent action of Congress. Pp. 47–48.

90 U. S. App. D. C. 382, 197 F. 2d 166, affirmed.

Respondent was convicted under R. S. § 102, as amended, 2 U. S. C. § 192, for refusal to give certain information to a congressional committee. The Court of

Appeals reversed. 90 U. S. App. D. C. 382, 197 F. 2d 166. This Court granted certiorari. 344 U. S. 812. *Affirmed,* p. 48.

Oscar H. Davis argued the cause for the United States. With him on the main brief was *Robert L. Stern,* then Acting Solicitor General. With him on a reply brief was *Solicitor General Cummings. Assistant Attorney General Murray, Beatrice Rosenberg* and *John R. Wilkins* were on both briefs.

Donald R. Richberg argued the cause for respondent. With him on the brief were *Alfons B. Landa* and *Delmar W. Holloman.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The respondent Rumely was Secretary of an organization known as the Committee for Constitutional Government, which, among other things, engaged in the sale of books of a particular political tendentiousness. He refused to disclose to the House Select Committee on Lobbying Activities the names of those who made bulk purchases of these books for further distribution, and was convicted under R. S. § 102, as amended, 52 Stat. 942, 2 U. S. C. § 192, which provides penalties for refusal to give testimony or to produce relevant papers "upon any matter" under congressional inquiry. The Court of Appeals reversed, one judge dissenting. It held that the committee before which Rumely refused to furnish this information had no authority to compel its production. 90 U. S. App. D. C. 382, 197 F. 2d 166. Since the Court of Appeals thus took a view of the committee's authority contrary to that adopted by the House in citing Rumely for contempt, we granted certiorari. 344 U. S. 812. This issue—whether the committee was authorized to

exact the information which the witness withheld—must first be settled before we may consider whether Congress had the power to confer upon the committee the authority which it claimed.

Although we are here dealing with a resolution of the House of Representatives, the problem is much the same as that which confronts the Court when called upon to construe a statute that carries the seeds of constitutional controversy. The potential constitutional questions have far-reaching import. We are asked to recognize the penetrating and pervasive scope of the investigative power of Congress. The reach that may be claimed for that power is indicated by Woodrow Wilson's characterization of it:

> "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function." Wilson, Congressional Government, 303.

Although the indispensable "informing function of Congress" is not to be minimized, determination of the "rights" which this function implies illustrates the common juristic situation thus defined for the Court by Mr. Justice Holmes: "All rights tend to declare themselves

absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 355. President Wilson did not write in light of the history of events since he wrote; more particularly he did not write of the investigative power of Congress in the context of the First Amendment. And so, we would have to be that "blind" Court, against which Mr. Chief Justice Taft admonished in a famous passage, *Child Labor Tax Case,* 259 U. S. 20, 37, that does not see what "[a]ll others can see and understand" not to know that there is wide concern, both in and out of Congress, over some aspects of the exercise of the congressional power of investigation.

Accommodation of these contending principles—the one underlying the power of Congress to investigate, the other at the basis of the limitation imposed by the First Amendment—is not called for until after we have construed the scope of the authority which the House of Representatives gave to the Select Committee on Lobbying Activities. The pertinent portion of the resolution of August 12, 1949, reads:

> "The committee is authorized and directed to conduct a study and investigation of (1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote, or retard legislation." H. Res. 298, 81st Cong., 1st Sess.

This is the controlling charter of the committee's powers. Its right to exact testimony and to call for the production of documents must be found in this language. The resolution must speak for itself, since Congress put

no gloss upon it at the time of its passage. Nor is any help to be had from the fact that the purpose of the Buchanan Committee, as the Select Committee was known, was to try to "find out how well [the Federal Regulation of Lobbying Act of 1946, 60 Stat. 839] worked." 96 Cong. Rec. 13882. That statute had a section of definitions, but Congress did not define the terms "lobbying" or "lobbying activities" in that Act, for it did not use them. Accordingly, the phrase "lobbying activities" in the resolution must be given the meaning that may fairly be attributed to it, having special regard for the principle of constitutional adjudication which makes it decisive in the choice of fair alternatives that one construction may raise serious constitutional questions avoided by another. In a long series of decisions we have acted on this principle. In the words of Mr. Chief Justice Taft, "[i]t is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality." *Richmond Co.* v. *United States,* 275 U. S. 331, 346. Again, what Congress has written, we said through Mr. Chief Justice (then Mr. Justice) Stone, "must be construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity." *Lucas* v. *Alexander,* 279 U. S. 573, 577. As phrased by Mr. Chief Justice Hughes, "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson,* 285 U. S. 22, 62, and cases cited.

Patently, the Court's duty to avoid a constitutional issue, if possible, applies not merely to legislation technically speaking but also to congressional action by way of resolution. See *Federal Trade Comm'n* v. *American Tobacco Co.,* 264 U. S. 298. Indeed, this duty of not

needlessly projecting delicate issues for judicial pronouncement is even more applicable to resolutions than to formal legislation. It can hardly be gainsaid that resolutions secure passage more casually and less responsibly, in the main, than do enactments requiring presidential approval.

Surely it cannot be denied that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment. In light of the opinion of Prettyman, J., below and of some of the views expressed here, it would not be seemly to maintain that these doubts are fanciful or factitious. Indeed, adjudication here, if it were necessary, would affect not an evanescent policy of Congress, but its power to inform itself, which underlies its policy-making function. Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits. Experience admonishes us to tread warily in this domain. The loose language of *Kilbourn* v. *Thompson,* 103 U. S. 168, the weighty criticism to which it has been subjected, see, *e. g.,* Fairman, Mr. Justice Miller and the Supreme Court, 332–334; Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, the inroads that have been made upon that case by later cases, *McGrain* v. *Daugherty,* 273 U. S. 135, 170–171, and *Sinclair* v. *United States,* 279 U. S. 263, strongly counsel abstention from adjudication unless no choice is left.

Choice is left. As a matter of English, the phrase "lobbying activities" readily lends itself to the construction placed upon it below, namely, "lobbying in its commonly accepted sense," that is, "representations made directly to the Congress, its members, or its committees," 90 U. S. App. D. C. 382, 391, 197 F. 2d 166, 175, and does not reach what was in Chairman Buchanan's mind, attempts "to saturate the thinking of the community." 96 Cong. Rec. 13883. If "lobbying" was to cover all activities of anyone intending to influence, encourage, promote or retard legislation, why did Congress differentiate between "lobbying activities" and other "activities . . . intended to influence"? Had Congress wished to authorize so extensive an investigation of the influences that form public opinion, would it not have used language at least as explicit as it employed in the very resolution in question in authorizing investigation of government agencies? Certainly it does no violence to the phrase "lobbying activities" to give it a more restricted scope. To give such meaning is not barred by intellectual honesty. So to interpret is in the candid service of avoiding a serious constitutional doubt. "Words have been strained more than they need to be strained here in order to avoid that doubt." (Mr. Justice Holmes in *Blodgett* v. *Holden,* 275 U. S. 142, 148, with the concurrence of Mr. Justice Brandeis, Mr. Justice Sanford and Mr. Justice Stone.) With a view to observing this principle of wisdom and duty, the Court very recently strained words more than they need be strained here. *United States* v. *C. I. O.,* 335 U. S. 106. The considerations which prevailed in that case should prevail in this.

Only a word need be said about the debate in Congress after the committee reported that Rumely had refused to produce the information which he had a right to refuse under the restricted meaning of the phrase "lobbying activities." The view taken at that time by the committee and by the Congress that the committee was au-

thorized to ask Rumely for the information he withheld is not legislative history defining the scope of a congressional measure. What was said in the debate on August 30, 1950, after the controversy had arisen regarding the scope of the resolution of August 12, 1949, had the usual infirmity of *post litem motam,* self-serving declarations.[1] In any event, Rumely's duty to answer must be judged as of the time of his refusal. The scope of the resolution defining that duty is therefore to be ascertained as of that time and cannot be enlarged by subsequent action of Congress.

Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication. Until then it is our duty to abstain from marking the boundaries of congressional power or delimiting the protection guaranteed by the First Amendment. Only by such self-restraint will we avoid the mischief which has followed occasional departures from the principles which we profess.

The judgment below should be

Affirmed.

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

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, concurring.

Respondent was convicted under an indictment charging willful refusal to produce records and give testimony before a Committee of the House of Representatives in violation of R. S. § 102, as amended, 52 Stat. 942, 2

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[1] The ambiguity of the terms of the resolution—that is, whether questions asked to which answers were refused were within those terms—is reflected by the close division by which the committee's view of its own authority prevailed. The vote was 183 to 175.

U. S. C. § 192.[1] The Committee, known as the Select Committee on Lobbying Activities, was created on August 12, 1949, by House Resolution 298 [2] which provides in part as follows:

> "The committee is authorized and directed to conduct a study and investigation of (1) all lobbying activities intended to influence, encourage, promote, or retard legislation; and (2) all activities of agencies of the Federal Government intended to influence, encourage, promote, or retard legislation."

Count one of the indictment charged that respondent willfully refused to produce records, duly subpoenaed, of the Committee for Constitutional Government (CCG), showing the name and address of each person from whom a total of $1,000 or more had been received by CCG from January 1, 1947, to May 1, 1950, for any purpose *including receipts from the sale of books and pamphlets.* Count six charged a similar offense as to a subpoena calling for the name and address of each person from whom CCG had received between those dates a total of $500 or more *for any purpose.* Count seven charged a willful refusal to give the name of a woman from Toledo who gave respondent $2,000 for distribution of The Road Ahead, a book written by John T. Flynn.

The background of the subpoena and of the questions asked respondent is contained in a report of the Select

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[1] This section provides in pertinent part: "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, . . . or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

[2] H. Res. 298, 81st Cong., 1st Sess.

Committee, H. R. Rep. No. 3024, 81st Cong., 2d Sess. It appears that CCG and respondent, its executive, registered under the Regulation of Lobbying Act (60 Stat. 839, 2 U. S. C. §§ 261 *et seq.*) on October 7, 1946. The reports under this registration (which was made under protest) showed that CCG had spent about $2,000,000 from October 1946 to August 1950. The basic function of CCG, according to the Select Committee, was the "distribution of printed material to influence legislation indirectly." The Regulation of Lobbying Act requires disclosure of contributions of $500 or more received or expended to influence, directly or indirectly, the passage or defeat of any legislation by the Congress. 2 U. S. C. §§ 264, 266. The Select Committee reported that after enactment of the Regulation of Lobbying Act CCG adopted a policy of accepting payments of over $490 only if the contributor specified that the funds be used for the distribution of one or more of its books or pamphlets. It then applied the term "sale" to the "contribution" and did not report them under the Regulation of Lobbying Act. H. R. Rep. No. 3024, *supra*, pp. 1, 2.

The Report of the Select Committee also shows that while respondent was willing to give the Committee the total income of CCG, he refused to reveal the identity of the purchasers of books and literature because "under the Bill of Rights, that is beyond the power of your committee to investigate." *Id.*, p. 8. The books involved were The Road Ahead by John T. Flynn, The Constitution of the United States by Thomas J. Norton, Compulsory Medical Care and the Welfare State, by Melchior Palyi, and Why the Taft-Hartley Law by Irving B. McCann. Most of the purchasers (about 90 percent) had the books shipped to themselves; the rest told CCG the individuals to send them to or the type of person (*e. g.*, "farm leaders") who should receive them. One person had CCG send Com-

pulsory Medical Care by Melchior Palyi to 15,550 libraries.[3]

The Select Committee stated in its report:

> "Our study of this organization indicates very clearly that its most important function is the distribution of books and pamphlets in order to influence legislation directly and indirectly. It attempts to influence legislation directly by sending copies of books, pamphlets, and other printed materials to Members of Congress. It attempts to influence legislation indirectly by distributing hundreds of thousands of copies of these printed materials to people throughout the United States.
>
> "Of particular significance is the fact that Edward A. Rumely and the Committee for Constitutional Government, Inc., in recent years have devised a scheme for raising enormous funds without filing true reports pursuant to the provisions of the Federal Regulation of Lobbying Act. This scheme has the color of legality but in fact is a method of circumventing the law. It utilizes the system outlined above whereby contributions to the Committee for Constitutional Government are designated as payments for the purchase of books, which are transmitted to others at the direction of the purchaser, with both the contributor of the money and the recipients of the books totally unaware of the subterfuge in most cases." H. R. Rep. No. 3024, *supra,* p. 2.

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[3] When the Taft-Hartley law was under discussion, CCG published a pamphlet "Labor Monopolies or Freedom" of which 250,000 copies were distributed. "All members of Congress got a copy. It went to publishers. People who could take opinion that way, and mint it into small coin to distribute to others." H. R. Rep. No. 3024, *supra,* p. 11. Respondent testified that Frank Gannett paid for that distribution.

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The Select Committee insisted that the information demanded of respondent was relevant to its investigation of "lobbying activities" within the meaning of the Resolution. It said:

> "Because of the refusal of the Committee for Constitutional Government, Inc., to produce pertinent financial records, this committee was unable to determine whether or not the Committee for Constitutional Government, Inc., is evading or violating the letter or the spirit of the Federal Regulation of Lobbying Act by the establishment of [a] class [of] contributions called 'Receipts from the sale of books and literature,' or whether they are complying with a law which requires amendments to strengthen it.
>
> "The policy of the Committee for Constitutional Government, Inc., of refusing to accept contributions of more than $490 unless earmarked for books, etc., may also involve: (1) Dividing large contributions into installments of $490 or less, and causing the records of the Committee for Constitutional Government to reflect receipt of each installment on a different date, and/or causing the records of the Committee for Constitutional Government to give credit, for the several installments, to various relatives and associates of the actual contributor. (2) Causing the Committee for Constitutional Government's records as to 'Contributions' to reflect less than the total amount of contributions actually received, by labeling some part of such funds as payments made for printed matter.
>
> "Because of the refusal of the Committee for Constitutional Government, Inc., to produce pertinent financial records, this committee was unable to determine whether or not the Federal Regulation of Lobbying Act requires amendment to prevent division of

large contributions into installments, or to prevent the crediting of contributions to others than the real contributor, or to prevent the use of other subterfuges." H. R. Rep. No. 3024, *supra*, pp. 2–3.

The Select Committee submitted its report to the House (96 Cong. Rec. 13873) and offered a Resolution that the Speaker certify respondent's refusal to answer to the United States Attorney for the District of Columbia. *Id.*, p. 13881. The House adopted the Resolution, *id.*, p. 13893, and on August 31, 1950, the Speaker certified respondent's refusal to testify.

Respondent was convicted and sentenced to a fine of $1,000 and to imprisonment for six months. The Court of Appeals reversed by a divided vote (90 U. S. App. D. C. 382, 197 F. 2d 166), the majority holding that "lobbying activities" as used in the Resolution creating the Select Committee did not authorize the inquiries made of respondent. In its view the term "lobbying activities" meant direct contact with Congress, not attempts to influence public opinion through the sale of books and documents.

I.

The Court holds that Resolution 298 which authorized the Select Committee to investigate "lobbying activities" did not extend to the inquiry on which this contempt proceeding is based. The difficulty with that position starts with Resolution 298. Its history makes plain that it was intended to probe the sources of support of lobbyists registered under the Regulation of Lobbying Act. Congressman Sabath, one of the sponsors of the Resolution, included CCG in a "partial list of some of the large lobby organizations and their reports of expenditures for the first quarter of 1949." See 95 Cong. Rec., p. 11386. The Regulation of Lobbying Act, under which respondent and CCG were registered, applies to all persons soliciting

or receiving money to be used principally "to influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States." 2 U. S. C. § 266 (b). Congressman Buchanan, who introduced the Resolution and who became Chairman of the Select Committee, said that the purpose of the Resolution was to investigate the operations of that Act.[4] Not a word in the Resolution, not a word in the debate preceding its adoption suggests that the inquiry was to be delimited, restricted, or confined to particular methods of collecting money to influence legislation directly or indirectly.

The Select Committee took the same broad view of its authority.[5] It concluded that "all substantial attempts to influence legislation for pay or for any consideration constitute lobbying." H. R. Rep. No. 3239, 81st Cong., 2d Sess., p. 1. It said that "pamphleteering" was a lobbying activity that overshadows "the traditional techniques of contact and persuasion." *Id.*, p. 3. And it cited for its conclusion the activities of CCG. *Id.* This conclusion was reached over vehement objections by three minority members of the Select Committee who insisted that an investigation of that breadth exceeded the authority of the Resolution and infringed on the constitutional rights of free speech and free press. *Id.*, Part 2, p. 2.

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[4] "Pressure groups interpret the Lobbying Act in different ways. Some file expenses. Others file full budget, but list expenditures they judge allocable to legislative activities. Still others file only expenditures directly concerned with lobbying.

"Some organizations argue they need not file unless principal purpose is influencing legislation. But Justice Department says, 'principal' includes all who have substantial legislative interests. Lobbies also differ on who filed expenditures—organizations or individuals." 95 Cong. Rec. 11389.

[5] An analysis of the scope of the investigation and the meaning of "lobbying" is contained in the General Interim Report of the Select Committee. H. R. Rep. No. 3138, 81st Cong., 2d Sess., pp. 5 *et seq.*

This was the posture of the case when the Select Committee referred respondent's refusal to testify to the House for contempt proceedings. Congressman Buchanan called the collection of funds through the sale of books and pamphlets an evasion of the Regulation of Lobbying Act. 96 Cong. Rec. 13882. He pressed on the House the importance of controlling that kind of activity in a regulation of lobbying. And he asked that the House ratify the conclusion of the Select Committee that respondent was in contempt. *Id.*, pp. 13886, 13887. That construction of the Resolution was challenged by Congressman Halleck, a member of the Select Committee who signed the minority report. He argued that the contempt citation sought had "nothing to do with the influencing of legislation in the ordinary ways of seeing Members of Congress or communicating with them. It has only to do with the formation of public opinion among the people of the country." *Id.*, p. 13888. Congressman Halleck's argument was twofold—that the inquiry was not within the purview of the Resolution and that, if it were, it would be unconstitutional. *Id.*, pp. 13887–13888. Others took up the debate on those issues. The vote was taken; and the Resolution passed. *Id.*, p. 13893.

Thus the House had squarely before it the meaning of its earlier Resolution. A narrower construction than the Select Committee adopted was urged upon it. Congressmen pleaded long and earnestly for the narrow construction and pointed out that, if the broader interpretation were taken, the inquiry would be trenching on the constitutional rights of citizens. I cannot say, in the face of that close consideration of the question by the House itself, that the Select Committee exceeded its authority. The House of Representatives made known its construction of the powers it had granted. If at the beginning there were any doubts as to the meaning of

Resolution 298, the House removed them. The Court is repudiating what the House emphatically affirmed, when it now says that the Select Committee lacked the authority to compel respondent to answer the questions propounded.

II.

Of necessity I come then to the constitutional questions. Respondent represents a segment of the American press. Some may like what his group publishes; others may disapprove. These tracts may be the essence of wisdom to some; to others their point of view and philosophy may be anathema. To some ears their words may be harsh and repulsive; to others they may carry the hope of the future. We have here a publisher who through books and pamphlets seeks to reach the minds and hearts of the American people. He is different in some respects from other publishers. But the differences are minor. Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas. The aim of the historic struggle for a free press was "to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government." *Grosjean* v. *American Press Co.,* 297 U. S. 233, 247. That is the tradition behind the First Amendment. Censorship or previous restraint is banned. *Near* v. *Minnesota,* 283 U. S. 697. Discriminatory taxation is outlawed. *Grosjean* v. *American Press Co., supra.* The privilege of pamphleteering, as well as the more orthodox types of publications, may neither be licensed (*Lovell* v. *Griffin,* 303 U. S. 444) nor taxed. *Murdock* v. *Pennsylvania,* 319 U. S. 105. Door to door distribution is privileged. *Martin* v. *Struthers,* 319 U. S. 141. These are illustrative of the preferred position granted speech and the press by the First Amendment. The command that "Congress

shall make no law . . . abridging the freedom of speech, or of the press" has behind it a long history. It expresses the confidence that the safety of society depends on the tolerance of government for hostile as well as friendly criticism, that in a community where men's minds are free, there must be room for the unorthodox as well as the orthodox views.

If the present inquiry were sanctioned, the press would be subjected to harassment that in practical effect might be as serious as censorship. A publisher, compelled to register with the Federal Government, would be subjected to vexatious inquiries. A requirement that a publisher disclose the identity of those who buy his books, pamphlets, or papers is indeed the beginning of surveillance of the press. True, no legal sanction is involved here. Congress has imposed no tax, established no board of censors, instituted no licensing system. But the potential restraint is equally severe. The finger of government leveled against the press is ominous. Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of everyone who reads. The purchase of a book or pamphlet today may result in a subpoena tomorrow. Fear of criticism goes with every person into the bookstall. The subtle, imponderable pressures of the orthodox lay hold. Some will fear to read what is unpopular, what the powers-that-be dislike. When the light of publicity may reach any student, any teacher, inquiry will be discouraged. The books and pamphlets that are critical of the administration, that preach an unpopular policy in domestic or foreign affairs, that are in disrepute in the orthodox school of thought will be suspect and subject to investigation. The press and its readers will pay a heavy price in harassment. But that will be minor in comparison with the menace of

the shadow which government will cast over literature that does not follow the dominant party line. If the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries, book stores, and homes of the land. Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press. Congress could not do this by law. The power of investigation is also limited.[6] Inquiry into personal and private affairs is precluded. See *Kilbourn* v. *Thompson,* 103 U. S. 168, 190; *McGrain* v. *Daugherty,* 273 U. S. 135, 173–174; *Sinclair* v. *United States,* 279 U. S. 263, 292. And so is any matter in respect to which no valid legislation could be had. *Kilbourn* v. *Thompson, supra,* pp. 194–195; *McGrain* v. *Daugherty, supra,* p. 171. Since Congress could not by law require of respondent what the House demanded, it may not take the first step in an inquiry ending in fine or imprisonment.

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[6] Cf. *Barsky* v. *United States,* 83 U. S. App. D. C. 127, 167 F. 2d 241, certiorari denied, 334 U. S. 843, rehearing denied, 339 U. S. 971, and *Marshall* v. *United States,* 85 U. S. App. D. C. 184, 176 F. 2d 473, certiorari denied, 339 U. S. 933, rehearing denied, 339 U. S. 959.

Syllabus.

UNEXCELLED CHEMICAL CORP. *v.* UNITED STATES.

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

No. 293. Argued January 9, 1953.—Decided March 9, 1953.

1. An action brought by the United States under the Walsh-Healey Act to recover liquidated damages from a government contractor who knowingly employed child labor in violation of the Act is subject to the two-year statute of limitations contained in § 6 of the Portal-to-Portal Act of 1947. Pp. 60–64.
2. Within the meaning of § 6 of the Portal-to-Portal Act, the cause of action in this case "accrued" when the minors were employed, not when it had been administratively determined that the contractor was liable to the United States for liquidated damages. Pp. 65–66.
3. That the power of the United States to safeguard the public interest may be prejudiced does not justify a construction of the statute at war with its clear and unambiguous words. P. 66.
4. For the purpose of § 6 of the Portal-to-Portal Act, an action is commenced on the date when the complaint in the lawsuit is filed, not when the administrative proceedings under the Walsh-Healey Act are initiated. P. 66.

196 F. 2d 264, reversed.

An action brought against petitioner by the United States under the Walsh-Healey Act was dismissed by the District Court as barred by limitations. 99 F. Supp. 155. The Court of Appeals reversed. 196 F. 2d 264. This Court granted certiorari. 344 U. S. 862. *Reversed,* p. 66.

George Morris Fay argued the cause for petitioner. With him on the brief were *John P. Burke* and *Edward L. Carey* for petitioner.

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

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is an action brought by the United States to recover liquidated damages under the Walsh-Healey Act. 49 Stat. 2036, as amended, 41 U. S. C. § 35 *et seq.* That Act provides that a contractor furnishing the Government materials, supplies, etc., in an amount exceeding $10,000 must meet specified labor standards. Thus, child labor and convict labor are prohibited, § 1 (d), under the sanction of $10 a day for each day any minor or convict is employed plus any underpayment of wages, payable as liquidated damages. § 2. These sums of money owing the United States may be withheld from amounts due on the contracts or may be recovered in suits brought in the name of the United States by the Attorney General. § 2. The Secretary of Labor administers the Act (see § 4; *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 507), making investigations and findings (§ 4) and issuing complaints and holding hearings. § 5.

On April 17, 1947, the Secretary of Labor issued a complaint charging petitioner with having knowingly employed child labor during the years 1942–1945 in violation of the Act. On February 25, 1949, a Hearing Examiner made a decision in which he found that petitioner had knowingly employed child labor in violation of the Act and was indebted to the United States in the sum of $15,600 as liquidated damages. Under the Rules of Practice of the Department of Labor that decision became final at the end of the twenty-day period within which petitioner had an opportunity to petition the Chief Hearing Examiner for review.

Nearly a year later—January 27, 1950—this action was brought. The answer tendered as a defense the two-year statute of limitations contained in § 6 of the Portal-to-Portal Act of 1947, 61 Stat. 84, 87, 29 U. S. C. (Supp. V) § 255. Both parties moved for summary judgment.

The District Court granted petitioner's motion, holding that the cause of action arose when petitioner violated the statute and that the two-year statute of limitations began to run from the date. 99 F. Supp. 155. The Court of Appeals reversed, 196 F. 2d 264, holding that actions brought by the United States to enforce the child labor provisions of the Walsh-Healey Act are not barred by the two-year limitation period of § 6 of the Portal-to-Portal Act. The case is here on certiorari because of a conflict between that decision and *Lance, Inc.* v. *United States,* 190 F. 2d 204, and *United States* v. *Lovknit Mfg. Co.,* 189 F. 2d 454, from the Courts of Appeals of the Fourth and Fifth Circuits respectively.

Section 6 of the Portal-to-Portal Act provides a two-year statute of limitations for any action commenced on or after the date of the Act "to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act." Section 6 also provides that "every such action shall be forever barred unless commenced within two years after the cause of action accrued."

The Portal-to-Portal Act was enacted to remedy what were deemed to be some harsh results of our decision in *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U. S. 680, which held that time necessarily spent by employees walking to work on the employer's premises and in preliminary activities after arriving at their places of work was working time within the scope of the Fair Labor Standards Act. 52 Stat. 1060, 63 Stat. 910, 29 U. S. C. § 201 *et seq.* The suits instituted by employees, the amounts claimed, and their threatened impact on business caused Congress to act. See H. R. Rep. No. 71, 80th Cong., 1st Sess.; S. Rep. No. 48, 80th Cong., 1st Sess. The consequences feared from *Anderson* v. *Mt.*

Clemens Pottery Co., supra, were summarized in § 1 (a) of the Portal-to-Portal Act.[1] None of these referred to the liquidated damage provisions of the Walsh-Healey Act. None in fact referred to its child labor provisions.

[1] "SECTION 1. (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur."

That is the start of the argument made by respondent and adopted by the Court of Appeals to the effect that Congress in the Portal-to-Portal Act had no intention to legislate with respect to the child labor provisions of the Walsh-Healey Act but had in mind only possible suits which employees might bring for unpaid minimum wages and overtime.

We do not stop to lay out the entire legislative history of the Portal-to-Portal Act. For the words Congress used in § 6 are too precise for extended argument. Three causes of action are covered—claims for "unpaid minimum wages," claims for "unpaid overtime compensation," and claims for "liquidated damages" under three Acts, including the Walsh-Healey Act. The only "liquidated damages" collectible under the Walsh-Healey Act are collectible by the United States. That marks a difference between that Act and the Fair Labor Standards Act. For, under the latter, employees may bring suits for double the amount of unpaid wages, plus costs and attorneys' fees. 29 U. S. C. § 216 (b). That is doubtless why § 1 (a) of the Portal-to-Portal Act, after summarizing the great burden on employers of the pending employee claims, states that "all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938 . . . may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey" Act and that "it is, therefore, in the national public interest . . . that this Act shall apply to the Walsh-Healey Act . . . ." That statement does no more than emphasize the difference of the problem of liquidated damages under the two Acts. The fact remains that the Portal-to-Portal Act treats claims for "liquidated damages" under the Walsh-Healey Act precisely the same as it does claims for "liquidated damages" under the Fair Labor Standards Act, even though the former are enforced exclusively by the Government, the latter by the employees. Perhaps that does not make

for an harmonious whole. Perhaps Congress misconceived the problems under the Walsh-Healey Act.[2] However that may be, the present cause of action seems to be precisely described by and expressly included in the words "liquidated damages under the . . . Walsh-Healey Act." If this cause of action is not covered by that language, apparently none other is.[3] It is not for us then to try to avoid the conclusion that Congress did not mean what it said. Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved. But when Congress, though perhaps mistakenly or inadvertently, has used language which plainly brings a subject matter into a statute, its word is final—save for questions of constitutional power which have not even been intimated here.

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[2] See for example H. R. Rep. No. 71, *supra*, p. 5: "The Walsh-Healey Act also concerns itself in its field with minimum wages and overtime compensation. The Bacon-Davis Act has provisions relating to minimum wages and other conditions of employment. These two acts are therefore affected by the Mount Clemens decision. The situation described herein as to the Fair Labor Standards Act applies to that existing under the Walsh-Healey Act and the Bacon-Davis Act. The same necessity exists there for remedial legislation."

[3] We do not reach the question whether employees have standing to sue under the Walsh-Healey Act. No provision, however, is made for their recovery of liquidated damages. The following provision relates to their rights: "All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America." § 2.

Respondent argues that even if this cause of action is subject to the two-year statute of limitations contained in § 6 of the Portal-to-Portal Act, the present suit was timely. The contention is that the cause of action accrues, and the two-year period begins to run, only after it is administratively determined by the Department of Labor that the contractor is liable to the United States for liquidated damages. If that contention is sound, the judgment below must stand, as this suit was begun less than two years after the conclusion of the administrative proceedings.

We take the opposing view. We conclude that "the cause of action accrued," within the meaning of § 6 of the Portal-to-Portal Act, when the minors were employed. That was the violation of the Walsh-Healey Act, giving rise to the liability for liquidated damages. It is true that the administration of the Act is entrusted in large measure to the Secretary of Labor. See *Endicott Johnson Corp.* v. *Perkins, supra.* He has broad investigatory and hearing powers. §§ 4, 5. He has authority to proscribe those who have violated the Act, barring them from government contracts for three years. § 3. Moneys withheld as liquidated damages are placed in a special fund and paid on order of the Secretary of Labor to the employees. § 2. These powers of the Secretary, important as they are in determining the relation between the courts and the administrative branch of government (*Endicott Johnson Corp.* v. *Perkins, supra*), are irrelevant to the narrow question of law that is presented. A cause of action is created when there is a breach of duty owed the plaintiff. It is that breach of duty, not its discovery, that normally is controlling. Section 2 of the Walsh-Healey Act provides that the Attorney General may bring suit to recover moneys owed the United

States.[4] The fact that due deference to the administrative process should make a court hold its hand until the administrative proceedings before the Secretary of Labor have been completed (*Far East Conference* v. *United States,* 342 U. S. 570; *Thompson* v. *Texas Mexican R. Co.,* 328 U. S. 134; *General American Tank Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422; *United States* v. *Morgan,* 307 U. S. 183) is a matter of judicial administration and of no relevancy here. The statutory liability accrued when the minors were employed. It was from that date that the period of limitations began to run.

This construction, it is said, will prejudice the power of the United States to safeguard the public interest. But if there is prejudice it is the result of the Portal-to-Portal Act which Congress, having made, can refashion.

There is the final argument that the action was, in any event, commenced when the administrative proceedings were initiated. Section 7 of the Portal-to-Portal Act provides that "an action is commenced for the purposes of section 6 . . . on the date when the complaint is filed." It is argued that the issuance of a formal complaint in the administrative proceedings (the customary procedure in Walsh-Healey cases) is the commencement of an action in the statutory sense. Congress, however, when it wrote § 7, was addressing itself to lawsuits in the conventional sense. Commencement of an action by the filing of a complaint has too familiar a history and the purpose of §§ 6 and 7 was too obvious for us to assume that Congress did not mean to use the words in their ordinary sense.

Reversed.

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[4] Section 2 provides in pertinent part: "Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof."

FOWLER *v.* RHODE ISLAND.

APPEAL FROM THE SUPREME COURT OF RHODE ISLAND.

No. 340. Argued February 3, 1953.—Decided March 9, 1953.

A municipal ordinance which is so construed and applied as to penalize a minister of Jehovah's Witnesses for preaching at a peaceful religious meeting in a public park, although other religious groups could conduct religious services there with impunity, violates the First and Fourteenth Amendments of the Federal Constitution. Pp. 67–70.

80 R. I. —, 91 A. 2d 27, reversed.

Appellant's conviction for violation of a municipal ordinance was affirmed by the State Supreme Court. 80 R. I. —, 91 A. 2d 27. On appeal to this Court under 28 U. S. C. § 1257 (2), *reversed and remanded*, p. 70.

Hayden C. Covington argued the cause and filed a brief for appellant.

Raymond J. Pettine, Assistant Attorney General of Rhode Island, argued the cause for appellee. With him on the brief was *William E. Powers*, Attorney General.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The City of Pawtucket, Rhode Island, has an ordinance which reads as follows:

"SEC. 11. No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park."

Jehovah's Witnesses, a religious sect, assembled in Slater Park of Pawtucket for a meeting which at the

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trial was conceded to be religious in character. About 400 people attended, 150 being Jehovah's Witnesses. Appellant is a minister of this sect, residing in Arlington, Mass. He was invited to Pawtucket as a visiting minister to give a talk before the Pawtucket congregation of Jehovah's Witnesses. Appellant accepted the invitation, attended the meeting in the park, and addressed it over two loud-speakers. It was a quiet, orderly meeting with no disturbances or breaches of the peace whatsoever.

Appellant's address was entitled "The Pathway to Peace." He discussed the futility of efforts being made to establish peace in the world. And then, according to his uncontradicted testimony, he "launched forth into the scriptural evidence to show where we were on the string of time; that we had reached the end of this wicked system of things." Appellant had been talking only a few minutes when he was arrested by the police and charged with violating the ordinance set forth above. He was tried and found guilty over objections that the ordinance as so construed and applied violated the First and the Fourteenth Amendments of the Constitution. He was fined $5. His conviction was affirmed by the Rhode Island Supreme Court. 80 R. I. —, 91 A. 2d 27. And see *Fowler* v. *State,* 79 R. I. 16, 83 A. 2d 67, an earlier opinion answering certified questions and holding the ordinance valid. The case is here on appeal. 28 U. S. C. § 1257 (2).

Davis v. *Massachusetts,* 167 U. S. 43, decided in 1897, sustained a conviction of a man for making a speech on the Boston Commons in violation of an ordinance that forbade the making of a public address there without a permit from the mayor. Much of the oral argument and most of the briefs have been devoted on the one hand to a defense of the *Davis* case and on the other hand to an attack on it. Analyses of subsequent decisions have been

submitted in an effort either to demonstrate that the *Davis* case is today good law, or to show that it has been so qualified as no longer to have any vitality. We are invited by appellant to overrule it; we are asked by respondent to reaffirm it.

We put to one side the problems presented by the *Davis* case and its offspring. For there is one aspect of the present case that undercuts all others and makes it necessary for us to reverse the judgment. As we have said, it was conceded at the trial that this meeting was a religious one. On oral argument before the Court the Assistant Attorney General further conceded that the ordinance, as construed and applied, did not prohibit church services in the park. Catholics could hold mass in Slater Park and Protestants could conduct their church services there without violating the ordinance. Church services normally entail not only singing, prayer, and other devotionals but preaching as well. Even so, those services would not be barred by the ordinance. That broad concession, made in oral argument, is fatal to Rhode Island's case. For it plainly shows that a religious service of Jehovah's Witnesses is treated differently than a religious service of other sects. That amounts to the state preferring some religious groups over this one. In *Niemotko* v. *Maryland,* 340 U. S. 268, 272–273, we had a case on all fours with this one. There a public park, open to all religious groups, was denied Jehovah's Witnesses because of the dislike which the local officials had of these people and their views. That was a discrimination which we held to be barred by the First and Fourteenth Amendments.

Appellant's sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some. But apart from narrow exceptions not relevant here (*Reynolds* v. *United States,* 98 U. S. 145; *Davis* v.

Beason, 133 U. S. 333) it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment. Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. Sermons are as much a part of a religious service as prayers. They cover a wide range and have as great a diversity as the Bible or other Holy Book from which they commonly take their texts. To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another. That would be precisely the effect here if we affirmed this conviction in the face of the concession made during oral argument. Baptist, Methodist, Presbyterian, or Episcopal ministers, Catholic priests, Moslem mullahs, Buddhist monks could all preach to their congregations in Pawtucket's parks with impunity. But the hand of the law would be laid on the shoulder of a minister of this unpopular group for performing the same function.

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

Reversed.

MR. JUSTICE FRANKFURTER concurs in the opinion of the Court, except insofar as it may derive support from the First Amendment. For him it is the Equal-Protection-of-the-Laws Clause of the Fourteenth Amendment that condemns the Pawtucket ordinance as applied in this case.

MR. JUSTICE JACKSON concurs in the result.

Syllabus.

NATIONAL LABOR RELATIONS BOARD *v.* ROCKAWAY NEWS SUPPLY CO., INC.

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

No. 318. Argued January 14, 1953.—Decided March 9, 1953.

1. Respondent discharged an employee for refusing to cross, in the performance of his duties, a lawful picket line maintained at premises other than his employer's by a union of which he was not a member. His own union had not forbidden him to cross the line, and his fellow employees did cross it. Their union had a contract with respondent which provided against strikes, lockouts, other cessation of work or interference therewith except as against a party failing to comply with a decision of an Adjustment Board for which it provided. On arbitration, this Adjustment Board decided in favor of respondent. The employee then filed with the National Labor Relations Board a charge that his discharge violated § 8 (a) of the National Labor Relations Act. There was no evidence that it resulted from antiunion bias or was intended to discourage his membership in the union. *Held:* In the circumstances of this case, respondent's discharge of this employee was not an unfair labor practice under § 8 (a) of the Act. Pp. 72–81.
2. In issuing a cease and desist order against respondent in this case, the National Labor Relations Board erred in ignoring respondent's contract with the union on the ground that it was utterly null and void under the Board's recent decision in another case, which was decided after the discharge of the employee here involved. Pp. 76–78.
3. The no-strike and arbitration provisions of respondent's contract with the employee's union are not unlawful, nor, in the circumstances of this case and in view of the savings and separability clauses of the contract, were they rendered illegal by appearing in the same contract with forbidden provisions for union security not expressly conditioned on a vote of employees under § 9 (e) of the Labor Management Relations Act. Pp. 78–81.

197 F. 2d 111, affirmed.

The National Labor Relations Board ordered respondent to cease and desist from labor practices which it found violative of § 8 (a) of the National Labor Relations Act, to reinstate a discharged employee, and to post appropriate notices. 95 N. L. R. B. 336. The Court of Appeals set aside the order. 197 F. 2d 111. This Court granted certiorari. 344 U. S. 863. *Affirmed,* p. 81.

Frederick U. Reel argued the cause for petitioner. With him on the brief were *Solicitor General Cummings, George J. Bott, David P. Findling* and *Mozart G. Ratner.*

Julius Kass argued the cause for respondent. With him on the brief was *Harry S. Bandler.*

Briefs of *amici curiae* urging reversal were filed by *J. Albert Woll, Herbert S. Thatcher* and *James A. Glenn* for the American Federation of Labor; *Arthur J. Goldberg* for the Congress of Industrial Organizations; and *Stephen C. Vladeck* and *Sylvan H. Elias* for the Newspaper and Mail Deliverers' Union of New York and Vicinity.

Mr. Justice Jackson delivered the opinion of the Court.

The Court of Appeals has set aside the National Labor Relations Board's order that Rockaway News Supply Co. reinstate one Charles Waugh as a chauffeur and routeman and make him whole for an unlawful discharge. The court below was divided,[1] and we granted certiorari.[2]

Waugh had been employed by respondent about seven years. His duty was to drive a truck along a regular route to pick up and deliver certain newspapers and other publications. One of his scheduled stops was at

[1] 197 F. 2d 111.

[2] 344 U. S. 863.

the Rockville Center plant of The Daily Review Corporation, publisher of the Nassau Daily Review, consignments of which he was to pick up and deliver to various retail dealers. Waugh, like all others similarly employed by respondent, was a member of the Newspaper and Mail Deliverers' Union of New York and Vicinity. For some years respondent had recognized this union as the exclusive bargaining representative of its employees, without the formality of an election. It had an employment contract bargained with this union which contained a union-security clause not conditioned upon a vote of the employees under § 9 (e) of the Labor Management Relations Act, an omission which raised questions as to the validity of the clause and of the contract as a whole.

The Nassau County Typographical Union No. 915, A. F. L., of which Waugh was not a member, established a picket line about the premises of The Daily Review Corporation which, on March 2, 1950, prevented a pickup of its newspaper except by passing through the picket line. Waugh assured himself that the line was ordered by the Typographical Union in connection with a labor dispute. He then informed his foreman that, because he was himself a union man, he would not cross the picket line of another union. He was advised not to take that attitude and was told "It might mean your job." Waugh insisted that he would not do harm to another union and asked to have the papers somehow delivered to him outside of the picket line. This was done for two days, but the following day he was ordered to cross the line and get the papers—"Otherwise you are fired; if you refuse, you are fired." Waugh left the premises but returned daily for three weeks seeking reemployment which was refused. Waugh had been willing to perform all duties provided he was not required personally to cross the picket line.

The other drivers were also members of the same union as Waugh, but only he refused to cross the line. Waugh's union had a collectively bargained contract with respondent which provided against strikes, lockouts, other cessation of work or interference therewith except as against a party failing to comply with a decision, award, or order of the Adjustment Board for which it provided. The union initiated an arbitration thereunder and the Adjustment Board, on March 31, 1950, made an award in favor of respondent.[3] Waugh then filed the charge of unfair labor practice and the General Counsel initiated these proceedings.

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[3] "The undersigned, constituting the members of the Board of Adjustment, designated in accordance with the agreement between the parties, having heard the proof and allegations, award as follows: Under Section 4 of the agreement between the parties, it is the obligation of an employee to comply with orders of the foreman, and if such orders are objectionable to him personally, to have the issues discussed and brought to arbitration in accordance with the procedure set forth therein. He may not, in the first instance, refuse to obey the order merely because it is personally distasteful to him, unless it is the type of order which might subject him to physical danger or be contrary to public policy.

"Of course, the order which the employee here refused to obey cannot be held to have been against public policy (and concededly it does not physically endanger him) particularly since the union had knowingly refrained from taking any position and the act required was willingly performed without objection by six other employees who were members of the union. In addition, the contract between the parties does not specifically permit the refusal by the employee to comply with such an order although other contracts in the industry do contain such a provision.

"Consequently it must be ruled that the act of Charles Waugh in refusing to obey the order of the foreman on March 7, 1950, constituted just cause for discharge. Signed, I. Robert Feinberg, Impartial Chairman; John Somyak, John Fylstra."

Thereunder is stated "The members of the Adjustment Board designated by the Union dissent from this award, dated, New York, New York, March 31, 1950."

The parties here see the case as requiring decision of sweeping abstract principles as to the respective rights of employer and employee regarding picket lines. But this decision does not, and should not be read to, declare any such principles. The actual controversy here is within a very narrow scope, so narrow that the Board in its opinion said:

> "Although Waugh's refusal to cross the picket line was a protected activity, the Respondent, as a normal incident of its right to maintain its operations, could have required Waugh to elect whether to perform all his duties or, as a striker, to vacate his job and make way for his replacement by the Respondent. Instead the Respondent discharged Waugh."

The Court of Appeals said, "We cannot follow the Board's reasoning." Nor can we. The distinction between discharge and replacement in this context seems to us as unrealistic and unfounded in law as the Court of Appeals found it. This application of the distinction is not sanctioned by *Labor Board* v. *Mackay Co.*, 304 U. S. 333, 347. It is not based on any difference in effect upon the employee. And there is no finding that he was not replaced either by a new employee or by transfer of duties to some nonobjecting employee, as would appear necessary if the respondent were to maintain the operation. Substantive rights and duties in the field of labor-management do not depend on verbal ritual reminiscent of medieval real property law.

In this case there is no finding, evidence or even charge that the dismissal of Waugh resulted from antiunion bias, or was intended to or did discriminate against him to discourage membership in a labor organization. Waugh's refusal to cross the line was not in obedience to any action by his union. Even Waugh was willing to have the picket line breached, so long as it was done by

others. No other member of his own union joined him. He held his position under his union's collectively bargained contract, the adjustment processes of which went against him. It is ironical that respondent has been denied the result of the arbitration by the Board solely because the respondent, by the contract, conceded too much to union security, allowing the union what the Taft-Hartley Act does not permit. If respondent pursued any wrong course in dealing with Waugh, it evidently was not due to hostility to labor organizations.

The Board, apparently conceding that, if valid, the contract between the union and respondent would establish the latter's defense against the charge of unfair labor practice, held the contract utterly null and void and denied it any effect whatever in this case. Also, in a proceeding decided June 5, 1951, the Board declared the contract to be illegal in its entirety and set it aside. In the present case it followed that decision and said, "It would not effectuate the policies of the Act to give effect in this case to a contract which the Board set aside in its entirety in a prior proceeding. Accordingly, the no-strike clause of that contract can have no impact upon Waugh's refusal to cross the picket line."

The Board's reference to a prior case refers to one decided about a month and a half before the present case. But it was not prior to the conduct out of which this case arises. The Board did not choose to rely on the doctrine of *res judicata* in the present proceedings, a doctrine whose applicability here is not free from doubt.[4] The ruling that the contract is without effect was reexamined in these proceedings and readopted as an essential part of the decision in this case.

There are two obstacles in the way of the Board's complete disregard of this contract. The first is that, even

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[4] See *Wallace Corp.* v. *Labor Board,* 323 U. S. 248.

if inclusion of a forbidden provision is enough to justify the Board in setting it aside as to the future, it does not follow that it can be wholly ignored in judging events that occurred before it was set aside. It is one thing for the Board to say that the parties should not go on under such a contract; it is another to say that no effect whatever may be given to a contract negotiated in good faith by the union and the employer which both believed to be valid and operative, to which both were conforming their conduct, and which no authority had yet held void.

Even where a statute is unconstitutional and hence declared void as of the beginning, this Court has held that its existence before it has been so declared is not to be ignored.

We think the principle is applicable here, which Mr. Chief Justice Hughes stated for a unanimous Court:

> "The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. . . . It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon ac-

cordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. . . ." *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, 374.

The second hurdle in the way of the Board's position is that it ignores savings and separability clauses of the contract itself, which we set forth in the margin.[5] We have never known that they are *per se* illegal. We do not, of course, question that there may be cases where a forbidden provision is so basic to the whole scheme of a contract and so interwoven with all its terms that it must stand or fall as an entirety. But the Board here simply held that the provision concerning union security invalidates the whole contract, as the examiner said, "because it does not *expressly* provide that the operation of the union-security provision was to be conditioned upon compliance with the provisions of Section 9 (e) of the Act." [6] (Italics supplied.)

The features to which the Board rightly objects not only may be severed but are separated in the contract. The whole contract shows respect for the law and not defiance of it. The parties, who could not foresee how

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[5] "To the best knowledge and belief of the parties this contract now contains no provision which is contrary to federal or state law or regulation. Should, however, any provision of this agreement, at any time during its life, be in conflict with federal or state law or regulation then such provision shall continue in effect only to the extent permitted. In event of any provision of this agreement thus being held inoperative, the remaining provisions of the agreement shall, nevertheless, remain in full force and effect."

[6] 29 U. S. C. § 159 (e)(1): "Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158 (a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer."

some of the provisions of the statute would be interpreted, proposed to go as far toward union security as they are allowed to go, and this is their right; and they proposed to go no farther, and that is their whole duty. Moreover, there is no showing that these illegal provisions in any way affected Waugh's employment, his discharge, or any conduct of any party that is relevant to this decision.

The total obliteration of this contract is not in obedience to any command of the statute. It is contrary to common-law contract doctrine. It rests upon no decision of this or any other controlling judicial authority. We see no sound public policy served by it. Realistically, if the formal contract be stricken, the enterprise must go on—labor continues to do its work and is worthy of some hire. The relationship must be governed by some contractual terms. There is no reason apparent why terms should be implied by some outside authority to take the place of legal terms collectively bargained. The employment contract should not be taken out of the hands of the parties themselves merely because they have misunderstood the legal limits of their bargain, where the excess may be severed and separately condemned as it can here.

We therefore consider this controversy to require no determination of rights or duties respecting picket lines broader than this contract itself prescribes. It is provided in this agreement that "No strikes, lockouts or other cessation of work or interference therewith shall be ordered or sanctioned by any party hereto during the term hereof except as against a party failing to comply with a decision, award, or order of the Adjustment Board." If this be considered ambiguous in meaning, respondent offered, as evidence of its intent and meaning, to prove that during the negotiations one of the demands made by the union was a clause in the contract

with reference to work stoppages which would have said "No man shall be required to cross a picket line," that this clause was rejected by respondent and the union acquiesced in the rejection and consented to the no-strike clause as above recited. The trial examiner said: "All right. Let the offer of proof appear in the record." From this it is not clear whether it was accepted or rejected. But the arbitrators' interpretation of the contract was in harmony with the offer. They said, "In addition, the contract between the parties does not specifically permit the refusal by the employee to comply with such an order although other contracts in the industry do contain such a provision."

In the section by which the Labor Management Relations Act prescribes certain practices of labor organizations which shall be deemed unfair, there is a proviso that nothing therein "shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act . . . ."[7] This clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree. And nothing in the Act prevents their agreeing upon contrary provisions if they consider them appropriate to the particular kind of business involved. An employee's breach of such an agreement may be made grounds for his discharge without violating § 7 of the Act. *Labor Board* v. *Sands Co.*, 306 U. S. 332, 334. In some instances he may not, even with an employer's assent, supplement the collective agreement with individual preferences over others em-

[7] 61 Stat. 142, 29 U. S. C. § 158 (b)(4)(D).

ployed under it. *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332.

We hold that the no-strike and arbitration provisions of the contract are not prohibited, nor were they rendered illegal by appearing in the same contract with forbidden provisions in view of the circumstances we have recited. Under the circumstances of this case, it was not an unfair labor practice to discharge Waugh, and the judgment below is

Affirmed.

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

Section 7 of the Taft-Hartley Act recognizes a right of employees to work together in "concerted activities" for their mutual aid and protection. One way some union men help others is to refrain from crossing picket lines. Habitual respect for union picket lines has long been the practice of union men. This practice has been a prized asset of the unions. The Taft-Hartley Act was designed to regulate and restrict the type of concerted activities in which employees could engage. But even that Act did not attempt to deprive unions of the advantage of a policy that required union men to respect picket lines. In § 8 (b)(4)(D) of the Act, Congress specifically declared that none of its union-restrictive provisions should be construed to make it unlawful for a man to refuse to cross a picket line thrown up to support a lawful strike. Consequently I agree with the Labor Board that it was an unfair labor practice for this employer to discharge a union employee who refused to cross a picket line. In holding to the contrary I think the Court takes away rights of employees that the Taft-Hartley Act left standing.

I say this despite the fact that the Court's opinion is based upon its interpretation of a collective bargaining

agreement. In the first place, I would accept the Labor Board's holding that the contract did not conform to the requirements of the Taft-Hartley law. It seems to me an unwise precedent for the Court to substitute its judgment about this contract for that of the Board. In the second place, I can find no language in that contract which would justify the discharge of the employee here because he insisted upon respecting a union picket line—a right reserved to each employee by reason of § 8 (b) (4)(D) of the Act. Believing that the Court departs from the Act's policy in holding as it does, I would affirm the Board's order.

Syllabus.

ORLOFF *v.* WILLOUGHBY, COMMANDANT.

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

No. 444. Argued January 13, 1953.—Decided March 9, 1953.

Petitioner, a physician educated at government expense and beyond the usual draft age, was inducted into the Army under the Doctors' Draft Law, 50 U. S. C. App. § 454 (i), which authorizes special conscription of certain "medical and allied specialist categories." Because of his refusal, on grounds of possible self-incrimination, to state in connection with his application for a commission whether he was or had been a member of the Communist Party, he was not commissioned or given the usual duties of an Army doctor, but was assigned duties as a medical laboratory technician. He applied to a federal court for a writ of habeas corpus and for discharge from the Army, on the ground that he had not been assigned the specialized duties or given the commissioned rank to which he claims to be entitled by the circumstances of his induction. *Held:*

1. Although not bound by it, this Court agrees with the Government's concession that the Act should be interpreted to obligate the Army to classify specially inducted professional personnel for duty within the categories which rendered them liable for induction. Pp. 87–88.

2. It cannot be found that petitioner is entitled to a commission as a matter of law. Pp. 88–92.

(a) Neither the Universal Military Training and Service Act nor the Army Reorganization Act requires that all personnel inducted under the Doctors' Draft Act and assigned to the Medical Corps be either commissioned or discharged. Pp. 88–89.

(b) The commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief, over which the courts have no control. P. 90.

(c) The President is not required to appoint to a position of honor and trust any person who refuses, on grounds of self-incrimination, to say whether he is or has been a member of the Communist Party. Pp. 89–92.

3. One lawfully inducted into the Army may not, through habeas corpus proceedings, obtain a judicial review of his assignments to duty. Pp. 92–94.

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4. Petitioner is not being held in the Army unlawfully, and the courts may not require his discharge therefrom in a habeas corpus proceeding. Pp. 94–95.

195 F. 2d 209, affirmed.

The District Court dismissed petitioner's application for a writ of habeas corpus. 104 F. Supp. 14. The Court of Appeals affirmed. 195 F. 2d 209. This Court granted certiorari. 344 U. S. 873. *Affirmed,* p. 95.

David Rein and *Stanley Faulkner* argued the cause and filed a brief for petitioner.

Robert S. Erdahl argued the cause for respondent. With him on the brief were *Solicitor General Cummings, Assistant Attorney General Murray, Beatrice Rosenberg* and *Murry Lee Randall.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

Petitioner presents a novel case. Admitting that he was lawfully inducted into the Army, he asks the courts, by habeas corpus, to discharge him because he has not been assigned to the specialized duties nor given the commissioned rank to which he claims to be entitled by the circumstances of his induction. The petitioner had passed the ages liable to induction except under the Universal Military Training and Service Act, 50 U. S. C. App. § 454 (i)(1)(A), which authorizes conscription of certain "medical and allied specialist categories." The statute sets up a priority system for calling such specialists, the first liable being those who received professional training at government expense during World War II and who have served less than ninety days since completion of such training. As a doctor who had received training under this program, Orloff was subject to this provision and was called up pursuant to it.

His petition alleged that he was illegally restrained of his liberty because he was liable for service only as a doctor but, after induction, had been given neither rank nor duties appropriate to that profession and so was entitled to be discharged. He alleged that under Army regulations and practice one can serve as a doctor only as a commissioned officer and that he applied for but had not received such an appointment. He also alleged that he had requested assignment of physician's duties, with or without a commission, but that this also had been denied him.

The return to the order to show cause asserted that Orloff was lawfully inducted and therefore the court is without jurisdiction of the subject matter. An affidavit by Colonel Willoughby set forth that the petitioner, after sixteen weeks of Army medical service training following his induction, was awarded a "potential military occupation specialty" as a medical laboratory technician. Appointment as an officer in the Army Medical Corps Reserve, he said, was still under consideration. It also asserted that under his induction he was liable for training and service under military jurisdiction and was subject to military orders and service the same as any other inducted person.

Answering the petition for habeas corpus, the respondent raised as affirmative defenses that petitioner was subject to military command and that both the subject matter and the person of the petitioner were under the exclusive jurisdiction of the President of the United States as Commander in Chief of the Armed Forces, and that petitioner had failed to exhaust his administrative remedies. Respondent further stated that his application for a commission still was being processed by military authorities "because of particular statements made by petitioner in his application concerning prior membership or association with certain organizations desig-

nated by the Attorney General of the United States on October 30, 1950 pursuant to Executive Order 9835," that the court was without jurisdiction, and that habeas corpus does not lie for the purpose of the case.

By way of traverse, Orloff set forth in detail his qualifications as a physician and psychiatrist and alleged that the medical laboratory technician status was not a doctor's work and required no more than a four-month training of a layman in the medical field service school. This, he claims, is not within the medical specialist category for which he was conscripted. He asserted that he was willing to serve as a medical specialist, that is, as a medical doctor, and had offered his services as a doctor in the grade or rank of private but had been advised that he could serve as a doctor only upon being commissioned.

Upon such pleadings the cause proceeded to hearing. Petitioner's counsel told the trial court that no question was involved as to the Army's granting or not granting a commission and that petitioner was not asking anybody to give anybody else a commission, but he claimed to be entitled to discharge until the Army was prepared to use his services as a doctor. It was admitted that petitioner had made no request of respondent for a discharge. Evidence was taken indicating that the specialty to which Orloff had been assigned was not that usual for a physician. The trial judge concluded that the law does not require a person drafted under the "medical and allied specialist categories" to be assigned doctor's functions and those only, and interpreted the law that a doctor inducted under the statute was in the same status, so far as his obedience to orders is concerned, as if he had been inducted under other conscription statutes and could not insist on being used in the medical category. He therefore denied the writ.

On appeal, as the Court of Appeals pointed out, the case was argued and briefed by the Government on the broad theory that under the statute doctors could be drafted and used for any purpose the Army saw fit, that duty assignment for such inductees was a matter of military discretion. The court agreed and on that ground affirmed.[1]

We granted certiorari,[2] and in this Court the parties changed positions as nimbly as if dancing a quadrille. The Government here admits that the petitioner is entitled to duties generally within a doctor's field and says that he now has been assigned to such. The petitioner denies that he yet has duties that fully satisfy that requirement. Notwithstanding his position before the trial court, he further says that anyway he must be commissioned and wants this Court to order him commissioned or discharged.

In its present posture, questions presented are, first, whether to accept the Government's concession that one inducted as a medical specialist must be used as such; second, whether petitioner, as matter of law, is entitled to a commission; third, whether the federal courts, by habeas corpus, have power to discharge a lawfully mustered member of the Armed Forces because of alleged discriminatory or illegal treatment in assignment of duties.

1. This Court, of course, is not bound to accept the Government's concession that the courts below erred on a question of law. They accepted the Government's argument as then made and, if they were right in doing so, we should affirm. We think, however, that the Government is well advised in confessing error and that candid reversal of its position is commendable. We

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[1] 195 F. 2d 209.

[2] 344 U. S. 873.

understand that the Army accepts and is governing itself by the Government's present interpretation of its duty toward those conscripted because of professional skills. To separate particular professional groups from the generality of the citizenship and render them liable to military service only because of their expert callings and, after induction, to divert them from the class of work for which they were conscripted would raise questions not only of bad faith but of unlawful discrimination. We agree that the statute should be interpreted to obligate the Army to classify specially inducted professional personnel for duty within the categories which rendered them liable to induction. It is not conceded, however, that particular duty orders within the general field are subject to judicial review by habeas corpus.

2. We cannot comply with the appellant's insistence that we order him to be commissioned or discharged. We assume that he is correct in stating that it has been a uniform practice to commission Army doctors; indeed, until 1950 Congress provided that the Army Medical Corps should consist of ". . . commissioned officers below the grade of brigadier general." 10 U. S. C. A. § 91. But in 1950 Congress repealed § 91 and substituted in its place the following language: "[The Medical Corps] . . . shall consist of Regular Army officers appointed and commissioned therein and such other members of the Army as may be assigned thereto by the Secretary of the Army . . . ." 10 U. S. C. § 81–1. 10 U. S. C. § 94 provides that medical officers of the Army may be assigned by the Secretary of the Army to such duties as the interests of the service demand. Thus, neither in the language of the Universal Military Training and Service Act nor of the Army Reorganization Act referred to above is there any implication that all personnel inducted under the Doctor's Draft Act and as-

signed to the Medical Corps be either commissioned or discharged.

Petitioner, by his concessions on the hearing to the effect that the question of a commission was not involved, may have avoided a full litigation of the facts which lie back of his noncommissioned status, but enough appears to make plain that there was cause for refusing him a commission.

It appears that just before petitioner was inducted he applied for and was granted a commission as captain in the Medical Corps, United States Air Force Reserve. When he refused to execute the loyalty certificate prescribed for commissioned officers, his appointment was revoked and he was discharged. This petitioner refused information as to his membership in or association with organizations designated by the Attorney General as subversive or which advocated overthrow of the Government by force and violence. He gave as his reason that "as a matter of conscience, I object to filling out the loyalty certificate because it involves an inquisition into my personal beliefs and views. Moreover, the inquiry into organizational affiliations employs the principle of guilt by association, to which I am vigorously opposed. Further, it is my understanding that all the organizations were listed by the Attorney General without notice or hearing which has caused the Supreme Court to invalidate it."

After he was inducted, petitioner applied for another commission and filed the required loyalty certificate but again refused to supply the requested information. He stated, "I have attended public meetings of the Civil Rights Congress and the National Council of American-Soviet Friendship. In 1943, I co-authored a radio play for the latter organization. Over a period of 7½ months I attended classes at the Jefferson School of Social Sciences (ending in the Spring of 1950). With respect to any other organizations contained on the annexed list I am

compelled to claim my Federal Constitutional Privilege. However, I have never considered myself an organizational member of any of the aforesaid." As to the question "Are you now or have you ever been a member of the Communist Party, U. S. A. or any Communist Organization?" he said, "Federal constitutional privilege is claimed."

The petitioner appears to be under the misconception that a commission is not only a matter of right, but is to be had upon his own terms.

The President commissions all Army officers. 5 U. S. C. § 11. We have held that, except one hold his appointment by virtue of a commission from the President, he is not an officer of the Army. *United States* v. *Mouat*, 124 U. S. 303. Congress has authorized the President alone to appoint Army officers in grades up to and including that of colonel, above which the advice and consent of the Senate is required. 55 Stat. 728, as amended, 57 Stat. 380.

It is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief. Whatever control courts have exerted over tenure or compensation under an appointment, they have never assumed by any process to control the appointing power either in civilian or military positions.

Petitioner, like every conscript, was inducted as a private. To obtain a change of that status requires appointment by or under authority of the President. It is true that the appointment he seeks is one that long and consistent practice seems never to have denied to one serving as an Army doctor; one, too, that Congress in authorizing the draft of doctors probably contemplated normally would be forthcoming. But, if he is the first to be denied a commission, it may also be that he is the first doctor to haggle about questions con-

cerning his loyalty. It does not appear to us that it is the President who breaks faith with Congress and the doctors of America. We are not easily convinced that the whole military establishment is out of step except Orloff.

The President's commission to Army officers recites that "reposing special trust and confidence in the patriotism, valor, fidelity and abilities" of the appointee he is named to the specified rank during the pleasure of the President. Could this Court, whatever power it might have in the matter, rationally hold that the President must, or even ought to, issue the certificate to one who will not answer whether he is a member of the Communist Party?

It is argued that Orloff is being punished for having claimed a privilege which the Constitution guarantees. No one, at least no one on this Court which has repeatedly sustained assertion by Communists of the privilege against self-incrimination, questions or doubts Orloff's right to withhold facts about himself on this ground. No one believes he can be punished for doing so. But the question is whether he can at the same time take the position that to tell the truth about himself might incriminate him and that even so the President must appoint him to a post of honor and trust. We have no hesitation in answering that question "No."

It is not our view of Orloff's fitness that governs. Regardless of what we individually may think of the usefulness of loyalty oaths or the validity of the Attorney General's list of subversive organizations, we cannot doubt that the President of the United States, before certifying his confidence in an officer and appointing him to a commissioned rank, has the right to learn whatever facts the President thinks may affect his fitness. Perhaps we would not ask some of these questions, or we might ask others, but if there had never been an

Attorney General's list the President would be within his rights in asking any questions he saw fit about the habits, associations and attitudes of the applicant for his trust and honor. Whether Orloff deserves appointment is not for judges to say and it would be idle, or worse, to remand this case to the lower courts on any question concerning his claim to a commission.

3. This leaves the question as to whether one lawfully inducted may have habeas corpus to obtain a judicial review of his assignments to duty. The Government has conceded that it was the legal duty of the Army to assign Orloff to duties falling within "medical and allied specialist categories." However, within the area covered by this concession there are many varieties of particular duties. The classification to which petitioner belonged for inductive purposes was defined by statute to be "medical and allied specialist categories." This class includes not merely doctors and psychiatrists but other medical technicians, and, while the duties must be within this category, a large area of discretion as to particular duties must be left to commanding officers. The petitioner obtained basic medical education at the expense of the Government. In private life he has pursued a specialty. But the very essence of compulsory service is the subordination of the desires and interests of the individual to the needs of the service. A conscripted doctor may have pursued the specialty of obstetrics, but in the Army, which might have limited use for his specialty, could he refuse other service within the general medical category?

Each doctor in the Army cannot be entitled to choose his own duties, and the Government concession does not extend to an admission that duties cannot be prescribed by the military authorities or that they are subject to review and determination by the judiciary.

The nature of this issue is pointed up by the controversy that survives the changes the parties have made in their positions in this Court. It is admitted that Orloff is now assigned to medical duties in the treatment of patients within the psychiatric field. He is not allowed functions that pertain to commissioned officers, but, apart from that, he is restricted from administering certain drugs and treatments said to induce or facilitate a state of hypnotism. Orloff claims this as his professional prerogative, because in private practice he would be free to administer such treatments. The Government says, however, that because of doubts about his loyalty he is not allowed to administer such drugs since his patients may be officers in possession of important military information which he could draw out from them while they were under the influence of the drugs. Of course, if it were the function or duty of the judiciary to resolve such a controversy, this case should be returned to the District Court to take evidence as to all issues involved.

However, we are convinced that it is not within the power of this Court by habeas corpus to determine whether specific assignments to duty fall within the basic classification of petitioner. It is surely not necessary that one physician be permitted to cover the whole field within the medical classification, nor would we expect that a physician is exempt from occasional or incidental duties not strictly medical. In these there must be a wide latitude allowed to those in command.

We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can

be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.

But the proceeding being in habeas corpus, petitioner urges that, if we may not order him commissioned or his duties redefined, we may hold that in default of granting his requests he may be discharged from the Army. Nothing appears to convince us that he is held in the Army unlawfully, and, that being the case, we cannot go into the discriminatory character of his orders. Discrimination is unavoidable in the Army. Some must be assigned to dangerous missions; others find soft spots. Courts are presumably under as great a duty to entertain the complaints of any of the thousands of soldiers as we are to entertain those of Orloff. The effect of entertaining a proceeding for judicial discharge from the Army is shown from this case. Orloff was ordered sent to the Far East Command, where the United States is now engaged in combat. By reason of these proceedings, he has remained in the United States and successfully avoided foreign service until his period of induction is almost past. Presumably, some doctor willing to tell whether he was a member of the Communist Party has been required to go to the Far East in his place. It is not difficult to see that the exercise of such jurisdic-

tion as is here urged would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities.

We see nothing to be accomplished by returning this case for further litigation. The judgment is

Affirmed.

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

I agree with MR. JUSTICE FRANKFURTER'S dissent. The United States confesses error in this case and then tells us that since the District Court rendered its erroneous judgment Dr. Orloff has been assigned to some duties that fall within the range of medical activities. This is denied by Dr. Orloff. Apparently admitting that Orloff could not be retained in the Army to do something other than the performance of medical services, the Court nevertheless refuses to send the case back to have this factual controversy determined by the District Court. This Court is usually exceedingly reluctant to resolve disputed facts. I cannot understand why it feels called on to affirm this admittedly erroneous judgment by deciding disputed facts on mere unsworn statements of parties here. And there are other reasons why I think the case should be reversed.

I believe the United States was right when it stipulated in the District Court that it could not lawfully utilize Orloff's services as a physician without giving him a commission. It is true the United States has here backed away from this stipulation. It now claims a right to utilize Orloff as a doctor without granting him a commission and this Court agrees. I do not agree.

Since 1847, one hundred and six years ago, Army doctors have served only when they have been commissioned

to do so as officers.* This long-standing Army practice is in harmony with the law as it exists today. 10 U. S. C. (Supp. IV) § 81–1 and § 91a. The congressional hearings and discussions of the special draft act under which Dr. Orloff was inducted indicate that the law probably never would have been passed but for repeated assurances given the Congress that all doctors drafted and held for service under it would be granted commissions. This, because the law was admitted by its sponsors to be "discriminatory legislation," singling out the medical profession and its allies, and providing for their induction up to 50 years of age, although other people of this age group could not be called into Army service. This discrimination was justified to Congress only on the ground that doctors made to serve under that law would be given at least a first lieutenant's grade in accordance with the century-old practice of the Army. 96 Cong. Rec. 13861. I think the Government breaks faith with the Congress and with the doctors of America in drafting a doctor without granting him a commission.

It is difficult to think of any sound reason why the Army claims power to use this doctor while denying him the privileges of all other Army doctors. He will be the only doctor denied a commission out of 3,989 doctors drafted under the special law up to last October. And if there was any genuine question about his loyalty to our country, it seems unthinkable that any responsible person in the armed forces would be willing to let him have any part in the treatment of sick and wounded soldiers. If therefore Dr. Orloff is being used as a doctor, the Army must believe that he is dependable despite his failure to answer the question about his past asso-

*The Government admits that such has been the practice since the Act of February 11, 1847, 9 Stat. 123, 124–125.

ciations. If he is being used, the law entitles him to a commission.

This record indicates to me, however, that Dr. Orloff is being held in the Army not to be used as a medical practitioner, but to be treated as a kind of pariah in order to punish him for having claimed a privilege which the Constitution guarantees. Doubtless there are some who would make it a crime for a person to claim this privilege. If an attempt is to be made to punish draftees for asserting constitutional claims, as I can hardly believe it would, it should be done only by an act of Congress. Should such be attempted I would hope that this Court would promptly declare an act to that effect unconstitutional. And if some kind of punishment is to be imposed for asserting constitutional rights, it should not be imposed without a trial according to due process of law.

I think it only fair to state that I see nothing in this record from which the slightest inference should be drawn that Dr. Orloff has taken the course he did in order to avoid service in the Army here or abroad.

This whole episode appears to me to be one of a too-rapidly increasing number to which Americans in a calmer future are not likely to point with much pride.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

Of course the commissioning of officers in the Army lies entirely within the President's discretion and is not subject to judicial control. Although there can be no doubt about that, it does not follow that Congress is precluded from drafting a special group into the Army on condition that they will be commissioned. Receiving a commission is clearly not a matter of right; but granting it may be a condition for retaining a person in the Army. The commissioning of officers in the

Army is, no doubt, a matter of discretion within the province of the President as Commander in Chief. But whether we can or cannot hold the President's lawful exercise of his discretion to be a ground for discharge of one he fails to commission depends on the conditions under which Congress authorized him to be drafted.

And so for me the central question in this case is whether one who is drafted under the doctors draft statute, 64 Stat. 826, 50 U. S. C. App. (Supp. IV) § 454 (i)(1), but who does not, in due course, obtain a commission, of whatever rank, must, as a matter of statutory construction, be discharged from the Army because Congress imposed the condition of such a commission on drafting doctors above the general draft age and the condition has not been fulfilled. That view would be strongly supported by the admission of the Government in the trial court that the "regulations and practice of the United States Army provide that an individual can serve as a doctor of medicine in the United States Army only if he holds a rank as a commissioned officer."* Further, if the statements that were made at the hearings and on the floor of the Congress by those who were in charge of the legislation had been made in a formal committee report, this Court could hardly have held that the receipt of a commission was not a condition on keeping in the Army a doctor drafted under these special provisions. Whatever we may think about the loose use of legislative history, it has never been questioned that reports of committees and utterances of those in charge of legislation constitute authoritative exposition of the meaning of legislation. It is hard to believe that the powerful American Medical Association would have failed to oppose

*Compare Petition for Writ of Habeas Corpus, par. 7, R. 2, with Answer to Petition for Writ of Habeas Corpus, par. VII, R. 8–9; see R. 23–24.

vigorously any provisions under which the Army could draft doctors not otherwise draftable as noncommissioned personnel or that the Congress would have adopted any such provision in the face of professional opposition.

An independent investigation of all the relevant factors bearing on the legislation, beyond what was brought to our attention, see Hearings before House Committee on Armed Services on H. R. 9554, 81st Cong., 2d Sess. 7164, 7166–7167, 7189, 7223; 96 Cong. Rec. 13861, would be necessary to enable one to be confident in rejecting the contention that doctors who were drafted were to obtain a commission. I do not mean to say that mandamus would lie to compel the grant of a commission. That is not the only alternative. The obvious *tertium quid* is the release of a doctor-draftee who is found unfit for a commission. On the basis of what has been put before us I do not see how we can dispose of the case with complete indifference to this crucial issue. This seems to me the more inadmissible in view of the shifting arguments of the Government, as it has been driven from position to position. Only in its purpose to keep this man in the Army has the Government been undeviating. He could not be drafted under the general draft law; and if a pledge was given to the medical profession, as apparently it was, that a special class of drafted doctors would be duly commissioned, Orloff ought not to be retained in disregard of that pledge. In that case, it is immaterial what quirky notions petitioner may have as to the reasons why a commission has been withheld from him.

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AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 53. Argued November 19, 1952.—Decided March 9, 1953.

A labor organization does not engage in an unfair labor practice, within the meaning of § 8 (b) (6) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, when it insists that newspaper publishers pay printers for reproducing advertising matter for which the publishers ordinarily have no use. Pp. 101–111.

(a) The language and legislative history of § 8 (b) (6) support the conclusion that the labor organization's insistence upon securing payment of wages to printers for "setting bogus" is not an "unfair labor practice" within the meaning of the section. Pp. 105–111.

(b) The Labor Management Relations Act's condemnation of "featherbedding" practices is limited to instances where a labor organization or its agents exact pay from an employer for services not performed or not to be performed. P. 110.

(c) Where work is done by an employee, with the employer's consent, a labor organization's demand that the employee be compensated for time spent in doing the disputed work is not an unfair labor practice under the statute. P. 110.

(d) Section 8 (b) (6) leaves to collective bargaining the determination of what, if any, work, including bona fide "made work," shall be included as compensable services and what rate of compensation shall be paid for it. P. 111.

193 F. 2d 782, affirmed.

In an unfair labor practice proceeding, petitioner's charges under § 8 (b) (6) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, were dismissed by the Board. 86 N. L. R. B. 951. The Court of Appeals affirmed. 193 F. 2d 782. This Court granted a limited certiorari. 344 U. S. 812. *Affirmed*, p. 111.

Elisha Hanson argued the cause for petitioner. With him on the brief were *William K. Van Allen* and *Arthur B. Hanson.*

Bernard Dunau argued the cause for respondent. With him on the brief were *Acting Solicitor General Stern, George J. Bott, David P. Findling* and *Mozart G. Ratner.*

MR. JUSTICE BURTON delivered the opinion of the Court.

The question here is whether a labor organization engages in an unfair labor practice, within the meaning of § 8 (b) (6) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947,[1] when it insists that newspaper publishers pay printers for reproducing advertising matter for which the publishers ordinarily have no use. For the reasons hereafter stated, we hold that it does not.

Petitioner, American Newspaper Publishers Association, is a New York corporation the membership of which includes more than 800 newspaper publishers. They represent over 90% of the circulation of the daily and Sunday newspapers in the United States and carry over 90% of the advertising published in such papers.

In November, 1947, petitioner filed with the National Labor Relations Board charges that the International

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[1] "SEC. 8. . . .

. . . . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed. . . ." 61 Stat. 140–142, 29 U. S. C. (Supp. V) § 158 (b) (6).

Typographical Union, here called ITU, and its officers were engaging in unfair labor practices within the meaning of § 8 (b)(1), (2) and (6) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, here called the Taft-Hartley Act.[2] The Regional Director of the Board issued its complaint, including a charge of engaging in an unfair labor practice as defined in § 8 (b)(6), popularly known as the "anti-featherbedding" section of the Act. It is not questioned that the acts complained of affected interstate commerce.

The trial examiner recommended that ITU be ordered to cease and desist from several of its activities but that the "featherbedding" charges under § 8 (b)(6) be dismissed. 86 N. L. R. B. 951, 964, 1024–1033. The Board dismissed those charges. *Id.*, at 951, 963. Petitioner then filed the instant proceeding in the Court of Appeals for the Seventh Circuit seeking review and modification of the Board's orders. That court upheld the Board's dismissal of all charges under § 8 (b)(6). 193 F. 2d 782, 796, 802. See also, 190 F. 2d 45. A comparable view was expressed in *Rabouin* v. *Labor Board,* 195 F. 2d 906, 912–913 (C. A. 2d Cir.), but a contrary view was taken in *Gamble Enterprises* v. *Labor Board,* 196 F. 2d 61 (C. A. 6th Cir.). Because of this claimed conflict upon an important issue of first impression, we granted certiorari in the instant case, 344 U. S. 812,[3] and in *Labor*

[2] 49 Stat. 449, 29 U. S. C. § 151 *et seq.*, as amended, 61 Stat. 140–142, 29 U. S. C. (Supp. V) § 158 (b)(1), (2) and (6).

[3] The grant was—

"limited to question No. 2 presented by the petition for the writ, *i. e.*:

"Whether the demand and insistence of the International Typographical Union that publishers pay employees in their composing rooms for setting 'bogus' violated Section 8 (b)(6) of the National Labor Relations Act in view of the fact that composing room employees perform no service incident or essential to the production of a newspaper in their handling of such 'bogused' material."

Board v. *Gamble Enterprises*, 344 U. S. 814. Our decision in the *Gamble* case follows this, *post*, p. 117.[4]

Printers in newspaper composing rooms have long sought to retain the opportunity to set up in type as much as possible of whatever is printed by their respective publishers. In 1872, when printers were paid on a piecework basis, each diversion of composition was at once reflected by a loss in their income. Accordingly, ITU, which had been formed in 1852 from local typographical societies, began its long battle to retain as much typesetting work for printers as possible.

With the introduction of the linotype machine in 1890, the problem took on a new aspect. When a newspaper advertisement was set up in type, it was impressed on a cardboard matrix, or "mat." These mats were used by their makers and also were reproduced and distributed, at little or no cost, to other publishers who used them as molds for metal castings from which to print the same advertisement. This procedure by-passed all compositors except those who made up the original form. Facing this loss of work, ITU secured the agreement of newspaper publishers to permit their respective compositors, at convenient times, to set up duplicate forms for all local advertisements in precisely the same manner as though the mat had not been used. For this reproduction work the printers received their regular pay. The doing of this "made work" came to be known in the trade as "setting bogus." It was a wasteful procedure. Nevertheless, it has become a recognized idiosyncrasy of the trade and a customary feature of the wage structure and work schedule of newspaper printers.

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[4] For a general discussion of the problems in these cases, see Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 274, 288–290; Featherbedding and Taft-Hartley, 52 Col. L. Rev. 1020–1033.

By fitting the "bogus" work into slack periods, the practice interferes little with "live" work. The publishers who set up the original compositions find it advantageous because it burdens their competitors with costs of mat making comparable to their own. Approximate time limits for setting "bogus" usually have been fixed by agreement at from four days to three weeks. On rare occasions the reproduced compositions are used to print the advertisements when rerun, but, ordinarily, they are promptly consigned to the "hell box" and melted down. Live matter has priority over reproduction work but the latter usually takes from 2 to 5% of the printers' time.[5] By 1947, detailed regulations for reproduction work were included in the "General Laws" of ITU. They thus became a standard part of all employment contracts signed by its local unions. The locals were allowed to negotiate as to foreign language publications, time limits for setting "bogus" and exemptions of mats received from commercial compositors or for national advertisements.

Before the enactment of § 8 (b)(6), the legality and enforceability of payment for setting "bogus," agreed to by the publisher, was recognized. Even now the issue before us is not what policy should be adopted by the Nation toward the continuance of this and other forms of featherbedding. The issue here is solely one of statutory

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[5] In metropolitan areas, only the printers on the "ad side" of a composing room, as contrasted with those on the "news side," take part in the reproduction work and never on a full-time basis. Such work is not done at overtime rates but when there is an accumulation of it, the newspaper is not permitted to reduce its work force or decline to hire suitable extra printers applying for employment. The trial examiner, in the instant case, found that reproduction work at the Rochester Democrat & Chronicle cost over $5,000 a year, at the Chicago Herald-American, about $50,000, and at the New York Times, about $150,000.

interpretation: Has Congress made setting "bogus" an unfair labor practice?

While the language of § 8 (b)(6) is claimed by both sides to be clear, yet the conflict between the views of the Seventh and Sixth Circuits amply justifies our examination of both the language and the legislative history of the section. The section reads:

> "SEC. 8. . . .
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> . . . . . .
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> "(b) It shall be an unfair labor practice for a labor organization or its agents—
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> . . . . . .
>
> "(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed. . . ." 61 Stat. 140–142, 29 U. S. C. (Supp. V) § 158 (b)(6).

From the above language and its history, the court below concluded that the insistence by ITU upon securing payment of wages to printers for setting "bogus" was not an unfair labor practice. It found that the practice called for payment only for work which actually was done by employees of the publishers in the course of their employment as distinguished from payment "for services which are not performed or not to be performed." Setting "bogus" was held to be service performed and it remained for the parties to determine its worth to the employer. The Board here contends also that the insistence of ITU and its agents has not been "in the nature of an exaction" and did not "cause or attempt to cause an employer" to pay anything "in the nature of an exaction." Agreement with the position taken by the court

below makes it unnecessary to consider the additional contentions of the Board.

However desirable the elimination of all industrial featherbedding practices may have appeared to Congress, the legislative history of the Taft-Hartley Act demonstrates that when the legislation was put in final form Congress decided to limit the practice but little by law.

A restraining influence throughout this congressional consideration of featherbedding was the fact that the constitutionality of the Lea Act penalizing featherbedding in the broadcasting industry was in litigation. That Act, known also as the Petrillo Act, had been adopted April 16, 1946, as an amendment to the Communications Act of 1934. Its material provisions are stated in the margin.[6] December 2, 1946, the United States District Court for the Northern District of Illinois held that it violated the First, Fifth and Thirteenth Amendments to the Constitution of the United States.

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[6] "SEC. 506. (a) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation, or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel, or constrain a licensee—

"(1) to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services; or

"(2) to pay or give or agree to pay or give any money or other thing of value in lieu of giving, or on account of failure to give, employment to any person or persons, in connection with the conduct of the broadcasting business of such licensee, in excess of the number of employees needed by such licensee to perform actual services; or

"(3) to pay or agree to pay more than once for services performed in connection with the conduct of the broadcasting business of such licensee; or

"(4) to pay or give or agree to pay or give any money or other thing of value for services, in connection with the conduct of the

United States v. *Petrillo,* 68 F. Supp. 845. The case was pending here on appeal throughout the debate on the Taft-Hartley bill. Not until June 23, 1947, on the day of the passage of the Taft-Hartley bill over the President's veto, was the constitutionality of the Lea Act upheld. *United States* v. *Petrillo,* 332 U. S. 1.[7]

The purpose of the sponsors of the Taft-Hartley bill to avoid the controversial features of the Lea Act is made clear in the written statement which Senator Taft, cosponsor of the bill and Chairman of the Senate Committee on Labor and Public Welfare, caused to be incorporated in the proceedings of the Senate, June 5, 1947. Referring to the substitution of § 8 (b)(6) in place of the detailed featherbedding provisions of the House bill, that statement said:

> "The provisions in the Lea Act from which the House language was taken are now awaiting determination by the Supreme Court, partly because of the problem arising from the term 'in excess of the number of employees reasonably required.' Therefore, the conferees were of the opinion that general legislation on the subject of featherbedding was not

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broadcasting business of such licensee, which are not to be performed; . . . .

. . . . . .

"(c) The provisions of subsection (a) or (b) of this section shall not be held to make unlawful the enforcement or attempted enforcement, by means lawfully employed, of any contract right heretofore or hereafter existing or of any legal obligation heretofore or hereafter incurred or assumed.

"(d) Whoever willfully violates any provision of subsection (a) or (b) of this section shall, upon conviction thereof, be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or both. . . ." 60 Stat. 89, 90, 47 U. S. C. § 506 (a)(c)(d).

[7] For a report of the subsequent trial and acquittal on the merits, see *United States* v. *Petrillo,* 75 F. Supp. 176.

warranted at least until the joint study committee proposed by this bill could give full consideration to the matter." 93 Cong. Rec. 6443.[8]

On the same day this was amplified in the Senator's oral statement on the floor of the Senate:

"There is one further provision which may possibly be of interest, which was not in the Senate bill. The House had rather elaborate provisions prohibiting so-called feather-bedding practices and making them unlawful labor practices. The Senate conferees, while not approving of feather-bedding practices, felt that it was impracticable to give to a board or a court the power to say that so many men are all right, and so many men are too many. It would require a practical application of the law by the courts in hundreds of different industries, and a determination of facts which it seemed to me would be almost impossible. So we declined to adopt the provisions which are now in the Petrillo Act. After all, that statute applies to only one industry. Those provisions are now the subject of court procedure. Their constitutionality has been questioned. We thought that probably we had better wait and see what happened, in any event, even though we are in favor of prohibiting all feather-bedding practices. However, we did accept one provision which makes

[8] In its report of December 31, 1948, the Joint Committee on Labor-Management Relations, established under § 401 of the Taft-Hartley Act, later reviewed the litigation arising under § 8 (b) (6), including the trial examiner's report in the instant case, and recommended "a continuing study of cases arising under the present featherbedding provision, since there has not been sufficient experience upon which to base intelligent amendments at this time." S. Rep. No. 986, Pt. 3, 80th Cong., 2d Sess. 61, and see pp. 58–61.

See also, Hartley, Our New National Labor Policy (1948), p. xiii (Taft), 174, 182–183 (Hartley).

> it an unlawful-labor practice for a union to accept money for people who do not work. That seemed to be a fairly clear case, easy to determine, and we accepted that additional unfair labor practice on the part of unions, which was not in the Senate bill." 93 Cong. Rec. 6441. See also, his supplementary analysis inserted in the Record June 12, 1947. 93 Cong. Rec. 6859.

As indicated above, the Taft-Hartley bill, H. R. 3020, when it passed the House, April 17, 1947, contained in §§ 2 (17) and 12 (a)(3)(B) an explicit condemnation of featherbedding. Its definition of featherbedding was based upon that in the Lea Act. For example, it condemned practices which required an employer to employ "persons in excess of the number of employees reasonably required by such employer to perform actual services," as well as practices which required an employer to pay "for services . . . which are not to be performed." [9]

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[9] H. R. 3020 as it passed the House provided that:

"SEC. 2. When used in this Act—

. . . . . .

"(17) The term 'featherbedding practice' means a practice which has as its purpose or effect requiring an employer—

"(A) to employ or agree to employ any person or persons in excess of the number of employees reasonably required by such employer to perform actual services; or

"(B) to pay or give or agree to pay or give any money or other thing of value in lieu of employing, or on account of failure to employ, any person or persons, in connection with the conduct of the business of an employer, in excess of the number of employees reasonably required by such employer to perform actual services; or

"(C) to pay or agree to pay more than once for services performed; or

"(D) to pay or give or agree to pay or give any money or other thing of value for services, in connection with the conduct of a business, which are not to be performed; or

"(E) to pay or agree to pay any tax or exaction for the privilege of, or on account of, producing, preparing, manufacturing, selling,

The substitution of the present § 8 (b)(6) for that definition compels the conclusion that § 8 (b)(6) means what the court below has said it means. The Act now limits its condemnation to instances where a labor organization or its agents exact pay from an employer in return for services not performed or not to be performed. Thus, where work is done by an employee, with the employer's consent, a labor organization's demand that the employee be compensated for time spent in doing the disputed work does not become an unfair labor practice. The transaction simply does not fall within the kind of featherbedding defined in the statute. In the absence of proof to the contrary, the employee's compensation reflects his entire relationship with his employer.

We do not have here a situation comparable to that mentioned by Senator Taft as an illustration of the type of featherbedding which he would consider an unfair labor practice within the meaning of § 8 (b)(6). June 5, 1947, in a colloquy on the floor of the Senate he said in reference to § 8 (b)(6):

> "[I]t seems to me that it is perfectly clear what is intended. It is intended to make it an unfair labor

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buying, renting, operating, using, or maintaining any article, machine, equipment, or materials; or to accede to or impose any restriction upon the production, preparation, manufacture, sale, purchase, rental, operation, use, or maintenance of the same, if such restriction is for the purpose of preventing or limiting the use of such article, machine, equipment, or materials.

. . . . . .

"SEC. 12. (a) The following activities, when affecting commerce, shall be unlawful concerted activities:

. . . . . .

"(3) Calling, authorizing, engaging in, or assisting—

. . . . . .

"(B) any strike or other concerted interference with an employer's operations, an object of which is to compel an employer to accede to featherbedding practices; . . . ." 1 Legislative History of the Labor Management Relations Act, 1947, 160, 170–171, 204, 205.

> practice for a man to say, 'You must have 10 musicians, and if you insist that there is room for only 6, you must pay for the other 4 anyway.' That is in the nature of an exaction from the employer for services which he does not want, does not need, and is not even willing to accept." 93 Cong. Rec. 6446.

In that illustration the service for which pay was to be exacted was not performed and was not to be performed by anyone.[10] The last sentence of the above quotation must be read in that context. There was no room for more than six musicians and there was no suggestion that the excluded four did anything or were to do anything for their pay. Section 8 (b)(6) leaves to collective bargaining the determination of what, if any, work, including bona fide "made work," shall be included as compensable services and what rate of compensation shall be paid for it.

Accordingly, the judgment of the Court of Appeals sustaining dismissal of the complaint, insofar as it was based upon § 8 (b)(6), is

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

I fail to see how the reproduction of advertising matter which is never used by a newspaper but which indeed is set up only to be thrown away is a service performed for the newspaper. The practice of "setting bogus" is old and deeply engrained in trade union practice. But so

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[10] Section 8 (b)(6) does not relate to union requests for, or insistence upon, such types of payments as employees' wages during lunch, rest, waiting or vacation periods; payments for service on relief squads; or payments for reporting for duty to determine whether work is to be done. Such practices are recognized to be incidental to the employee's general employment and are given consideration in fixing the rate of pay for it. They are not in the nature of exactions of pay for something not performed or not to be performed. See 93 Cong. Rec. 6859.

are other types of "featherbedding." Congress, to be sure, did not outlaw all "featherbedding" by the Taft-Hartley Act. That Act leaves unaffected the situation where two men are employed to do one man's work. It also, in my view, leaves unaffected the situation presented in *Labor Board* v. *Gamble Enterprises, Inc., post,* p. 117.

MR. JUSTICE JACKSON labels the services tendered in that case as "useless and unwanted work." Certainly it was "unwanted" by the employer—as much unwanted as putting on two men to do one man's work. But there is no basis for saying that those services were "useless." They were to be performed in the theatres, providing music to the audiences. The *Gamble Enterprises* case is not one where the employer was forced to hire musicians who were not used. They were to be used in the theatrical program offered the public. Perhaps the entertainment would be better without them. But to conclude with MR. JUSTICE JACKSON that it would be better would be to rush in where Congress did not want to tread. For Senator Taft reported from Conference that "The Senate conferees, while not approving of feather-bedding practices, felt that it was impracticable to give to a board or a court the power to say that so many men are all right, and so many men are too many." 93 Cong. Rec. 6441.

But the situation in this case is to me quite different. Here the typesetters, while setting the "bogus," are making no contribution whatsoever to the enterprise. Their "work" is not only unwanted, it is indeed wholly useless. It does not add directly or indirectly to the publication of the newspaper nor to its contents. It does not even add an "unwanted" page or paragraph. In no sense that I can conceive is it a "service" to the employer. To be sure, the employer has agreed to pay for it. But the agreement was under compulsion. The statute does not

draw the distinction MR. JUSTICE JACKSON tenders. No matter how time-honored the practice, it should be struck down if it is not a service performed for an employer.

The outlawry of this practice under § 8 (b)(6) of the Taft-Hartley Act might be so disruptive of established practices as to be against the public interest. But the place to obtain relief against the new oppression is in the Congress, not here.

MR. JUSTICE CLARK, with whom THE CHIEF JUSTICE joins, dissenting.

Today's decision twists the law by the tail. If the employees had received pay for staying home, conserving their energies and the publisher's materiel, the Court concedes, as it must, that § 8 (b)(6) of the National Labor Relations Act would squarely apply. Yet in the Court's view these printers' peculiar "services" snatch the transaction from the reach of the law. Those "services," no more and no less, consist of setting "bogus" type, then proofread and reset for corrections, only to be immediately discarded and never used. Instead, this type is consigned as waste to a "hell box" which feeds the "melting pot"; that, in turn, oozes fresh lead then molded into "pigs" which retravel the same Sisyphean journey. The Court thus holds that an "anti-featherbedding" statute designed to hit wasteful labor practices in fact sanctions additional waste in futile use of labor, lead, machines, proofreading, "hell-boxing," etc. Anomalously, the more wasteful the practice the less effectual the statute is.

Section 8 (b)(6) declares it an unfair labor practice for a labor organization or its agents "*to cause or attempt to cause* an employer to pay or deliver or agree to pay or deliver any money or other thing of value, *in the nature of an exaction,* for *services* which are not performed or

not to be performed."[1] But "to cause or attempt to cause" can refer equally to the ordinary give-and-take of the collective bargaining process or the unleashing of the ultimate weapons in a union's armory. Likewise, "in the nature of an exaction" may imply that a union's pay demands must be tantamount to extortion to bring § 8 (b)(6) into play; on the other hand, the phrase may merely describe payments "for services which are not performed or not to be performed." Again, "services" may designate employees' conduct ranging from shadowboxing on or off the plant to productive effort deemed beneficial to the employer in his judgment alone.

The Court solves these complex interpretive problems by simply scrapping the statute. A broadside finding that "bogus" is "work," making analysis of all other statutory criteria superfluous, automatically takes the case out of § 8 (b)(6). And the printers' doing solely that which then must be undone passes for "work." An imaginative labor organization need not strain far to invent such "work." With that lethal definition to stifle § 8 (b)(6), this Court's first decision on "featherbedding" may well be the last.

Concededly, § 8 (b)(6) was not designed to ban every make-work device ingenuity could spawn. Senator Taft, the prime exponent of the section as ultimately enacted, advised that general "featherbedding" legislation be held in abeyance pending this Court's decision in *United States* v. *Petrillo*.[2] Meanwhile, however, § 8 (b)(6) aimed to catch practices by which unions "accept money for people

[1] 29 U. S. C. (Supp. V) § 158 (b)(6). (Emphasis added.)

[2] 332 U. S. 1 (1947). See 93 Cong. Rec. 6441, 6443. In the *Petrillo* case we upheld, against claims including unconstitutional vagueness, the provisions of the Lea Act, 47 U. S. C. § 506, which banned various "featherbedding" practices plaguing broadcast licensees.

who do not work." [3] He considered it a "perfectly clear" violation of the section "for a man to say, 'You must have 10 [employees], and if you insist that there is room for only 6, you must pay for the other 4 anyway.' " [4] But surely this cannot imply that six must pack the plant to overflow so that "the other 4" must stay home before § 8 (b)(6) may apply. That quaint notion befogs the draftsmen's clear intent that § 8 (b)(6) strike at union pay demands "for services which [the employer] does not want, does not need, and is not even willing to accept." [5]

Accordingly, we would read the statute's test of "services" as more than a hollow phrase. Recognizing the administrative difficulties in deciding how many employees are too many for a particular job, Congress perhaps spared the National Labor Relations Board from that.[6] But the Board should certainly not need efficiency engineers to determine that printers setting "bogus" indulge in frivolous make-work exercise. An interpretation of "services" in § 8 (b)(6) to exclude contrived and patently useless job operations not to the employer's benefit could effectuate the legislative purpose. Cf. *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local,* 321 U. S. 590, 598–599 (1944); *Jewell Ridge Coal Corp.* v. *Local No. 6167,* 325 U. S. 161, 165–166 (1945); *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U. S. 680, 691–693 (1946). And the Labor Board should not so modestly disclaim its oft-recognized expertise which assures full qualifications for administering this task.

It may well be that union featherbedding practices reflect no more than labor's fears of unstable employment

[3] 93 Cong. Rec. 6441.

[4] 93 Cong. Rec. 6446.

[5] *Ibid.*

[6] See 93 Cong. Rec. 6441, 6443.

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and sensitivity to displacement by technological change. But in a full-employment economy Congress may have deemed this form of union security an unjustifiable drain on the national manpower pool. In any event, that judgment was for the legislature. Under our system of separation of powers the Court ought not so blithely mangle the congressional effort.

Syllabus.

NATIONAL LABOR RELATIONS BOARD *v.* GAMBLE ENTERPRISES, INC.

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

No. 238. Argued November 19, 1952.—Decided March 9, 1953.

A labor organization does not engage in an unfair labor practice, within the meaning of § 8 (b)(6) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, when it insists that the management of one of an interstate chain of theaters shall employ a local orchestra to play in connection with certain programs, although that management does not need or want to employ that orchestra. *American Newspaper Publishers Assn.* v. *Labor Board, ante,* p. 100. Pp. 118–124.

(a) This Court in this case accepts the finding of the Board, made upon the entire record, that the union was seeking actual employment for its members and not mere "stand-by" pay. P. 123.

(b) Payments for "standing-by," or for the substantial equivalent of "standing-by," are not payments for services performed; but when an employer receives a bona fide offer of competent performance of relevant services, it remains for the employer, through free and fair negotiation, to determine whether such offer shall be accepted and what compensation shall be paid for the work done. Pp. 123–124.

196 F. 2d 61, reversed.

In an unfair labor practice proceeding, respondent's charges under § 8 (b)(6) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, were dismissed by the Board. 92 N. L. R. B. 1528. The Court of Appeals set aside the Board's order of dismissal and remanded the cause. 196 F. 2d 61. This Court granted certiorari. 344 U. S. 814. *Reversed and remanded,* p. 124.

Bernard Dunau argued the cause for petitioner. With him on the brief were *Acting Solicitor General Stern, George J. Bott, David P. Findling* and *Mozart G. Ratner.*

Frank C. Heath argued the cause for respondent. With him on the brief was *H. Chapman Rose.*

Henry Kaiser, Gerhard P. Van Arkel and *Eugene Gressman* filed a brief for Local No. 24, American Federation of Musicians, as *amicus curiae,* supporting petitioner.

MR. JUSTICE BURTON delivered the opinion of the Court.

This case is a companion to *American Newspaper Publishers Assn.* v. *Labor Board, ante,* p. 100.

The question here is whether a labor organization engages in an unfair labor practice, within the meaning of § 8 (b)(6) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947,[1] when it insists that the management of one of an interstate chain of theaters shall employ a local orchestra to play in connection with certain programs, although that management does not need or want to employ that orchestra. For the reasons hereafter stated, we hold that it does not.

While the circumstances differ from those in the preceding case, the interpretation there given to § 8 (b)(6) is controlling here.

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[1] "SEC. 8. . . .

. . . . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed. . . ." 61 Stat. 140–142, 29 U. S. C. (Supp. V) § 158 (b)(6).

For generations professional musicians have faced a shortage in the local employment needed to yield them a livelihood. They have been confronted with the competition of military bands, traveling bands, foreign musicians on tour, local amateur organizations and, more recently, technological developments in reproduction and broadcasting. To help them conserve local sources of employment, they developed local protective societies. Since 1896, they also have organized and maintained on a national scale the American Federation of Musicians, affiliated with the American Federation of Labor. By 1943, practically all professional instrumental performers and conductors in the United States had joined the Federation, establishing a membership of over 200,000, with 10,000 more in Canada.[2]

The Federation uses its nationwide control of professional talent to help individual members and local unions. It insists that traveling band contracts be subject to its rules, laws and regulations. Article 18, § 4, of its By-Laws provides: "Traveling members cannot, without the consent of a Local, play any presentation performances in its jurisdiction unless a local house orchestra is also employed." [3]

From this background we turn to the instant case. For more than 12 years the Palace Theater in Akron, Ohio, has been one of an interstate chain of theaters managed by respondent, Gamble Enterprises, Inc., which is a Washington corporation with its principal office in New York. Before the decline of vaudeville and until about 1940, respondent employed a local orchestra of nine union musicians to play for stage acts at that theater. When a

[2] Countryman, The Organized Musicians, 16 U. of Chi. L. Rev. 56–85, 239–297.

[3] Article 18, § 3, provides: "Traveling members appearing in acts with vaudeville unit or presentation shows are not permitted to play for any other acts on the bill without consent of the Local."

traveling band occupied the stage, the local orchestra played from the pit for the vaudeville acts and, at times, augmented the performance of the traveling band.

Since 1940, respondent has used the Palace for showing motion pictures with occasional appearances of traveling bands. Between 1940 and 1947, the local musicians, no longer employed on a regular basis, held periodic rehearsals at the theater and were available when required. When a traveling band appeared there, respondent paid the members of the local orchestra a sum equal to the minimum union wages for a similar engagement but they played no music.

The Taft-Hartley Act, containing § 8 (b)(6), was passed, over the President's veto, June 23, 1947, and took effect August 22. Between July 2 and November 12, seven performances of traveling bands were presented on the Palace stage. Local musicians were neither used nor paid on those occasions. They raised no objections and made no demands for "stand-by" payments. However, in October, 1947, the American Federation of Musicians, Local No. 24 of Akron, Ohio, here called the union, opened negotiations with respondent for the latter's employment of a pit orchestra of local musicians whenever a traveling band performed on the stage. The pit orchestra was to play overtures, "intermissions" and "chasers" (the latter while patrons were leaving the theater). The union required acceptance of this proposal as a condition of its consent to local appearances of traveling bands. Respondent declined the offer and a traveling band scheduled to appear November 20 canceled its engagement on learning that the union had withheld its consent.

May 8, 1949, the union made a new proposal. It sought a guaranty that a local orchestra would be employed by respondent on some number of occasions having a relation to the number of traveling band appear-

ances.[4] This and similar proposals were declined on the ground that the local orchestra was neither necessary nor desired. Accordingly, in July, 1949, the union again declined to consent to the appearance of a traveling band desired by respondent and the band did not appear. In December an arrangement was agreed upon locally for the employment of a local orchestra to play in connection with a vaudeville engagement on condition that the union would consent to a later traveling band appearance without a local orchestra. Respondent's New York office disapproved the plan and the record before us discloses no further agreement.

In 1949, respondent filed charges with the National Labor Relations Board asserting that the union was engaging in the unfair labor practice defined in § 8 (b)(6). The Regional Director of the Board issued a complaint to that effect. After a hearing the trial examiner found respondent to be engaged in interstate commerce and recommended that the Board assert jurisdiction. 92 N. L. R. B. 1528, 1538, 1540. On the merits, he concluded that the union's conduct "was nothing more or less than a proposal for a stand-by engagement," but he was not convinced that the union's demands were an "attempt to cause" any payment to be made "in the nature of an *exaction*." He, accordingly, recommended dismissal of the complaint. *Id.*, at 1549, 1550, 1551. The Board unanimously agreed to assert jurisdiction. With one dissent, it also ordered dismissal of the com-

[4] The union suggested four plans. Each called for actual playing of music by a local union orchestra in connection with the operation of the theater: (1) to play overtures, intermissions and chasers; (2) to play the music required for vaudeville acts not an integral part of a traveling band ensemble; (3) to perform on stage with vaudeville acts booked by respondent; or (4) to play at half of the total number of respondent's stage shows each year.

plaint, but it did so on grounds differing from those urged by the trial examiner. *Id.*, at 1528–1529. It said:

> "On the contrary, the instant record shows that in seeking employment of a local orchestra, the . . . [union] insisted that such orchestra be permitted to play at times which would not conflict with the traveling bands' renditions. Thus, the record herein does not justify a finding that, during the period embraced by the charges herein, the . . . [union] was pursuing its old policy and was attempting to cause the charging party to make payments to local musicians for services which were not to be performed.
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> . . . . . .
>
> "In our opinion, Section 8 (b)(6) was not intended to reach cases where a labor organization seeks actual employment for its members, even in situations where the employer does not want, does not need, and is not willing to accept such services. Whether it is desirable that such objective should be made the subject of an unfair labor practice is a matter for further congressional action, but we believe that such objective is not proscribed by the limited provisions of Section 8 (b)(6).
>
> "Upon the entire record in the case, we find that the . . . [union] has not been guilty of unfair labor practices within the meaning of Section 8 (b)(6) of the Act." *Id.*, at 1531, 1533–1534.

The Court of Appeals for the Sixth Circuit did not disturb the Board's finding that the union sought actual employment for its members, but it held, nevertheless, that the union was engaging in a labor practice declared unfair by § 8(b)(6). It, therefore, set aside the Board's order of dismissal and remanded the cause. 196 F. 2d 61. For reasons stated in the *American Newspaper* case, *ante*, p. 100, we granted certiorari. 344 U. S. 814. We denied

the union's motion to intervene, 344 U. S. 872, but, with the consent of the parties, it filed a brief as *amicus curiae,* supporting the Board.

We accept the finding of the Board, made upon the entire record, that the union was seeking actual employment for its members and not mere "stand-by" pay. The Board recognized that, formerly, before § 8 (b)(6) had taken effect, the union had received "stand-by" payments in connection with traveling band appearances. Since then, the union has requested no such payments and has received none. It has, however, requested and consistently negotiated for actual employment in connection with traveling band and vaudeville appearances. It has suggested various ways in which a local orchestra could earn pay for performing competent work and, upon those terms, it has offered to consent to the appearance of traveling bands which are Federation-controlled. Respondent, with equal consistency, has declined these offers as it had a right to do.

Since we and the Board treat the union's proposals as in good faith contemplating the performance of actual services, we agree that the union has not, on this record, engaged in a practice proscribed by § 8 (b)(6). It has remained for respondent to accept or reject the union's offers on their merits in the light of all material circumstances. We do not find it necessary to determine also whether such offers were "in the nature of an exaction." We are not dealing here with offers of mere "token" or nominal services. The proposals before us were appropriately treated by the Board as offers in good faith of substantial performances by competent musicians. There is no reason to think that sham can be substituted for substance under § 8 (b)(6) any more than under any other statute. Payments for "standing-by," or for the substantial equivalent of "standing-by," are not payments for services performed, but when an employer receives a

bona fide offer of competent performance of relevant services, it remains for the employer, through free and fair negotiation, to determine whether such offer shall be accepted and what compensation shall be paid for the work done.[5]

The judgment of the Court of Appeals, accordingly, is reversed and the cause is remanded to it.

Reversed and remanded.

MR. JUSTICE JACKSON, dissenting.

The economic advantages or abuses that result from "featherbedding" admittedly are not our concern. But I cannot escape the conclusion that the facts of this case bring it within the statute which makes it an "unfair labor practice" for a labor organization or its agents "to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed. . . ." 61 Stat.

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[5] In addition to the legislative history cited in the *American Newspaper* case, the following explanation by Senator Ball emphasizes the point that § 8 (b) (6) proscribes *only* payments where *no work is done*. As a member of the Senate Committee on Labor and Public Welfare, and as one who had served as a Senate conferee, he made it on the floor of the Senate immediately preceding the passage of the bill, over the President's veto, June 23, 1947:

"There is not a word in that [§ 8 (b) (6)], Mr. President, about 'featherbedding.' It says that it is an unfair practice for a union to force an employer to pay for *work which is not performed*. In the colloquy on this floor between the Senator from Florida [Mr. Pepper] and the Senator from Ohio [Mr. Taft], before the bill was passed, it was made abundantly clear that it did not apply to rest periods, it did not apply to speed-ups or safety provisions, or to anything of that nature; it applied *only* to situations, for instance, where the Musicians' Federation forces an employer to hire one orchestra and then to pay for another *stand-by orchestra, which does no work at all*." (Emphasis supplied.) 93 Cong. Rec. 7529.

140–142, 29 U. S. C. (Supp. V) § 158 (b)(6). Granting that Congress failed to reach all "featherbedding" practices, its enactment should not be interpreted to have no practical effect beyond requiring a change in the form of an exaction.

Accepting the result in No. 53, *American Newspaper Publishers Association* v. *Labor Board, ante,* p. 100, I think that differences in this case require a contrary result.

In both cases, the payments complained of obviously were caused by the respective unions. In both, the work performed was unwanted by the employer and its cost burdened the industry and contributed nothing to it. But here resemblance ceases. The Typographical Union is adhering to an old custom which mutual consent established and for years maintained and to which other terms of employment have long since been adjusted. In this case the union has substituted for the practice specifically condemned by the statute a new device for achieving the same result. The two cases may exemplify the same economic benefits and detriments from made work, but superfluous effort which long and voluntary usage recognized as a fair adjustment of service conditions between employer and employee in the printing industry is "exacted" for the first time in the entertainment field in order to evade the law.

That the payments involved in this case constitute a union "exaction" within the statute would seem hard to deny, whatever may be thought of the printers' case. As the Court says, the American Federation of Musicians has established a "nationwide control of professional talent." No artist or organization can perform without its approval. The respondent is in the entertainment business but can get no talent to exhibit unless it makes these payments. The "service" tendered for the payments is not wanted or useful. What the Court speaks of as "free

and fair negotiation, to determine whether such offer shall be accepted" is actually only freedom to pay or go out of business with all its attendant losses. If that does not amount to an exaction, language has lost all integrity of meaning.

But the Court holds that so long as some exertion is performed or offered by the employees, no matter how useless or unwanted, it can never be said that there is an exaction "for services which are not performed or not to be performed." This language undoubtedly presents difficulties of interpretation, but I am not persuaded that it is so meaningless and empty in practice as the Court would make it. Congress surely did not enact a prohibition whose practical application would be restricted to those without sufficient imagination to invent some "work."

Before this Act, the union was compelling the theatre to pay for no work. When this was forbidden, it sought to accomplish the same result by compelling it to pay for useless and unwanted work. This is not continuation of an old usage that long practice has incorporated into the industry but is a new expedient devised to perpetuate a union policy in the face of its congressional condemnation. Such subterfuge should not be condoned.

MR. JUSTICE CLARK, with whom THE CHIEF JUSTICE joins, dissenting.

THE CHIEF JUSTICE and I dissent on the basis of our dissenting opinion in *American Newspaper Publishers Association* v. *Labor Board, ante,* p. 100. We cannot perceive a tenable distinction between this and the printers' "featherbedding" case. To the extent of that consistency, today's majority and we are in accord. True, the employees there "work" on the keyboard of a Linotype, and here on the keys of a musical instrument. But, real-

istically viewed, one enterprise is as bogus as the other; both are boondoggles which the employer "does not want, does not need, and is not even willing to accept." The statute, moreover, does not distinguish between modern make-work gimmicks and featherbedding techniques encrusted in an industry's lore. Congress accorded no preferred position to seasoned unfair labor practices, and § 8 (b)(6) does not recognize prescriptive rights in the law. Custom and tradition can no more deprive employers than employees of statutory rights. Cf. *National Labor Relations Board* v. *Newport News Shipbuilding Co.*, 308 U. S. 241, 250–251 (1939); *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local,* 321 U. S. 590, 601–602 (1944); *Jewell Ridge Coal Corp.* v. *Local No. 6167,* 325 U. S. 161, 167 (1945).

RAMSPECK ET AL. *v.* FEDERAL TRIAL EXAMINERS CONFERENCE ET AL.

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

No. 278. Argued January 9, 12, 1953.—Decided March 9, 1953.

Certain provisions of regulations promulgated by the Civil Service Commission under § 11 of the Administrative Procedure Act and governing the classification, promotion, compensation and tenure of trial examiners and the assignment of cases to them are here sustained as conforming to the statute and carrying out the purpose and intent of Congress. Pp. 129–143.

1. The provision of § 11 of the Act that hearing examiners shall receive compensation prescribed by the Commission "in accordance with the Classification Act" authorizes the Commission to establish more than one salary grade for hearing examiners employed by a particular agency; and § 34.10 of the Regulations is valid. Pp. 134–137.

2. Section 34.4 of the Regulations, which provides for the promotion of individual hearing examiners and gives the agency a choice as to how a vacancy in a higher grade may be filled—*i. e.*, by promotion from within or otherwise—does not violate § 11 of the Act. Pp. 137–139.

3. The provision of § 11 of the Act that hearing examiners "shall be assigned to cases in rotation so far as practicable" does not require that all hearing examiners employed by a particular agency be assigned to cases in mechanical rotation without regard to the difficulty or complexity of particular cases or the experience or competence of particular examiners; and § 34.12 of the Regulations is valid. Pp. 139–140.

4. Section 34.15 of the Regulations, which provides for a reduction in force of examiners under circumstances governing the reduction in force of other federal employees, is not inconsistent with the provision of § 11 of the Act that examiners "shall be removable . . . only for good cause established and determined by the Civil Service Commission . . . ." Pp. 140–143.

91 U. S. App. D. C. 164, 202 F. 2d 312, reversed.

The District Court enjoined enforcement of four Civil Service Rules concerning trial examiners. 104 F. Supp. 734. The Court of Appeals affirmed. 91 U. S. App. D. C. 164, 202 F. 2d 312. This Court granted certiorari. 344 U. S. 853. *Reversed and remanded with directions to dismiss the complaint,* p. 143.

Robert W. Ginnane argued the cause for petitioners. With him on the brief was *Solicitor General Cummings.*

Charles S. Rhyne argued the cause for respondents. With him on the brief was *Eugene J. Bradley.*

Richard S. Doyle and *Donald C. Beelar* filed a brief for the Bar Association of the District of Columbia, Inc., as *amicus curiae,* urging affirmance.

MR. JUSTICE MINTON delivered the opinion of the Court.

The present suit was brought by the Federal Trial Examiners Conference,[1] an unincorporated association of trial examiners, and by a number of individual trial examiners, against the members of the United States Civil Service Commission and the National Labor Relations Board. The plaintiffs, who had been appointed pursuant to § 11 of the Administrative Procedure Act, 60 Stat. 244, 5 U. S. C. § 1010, sought a declaratory judgment that certain rules relating to their promotion, compensation, tenure, and the assignment of cases, promulgated by the Civil Service Commission pursuant to § 11, were invalid, and asked that their enforcement be enjoined. The District Court held that these four rules were invalid, interpreting § 11 as requiring: (1) that

[1] Since the question was not raised before us, we do not rule on the standing of the Federal Trial Examiners Conference to be a party in this suit.

hearing examiners employed by a particular federal administrative agency must be placed in the same salary grade; (2) that a hearing examiner may not be promoted from one salary grade to another within the same agency; (3) that hearing examiners must be assigned to cases in mechanical rotation without regard to the difficulty or importance of particular cases or the competence or experience of particular examiners; and (4) that the employment of hearing examiners may not be terminated by reduction in force procedures where there is a lack of work or of funds with which to pay them. The District Court granted a permanent injunction against the enforcement of these four Civil Service rules, 104 F. Supp. 734. The Court of Appeals affirmed in a short per curiam opinion, one judge dissenting. 91 U. S. App. D. C. 164, 202 F. 2d 312. We granted certiorari, 344 U. S. 853.

Prior to the passage of the Administrative Procedure Act, hearing examiners' tenure and status were governed by the Classification Act of 1923, as amended. Under the Classification Act, as employees of an agency, their classification was determined by the ratings given them by the agency, and their compensation and promotion depended upon their classification. The examiners were in a dependent status.

With the rapid growth of administrative law in the last few decades, the role of these quasi-judicial officers became increasingly significant and controversial. Many of the regulatory powers which Congress has assigned federal administrative agencies can be exercised only after notice and hearing required by the Constitution or by statute. These agencies have such a volume of business, including cases in which a hearing is required, that the agency heads, the members of boards or commissions, can rarely preside over hearings in which evidence is required. The agencies met this problem long before

the Administrative Procedure Act by designating hearing or trial examiners to preside over hearings for the reception of evidence. Such an examiner generally made a report to the agency setting forth proposed findings of fact and recommended action. The parties could address to the agency exceptions to the findings, and, after receiving briefs and hearing oral argument, the agency heads would make the final decision.

Many complaints were voiced against the actions of the hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations. A study by President Roosevelt's Committee on Administrative Management resulted in a report in 1937 recommending separation of adjudicatory functions and personnel from investigative and prosecution personnel in the agencies. The Attorney General's Committee on Administrative Procedure was appointed in 1939 to study the decisional process in administrative agencies, and the final report of this Committee was published in 1941. Both the majority and minority members of the Committee recommended that hearing examiners be made partially independent of the agency by which they were employed; the majority recommended hearing examiners be appointed for a term of seven years, and the minority recommended a term of twelve years. Although extensive hearings were held on bills to carry out the recommendations of this Committee, World War II delayed final congressional action on the subject. After the war, the McCarran-Sumners Bill, which became the Administrative Procedure Act, was introduced. The Senate Judiciary Committee Print of June 1945 reveals that at that time there was still great diversity of opinion as to how the status of hearing examiners should be enhanced. Several proposals were considered, and in the final bill Congress provided that

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hearing examiners should be given independence and tenure within the existing Civil Service system.[2]

Congress intended to make hearing examiners "a special class of semi-independent subordinate hearing officers" [3] by vesting control of their compensation, promotion and tenure in the Civil Service Commission to a much greater extent than in the case of other federal employees. Section 11 is as follows:

> "Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recom-

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[2] The Senate Report described the alternatives before the Congress and the purpose of § 11 as follows:

"The purpose of this section is to render examiners independent and secure in their tenure and compensation. The section thus takes a different ground than the present situation, in which examiners are mere employees of an agency, and other proposals for a completely separate 'examiners' pool' from which agencies might draw for hearing officers. Recognizing that the entire tradition of the Civil Service Commission is directed toward security of tenure, it seems wise to put that tradition to use in the present case. However, additional powers are conferred upon the Commission." Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., p. 215.

[3] Legislative History, p. 192.

> mendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witness fees as established for the United States courts."

An examination of § 11 shows that Congress retained the examiners as classified Civil Service employees but made inapplicable to them paragraphs (2) and (3) of subsection (b) of § 7 of the Classification Act and § 9 of that Act. These sections had made the examiners dependent upon the agencies' ratings for their classification. Freed from this dependence upon the agencies, the examiners were specifically declared to be otherwise under the other provisions of the Classification Act of 1923 as amended (now the Classification Act of 1949, 5 U. S. C. (Supp. V) § 1071 *et seq.*).

The position of hearing examiners is not a constitutionally protected position. It is a creature of congressional enactment. The respondents have no vested right to positions as examiners. They hold their posts by such tenure as Congress sees fit to give them. Their positions may be regulated completely by Congress, or Congress may delegate the exercise of its regulatory power, under proper standards, to the Civil Service Commission, which it has done in this case.

The question we have presented is whether the Civil Service Commission in the adoption of these rules followed or departed from the directions given it by § 11 of the Administrative Procedure Act. Did it implement the statute, or did it enlarge it?

Respondents do not contend that *all* hearing examiners should be classified in the same grade; they contend only that all hearing examiners *in any one agency* should be classified in the same grade. Petitioners argue that cases in a given agency are of varying levels of difficulty and importance and that the examiners hearing them must possess varying degrees of competency and types of qualifications. Petitioners point to the experience of the Civil Aeronautics Board where there are safety cases heard by one group of examiners and economic cases heard by another. The examiners assigned to the safety cases have pilots' certificates, while those assigned to the economic cases have completely different types of qualifications. Again, certain cases before the Interstate Commerce Commission involve relatively simple applications for extensions of motor carrier certificates, while others involve complicated and difficult railroad rate proceedings. Petitioners' argument indicates the need for specialization among examiners in the same agency to meet the diverse types of cases presented.

Proceeding under the provisions of the Classification Act, the Commission still classified the examiners according to their experience, skill, and ability,[4] but without seeking or receiving rating of the examiners by the

[4] Section 11 of the Administrative Procedure Act became effective June 11, 1947, one year after the Act's approval. The Commission accepted the examiner positions in the five different grades established by the agencies. After notice and hearing, regulations were promulgated on September 23, 1947. The Commission appointed a Board of Examiners from outside the Government to pass on the qualifications of incumbent status examiners, and to conduct a com-

agencies and wholly independent thereof. A classification of the examiners into grades, with salaries appropriate to each grade, was set up by the Commission in each federal agency using examiners. This classification ranged from just one grade in several agencies to five grades in two agencies. Allocation of examiners in accordance with these classifications is provided for in Rule 34.10 [5] which specifically states, "Allocations *shall* be made independently of agency recommendations and ratings." (Emphasis supplied.)

When the Commission classified the examiners according to the Classification Act, it was doing just what Congress directed it to do. As has been previously shown, § 11 specifically directs that "Examiners shall re-

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petitive examination for nonstatus incumbents and new applicants. When the results were announced in March 1949, 25.5% of the 212 status incumbents rated by the Board were found disqualified, but appeals were taken and ultimately all were found qualified. The action of the Board of Examiners was much criticized. See Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process* (1950), 59 Yale L. J. 431, 433; Fuchs, *The Hearing Examiner Fiasco Under the Administrative Procedure Act* (1950), 63 Harv. L. Rev. 737, 767. Meanwhile, dispute had arisen as to what part the agencies had in the promotion of examiners—the existing regulations permitted the agency to select the examiner to be promoted subject to the retroactive approval of the Commission. On February 23, 1951, the Attorney General issued an opinion holding the promotion regulation invalid. 41 Op. Atty. Gen., No. 14. On September 21, 1951, the Commission promulgated the present regulations involved in this suit.

[5] "§ 34.10 *Compensation.* (a) Hearing examiner positions shall be allocated by the Commission in accordance with the regulations and procedures adopted by the Commission for allocations under the Classification Act of 1949. Allocations shall be made independently of agency recommendations and ratings.

"(b) Hearing examiners shall receive within-grade salary advancements in accordance with Part 25 of this chapter: *Provided,* That the requirement of a satisfactory or better performance rating shall not apply." 5 CFR, 1951 Supp., § 34.10.

ceive compensation . . . in accordance with the Classification Act of 1923, as amended," with the exception provided in the statute and in the rules that this is to be done independently of agency influence. This contradicts the contention that Congress did not intend to permit classification of examiner positions by the Commission. The Act clearly provides, as Congress thought it did,[6] for the allocation of positions within an agency to be made in various salary grades, which reflect the competence and experience of the person in the grade. Congress must have recognized the right of the Commission so to classify when it amended the Classification Act in 1949. At that time it specifically excluded thirty-two categories of government employees, but not examiners, 5 U. S. C. (Supp. V) § 1082, although the Commission then was classifying examiners under regulations similar to the present ones.

The District Court was critical of the specifications used by the Commission to classify the examiners as being "nebulous and subjective." To classify the positions into the different grades from GS 11 to GS 15, the Commission used specifications as to job content as "moderately difficult and important," "difficult and important," "unusually difficult and important," "exceed-

[6] "In the matter of examiners' compensation the section adds greatly to the Commission's powers and function. It must prescribe and adjust examiners' salaries, independently of agency ratings and recommendations. The stated inapplicability of specified sections of the Classification Act carries into effect that authority. The Commission would exercise its powers by classifying examiners' positions and, upon customary examination through its agents, shift examiners to superior classifications or higher grades as their experience and duties may require. The Commission might consult the agency, as it now does in setting up positions or reclassifying positions, but it would act upon its own responsibility and with the objects of the bill in mind." Legislative History, p. 215 (Senate Report). See also pp. 280–281 (House Report).

ingly difficult and important," and "exceptionally difficult and important." These specifications of necessity must be subjective. They are not based so much on evidence as on judgment. It is a discriminating judgment and one Congress committed to the experience and expertise of the Civil Service Commission, not the courts. The specifications evidently had practical content and meaning to Congress, as it repeatedly used similar phrases to describe relative methods in § 602 of the Classification Act of 1949, 5 U. S. C. (Supp. V) § 1112.

We come next to Rule 34.4 of the Commission relating to promotions,[7] which is set forth in the margin. This

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[7] "§ 34.4 *Promotion*—(a) *From a hearing examiner position.* When an agency decides that a hearing examiner position should be filled by the promotion of one of its hearing examiners, the Commission will select the examiner who is to be promoted. To be eligible to compete for promotion, hearing examiners must be serving in the agency, in the area of competition designated by the Commission, under absolute appointments, in grades lower than the position to be filled. In addition, hearing examiners must meet the current recruiting standards (including the requirement of at least one year of experience of a level of difficulty comparable to that of the next lower grade). After examining the qualifications of all candidates, the Commission will select the best qualified. The hearing examiner selected by the Commission must be promoted not later than the beginning of the second pay period following the period in which the Commission's decision is reached, unless the Commission directs that the promotion be delayed pending adjudication of appeals. Once an agency elects to have a position filled by promotion and the Commission undertakes an examination to fill the position, the hearing examiner selected by the Commission must be promoted.

"(b) *From a position other than a hearing examiner position.* When an agency desires to fill a vacancy in a hearing examiner position by the promotion of an employee who is serving in a position other than a hearing examiner position, with competitive status but without absolute status as a hearing examiner, it shall submit the name of the person to the Commission with an application form executed by him. The Commission will rate the qualifications of the applicant in

rule was held invalid by the District Court, consistent with its view that there can be no classification of examiners and therefore there can be only one grade. Since we disagree with the court below as to the right of the Commission to classify examiners into grades within an agency and hold that such classification can be made, it must follow that promotions from one grade to another may be made.

But respondents also challenge the *method* by which promotions are made. The rule provides that the agency shall decide if there is a vacancy to be filled, and further that the agency shall decide if this vacancy is to be filled by promotion from among the present examiners. The examiners insist that thus the agency can control and coerce its examiners, and has an absolute veto power over promotions. But it is the Commission which chooses the examiner who shall receive the promotion. Respondents imagine all sorts of devious schemes by which the agencies shrewdly analyze their staffs to pick out which examiners would probably be chosen by the Commission for promotion, and then create vacancies for them as a reward for favorable decisions, or else fill vacancies from outside in order to discipline recalcitrant examiners. Respondents have not shown any actual examples of this, nor do they show that in such circumstances the Commission would not correct the situation. As a practical matter, the Commission must always turn to the agency for advice on the number of examiners needed at the various levels. The statute declares that

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accordance with the experience and training requirements of the open competitive examination (except the maximum age requirement) including an investigation of character and suitability. If on the basis of the rating assigned, the applicant would be within reach for certification if his name were on the open competitive register with the same rating, the Commission will approve the promotion; otherwise it will disapprove the request." 5 CFR, 1951 Supp., § 34.4.

"there shall be appointed *by and for each agency* as many qualified and competent examiners as may be necessary." (Emphasis supplied.) It then puts sufficient responsibility in the Commission's hands to ensure independent judgments from the examiners. It does not reduce the responsibility of the agency to see that it has a sufficient number of competent examiners to handle its business properly.

We come next to Rule 34.12, Rotation of Examiners. It provides:

> "Insofar as practicable, examiners shall be assigned in rotation to cases of the level of difficulty and importance that are normally assigned to positions of the salary grade they hold." 5 CFR, 1951 Supp., § 34.12.

This rule purports to implement the provision of § 11 that examiners "shall be assigned to cases in rotation *so far as practicable.*" (Emphasis supplied.) The respondents contend that this means mechanical rotation—that a case must be assigned to an examiner when his name comes up on the register, unless he is on leave or sick or disqualified or has not completed another assignment, etc. The lower courts accepted the respondents' view and held Rule 34.12 invalid.

The Commission gave to § 11's requirement of assignment of cases in rotation "so far as practicable" consideration beyond the mere mechanics of bringing the next case on the docket opposite the top name on the register of available examiners. It gave consideration to the kind of case involved as well as the kind of examiner available. The Commission had classified the examiners on that basis, and it considered it was practicable to assign cases to examiners who were, according to their classification, qualified to handle the case at hand, having regard to the complexity and difficulty

thereof, together with the experience and ability of the examiner available. If assigned by mechanical rotation, the value and use of such classification, which Congress had authorized, would be lost. To use the classification, it was not practicable to use mechanical rotation. Congress did not provide for the classification of examiners by the Commission, and then provide for the Commission to ignore such classification by a mechanical rotation. The rotation for practical reasons was adjusted to the classifications. This was an allowable judgment by the Commission as to what was practicable.

Finally, we come to the consideration of Rule 34.15,[8] which provides for a reduction in force of examiners

[8] "§ 34.15 *Reductions in force*—(a) *Retention credits.* Retention credits for purposes of reductions in the force of hearing examiners are credits for length of service in determining retention order in each retention subgroup. They are computed by allowing one point for each full year of Federal Government service.

"(b) *Retention preference, classification.* For the purpose of determining relative retention preference in reduction in force, hearing examiners shall be classified according to tenure of employment in competitive retention groups and subgroups in the manner prescribed in § 20.3 of the Retention Preference Regulations for Use in Reductions in Force (Part 20 of this chapter): *Provided,* That no distinction will be made in subgroups on the basis of a satisfactory or better performance rating as opposed to performance ratings of less than satisfactory.

"(c) *Status of hearing examiners who are reached in reduction in force.* When a hearing examiner has been separated, furloughed, or reduced in rank or compensation because of a reduction in force, his name shall be placed at the top of the open competitive register for the grade in which he formerly served and for all lower grades. Where more than one hearing examiner is affected, the qualifications of the several hearing examiners shall be rated by the Commission and relative standing at the top of the register will be on the basis of these ratings.

"(d) *Appeals.* (1) Any hearing examiner who feels that there has been a violation of his rights under the regulations governing reductions in force may appeal to the Commission (attention, Chief Law

under circumstances governing the reduction in force of other federal employees. Respondents' contention, sustained by the courts below, is that the provision of § 11 that examiners "shall be removable . . . only for good

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Officer) within 10 days from the date he received his notice of the action to be taken.

"(2) Each appeal shall state clearly the grounds on which it is based, whether error in the records; violation of the rule of selection; restriction of the competitive area or level; disregard of a specified right under the law or regulations; or denial of the right to examine the regulations, retention register, or records.

"(3) The agency in which the hearing examiner is employed shall be notified of the appeal and shall be allowed to file an answer thereto. The agency's answer must be submitted to the Commission's Chief Law Officer within 10 days from the date the agency is notified.

"(4) Upon receipt of an appeal the Chief Law Officer will refer the case to the Personnel Classification Division for investigation. The Personnel Classification Division will make investigation and submit its report to the Chief Law Officer. If the investigation discloses violations of the rights of the appellant, the Chief Law Officer shall notify the agency as to the corrective action to be taken. The agency may appeal the decision of the Chief Law Officer within 10 days of its receipt to the Commission's Board of Appeals and Review. If the Board of Appeals and Review disagrees with the decision of the Chief Law Officer, it shall refer the case to the Commission's Chief Hearing Examiner for a hearing in accordance with subparagraph (5) of this paragraph.

"(5) Appeals in which the Chief Law Officer cannot make initial finding in favor of the appellant shall be referred to the Commission's Chief Hearing Examiner for a hearing. The hearing shall be conducted in accordance with the provisions of the Administrative Procedure Act. The appellant, the agency concerned, and the Commission's Chief Law Officer may be represented at the hearing. Upon completion of the hearing the presiding hearing examiner shall transmit the entire file with his recommended decision to the Commission for decision.

"(e) *Retention preference regulations.* The Retention Preference Regulations for Use in Reductions in Force (Part 20 of this chapter), except as modified by this section, shall apply to reductions in the force of hearing examiners."

cause established and determined by the Civil Service Commission . . . after opportunity for hearing and upon the record thereof" gives them a lifetime position, subject to removal only for cause, and that the reduction in force procedures of the Commission have no application to them.

In this, we think the respondents are mistaken. Congress intended to provide tenure for the examiners in the tradition of the Civil Service Commission. They were not to be paid, promoted, or discharged at the whim or caprice of the agency or for political reasons. One of the individual examiners suing here was discharged by the Labor Board for lack of funds. The Commission has traditionally provided for a reduction in force for lack of funds, personnel ceilings, reorganizations, decrease of work, and similar reasons. 5 CFR, 1951 Supp., § 20.2 (a).

Part of respondents' argument seems to direct itself to the point that it is the agency which makes the reduction in force. Rule 34.15 provides for the dropping of examiners with the lowest number of "retention credits" after the agency finds that it must reduce its force. These credits are based on length of service and are beyond the power of the agency to affect. As with promotions, the Commission will always need to consult with the agency to ascertain that there is occasion for a reduction. Just as the statute leaves with the agency the duty to see that there are an adequate number of the right type of examiners, it leaves with the agency the responsibility to declare that there are a lesser number of examiners necessary at this time. It must be assumed that the Commission will prevent any devious practice by an agency which would abuse this Rule. The Rule provides for examiner appeal to the Commission, so there is opportunity to bring abuses to the Commission's attention. Also challenged is the statement in the

Retention Preference Regulations for Reduction in Force (5 CFR, 1951, § 20.2) allowing reduction in force "for other reasons." This is obviously to provide for legitimate reasons for reduction not now foreseen, and it must be assumed that the Commission will not permit an agency to misuse it.

We find no evidence that Congress intended to make hearing examiners a class with lifetime employment, whether there was work for them to do or not, as contended by the respondents. A reduction in force for the reasons heretofore provided by the Civil Service Commission and removal of an examiner in accordance therewith is "good cause" within the meaning of § 11.

The rules conform to the statute and carry out the purpose and intent [9] of Congress, and they are therefore valid.

The judgment is reversed, and the cause is remanded to the District Court with directions to dismiss the complaint.

Reversed.

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

I think these regulations should be held invalid and the judgment affirmed for substantially the reasons given in the opinion of Chief Judge Laws of the District Court for the District of Columbia. 104 F. Supp. 734. I wish

[9] Respondents' brief and the dissenting opinion filed herein quote a sentence from a letter of September 6, 1951, from Senator McCarran, Chairman of the Senate Judiciary Committee, to Chairman Ramspeck of the Civil Service Commission, as follows: "It was intended that [examiners] be very nearly the equivalent of judges even though operating within the Federal system of administrative justice." S. Doc. No. 82, 82d Cong., 1st Sess., p. 9. We do not feel justified in regarding this sentence, taken out of context and written over five years after the Administrative Procedure Act was enacted, as illustrative of the intent of Congress at the time it passed the Act.

to add a few words merely to emphasize certain aspects of that opinion.

The Administrative Procedure Act was designed to give trial examiners in the various administrative agencies a new status of freedom from agency control. Henceforth they were to be "very nearly the equivalent of judges even though operating within the Federal system of administrative justice." [1] Agencies were stripped of power to remove examiners working with them. Henceforth removal could be effected only after hearings by the Civil Service Commission. That same Commission was empowered to prescribe an examiner's compensation independently of recommendations or ratings by the agency in which the examiner worked. And to deprive regulatory agencies of all power to pick particular examiners for particular cases, § 11 of the Act commanded that examiners be "assigned to cases in rotation so far as practicable . . . ." I agree with the District Court and the Court of Appeals that the regulations here sustained go a long way toward frustrating the purposes of Congress to give examiners independence.[2]

Section 11 of the Administrative Procedure Act, as pointed out, provides that examiners may be removed "only for good cause established" after hearings. One of the regulations here approved authorizes their removal when an agency finds it necessary to reduce its force. We have been pointed to no act of Congress which justifies this regulation.

Another regulation here approved permits the assignment of cases to examiners by "classification" instead of by "rotation" as § 11 requires. I do not agree with the Court that the Classification Act of 1923 or any other

[1] S. Doc. No. 82, 82d Cong., 1st Sess. 9.

[2] Support of the foregoing statements as to the purpose of the Act can be found in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, and in the opinion of Chief Judge Laws, 104 F. Supp. 734.

act of Congress authorizes the distinctions here made between examiners. In fact, the Administrative Procedure Act appears to contemplate that all examiners employed by a particular agency stand on equal footing in regard to service and pay. A central objective was to prevent agency heads from using powers over assignments to influence cases. Unlimited discretion in assignment would lead to subservient examiners, it was thought. But the effect of the Civil Service classifications is to restore the unlimited discretion existing before passage of the Administrative Procedure Act.

The distinctions depended upon to support the different classifications are so nebulous that the head of an agency is left practically free to select any examiner he chooses for any case he chooses. For the regulations permit the head of an agency to assign a particular case on the basis of whether the head of the agency believes it to be "moderately difficult and important," "difficult and important," "unusually difficult and important," "exceedingly difficult and important," or "exceptionally difficult and important." And administrative agencies are permitted to attribute choice of a particular examiner for a particular case to considerations whether "complex legal, economic, financial or technical questions or matters" are merely "moderately complex," "fairly complex," "extremely complex," "exceptionally complex," or just "complex." I think all these conceptualistic distinctions mean is that the congressional command for a nonagency controlled rotation of cases is buried under words.

BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 258. Argued January 7, 1953.—Decided March 16, 1953.

Appellant railroads sued to set aside an order of the Interstate Commerce Commission prescribing maximum carload rates for carrying certain kinds of fresh vegetables—on the ground that they were "confiscatory" and therefore in violation of the Due Process Clause of the Fifth Amendment. The sole basis for this charge was an allegation that, if put into effect, the rates would produce less money than it would cost the railroads to carry the particular vegetables covered by each rate. *Held:* The suit was properly dismissed. Pp. 147–150.

(a) *Northern Pacific R. Co.* v. *North Dakota,* 236 U. S. 585, and *Norfolk & W. R. Co.* v. *West Virginia,* 236 U. S. 605, distinguished. Pp. 148–149.

(b) So long as rates as a whole afford railroads just compensation for their over-all services to the public, the Due Process Clause should not be construed as a bar to fixing noncompensatory rates for carrying some commodities when the public interest is thereby served. P. 150.

105 F. Supp. 631, affirmed.

The District Court dismissed a suit to set aside a rate order of the Interstate Commerce Commission. 105 F. Supp. 631. On appeal to this Court, *affirmed,* p. 150.

Robert H. Bierma argued the cause for appellants. With him on the brief were *Richmond C. Coburn, Frank H. Cole, Jr., Leo P. Day, James B. Gray* and *Toll R. Ware.*

Daniel M. Friedman argued the cause for the United States and the Interstate Commerce Commission, appellees. With him on the brief were *Solicitor General Cummings, Acting Assistant Attorney General Clapp, Marvin E. Frankel* and *Edward M. Reidy.*

Frank A. Leffingwell submitted on brief for the Texas Citrus and Vegetable Growers and Shippers, appellee.

MR. JUSTICE BLACK delivered the opinion of the Court.

The appellant railroads brought this action in a United States District Court to set aside a rate order of the Interstate Commerce Commission. The order prescribed maximum carload rates for carrying certain kinds of fresh vegetables. The rates were charged to be "confiscatory" and therefore in violation of the Due Process Clause of the Fifth Amendment. The sole basis for this charge was an allegation that if put in effect the rates would produce less money than it would cost the railroads to carry the particular vegetables covered by each rate. Denying that a commodity rate violates due process *merely* because it is noncompensatory, the Commission moved to dismiss the complaint on the ground that proof of everything the complaint alleged would not justify invalidation of the order. On this ground, and without reaching another Commission contention on which the District Court relied, we hold that the case was properly dismissed by that court.[1]

[1] The District Court dismissed because the railroads had not tendered any issue of confiscation or offered any proof of transportation costs until after the Commission had finished its hearings, made findings and entered its rate order. 105 F. Supp. 631. For this reason the District Court declined the railroads' request to hear evidence of transportation costs, a procedural course approved in *Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, or to hold the case for remand to the Commission for it to make a preliminary appraisal of the facts in line with the suggestion in *New York* v. *United States*, 331 U. S. 284, 334–336. Relying on the Court's opinion in the *Baltimore & Ohio* case, *supra*, the railroads here contend that dismissal because of their delay in raising the issue before the Commission deprived them of a constitutional right to have a judicial determination of their Fifth Amendment contention. The Commission's answer to this contention is a request that we re-examine the *Baltimore & Ohio* case, abandon the constitutional principles announced by the majority

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There is and has been no claim that the challenged rates will make any one of the complaining railroads operate its entire business at a loss, or even carry all fresh vegetables at a loss. The carload rates prescribed are but minor alterations in a vast, complex network of rates that apply to fresh vegetable shipments throughout the Nation. One of the two rates applies only to carload shipments of carrots with tops, the other to carload shipments of a limited group of other fresh vegetables such as string beans, lettuce and parsnips. And both rates relate only to shipments from points in Texas to points in some but not all of the other states.

Such adjustments of rates among vegetables as the Commission here made would appear to be but normal, run-of-the-mine regulations and the fixing of a cheaper transportation rate for one vegetable than for another may well serve an important public need. So long as a railroad is not caused by such regulations to lose money on its over-all business, it is hard to think that it could successfully charge that its property was being taken for public use "without just compensation." [2] And apparently the railroads rely not on the just compensation but on the Due Process provision of the Fifth Amendment. This appears from their complaint and the cases cited to support their contention. Chief reliance is placed on *Northern Pacific R. Co.* v. *North Dakota,* 236 U. S. 585, and a companion case decided the same day, *Norfolk & W. R. Co.* v. *West Virginia,* 236 U. S. 605. Both cases involved state statutes fixing rail-

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there and apply the concurring minority views to the facts of this case. Because there is a more appropriate ground for decision we assume, without deciding, that the confiscation issue here was raised in time.

[2] The Fifth Amendment provides in part: "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

road rates, one on coal and one on passengers. Both were found to be noncompensatory. Both were held violative of the Due Process Clause of the Fourteenth Amendment. In both the ground was that the rates were "unreasonable" and "arbitrary." The Court was careful to point out and emphasize that there was nothing in the records of those cases to show that there were "reasonable" grounds on which to justify imposing noncompensatory rates on the railroads. It would not be possible to hold that the vegetable rates here challenged are the result of unreasonable or arbitrary Commission action.

The history of regulation of fresh vegetable transportation rates from the south and southwest shows the difficulties the Commission has had in that field. Much of that history can be found in the Commission reports cited below.[3] Not only has the Commission had to consider conflicting rate claims as between shippers and carriers; it has also had to resolve disputes over such questions among the carriers themselves. The present rate order is but one of a long series of Commission orders designed to correct defects and injustices that develop from time to time in the general fresh vegetable rate pattern. Among the factors considered by the Commission in fixing these rates have been these: value of the vegetable; comparison of vegetable values; comparisons with rates on the same vegetables in different sections of the country; comparisons with rates on commodities other than vegetables; special characteristics of some vegetables that

[3] 279 I. C. C. 671 and 284 I. C. C. 206 are the original and rehearing reports on the present rate order. Other reports on the system of vegetable rates are *Southwestern Vegetable Case,* 200 I. C. C. 355, 209 I. C. C. 606, 214 I. C. C. 63; *Southeastern Vegetable Case,* 200 I. C. C. 273; *Transcontinental Rates and Estimated Weights on Vegetables,* 270 I. C. C. 665; *Estimated Weights on Lettuce from the Southwest,* 276 I. C. C. 647.

add to or subtract from expense of transportation; perishability; claim hazards of the carrier as between different vegetables; competing truck rates; and possible harmful effects of rates on vegetable prices and sales.

This mere sample of factors that have to be considered in rate cases demonstrates the absolute necessity for considerable flexibility in rate making. For not only are fair decisions as to vegetable rates vital to the welfare of farmers and whole sections of the country; the health and well-being of the Nation are involved. Moreover, Commission power to adjust rates to meet public needs is implicit in the congressional plan for a nationally integrated railroad system. *United States* v. *Lowden,* 308 U. S. 225, 230; *The New England Divisions Case,* 261 U. S. 184; *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 583–586. And so long as rates as a whole afford railroads just compensation for their over-all services to the public the Due Process Clause should not be construed as a bar to the fixing of noncompensatory rates for carrying some commodities when the public interest is thereby served.

Affirmed.

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

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE concurs, dissenting.

Baltimore & Ohio R. Co. v. *United States,* 298 U. S. 349, established a rule of procedure that entitles a carrier to raise the issue of confiscation in judicial proceedings for review of an order of the Commission, even though it has not tendered the issue in the hearings before the Commission but only on a petition for reconsideration after the order was issued. That rule of procedure was challenged by Mr. Justice Brandeis in an opinion in which

three other Justices joined. *Id.*, p. 381. There has been much discussion in the briefs and on oral argument concerning the wisdom and propriety of that rule. Whatever may be concluded on the merits, it is a rule on which litigants are entitled to rely until and unless it is overruled. Appellants properly relied on it here. After the Commission entered this rate order, the appellants filed a petition for reconsideration, offering to prove that the costs of operation under the new rates would exceed the revenues. The District Court therefore erred when it ruled that evidence bearing on the issue of confiscation was inadmissible in these review proceedings because it had not been tendered in the hearings before the Commission. 105 F. Supp. 631.

The Court, without deciding that issue, assumes that the tender of proof on the issue of confiscation was timely, but concludes that even if a confiscatory rate were established, the carriers would be entitled to no relief. That ruling is, in my view, quite unjustified on the record before us.

Appellants offer to prove that their costs of handling the traffic are greater than the revenues which the traffic will produce under the new rates. We must assume under the Court's ruling that that is the fact. What justification then is there for the Commission forcing the carriers to haul the traffic at less than cost?

One will read the record in vain for any clue. The report of the Commission is largely a hodge-podge of statistics dealing with rates on vegetables from Texas, California, Arizona, and New Mexico to eastern and northern points. The Commission was apparently bent on leveling down some of the rates out of Texas to make them more nearly equal to those out of California, Arizona, and New Mexico. The reasons are not disclosed.

There is no suggestion or intimation that the vegetable markets were suffering by reason of the Texas rates.

Texas growers and shippers complained that the rate structure was unduly prejudicial to them and unduly preferential to growers and shippers in California, Arizona, and New Mexico. The record shows that the former were in competition with the latter in various markets. But the Commission held that there was "no persuasive evidence" that the Texas rates had an adverse effect on the Texas growers and shippers. The Commission in other words refused to find that the rates were unduly prejudicial under § 3 of the Interstate Commerce Act. 49 U. S. C. § 3.

The Commission did, however, find that the Texas rates were unreasonable; and it proceeded to prescribe "reasonable" rates pursuant to § 15 (1) of the Act.

Can a confiscatory rate be a "reasonable" rate under the statutory and constitutional system within which the Commission operates? It is incredible to me that Congress used "reasonable" in such an odd and unusual sense. The history of rate-making, reviewed in *Northern Pacific R. Co.* v. *North Dakota,* 236 U. S. 585, denies it. Perhaps there will be exceptions. Perhaps dire emergencies will arise, making it necessary in the public interest to compel the transportation of certain commodities at less than cost. But certainly such a step should not be taken without appropriate findings showing why the confiscatory rate is a "reasonable" one.

This controversy on the merits may be insubstantial. The proof of confiscation may fail. It may be established, as one of the appellees contends, that the carriers since 1940 have voluntarily published rates yielding less than half the revenue per car to be yielded by the new rates. But the issues tendered should be tried. If we assume that the prescribed rates are confiscatory, it is, in my view, impossible to say on the present record that they are "reasonable."

Syllabus.

UNITED STATES EX REL. CHAPMAN, SECRETARY OF THE INTERIOR, *v.* FEDERAL POWER COMMISSION ET AL.

NO. 28. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.*

Argued October 22, 1952.—Decided March 16, 1953.

The Corps of Engineers recommended to Congress a comprehensive plan for the development of the Roanoke River Basin for flood-control, power, and other purposes; but it did not clearly recommend that all projects be constructed by the United States. The Federal Power Commission concurred in this recommendation. In the Flood Control Act of 1944, Congress approved the plan and specifically authorized two projects not at Roanoke Rapids. Subsequently, the Commission ordered issuance of a license to a private power company to construct a hydroelectric generating plant at Roanoke Rapids, N. C. *Held:*

1. Petitioners, the Secretary of the Interior and an association of nonprofit rural electric cooperatives, had standing to institute this proceeding under § 313 (b) of the Federal Power Act to set aside the Commission's order. Pp. 154–156.

2. Congress has not withdrawn, as to the Roanoke Rapids site, the jurisdiction of the Federal Power Commission to issue such a license. Pp. 156–172.

3. Under § 7 (b) of the Federal Power Act, the Commission's concurrence in the recommendation of the Corps of Engineers did not preclude the Commission from issuing such a license. Pp. 172–174.

191 F. 2d 796, affirmed.

The Federal Power Commission ordered issuance of a license to a private power company to construct a hydroelectric generating plant at Roanoke Rapids, N. C. 87 P. U. R. (N. S.) 469. The Court of Appeals denied a petition to set aside this order. 191 F. 2d 796. This Court granted certiorari. 343 U. S. 941. *Affirmed,* p. 174.

*Together with No. 29, *Virginia REA Association et al.* v. *Federal Power Commission et al.,* also on certiorari to the same court.

Gregory Hankin argued the cause and filed a brief for petitioner in No. 28.

Robert Whitehead argued the cause and filed a brief for the Virginia REA Association et al., petitioners in No. 29.

Bradford Ross argued the cause for the Federal Power Commission, respondent. With him on the brief were *Willard W. Gatchell, John Mason* and *Howard E. Wahrenbrock.*

T. Justin Moore argued the cause for the Virginia Electric & Power Co., respondent. With him on the brief were *George D. Gibson* and *Patrick A. Gibson.*

Charles F. Rouse and *David W. Robinson* submitted on brief for the Carolina Power & Light Co., respondent.

Herbert B. Cohn submitted on brief for the Appalachian Electric Power Co., respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In these two cases, the Secretary of the Interior and an association of nonprofit rural electric cooperatives have challenged the authority of the Federal Power Commission to grant to the respondent power company, VEPCO, a license to construct a hydroelectric generating station at Roanoke Rapids, North Carolina. They claim that Congress, by approving a comprehensive plan set out in the Flood Control Act of 1944 for improvement of the Roanoke River Basin, has withdrawn all eleven sites proposed for development in the plan, including Roanoke Rapids, from the licensing jurisdiction of the Commission and has reserved them for public construction. The underlying premise, that the plan approved by Congress presupposed federal development of all sites included in the plan, also underlies petitioners' other main conten-

tion here, that the Commission's concurrence in the plan constituted a determination by the Commission that the development of these water resources should be undertaken by the United States itself. Such a determination, they say, requires the Commission under § 7 (b) of the Federal Power Act, 41 Stat. 1067, as amended, 49 Stat. 842, 16 U. S. C. § 800 (b), to make investigations and submit its findings together with appropriate recommendations to Congress and in any event bars the Commission from approving applications for private construction of the project. Petitioners unsuccessfully raised these contentions, along with attacks on the Commission's findings not pressed here, before the Court of Appeals for the Fourth Circuit, which denied their petitions to set aside the Commission's order granting a license to VEPCO. *United States* v. *Federal Power Comm'n*, 191 F. 2d 796. We granted certiorari, 343 U. S. 941. The cases present questions of importance in that they involve a conflict of view between two agencies of the Government having duties in relation to the development of national water resources. Determination of the issues may affect a substantial number of important potential sites for the development of hydroelectric power. Cf. Rules Sup. Ct. 38 (5)(b).

Both here and in the court below, petitioners' standing to raise these issues has been questioned. The Secretary of the Interior points to his statutory duty to act as sole marketing agent of power developed at public hydroelectric projects and not required for the operation of the project; § 5 of the Flood Control Act of 1944 directs him to transmit and dispose of such power in a manner calculated to "encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles." 58 Stat. 890, 16 U. S. C. § 825s. This provision, it is said, announces a congressional policy for the guidance of the Secretary that would

be disturbed by the respondent company's plan; thus a specific interest of the Secretary, in addition to his more general duties relating to the conservation and utilization of the Nation's water resources, is said to be adversely affected by the Commission's order. The REA Association, an association of cooperatives, asserts that, as an organization of consumers entitled, along with "public bodies," to a preference in sales by the Secretary under § 5, it has a substantial interest in the development of low-cost power at the Roanoke Rapids site and consequently in the kind of instrumentality, public or private, to which power development at this site is committed. Respondents say, however, that decisions of policy in the construction of power projects have been entrusted to the Commission, or at most also to the Secretary of the Army, under whom the Corps of Engineers performs its statutory functions of making surveys and constructing public works, and that the interests of petitioners arise only after a public project has been constructed and the Secretary of the Army has determined that there is excess power to be distributed and sold.

We hold that petitioners have standing. Differences of view, however, preclude a single opinion of the Court as to both petitioners. It would not further clarification of this complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations, to set out the divergent grounds in support of standing in these cases.

Petitioners' main contention, that Congress has, by a series of enactments to be construed as part of an evolving assumption by the Federal Government of comprehensive authority over navigable waters, reserved the Roanoke Rapids site for public development and so has placed it beyond the licensing power of the Federal Power Commission, requires us to consider with some partic-

ularity the steps by which plans for the Roanoke Rapids project have unfolded. Petitioners' contention reduces itself to the claim that the authority of the agency to which Congress has delegated the responsibility for safeguarding the public interest in the private development of power resources has been revoked *pro tanto* by congressional action as to this particular site.

In 1927, the Army Engineers were authorized to make a specific survey of the Roanoke River by § 1 of the Rivers and Harbors Act, 44 Stat. 1010, 1015, which "adopted and authorized" enumerated "works of improvement" including "surveys in accordance with" H. R. Doc. No. 308, 69th Cong., 1st Sess. (1926). That document, a milestone in the development of integrated federal planning for the use of the Nation's water resources, had recommended surveys of a large number of streams throughout the country, including the Roanoke River, "either for the preparation of plans for improvement to be undertaken by the Federal Government alone or in connection with private enterprise, or to secure adequate data to insure that waterway developments by private enterprise would fit into a general plan for the full utilization of the water resources of a stream." H. R. Doc. No. 308, 69th Cong., 1st Sess. 4. The detailed survey of the Roanoke River was transmitted to Congress in 1934; in it the Chief of Engineers stated that a comprehensive plan for navigation and power, flood control or irrigation "is not economically justifiable at the present time," H. R. Doc. No. 65, 74th Cong., 1st Sess. 2 (1935), and concurred in the judgment of the investigating engineer that "[t]here is no justification for any Federal expenditures for either flood control or power." *Id.*, at 53; cf. *id.*, at 14–15.

In 1936, Congress enacted the Flood Control Act of 1936, 49 Stat. 1570, defining the public interest in flood control as follows: "It is hereby recognized that destruc-

tive floods upon the rivers of the United States . . . constitute a menace to national welfare; that it is the sense of Congress that flood control on navigable waters or their tributaries is a proper activity of the Federal Government . . .; that the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected." 49 Stat. 1570, 33 U. S. C. § 701a. In the same Act, the Secretary of War was authorized to continue surveys at a number of localities, including "Reservoirs in Roanoke and Tar Rivers, North Carolina." [1] § 7, Act of 1936, 49 Stat. 1596. In § 6 of the Act, Congress provided that "the Government shall not be deemed to have entered upon any project for the improvement of any waterway mentioned in this Act until the project for the proposed work shall have been adopted by law." 49 Stat. 1592.

Following a destructive flood on the Roanoke River in 1940, the House Committee on Flood Control adopted a resolution requesting reappraisal of the previous reports on the Roanoke River to determine "whether any improvements in the interests of flood control and allied purposes are advisable at this time." See H. R. Doc. No. 650, 78th Cong., 2d Sess. 12 (1944). A similar resolution was adopted later by the House Committee on Rivers and Harbors, see *ibid.*, and as a result, the Corps of Engineers submitted its recommendations in a report which became H. R. Doc. No. 650, 78th Cong., 2d Sess.

[1] Section 6 of the Flood Control Act of 1938 authorized the Secretary of War to make surveys "for flood control" of the Smith River, a tributary of the Roanoke on which two of the eleven projects in the comprehensive Roanoke Basin plan are located. 52 Stat. 1223.

(1944). This report recommended the comprehensive Roanoke Basin plan here in issue. The report proposed a system of eleven dams and reservoirs, eight of them on the Roanoke River, and recommended authorization of two of those projects, designated Buggs Island and Philpott, "as the initial step." *Id.*, at 2.

Petitioners rely most strongly on two features of this report for their claim that Congress has, by approving the plan outlined in the report, withdrawn all sites in the plan from the licensing jurisdiction of the Federal Power Commission. As the report moved up through the hierarchy of the Corps of Engineers, comments upon the plan were made by the different responsible officers. The detailed report of the investigating engineer estimated costs, including interest, on bases obviously contemplating federal financing. These figures were accepted in the comments of each forwarding officer. Further, the Chief of Engineers, in submitting the report, stated, "To safeguard the interests of navigation and flood control, the dams and power facilities should be constructed, operated, and maintained under the direction of the Secretary of War and the supervision of the Chief of Engineers." *Ibid.* Neither the reports nor the comments of subordinates had contained any such suggestion or any engineering or other reasons why such a recommendation might be made, and the Chief of Engineers gave no reasons for his suggestion. Further, it is not clear from the context that the statement referred to all the projects and not simply to the two dams to be authorized, that is, the ones with flood-control features, or even that the words "under the direction . . . and the supervision" precluded construction by a private applicant; indeed, the order here granting the license specifically requires the licensee to "operate its project in such a manner as the Chief of Engineers, Corps of Engineers, Department of the Army, or his authorized

representative, may prescribe." We do not think these disconnected statements would justify us in saying that the report as it went to Congress plainly proposed that the Government construct all the projects in the plan. There are contrary indications in the report itself; particularly pertinent in the light of congressional practice is the strong emphasis put on the flood-control aspects of the two projects recommended for authorization. In any event, we do not have a recommendation for public construction that is clearly an integral part of the plan, and the decisive question is not what this or that isolated statement in the report or the comments thereon imply but how Congress may fairly be said to have received and read the report in the light of the legislative practice in relation to such public works.

It deserves mention that the Roanoke Rapids site, although comprehended in the plan and found to be the most desirable power site of all eleven units, was to be developed simply for the production of power. The District Engineer pointed out that the two projects recommended for early authorization would provide practically all the flood-control benefits to be derived from the plan; installations at the two sites, Buggs Island and Philpott, would "eliminate over 90 percent of the flood losses to the two main flood-damage areas in the Roanoke River Basin." *Id.*, at 88. At those two sites were to be built multiple-purpose reservoirs for flood control, water power, and low-water regulation, while at the other nine sites, with one minor exception, there were simply to be power projects.

As is customary, the Federal Power Commission was asked to comment on the proposal; by letter to the Chief of Engineers dated May 3, 1944, the Commission suggested some technical changes but concurred substantially in the recommendations of the Engineers, "that the comprehensive development of the Roanoke River Basin,

in general accordance with the plans prepared therefor by the district engineer consisting of 11 dam and reservoir projects with power, is desirable and that the Buggs Island and Philpott projects would constitute a desirable initial step in the development of the Roanoke River Basin." *Id.*, at 4.

The report was presented to Congress while the bill that became the Flood Control Act of 1944 was under consideration; although the House had already closed its hearings, the Senate Report proposed amending the bill to include provision for the Roanoke Basin, recommending "approval of the comprehensive plan and authorization for construction of the Buggs Island and Philpott Reservoirs in accordance with the recommendations of the Chief of Engineers." S. Rep. No. 1030, 78th Cong., 2d Sess. 8.

The proposal was accepted, and § 10 of the Act contains a corresponding provision. It provides that "the following works of improvement . . . are hereby adopted and authorized." Included in an omnibus listing of such "works of improvement" is the following: "The general plan for the comprehensive development" of the Roanoke Basin recommended in H. R. Doc. No. 650 "is approved" and construction of Buggs Island and Philpott is "hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $36,140,000." [2]

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[2] The full text of the provisions, so far as they are relevant, is as follows:

"SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in ac-

It is this statutory language that petitioners say withdrew the Roanoke Rapids site from the licensing jurisdiction of the Commission. They ask us to read the word "approved" as a reservation of the site for public construction and, by necessary implication, a withdrawal of the site from the Commission's licensing authority. A flat "approval" of a plan clearly recommending public construction as an indispensable constituent of the plan might indeed have that effect, but, as indicated above, we do not find that the plan made any such recommendation.

A separate argument of petitioners is based in part on the language of a proviso commonly inserted in authorizations for flood-control surveys,[3] that the Government shall not be deemed to have entered upon a project until the project is "adopted by law." From this language petitioners infer that the Government's entry upon a project so as to preclude private construction occurs when Congress adopts a project, and they ask us to say that such adoption occurred here when Congress "ap-

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cordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: [Provisos omitted].

. . . . . .

"Roanoke River Basin

"The general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session, is approved and the construction of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina, and the Philpott Reservoir on the Smith River in Virginia, are hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $36,140,000." 58 Stat. 891–892, 894.

[3] See, *e. g.*, § 6 of the Flood Control Act of 1936, quoted p. 158, *supra*.

proved" the plan comprehending the Roanoke Rapids site. We do not think the word "approval" carries the implication of "adoption" or "authorization" by its own force. Read together with other legislative action concerning water resources and with the history of federal activity in that regard, congressional "approval" without more [4] cannot be taken, we think, to indicate in this case more than a legislative finding that the proposed projects, no matter by whom they may be built, are desirable and consistent with congressional standards for the ordered development of the Nation's water resources. Such a finding has meaning in conveying the congressional purpose and expressing a congressional attitude. Concretely it means that Congress has adopted a basic policy for the systematic development of a river basin. Decision is made on such questions as the locations of projects, the purposes they are to serve, their approximate size and the desirable order of construction; because of the necessary interrelationship of many technical engineering and economic features of the several dams in a single river basin, early choice among possible alternatives is imperative. The policy chosen by Congress when it approves a plan is, in the first place, directed to Congress

[4] There is little force in the argument that the words "adopted and authorized" in § 10, see note 2, *supra*, apply to the Roanoke Rapids site. Not only is the specific provision as to the Roanoke Basin to control over the general, but that which is adopted and authorized is not "the following plans" but "the following works of improvement," which patently refers to such projects as Buggs Island and Philpott, rather than to all sites named in a comprehensive plan. This answers that part of petitioners' argument which relies on the language of § 10 speaking of prosecution of the projects "under the direction of the Secretary of War" when "budgetary requirements" permit. As a matter of language, apart from all other considerations, the "works of improvement" to which such language refers is better read as the projects authorized rather than as all projects named in plans that were approved.

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itself in its appropriating function.[5] Approval also tells the Federal Power Commission—the executant of congressional policy—how to exercise its authority in relation to the authorization of sites in the Roanoke Basin. The finding had utility in this case in the guidance it gave the Commission in determining whether a private applicant would adequately develop all the benefits that should be derived from the proposed site.

In so interpreting the language Congress has used, we gain some light from the action Congress has taken to set projects in motion following enactment of statutes "approving" a comprehensive plan and "authorizing" certain projects set out in the plan. For the Roanoke River Basin itself, although Buggs Island and Philpott were specifically "authorized" in the Flood Control Act of 1944, separate steps were taken by Congress to complete the authorization; "planning money" was appro-

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[5] The Rules of both the Senate and the House in 1944, as now, called for previous choice of policy through authorization by law before any item of appropriations might be included in a general appropriations bill. Rule XVI, Senate Manual, S. Doc. No. 239, 77th Cong., 2d Sess. 20; Rule XXI, Rules of the House of Representatives, H. R. Doc. No. 812, 77th Cong., 2d Sess. 384. The importance of this distinction in the context of authorization of power projects is brought out in the following colloquy between a representative of the Corps of Engineers and Chairman Whittington of the House Committee on Public Works:

"The CHAIRMAN. . . . Is not the word 'approved' an authorization for the plan but without appropriation, or without an authorization for the appropriation?

"What is the difference between approving and authorizing a plan?

"Colonel GEE. We have never construed the approval of the plan to carry with it the authorization to construct the elements of that plan.

"The CHAIRMAN. Nor do we." Hearings before the House Committee on Public Works on H. R. 5472 (Title II), 81st Cong., 1st Sess. 42.

priated, a "Definite Project Report" was received for Buggs Island, and then funds for construction of Buggs Island were appropriated. Equally illuminating is the procedure by which Congress recently set in motion plans to build a project "approved" exactly as was the Roanoke Rapids project. At approximately the same time as the engineering reports on the Roanoke River were submitted, a comparable report was submitted concerning the Savannah River, Georgia, and recommending a comprehensive plan much like the Roanoke River Basin plan. Like Buggs Island and Philpott in the Roanoke plan, Clark Hill in the Savannah plan was recommended for immediate authorization, "as the initial step." See H. R. Doc. No. 657, 78th Cong., 2d Sess. 6. As the demand for power increased, other projects included in the plan were to follow, the first to be the Hartwell site. The Senate Report accepted this recommendation, S. Rep. No. 1030, 78th Cong., 2d Sess. 9–10, just as it had the Roanoke Basin recommendation, and called for "approval of the comprehensive plan and authorization for construction of the Clark Hill project." *Id.*, at 10. Section 10 of the Flood Control Act of 1944 contains a corresponding provision. 58 Stat. 894. Thus, the background as well as the precise terms of the provisions relating to projects in the Savannah River plan are closely parallel to those relating to the Roanoke projects. Recently, when further construction on the Savannah River was proposed and authorization of Hartwell, the site next in line, was recommended, neither Congress nor the Engineers treated the earlier "approval" of the comprehensive plan as a final step making unnecessary other than automatic appropriations for Hartwell. Rather, hearings were held, see Hearings before House Committee on Public Works on H. R. 5472 (Title II), 81st Cong., 1st Sess. 37–85 (May 16, 1949), and a separate authorization for construction was

included in the Rivers and Harbors Act of 1950, 64 Stat. 171.[6]

Respondents further point out that at the same time hearings were held on the Hartwell project, there were also hearings on further construction in the Roanoke Basin, and the Corps of Engineers proposed the authorization of Smith Mountain, a project with minor flood-control benefits but not next in line under the plan as approved in the Flood Control Act of 1944. That plan had put the Roanoke Rapids site here involved and the Gaston site ahead of Smith Mountain. The reason given by the Engineers for changing the order of construction was that private applications, including the application here, had been made or contemplated for the Roanoke Rapids and Gaston sites. While we do not attach weight to subsequent statements by the Engineers that the Flood Control Act of 1944 did not preclude private construction of some projects in the plan, it is pertinent to note that a Committee of Congress responsible for water resources legislation was informed that an application was pending for private construction. Whether or not the Committee agreed that the Flood Control Act of 1944 allowed private construction of projects comprehended in plans there approved, in fact no action was taken by it to prevent the Commission from proceeding to hear the

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[6] The general enacting provision, § 204, 64 Stat. 170, is substantially the same as § 10 of the Flood Control Act of 1944, *supra*, note 2. The specific provision as to the Savannah River is as follows:

"Savannah River Basin

"There is hereby authorized to be appropriated the sum of $50,000,000 for the construction of the Hartwell project in the general plan for the comprehensive development of the Savannah River Basin, approved in the Act of December 22, 1944, in addition to the authorization for project construction in the Act of December 22, 1944." 64 Stat. 171.

VEPCO application, although the Committee learned that the application was pending over a year and a half before the order was handed down by the Commission.

Whatever light these subsequent proceedings in Congress afford, both as to the Roanoke Basin and as to the comparable Hartwell site in the Savannah River plan, we find no solid ground for concluding that Congress has taken over the entire river basin for public development with such definiteness and finality so as to warrant us in holding that Congress has withdrawn as to this whole river basin its general grant of continuing authority to the Federal Power Commission to act as the responsible agent in exercising the licensing power of Congress. Extensive review of the need for integration of federal activities affecting waterways, see, *e. g.,* Report of Secretary of War Stimson, H. R. Doc. No. 929, 62d Cong., 3d Sess. 32–35 (1912), and of the breadth of authority granted to the Commission by Congress in response to that need is hardly necessary to establish the role of the Commission in hydroelectric power development. See, *e. g., First Iowa Coop.* v. *Power Comm'n,* 328 U. S. 152, 180, 181, and cases cited. From the time that the importance of power sites was brought to public and congressional consciousness during the administration of President Theodore Roosevelt, the significant development has been the devising of a general power policy instead of *ad hoc* action by Congress, with all the difficulties and dangers of local pressures and logrolling to which such action gave rise. See the Veto Messages of Presidents Roosevelt and Taft, *e. g.,* 36 Cong. Rec. 3071 (Muscle Shoals, Ala., 1903); 42 Cong. Rec. 4698 (Rainy River, 1908); H. R. Doc. No. 1350, 60th Cong., 2d Sess. (James River, 1909); H. R. Doc. No. 899, 62d Cong., 2d sess. (White River, 1912); S. Doc. No. 949, 62d Cong., 2d Sess. (Coosa River, 1912). It soon became clear that indispensable to a wise national policy

was the creation of a commission with functions and powers comparable to those of the Interstate Commerce Commission in the field of transportation. It took the usual time for such a commission to come into being, and the process was step-by-step. Originally Congress entrusted its policy to a commission composed of three Cabinet officers. 41 Stat. 1063. An agency so burdened with other duties was naturally found inadequate as the instrument of these important water-power policies. And so, in 1930, the Commission was reorganized as an expert body of five full-time commissioners. 46 Stat. 797, 16 U. S. C. § 792. These enactments expressed general policies and granted broad administrative and investigative power, making the Commission the permanent disinterested expert agency of Congress to carry out these policies. Cf. 41 Stat. 1065, as amended, 49 Stat. 839, 16 U. S. C. § 797; 3 Report of the President's Water Resources Policy Comm'n 501 (1950).

A principal responsibility of the Commission has always been that of determining whether private construction is consistent with the public interest. See, *e. g.*, S. Rep. No. 180, 66th Cong., 1st Sess. 3. Express provision is made to charge the Commission with the task of deciding whether construction ought to be undertaken by the United States itself. 41 Stat 1067, as amended, 49 Stat. 842, 16 U. S. C. § 800 (b). Further, even if private construction is to be allowed, approval of private applications requires a determination that the proposed project is "best adapted to a comprehensive plan" for water resources development. 41 Stat. 1068, as amended, 49 Stat. 842, 16 U. S. C. § 803 (a). Thus, congressional approval of a comprehensive plan can be read, as we think it should in this case, simply as saying that a plan such as that here, recommended by the Corps of Engineers for the fullest realization of the potential benefits in the river basin, should be accepted by the

Commission as the comprehensive plan to be used in the application of these statutory provisions. That "approval" as such does not reserve all projects in the plan for public construction is perhaps further indicated by the fact that when Congress has wished to reserve particular sites for public construction, it has chosen to say so. See 41 Stat. 1353, 45 Stat. 1012, 45 Stat. 1062.

Of course it is not for us to intimate a preference between private or public construction at this site. Nor are we even asked to review the propriety of the Commission's determination in this case that private construction is "in harmony with" the comprehensive plan for the Roanoke Basin. *Re Virginia Electric & Power Co.*, 87 P. U. R. (N. S.) 469, 483. We are simply asked to decide whether Congress has withdrawn the power to decide this question from the Commission. To conclude that Congress has done so by approving a general plan for development that may be, and in this case was, a plan for long-term development, would be to contract, by a tenuous chain of inferences, the broad standing powers of the Commission. Particularly relevant in this regard is the estimate that public development at this site would not in the normal course be undertaken for many years. See Examiner's Decision of March 17, 1950, R., I, 109. Congress was of course aware that, by granting a license to private enterprise, the Federal Power Commission would not commit the site permanently to private development and preclude all further congressional action. The Commission would, as it did here, simply express its judgment that, at the time, private development of the site was consistent with the general conception of the way in which the Roanoke River Basin should be developed. For, at any time short of the fifty years in which a site automatically becomes available to the Government without compensation, the Government may determine that the public interest makes it more desirable that the

project be operated publicly and has the right then, by appropriate steps, to take over the project. 41 Stat. 1071, as amended, 49 Stat. 844, 16 U. S. C. § 807. The purpose of Congress would have to be much more clearly manifested to justify us in inferring that Congress revoked the Commission's power to decide whether a private license consonant with the general scheme of development for this river basin ought now to be granted in the public interest.

Our conclusion is in accord with the implications of the manifest reluctance of Congress to enter upon power projects having no flood-control or navigational benefits. It cannot be said that as unclear a term as "approval" was to have settled, for this entire river basin, a major controversy that has arisen again and again in connection with legislation authorizing public construction of hydroelectric projects. The declaration of policy in the Flood Control Act of 1936, *supra*, pp. 157–158, puts strong emphasis on the flood-control aspects of plans for sites that would also produce power; no change in this policy can be read into § 10 of the Flood Control Act of 1944. Cf., *e. g.*, 90 Cong. Rec. 4126; *id.*, at 4127. And the sponsor in the House of the Flood Control Act of 1944 stated in answer to a question: ". . . we have repeatedly stated during the debate that no project, reservoir, or dam, or other improvement is embraced in this bill unless it is primarily for flood control. If power can be developed as an incident, or if reclamation can be provided, they are cared for in the bill." 90 Cong. Rec. 4199; cf. *id.*, at 4202. In the light of this history and these specific declarations, it strains belief that "approval" of the comprehensive plan for the Roanoke Basin reserves all projects named in the plan for federal construction when the two projects that provided the chief flood-control features of the plan were the only ones specifically authorized.

Subordinate arguments are made, bearing partly on the power of the Commission to issue any license for private development and partly on the Commission's exercise of its power in granting this license. The arguments involve technical engineering and economic details which it would serve no useful purpose to canvass here. Once recognizing, as we do, that the Commission was not deprived of its power to entertain this application for a license, we cannot say, within the limited scope of review open to us, that the Commission's findings were not warranted. Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine, so long as it cannot be said, as it cannot, that the judgment which it exercised had no basis in evidence and so was devoid of reason.

At the heart of these arguments is the fact that the Roanoke Rapids site is, under present estimates, the most desirable site for power in the Roanoke Basin. For that reason, as petitioners argue, removal of the Roanoke Rapids site from a government-operated system would result in loss to the Federal Government of the potential benefits of that site and a decrease, but only by the amount of the Roanoke Rapids profits, in the potential profits of the system as a whole. But it has never been suggested that such is the criterion under which the Commission is to determine whether a project ought to be undertaken by the United States, let alone that such considerations could demonstrate that Congress withdrew the Roanoke Rapids site from the licensing jurisdiction of the Commission. If it could be shown that the plan could not be executed successfully without the Roanoke Rapids site, it would be arguable that congressional approval of the plan presupposed that all units of the plan be centrally administered. The findings are to the contrary. The Commission has found that the proposed pri-

vate project is consistent with the plan contained in the Flood Control Act of 1944, *Re Virginia Electric & Power Co., supra,* at 483; that there is no reason to believe that the "interest of the public at large will not be fully protected and promoted" by the issuance of this license, *id.,* at 472; and that there was no showing that the Roanoke Rapids site would "at any time" be developed by the United States. *Id.,* at 483. Further, there is express recognition of the possibility that the site may be benefited by government projects in operation and consequently of the fact that VEPCO may be required to compensate the Government for any such "headwater benefits" conferred.[7] *Id.,* at 477–478.

Finally, we do not find merit in the contention that the Commission was required by § 7 (b) of the Federal Power Act to recommend public construction of the project.[8] As the report of the Corps of Engineers does not

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[7] Thus, whatever benefits may be conferred by such government projects as Buggs Island on the Roanoke Rapids site will not be lost to the United States. The Commission is required by § 10 (f) of the Federal Power Act, 41 Stat. 1070, as amended, 49 Stat. 843, 16 U. S. C. § 803 (f), to determine the charges to be paid by the licensee. The parties are in dispute over the value of the benefits, but, as the Commission said, "[t]he amount of the payments for headwater benefits due under the Federal Power Act cannot be estimated with any degree of accuracy until after the project has been placed in operation for such time as necessary to demonstrate what actual benefits are being conferred." *Re Virginia Electric & Power Co., supra,* at 478. We do not consider the correct basis for ascertaining the amount due to the United States, because, as the Commission's statement indicates, the question is not before us in this case.

[8] Section 7 (b) of the Federal Power Act provides:

"Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall

clearly recommend that all projects be constructed by the United States, the Commission's concurrence in that report cannot provide a basis for invoking the provisions of § 7 (b). Section 7 (b) is a direction to the Commission not to approve a private application for a project "affecting" any development of water resources which, in the judgment of the Commission, should be undertaken by the United States itself. Petitioners in effect ask us to tell the Commission what it thought—to say to the Commission that it was its judgment that Roanoke Rapids, as well as all the other seven projects in the Roanoke plan not yet under consideration, should be built by the Government. It is not clear that the Commission's concurrence in the general plan would have been much more than simple approval of the location of the dams, the purposes they would serve, and the engineering characteristics of the projects, even if the report had clearly recommended public construction. Primary responsibility for the enforcement of the provisions of § 7 (b) must remain with the Commission; we cannot infer a judgment of the Commission that it never expressed and now specifically disavows.

For these reasons, we agree with the Court of Appeals that the Commission's order must stand. In the bits and pieces of legislative history which we have set out, we find no justification for inferring that Congress withdrew the Commission's authority regarding the Roanoke River Basin from the general authority given the Commission to grant licenses for private construction of hydroelectric projects with appropriate safeguards of the public interest. Whatever the merits of the controversy

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cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development."

as to which agency—the Government or a private party—should construct this project, that question is not within our province.

Affirmed.

MR. JUSTICE CLARK, concurring.

I agree with the majority that the sole question before us is whether Congress has withdrawn the Roanoke Rapids site from the licensing jurisdiction of the Commission and that the answer is in the negative. But in reaching this result weight should be given the administrative interpretation of the 1944 Flood Control Act both by the Army Corps of Engineers and the Federal Power Commission. Taken together with the fact that Congress was fully advised of the Commission's action and the Corps' agreement with it as early as May 1949 and failed to express any disagreement during the period of more than two years when the application was under consideration, this administrative interpretation seems to me decisive.

We are cited to three cases in which the Commission, with the full approval of the Corps of Engineers, has licensed private developments despite prior congressional action adopting and authorizing public construction as part of river basin improvement plans.[1] While the plans included in those projects may not have

[1] License issued to County of Placer, California, August 8, 1951. Project No. 2021, for power plant at debris storage dam on North Fork, American River, constructed pursuant to authorization in River and Harbor Act of August 30, 1935 (49 Stat. 1028, 1038), as recommended in House Rivers and Harbors Committee Document No. 50, 74th Cong., 1st Sess. License issued to St. Anthony's Falls Water Power Co., August 31, 1951, Project No. 2056, to use water from United States navigation dam at St. Anthony's Falls, Minnesota, authorized in the River and Harbor Act of 1937 (50 Stat. 844, 848), as recommended in House Rivers and Harbors Committee

been as comprehensive as The Roanoke River Basin Plan, each had been approved by Acts of Congress using language similar to that in § 10 of the Flood Control Act of 1944. With this as background, a colloquy between Colonel Gee of the Corps of Engineers and the House Flood Control Committee on May 16, 1949, gains significance. Colonel Gee mentioned VEPCO's then pending application and stated that the Corps had not regarded the 1944 approval as precluding such private licensing.[2] I would affirm on the basis of this administrative interpretation by two agencies charged by Congress with direct flood control and power licensing responsibilities.

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

Roanoke Rapids is a power site belonging to the Federal Government and now surrendered to private power interests under circumstances that demand a dissent.

Roanoke Rapids is a part of the *public domain.*

Document No. 34, 75th Cong., 1st Sess. Two licenses issued in 1934 and 1936 to Kanawha Valley Power Co., Projects Nos. 1175 and 1290, for three power plants at navigation dams on Kanawha River, West Virginia, authorized in River and Harbor Act of 1930 (46 Stat. 918, 928) as recommended in H. R. Doc. No. 190, 70th Cong., 1st Sess.

[2] "MR. ANGELL. Is the Federal Government at the present time planning to develop any of those dams on the lower part of the river which are devoted exclusively to power production?

"COLONEL GEE. No, sir. They have the same status in this basin plan as the eight remaining projects. They are part of the approved plan. Their being in that plan certainly is no bar to a private utility company coming in and seeking to develop one of these projects.

"MR. ANGELL. And that is what is being done now.

"COLONEL GEE. That is being done now at Roanoke Rapids, sir." Hearings before the House Committee on Public Works on H. R. 5472 (Tit. II), 81st Cong., 1st Sess. 144.

(1) The Roanoke is a navigable stream over which Congress has complete control for purposes of navigation, flood control, watershed development, and the generation of electric power. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 525.

(2) The water power inherent in the flow of a navigable stream belongs to the Federal Government. *United States* v. *Appalachian Power Co., supra,* at 424.

(3) The dam sites on this navigable stream are public property. The technical title to the bed of the stream may be in private hands. But those private interests have no compensable interest as against the control of the Federal Government. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 596–597; *United States* v. *Commodore Park,* 324 U. S. 386, 390.

This is familiar law that emphasizes the *public* nature of the project which the Court now allows to be used for the aggrandizement of private power interests. This project is as much in the public domain as any of our national forests or national parks. It deals with assets belonging to all the people.

These facts must be kept in mind in reading § 10 of the Flood Control Act of 1944, 58 Stat. 887, 891.[1] From that

[1] Section 10 of the Flood Control Act of 1944 reads in pertinent part as follows: "That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided,* That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this Act to be constructed by the War Department during the war, with funds from appropriations

starting point I think it only fair to conclude (1) that if Congress undertook to remove this project from the *public domain,* it would make its purpose plain; and (2) that when Congress approved the project it meant to reserve it for the public good, not to make it available to private interests to exploit for their own profit.

Section 10 "adopted and authorized" the development of the Roanoke River Basin "in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program." The words "public works" certainly connote *public* not private construction.

Section 10 further provided that the projects which are "adopted and authorized" are "to be prosecuted under

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heretofore or hereafter made for flood control, so as to be ready for rapid inauguration of a post-war program of construction: *Provided further,* That when the existing critical situation with respect to materials, equipment, and manpower no longer exists, and in any event not later than immediately following the cessation of hostilities in the present war, the projects herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: *And provided further,* That penstocks and other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam authorized in this Act for construction by the War Department when approved by the Secretary of War on the recommendation of the Chief of Engineers and the Federal Power Commission.

. . . . . .

"ROANOKE RIVER BASIN

"The general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 650, Seventy-eighth Congress, second session, is approved and the construction of the Buggs Island Reservoir on the Roanoke River in Virginia and North Carolina, and the Philpott Reservoir on the Smith River in Virginia, are hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in that report at an estimated cost of $36,140,000."

the direction of the Secretary of War and supervision of the Chief of Engineers." That language also suggests *public* projects, not private undertakings.

Section 10 also provided that these projects "shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements." Plainly Congress was concerned with the "budgetary requirements" of the Federal Government, not with the budgetary requirements of private power companies. Section 10, after approving the general plan for the comprehensive development of the Roanoke River Basin, authorizes the construction of the Buggs Island Reservoir on the Roanoke River and the Philpott Reservoir on the Smith River.

This Act, passed before the end of World War II, was designed to serve a post-war need. It was drawn so as to provide a backlog of public works projects which would take up the slack of unemployment expected at the war's end. Congressman Whittington, in charge of the bill in the House, made the following significant statement concerning this objective, 90 Cong. Rec. 4122:

> "We recall the depression following World War No. 1. We are apprehensive of another debacle following the present war. It is difficult to arm. It is more difficult to disarm. Post-war unemployment will be a major national problem. While we are defending our freedom and our way of life, we must not fail to take stock of the problem of unemployment which we must face when the war is over.
>
> "We must profit by the experience of 1920. We must profit by the experience of 1930. A reservoir of projects must be adopted. Backlogs should be provided and they should be real backlogs. Many wasteful and extravagant activities to provide employment were adopted in 1933. Haste and speed

> were imperative. There was hunger in the land. Unemployment was widespread. There must be no repetition of waste and extravagance. There are Federal activities and there are public works that will promote the general welfare."

This statement highlights the meaning of "public works" as used in § 10; it discloses an important reason for lodging the program with public officials; it emphasizes the occasion for referring to the budgetary requirements of the Federal Government and the importance of linking flood control with post-war unemployment problems.

The argument that when Congress by § 10 of the Act "adopted and authorized" the "following works of improvement," it "adopted and authorized" *only* the Buggs Island and Philpott reservoirs involves an invented distinction between "works of improvement" and "general plans for development"—a distinction without any rational basis. The "works of improvement" which are "adopted and authorized" by § 10 are 38 in number. Some of these are described in the sub-headings as "projects" that are "authorized," some as "plans of improvement" that are "approved" and "authorized," some as "general plans" for the comprehensive development of river basins that are "approved" together with the "construction" of specific projects that are "authorized." This makes plain that "works of improvement" which are "adopted and authorized" by § 10 include a variety of undertakings, not merely works of construction which are first steps in general comprehensive plans being adopted and authorized.

From this it seems almost too plain for argument that Congress, in approving the plan for the development of the Roanoke River Basin, was setting it aside for federal development, the several public works projects under the plan to be authorized as, if, and when conditions war-

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ranted them and budgetary requirements permitted.[2] In this setting "approval" by Congress meant a dedication of the projects for public development.[3]

If that view is not taken, then why did Congress call these projects "public works"? If these projects were destined for development by private power interests, why did Congress place their construction under the Secretary of War and the Chief of Engineers? If Congress left this part of the public domain for exploitation by private power groups, why did it gear them to the employment requirements of the post-war period and the budget requirements of the Federal Government? Approval of the projects by Congress under these various terms and conditions can only mean one thing—that Congress gave its sanction to their development as public projects.

To be sure, Congress in the Federal Power Act left part of the public domain to be exploited by private interests, if the Federal Power Commission so orders. But the action relative to the Roanoke River Basin was action by Congress without reference to the Federal Power Com-

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[2] Congressman Curtis, one of the House conferees, explained the same language in § 9 of the Act whereby Congress "approved" comprehensive plans for the development of the Missouri River Basin (90 Cong. Rec. 9284):

"It means that Congress has approved the general plans of the engineers, and it means that these plans are authorized by law and are, therefore, eligible for future appropriations. Without such an authorization, no appropriation can be had."

[3] The interpretations placed on the Act by the Army Corps of Engineers are entitled to no weight. The Corps of Engineers is not an administrative agency charged with the responsibility of deciding issues of policy. Its powers are limited to the making of investigations and the preparation and submission of recommendations and reports based on engineering considerations. See, for example, § 1 (a) of the Act of December 22, 1944, 58 Stat. 887, adopting and authorizing the Roanoke River Basin plan; 33 U. S. C. § 701–1 (a). Congress alone makes policy decisions affecting the public domain.

mission. Its action was not made dependent on the approval of the Federal Power Commission. The Act in no way links the Roanoke River Basin program to the Commission. To the contrary, the Congress undertook to authorize specific projects under the plan, plainly suggesting that these were *public* projects whose authorization was in no way dependent on Commission action.

The true character of this raid on the *public domain* is seen when Roanoke Rapids is viewed in relation to the other projects in the comprehensive plan. Roanoke Rapids is the farthest downstream of the 11 units in the plan. Upstream from Roanoke Rapids is Buggs Island (now under construction with federal funds) with an ultimate installed capacity of 204,000 kw. and a controlled reservoir capacity of over 2,500,000 acre-feet. Roanoke Rapids is indeed the powerhouse of the Buggs Island Reservoir. That reservoir increases the dependable capacity of Roanoke Rapids from 4 hours during the peak month of December to 288 hours in the same peak month. Buggs Island contributes 70,000,000 kw.-hr. to the Roanoke Rapids project. This is on-peak energy, firm energy made dependable by the storage in the Buggs Island Reservoir. There is evidence that this energy will have a value in excess of $700,000 a year.[4]

That $700,000 of value is created by the taxpayers of this country. Though it derives from the investment of federal funds, it will now be appropriated by private power groups for their own benefit. The master plan now becomes clear: the Federal Government will put up the auxiliary units—the unprofitable ones; and the private power interests will take the plums—the choice ones.

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[4] Even the evidence submitted by the private power company applicant belies the Commission's figure of $250,000 (see 87 P. U. R. (N. S.) 469, 477–478) and places the value in excess of $700,000. The Commission's figure of $250,000 is indubitably a plain error.

There is not a word in the Act which allows such an unconscionable appropriation of the *public domain* by private interests. To infer that Congress sanctioned such a scheme is to assume it was utterly reckless with the *public domain*. I would assume that Congress was a faithful trustee, that what it approved as "public works" projects it dedicated to the good of all the people.

ORVIS ET AL. *v.* BROWNELL, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN.

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

No. 404. Argued February 4, 1953.—Decided March 16, 1953.

After Executive Order No. 8389, issued pursuant to the Trading with the Enemy Act, became effective as to Japan, blocking all transfers of evidences of debt or interests in property of Japanese citizens, petitioners commenced a suit in a New York state court against Japanese debtors. Without obtaining a license therefor, petitioners attached a credit owed the Japanese debtors by a third party, and obtained judgment. Thereafter the Custodian vested the credit by a *res* vesting order and it was paid over to the Custodian. *Held:* By their unlicensed attachment, petitioners obtained no "interest, right, or title" recoverable against the Custodian in a proceeding under § 9 (a) of the Act. Pp. 184–189.

(a) The freezing order, while permitting an attachment for jurisdictional and other state law purposes, prevented the subsequent acquisition of a lien which would bind the Custodian under § 9 (a). Pp. 186–189.

(b) The Custodian may proceed to administer the vested assets according to § 34 of the Act and to consider petitioners' claim and its status thereunder, subject to the review therein provided. Pp. 188–189.

198 F. 2d 708, affirmed.

The District Court granted petitioners' motion for judgment on the pleadings in a suit against the Custodian under § 9 (a) of the Trading with the Enemy Act. The Court of Appeals reversed. 198 F. 2d 708. This Court granted certiorari. 344 U. S. 902. At the time of the argument, February 4, 1953, Brownell, present Attorney General, was substituted as respondent for McGranery, former Attorney General. *Affirmed,* p. 189.

Donald Marks argued the cause and filed a brief for petitioners.

James L. Morrisson argued the cause for respondent. With him on the brief were *Solicitor General Cummings, Assistant Attorney General Kirks, James D. Hill* and *George B. Searls.*

Briefs of *amici curiae* supporting petitioners were filed by *Joseph M. Cohen* for Zittman; and *Henry I. Fillman* for McCarthy.

MR. JUSTICE JACKSON delivered the opinion of the Court.

This suit, under § 9 (a) of the Trading with the Enemy Act,[1] asks a decree that petitioners have an interest in vested property of Japanese nationals in the hands of the Alien Property Custodian, that he holds the prop-

[1] 50 U. S. C. App. § 9 (a): "Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States . . . may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment . . . or delivery to said claimant of the money or other property so held by the Alien Property Custodian . . . or of the interest therein to which the President shall determine said claimant is entitled . . . . If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides . . . to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment . . . or delivery to said claimant of the money or other property so held by the Alien Property Custodian . . . ."

erty subject to petitioners' attachment lien and must satisfy their judgment. The controlling facts are not in controversy. The Japanese nationals involved were indebted to petitioners, while a third party, Anderson, Clayton & Co., was indebted to those Japanese. On June 14, 1941, Executive Order No. 8389 became effective as to Japan, and it blocked all transfers of evidences of debt or interests in property of Japanese citizens. Thereafter, petitioners commenced suit against the Japanese debtors in a New York state court and, without obtaining a license therefor, attached the Anderson, Clayton & Co. credit on June 25, 1943. Judgment was obtained, whereupon petitioners applied for a federal license to permit Anderson, Clayton & Co. to pay it. The application was refused.

Meanwhile, on June 27, 1947, the Custodian vested the Anderson, Clayton & Co. credit by a *res* vesting order and it was paid over to the Custodian. Petitioners filed notice of their present claim under § 9 (a) of the Act for return of an interest in vested property, which was treated as another application for a retroactive license. The claim was dismissed insofar as it was a claim under § 9 (a), based on interest in property, but was left and still is pending as a claim for payment of a debt under § 34 of the Act.

The difference between what was denied and what was left pending is important, for if the attachment and judgment create an interest in the property which can be retrieved from the Custodian under § 9 (a), the judgment will be paid in full. On the other hand, if it is only an allowable debt under § 34, unless granted a priority it apparently will be paid only in part, since it appears that claims against the Japanese nationals considerably exceed the funds in the Custodian's hands.

Both parties moved for judgment on the pleadings. The District Court granted petitioners' motion and de-

nied that of the respondent. The Court of Appeals reversed.[2] We granted certiorari.[3]

The petitioning judgment creditors here are in the same position as were those in the declaratory judgment action of *Zittman* v. *McGrath,* 341 U. S. 446, in that they have judgments and attachment liens valid under New York law as against their enemy national debtors and as against those whose credits were attached. In the first *Zittman* case, we held that the executive freezing order did not prevent such an attachment from creating rights between the judgment creditor and the enemy debtor whom the Custodian had elected to succeed. In the second *Zittman* case, however, we held that where the Custodian elected to vest the *res* for administration purposes he was entitled to possession, even as against such an attaching creditor whose lien would have been valid under New York law. We are now called upon to decide a question not presented by these earlier cases: whether the freezing order prevented a creditor from thereafter acquiring by attachment an "interest, right, or title" in property such as will support a claim against the Custodian under § 9 (a) of the Act.[4] We hold that the freezing order did have such an effect and that, while it recognized attachment liens insofar as they determined

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[2] 198 F. 2d 708.

[3] 344 U. S. 902.

[4] Executive Order No. 8389, April 10, 1940, 5 Fed. Reg. 1400, as amended by Executive Order No. 8785, June 14, 1941, 6 Fed. Reg. 2897: ". . . All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of . . . licenses, . . . if . . . such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect: . . . E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States . . . ."

relationships between creditor and enemy debtor, it did not permit the transfer of a property interest in the blocked funds which could be asserted against the Custodian.

The order forbids "transfers of credit" and "transfers of any evidences of indebtedness or evidences of ownership of property," and General Ruling No. 12 [5] specifies that this prohibition extends to the creation of a lien. Admittedly, if the Japanese had made a voluntary unlicensed assignment, it could have created no property interest. Admittedly also, if Anderson, Clayton & Co., with or without the consent of its Japanese creditors but without federal license, had paid over the fund to these petitioners, they would obtain no such interest. We cannot doubt that these administrative interpretations apply to the present transaction and that the general assent by the Government to state attachment procedures which we recited in the *Zittman* opinion did not extend so far as to recognize them as effecting a transfer. To so interpret it would ignore the express conditions on which the consent was extended. Realistically, these reservations deprive the assent of much substance; but that should have been apparent on its face to those who chose to litigate. The opportunity to settle their accounts with the enemy debtor was all that the permission to attach granted.

Petitioners challenge the statutory authorization for such an order. It is argued that the sole purpose of the Trading with the Enemy Act was to prevent transfers under duress of funds credited to residents of occupied countries. Though this was one of the aims of the Act,

[5] General Ruling No. 12, April 21, 1942, § 131.12 (e)(1), 7 Fed. Reg. 2991: "The term 'transfer' shall mean any actual or purported act or transaction, . . . and without limitation upon the foregoing shall include . . . the creation or transfer of any lien . . . ."

its language extends the authorization much farther.[6] The validity of the freezing order as an implementation of the Trading with the Enemy Act was sustained in *Propper* v. *Clark*, 337 U. S. 472, and we adhere to that holding. Petitioners also contend that the Custodian was not given power, similar to that of a bankruptcy court, to "annul" liens and attachments. But the question is not whether a lien, concededly valid because obtained prior to the freezing order, may be "annulled" by the Custodian, but rather whether the freezing order prevented the subsequent acquisition, by attachment, of such a property interest as the Custodian would have to recognize under § 9 of the Act. Because of the supremacy of the Federal Government on matters within its competence, the freezing order, while permitting an attachment for jurisdictional and other state law purposes, prevented the subsequent acquisition of a lien which would bind the Custodian under § 9.

Section 34 of the Act provides liquidation procedures by which debt claims may be allowed and priorities established. The petitioners' claim is pending for that purpose. Judicial review is provided. It would be premature to decide how the Custodian must treat this claim in a general accounting and settlement of his trust, since this proceeding seeks only to forestall such settlement of this claim.

The parties are in disagreement as to the course pursued by the Custodian in allowing payment of attachment creditors. In view of the statutory mandate that

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[6] 50 U. S. C. App. § 5 (b)(B): ". . . [T]he President may . . . investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest . . . ."

the assets shall be "equitably applied by the Custodian in accordance with the provisions of this section," each case, to some extent, may rest on its own facts. We do not find it either necessary or possible to inquire whether other similar claims have been allowed on the grounds mentioned in § 9, and, if so, whether they were properly allowed by the Custodian.

Petitioners by their unlicensed attachment could obtain no "interest, right, or title" in this fund recoverable against the Custodian. He may proceed to administer the vested assets according to § 34 of the Act and to consider petitioners' claim and its status thereunder, subject to the review therein provided. The suit under § 9 (a), however, must fail.

Judgment affirmed.

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

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

Section 34 (a) of the Trading With the Enemy Act, 60 Stat. 925, provides that property vested in the Alien Property Custodian "shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property" prior to the vesting in the Custodian. A priority of debt claims is provided by § 34 (g).[1] But, un-

[1] "Debt claims shall be paid in the following order of priority: (1) Wage and salary claims, not to exceed $600; (2) claims entitled to priority under sections 191 and 193 of title 31 of the United States Code, except as provided in subsection (h) hereof; (3) all other claims for services rendered, for expenses incurred in connection with such services, for rent, for goods and materials delivered to the debtor, and for payments made to the debtor for goods or services not received by the claimant; (4) all other debt claims. No

like § 60 of the Bankruptcy Act (52 Stat. 869), it does not purport to outlaw liens acquired within certain periods or under specified conditions. Section 34 (i) indeed recognizes that there may be liens asserted against the Custodian; [2] and it in no way qualifies them by reason of the time of their acquisition. The House Report (H. R. Rep. No. 2398, 79th Cong., 2d Sess., p. 15) was quite explicit as respects the protection which § 34 (i) was designed to give secured creditors and creditors claiming a lien:

> "Protection of a secured creditor or a creditor claiming a lien is afforded by the proviso in subsection (i). Such a claimant may proceed as a general creditor, without thereby waiving his security. In addition or alternatively, he may file a claim or suit as a title claimant for return of his security interest in the property or for just compensation in respect of that interest, in which event his recovery would be reduced, as in the case of any other such plaintiff, to the extent of any debt claim payment made to him (or to any other claimant, if his claim as a title claimant was not filed in time to hold up debt claim payments). It is believed that this arrangement is preferable to provision of a separate special procedure for secured creditors."

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payment shall be made to claimants within a subordinate class unless the money from which, in accordance with subsection (d) hereof, payment may be made permits payment in full of all allowed claims in every prior class."

[2] ". . . no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding."

Thus, as the Custodian concedes, a secured or lien creditor can proceed under § 9 (a) for recovery of a property interest (see *Markham* v. *Cabell,* 326 U. S. 404; *Clark* v. *Uebersee Finanz-Korp.,* 332 U. S. 480), or under § 34 for recovery of a debt, or both.

We have been meticulous in protecting the right of the Custodian to *possession* of assets which have been vested. *Propper* v. *Clark,* 337 U. S. 472; *Lyon* v. *Singer,* 339 U. S. 841; *Zittman* v. *McGrath,* 341 U. S. 471. But we have also been meticulous to respect liens and preferences obtained in judicial or administrative proceedings so long as the enforcement of those liens did not interfere with the Custodian's administration. *Lyon* v. *Singer, supra; Zittman* v. *McGrath,* 341 U. S. 446.

Yet why the concern in protecting the lien or the preference if there was no possibility of asserting it? Certainly it was not necessary to establish the lien to prove the claim. Certainly it was not necessary to establish the lien in order to have the right to apply for a license. "As against the German debtors," we said in *Zittman* v. *McGrath,* 341 U. S. 446, 463–464, "the attachments and the judgments they secure are valid under New York law, and cannot be cancelled or annulled under a Vesting Order by which the Custodian takes over only the right, title, and interest of those debtors in the accounts." If we meant what we said, the claimants (in the position of petitioners in the present case) were more than unsecured creditors. They had lawful liens that could be proved in the federal proceedings. A lien implies some priority. We reserved the question as to its nature. But if we meant no more than what is now granted, the dissenting opinion in *Zittman* v. *McGrath, supra,* at 465, should have been made the law then rather than now.

LOCAL UNION NO. 10, UNITED ASSOCIATION OF JOURNEYMEN PLUMBERS & STEAMFITTERS, ET AL. *v.* GRAHAM ET AL., TRADING AS GRAHAM BROTHERS.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 86. Argued December 8, 1952.—Decided March 16, 1953.

The Virginia Right to Work Statute, as construed by the highest court of that State, provides in substance that neither membership nor nonmembership in a labor union shall be made a condition of employment and that a contract limiting employment to union members is against public policy. *Held:*

1. A Virginia state court injunction against peaceful picketing which is carried on for purposes in conflict with the statute does not violate the Fourteenth Amendment of the Federal Constitution. Pp. 193–201.

2. There was a reasonable basis in the evidence in this case for the state court's finding that the picketing was for a purpose in conflict with the statute, since the immediate results of the picketing demonstrated its potential effectiveness as a practical means of putting pressure on the general contractor to eliminate from further participation all nonunion men or all subcontractors employing nonunion men on the project. Pp. 197–201.

Affirmed.

A Virginia state court issued a permanent injunction against picketing by petitioners which was found to be for a purpose in conflict with the Virginia Right to Work Statute. The Supreme Court of Appeals refused to hear an appeal, and in effect affirmed the decree. This Court granted certiorari. 344 U. S. 811. *Affirmed,* p. 201.

Herbert S. Thatcher argued the cause for petitioners. With him on the brief were *J. Albert Woll, James A. Glenn* and *John R. Foley.*

Richmond Moore, Jr. submitted on brief for respondents.

MR. JUSTICE BURTON delivered the opinion of the Court.

The basic question here is whether the Commonwealth of Virginia, consistently with the Constitution of the United States, may enjoin peaceful picketing when it is carried on for purposes in conflict with the Virginia Right to Work Statute.[1] A question also before us is whether the record in this case justifies the finding, made below, that the picketing was for such purposes. We answer each in the affirmative.

A bill of complaint was filed September 25, 1950, in the Law and Equity Court of the City of Richmond, Virginia, by respondents, doing a general contracting

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[1] "1. Section 1. It is hereby declared to be the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization.

"Section 2. Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against public policy and an illegal combination or conspiracy.

"Section 3. No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.

"Section 4. No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

"Section 5. No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization.

"Section 6. Any person who may be denied employment or be deprived of continuation of his employment in violation of sections three, four or five or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm,

business there. They named as defendants Local Union No. 10, United Association of Journeymen Plumbers and Steamfitters of the United States and Canada of the American Federation of Labor, here called the Plumbers Union, three other local unions, the business agents of each of the unions and the Richmond Building & Construction Trades Council.[2] The complaint alleged in substance that respondents had begun work under their contract with the City of Richmond to build the George Washington Carver School, that early completion of the school was urgent, that respondents had made contracts with all necessary subcontractors, that some of the subcontractors employed only union labor while others employed nonunion as well as union labor, that in July certain of the defendants had requested that all nonunion labor on the project be laid off and had said that, unless

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corporation or association acting in concert with him by appropriate action in the courts of this Commonwealth such damages as he may have sustained by reason of such denial or deprivation of employment.

"Section 7. The provisions of this act shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of an existing contract." Va. Acts, Extra Session 1947, c. 2, Va. Code, 1950, §§ 40–68 to 40–74, inclusive.

See also, recognition of such state legislation in the Taft-Hartley Act:

"SEC. 14. . . .

"(b) Nothing in this Act [National Labor Relations Act, as amended] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 61 Stat. 151, 29 U. S. C. (Supp. V) § 164 (b).

[2] The unions named were Local Union No. 1018, Brotherhood of Painters, Decorators and Paperhangers of America; Local Union No. 64, Cement Finishers and Operative Plasterers International Association; and Local Union No. 147, International Union of Operating Engineers, each affiliated with the American Federation of Labor.

that were done, "every effort would be made to prevent any union labor employed . . . on that project from continuing work thereon," that on September 25 certain of the defendants had picketed the project, carrying a sign reading "This Is Not a Union Job. Richmond Trades Council," that, as a result of such picketing, union members on the job had refused to continue to work there and that, therefore, the project had "slowed to a standstill." The complaint further alleged that the foregoing demands sought to induce respondents to take action which would subject them to criminal and civil liabilities under the Virginia Right to Work Statute and to break respondents' contracts with such of their subcontractors as did not employ all union labor. Finally, it alleged that the objectives of defendants in making such demands and conducting such picketing were to prevent nonunion employees from working on the project. On the strength of such allegations, the trial court granted respondents the temporary injunction they sought and the picketing ceased. A motion to dissolve the injunction was denied, an answer was filed, depositions were taken and the temporary injunction was continued in effect until July 17, 1951. On that date, the trial court made the injunction permanent. The court rendered no opinion but included the following statement in its decree:

> "[I]t appearing to the Court that the picketing complained of was conducted and carried on by the defendants, except for those defendants hereinafter noted, and *for aims, purposes and objectives in conflict with the provisions of the Right To Work laws of the State of Virginia and, therefore, illegal,* that a permanent injunction is necessary to prevent irreparable harm and damage to the complainants, and that complainants have already been damaged to the

extent of One Hundred and Ninety ($190.00) Dollars, the Court doth so find; . . . ." (Emphasis supplied.) [3]

January 23, 1952, the Supreme Court of Appeals of Virginia, also without opinion, refused to hear an appeal but said in its order "the court being of opinion that the said decrees [of the trial court] are plainly right, doth reject said petition and refuse said appeal and supersedeas, the effect of which is to affirm the decree of the said law and equity court." Because of the importance of the issue in the practical administration of labor law, we granted certiorari. 344 U. S. 811. Respondents filed no brief here other than that in opposition to the petition for certiorari and submitted their case without oral argument.

A few days before our grant of certiorari, the Supreme Court of Appeals of Virginia, in another case, reached a result which petitioners claim is in conflict with its judgment in the instant case. *Painters & Paperhangers Local Union No. 1018* v. *Rountree Corp.,* 194 Va. 148, 72 S. E. 2d 402. We find that decision helpful as upholding the constitutionality of the Right to Work Statute and interpreting its meaning, but we do not find it inconsistent with the result below. See also, *Edwards* v. *Virginia,* 191 Va. 272, 60 S. E. 2d 916; *Finney* v. *Hawkins,* 189 Va. 878, 54 S. E. 2d 872; *American Federation of Labor* v. *American Sash Co.,* 335 U. S. 538; *Lincoln Union* v. *Northwestern Co.,* 335 U. S. 525.

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[3] The decree dismissed the complaint against Local Union No. 147 and its business agent, but enjoined the remaining defendants "from interfering with, molesting or otherwise carrying on their picketing or other activities in front of or around the site of construction of George Washington Carver School in the City of Richmond, Virginia."

Petitioners now object to the breadth of the terms of the injunction. That objection was not presented in their petition for certiorari and is not considered here.

In the *Rountree* case, 194 Va., at 154, 72 S. E. 2d, at 405, the highest court of Virginia holds that the Statute does not prohibit peaceful picketing "unless . . . for an unlawful purpose." It adds that "a purpose to compel the complainants to discharge the non-union painters or to compel the painters to join the union as a condition of their continued employment" would be an unlawful purpose, but it fails to find the existence of such a purpose. On the other hand, in the instant case, the same court states that the injunctive decrees of the trial court "are plainly right." It thereby sustains the trial court's finding that "the picketing complained of was . . . carried on by the defendants . . . for aims, purposes and objectives in conflict with the provisions of the Right To Work laws of the State of Virginia . . . ." The *Rountree* case thus reflects an instance of picketing so conducted as not to be in violation of the Right to Work Statute, whereas the facts in the instant case reflect conduct that is in conflict with the provisions of that Statute. However innocent the picketing appeared while in progress, the Virginia courts found that it was combined with conduct and circumstances occurring before and during the picketing that demonstrated a purpose on the part of petitioners that was in conflict with the Right to Work Statute.

In a case of this kind, we are justified in searching the record to determine whether the crucial finding by the state courts had a reasonable basis in the evidence.[4] The record consists of the depositions of nine witnesses taken

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[4] ". . . it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. . . .

". . . We have not only his [the master's] findings but his findings authenticated by the State of Illinois speaking through her supreme

six to nine months after the events described. There is some conflict in the testimony as to what took place July 27, 28, and September 25, 26. The record contains, however, ample grounds for sustaining the crucial findings of the trial court. Those grounds appear particularly in the testimony of respondent O. J. Graham and his general manager, J. Q. Acree, as to what was said during their conversation, on July 28, 1950, with J. F. Joinville, business agent of the Plumbers Union and president of the Richmond Building & Construction Trades Council, together with Henry Cochran, business agent of the Engineers Union and Secretary and Treasurer of the same Trades Council.[5]

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court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked." *Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 293, 294.

[5] For example, O. J. Graham testified:

"A. . . . he [Joinville] finally got into the question of this particular job at the George Washington Carver School and Mr. Joinville said he wanted us to make it one hundred per cent union job and I told him we couldn't do that, that we had already let sub-contracts that were union and non-union and we weren't making any distinction between the two, generally speaking, unless something was wrong or unless we didn't think the sub-contractor could perform like we wanted him to; that we let the contract to the lowest bidder, whether he was union or non-union, and Mr. Joinville then said about this plumbing and heating contract he wanted me to cancel the contract with Talley and I told him we couldn't do that, that a contract with a non-union man was just as valid as one with a union man, and that led on into a discussion of the general policy of the Richmond Trades Council.

"The way that came up was I asked Mr. Joinville why pick out this job, that a number of other contractors were operating the same as we were now and we had been very friendly with the unions, hadn't had any trouble with them and sometime past we had worked probably ninety per cent union on some jobs and our relations up to this time had been very good. 'Well,' he said, 'from now on, we are not going to permit the things we have been permitting in the past and

It is undisputed that the picketing lasted from 8 a. m., September 25, until stopped by injunction the following noon. The picketing was peaceful in appearance. There usually was but one picket and there never were more than two pickets on duty at a time. There was no violence and no use of abusive language. Each picket walked up and down the sidewalk adjoining the project carrying a sign bearing substantially the language quoted in the complaint. September 25, the picketing was done consecutively by the respective business agents of the Painters, Plumbers, Plasterers and Ironworkers unions. The premises picketed were frequented by few except the construction workers. The project was in its earliest stages. Before the picketing began, there were not more than fourteen men at work. Of these, three union carpenters worked about one hour on September 25. They left the project when the picketing began and returned a few days after the picketing stopped. Two union ironworkers or rodmen gave notice on the preceding Saturday that picketing was to begin Monday, September 25, and that, therefore, they would not come to work. They never returned and the contractor was delayed several days while seeking to replace them. A nonunion plumber was assisted by a helper, who, oddly enough, belonged to a

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if a job isn't one hundred per cent union, the union labor is not going to work on it; it has got to be one hundred per cent union.' If it wasn't—talking about this particular job together with any other jobs in the future, not only of ours, but other people's as well, that they would just have to take what came from the union as a result of not being one hundred per cent union, and we did discuss to some degree the right-to-work law and the effect that it had had or should have on labor and I told him I didn't see how we could comply with the law and make any job one hundred per cent union. 'Well,' he said, 'nobody else is paying any attention to the right-to-work law; I don't see any reason why Graham Brothers should be so concerned about it.' "

printers union. The plumber did not stop work but his helper left when the picketing began.

The others present were six or seven laborers whose status as union men was not clear. They did not quit but the work on the project as a whole came to a substantial standstill during the week of September 25, because the principal activity then called for was that of pouring concrete which required the services of rodmen as well as those of laborers.

The effect of the picketing was confirmatory of its purpose as found by the trial court. Petitioners here engaged in more than the mere publication of the fact that the job was not 100% union. Their picketing was done at such a place and in such a manner that, coupled with established union policies and traditions, it caused the union men to stop work and thus slow the project to a general standstill. Such conduct, furthermore, was conditioned upon the fact that some of the work on this job, particularly the plumbing, was being done by a subcontractor who employed nonunion labor, whereas Joinville had demanded of the general contractor that the job be "one hundred per cent union."

The policy of Virginia which is expressed in its Right to Work Statute is summarized as follows by its highest court:

> "It provides in substance that neither membership nor non-membership in a labor union shall be made a condition of employment; that a contract limiting employment to union members is against public policy; and that a person denied employment because he is either a member of a union or not a member of a union shall have a right of action for damages." *Finney* v. *Hawkins,* 189 Va. 878, 880, 54 S. E. 2d 872, 874.

Based upon the findings of the trial court, we have a case in which picketing was undertaken and carried on with at least one of its substantial purposes in conflict with the declared policy of Virginia. The immediate results of the picketing demonstrated its potential effectiveness, unless enjoined, as a practical means of putting pressure on the general contractor to eliminate from further participation all nonunion men or all subcontractors employing nonunion men on the project.

Assuming the above conclusions to have been established, petitioners still contend that the injunction in this case was inconsistent with the Fourteenth Amendment to the Constitution of the United States. On the reasoning and authority of our recent decisions, we reaffirm our position to the contrary. *Building Service Union* v. *Gazzam,* 339 U. S. 532; *Teamsters Union* v. *Hanke,* 339 U. S. 470; *Hughes* v. *Superior Court,* 339 U. S. 460; *Giboney* v. *Empire Storage Co.,* 336 U. S. 490; *Thomas* v. *Collins,* 323 U. S. 516, 537–538, and 543–544 (concurring opinion); *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769, 776–777 (concurring opinion); *Carpenters Union* v. *Ritter's Cafe,* 315 U. S. 722; *Carlson* v. *California,* 310 U. S. 106; *Thornhill* v. *Alabama,* 310 U. S. 88, 103–104; *Senn* v. *Tile Layers Union,* 301 U. S. 468, 479–481. See also, *Electrical Workers* v. *Labor Board,* 341 U. S. 694, 705.

The judgment of the Supreme Court of Appeals of Virginia accordingly is

Affirmed.

MR. JUSTICE BLACK dissents.

MR. JUSTICE DOUGLAS, dissenting.

If this union used the coercive power of picketing to force the contractor to discharge the nonunion men who

were employed on the job, Virginia could issue the injunction. For it is within the police power of the state to keep opportunities for work open to both nonunion and union men. See *Giboney* v. *Empire Storage Co.*, 336 U. S. 490; *Building Service Union* v. *Gazzam,* 339 U. S. 532. But if the union did no more than advertise to union men and union sympathizers that nonunion men were employed on the job, the picketing would be privileged.

Picketing is a form of free speech—the workingman's method of giving publicity to the facts of industrial life. As such it is entitled to constitutional protection. *Thornhill* v. *Alabama,* 310 U. S. 88. No court would be entitled to prevent the dissemination of the news "This is not a Union Job," whether it be by radio, by newspaper, by pamphlets, or by picketing. A picket carrying that sign would be proclaiming to all union men to stay away. Yet as MR. JUSTICE MINTON, dissenting in *Teamsters Union* v. *Hanke,* 339 U. S. 470, 481, 482, stated, peaceful picketing when used "as an instrument of publicity" is a form of speech protected by the First and Fourteenth Amendments. It is entitled to that protection though it incites to action. For it is the aim of most ideas to shape conduct.[1]

The line between permissible and unlawful picketing will therefore often be narrow or even tenuous. A purpose to deprive nonunion men of employment would make the picketing unlawful; a purpose to keep union men away from the job would give the picketing constitutional protection. The difficulty here is that we

[1] I have expressed elsewhere my views concerning the line between sanctity of speech and the unlawful use of the coercive power of unions. See *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769, 775–777; *Thomas* v. *Collins,* 323 U. S. 516, 543–544.

have no findings of fact. We have only the recitation in the decree that the picketing conflicted with the Virginia statute.

There is a dispute in the testimony as to the purpose of the picketing. The contractor testified that the aim was to coerce him to replace nonunion men with union men. The union official testified unequivocally that that was not the purpose, that the aim was to inform union men that nonunion men were on the job.[2] Per-

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[2] Mr. Joinville testified:

"Q. Now Mr. Graham has alleged that you came to talk with him as business representative for Local No. 10 and that you renewed your request of July 27, 1950, that all non-union labor on the job project be laid off or discharged. Did you make that request?

"A. No.

"Q. Were you interested in all the non-union labor on the project being laid off?

"A. I was only interested in furthering the interests of union labor. As to the standing and who was on the job and what crafts, I didn't know and didn't know until I talked to Mr. Graham and got it from him direct.

"Q. Did you in your conversation with him request him to lay off or fire or discharge anybody?

"A. No. Mr. Graham definitely told me he intended to go through with it and I asked him to give his contracts to some of the boys—some of the contractors whom he had let his contracts to in the past. He said definitely he had made commitment to Mr. Talley and he intended to hold Mr. Talley to his commitment and see that Mr. Talley completed that job, and knowing the contracting business, I know that.

. . . . . .

"Q. You have testified that you went to see him [Mr. Graham] for the purpose of getting him to use some of your union subcontractors, is that correct?

"A. That is my job, to promote subcontractors and my membership wherever possible.

"Q. He refused to do just that, didn't he?

"A. He said he had already let the contract to a non-union,—as

haps the trial judge believed the contractor. Perhaps he deemed it irrelevant to resolve the conflict. Certainly I cannot resolve it from this cold record. I believe the case should be remanded for specific findings. We spoke in *Thornhill* v. *Alabama, supra,* at 105, of the importance of a "narrowly drawn" picketing statute, of the danger of one that condemned picketing indiscriminately. The same dangers are inherent in cases where there are no findings and yet where the unlawful purpose must be found before the picketing can be enjoined. If Virginia is to enjoin this form of free speech, I would require her to show precisely the reasons for it. Unless we are meticulous in that regard, great rights will be lost by the absence of findings, by the generality of findings, or by the vagueness of decrees. There is more than suspicion that that has happened here. For the decree permanently enjoins defendants from "carrying on their picketing or other activities in front of or around" the construction site. This decree was not "tailored to prevent a specific violation" of state law. *Building Service Union* v. *Gazzam,*

I assume, I had no relationship with him—to a contractor by the name of Talley and he had no intention of violating that contract with Talley, and I agreed with him.

"Q. Then he denied your men the right to work for him, didn't he?

"A. He definitely did.

. . . . . .

"Q. Mr. Joinville, did Mr. Graham refuse to employ any of your local union men?

"A. He definitely took the stand he wouldn't have anyone but Talley on that job.

"Q. Did you ask Mr. Graham to cancel his contract with Talley?

"A. No. I have been in this construction business long enough and business agent for twenty some years and I know when a contract is signed and delivered nobody cancels them.

"Q. That would have nothing to do with the State Law, would it?

"A. That is right."

supra, at 541.[3] It is a broadside against all picketing, the kind of general assault condemned by *Thornhill* v. *Alabama, supra.* It illustrates the evil consequences that flow from a failure to be utterly painstaking in isolating the precise evils in picketing which the state may regulate.

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[3] See also *Hughes* v. *Superior Court,* 339 U. S. 460, where we upheld the validity of an injunction which restrained the defendants from "picketing . . . for the purpose of compelling plaintiff to do any of the following acts:

"(1) the selective hiring of negro clerks, such hiring to be based on the proportion of white and negro customers who patronize plaintiff's stores; . . . ."

This purpose was declared unlawful by the California courts and we sustained the injunction *directed against that unlawful purpose.* Cf. *Hotel Employees' Local* v. *Wisconsin Board,* 315 U. S. 437, involving an administrative order prohibiting picketing. It was undisputed that the picketing had erupted into violence. We accepted the Wisconsin court's determination that the order was directed only against such unlawful conduct and did not reach out to strike down peaceful picketing for a lawful purpose.

SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, *v.* UNITED STATES EX REL. MEZEI.

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

No. 139. Argued January 7–8, 1953.—Decided March 16, 1953.

An alien resident of the United States traveled abroad and remained in Hungary for 19 months. On his return to this country, the Attorney General, acting pursuant to 22 U. S. C. § 223 and regulations thereunder, ordered him permanently excluded without a hearing. The order was based on "information of a confidential nature, the disclosure of which would be prejudicial to the public interest," and on a finding that the alien's entry would be prejudicial to the public interest for security reasons. Because other nations refused to accept him, his exclusion at Ellis Island was continued for 21 months. A federal district court in habeas corpus proceedings then directed his conditional parole into the United States on bond. *Held:* The Attorney General's continued exclusion of the alien without a hearing does not amount to an unlawful detention, and courts may not temporarily admit him to the United States pending arrangements for his departure abroad. Pp. 207–216.

(a) In exclusion cases, the courts cannot retry the Attorney General's statutory determination that an alien's entry would be prejudicial to the public interest. Pp. 210–212.

(b) Neither an alien's harborage on Ellis Island nor his prior residence in this country transforms the administrative proceeding against him into something other than an exclusion proceeding; and he may be excluded if unqualified for admission under existing immigration laws. P. 213.

(c) Although a lawfully resident alien may not captiously be deprived of his constitutional rights to due process, the alien in this case is an entrant alien or "assimilated to that status" for constitutional purposes. *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, distinguished. Pp. 213–214.

(d) The Attorney General therefore may exclude this alien without a hearing, as authorized by the emergency regulations promulgated pursuant to the Passport Act, and need not disclose the evidence upon which that determination rests. Pp. 214–215.

(e) The alien's continued exclusion on Ellis Island does not deprive him of any statutory or constitutional right. Pp. 215–216.

(f) The alien's right to enter the United States depends on the congressional will, and the courts cannot substitute their judgment for the legislative mandate. P. 216.

195 F. 2d 964, reversed.

In a habeas corpus proceeding, the Federal District Court authorized the temporary admission of an alien to this country on $5,000 bond. 101 F. Supp. 66. The Court of Appeals affirmed that action, but directed reconsideration of the terms of the parole. 195 F. 2d 964. This Court granted certiorari. 344 U. S. 809. *Reversed,* p. 216.

Ross L. Malone, Jr. argued the cause for petitioner. With him on the brief were *Solicitor General Cummings, John F. Davis, L. Paul Winings* and *Maurice A. Roberts.*

Jack Wasserman argued the cause and filed a brief for respondent.

MR. JUSTICE CLARK delivered the opinion of the Court.

This case concerns an alien immigrant permanently excluded from the United States on security grounds but stranded in his temporary haven on Ellis Island because other countries will not take him back. The issue is whether the Attorney General's continued exclusion of respondent without a hearing amounts to an unlawful detention, so that courts may admit him temporarily to the United States on bond until arrangements are made for his departure abroad. After a hearing on respondent's petition for a writ of habeas corpus, the District Court so held and authorized his temporary admission on $5,000 bond.[1] The Court of Appeals affirmed that action, but directed reconsideration of the terms of the

[1] 101 F. Supp. 66 (1951).

parole.[2] Accordingly, the District Court entered a modified order reducing bond to $3,000 and permitting respondent to travel and reside in Buffalo, New York. Bond was posted and respondent released. Because of resultant serious problems in the enforcement of the immigration laws, we granted certiorari. 344 U. S. 809.

Respondent's present dilemma springs from these circumstances: Though, as the District Court observed, "[t]here is a certain vagueness about [his] history," respondent seemingly was born in Gibraltar of Hungarian or Rumanian parents and lived in the United States from 1923 to 1948.[3] In May of that year he sailed for Europe, apparently to visit his dying mother in Rumania. Denied entry there, he remained in Hungary for some 19 months, due to "difficulty in securing an exit permit." Finally, armed with a quota immigration visa issued by the American Consul in Budapest, he proceeded to France and boarded the *Ile de France* in Le Havre bound for New York. Upon arrival on February 9, 1950, he was temporarily excluded from the United States by an immigration inspector acting pursuant to the Passport Act as amended and regulations thereunder. Pending disposition of his case he was received at Ellis Island. After reviewing the evidence, the Attorney General on May 10, 1950, ordered the temporary exclusion to be made permanent without a hearing before a board of special inquiry, on the "basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest." That determination rested on a finding that respondent's entry would be prejudicial to the public interest for security reasons. But thus far all attempts to effect respondent's departure have failed: Twice he shipped

[2] 195 F. 2d 964 (C. A. 2d Cir. 1952).

[3] 101 F. Supp., at 67.

out to return whence he came; France and Great Britain refused him permission to land. The State Department has unsuccessfully negotiated with Hungary for his readmission. Respondent personally applied for entry to about a dozen Latin-American countries but all turned him down. So in June 1951 respondent advised the Immigration and Naturalization Service that he would exert no further efforts to depart. In short, respondent sat on Ellis Island because this country shut him out and others were unwilling to take him in.

Asserting unlawful confinement on Ellis Island, he sought relief through a series of habeas corpus proceedings. After four unsuccessful efforts on respondent's part, the United States District Court for the Southern District of New York on November 9, 1951, sustained the writ. The District Judge, vexed by the problem of "an alien who has no place to go," did not question the validity of the exclusion order but deemed further "detention" after 21 months excessive and justifiable only by affirmative proof of respondent's danger to the public safety. When the Government declined to divulge such evidence, even *in camera,* the District Court directed respondent's conditional parole on bond.[4] By a divided vote, the Court of Appeals affirmed. Postulating that the power to hold could never be broader than the power to remove or shut out and that to "continue an alien's confinement beyond that moment when deportation becomes patently impossible is to deprive him of his liberty," the court found respondent's "confinement" no longer justifiable as a means of removal elsewhere, thus not authorized by statute, and in violation of due process.[5] Judge Learned Hand, dissenting, took a different view: The Attorney General's order was one of "exclu-

[4] 101 F. Supp., at 67, 70; R. 26–27.

[5] 195 F. 2d, at 967, 968.

sion" and not "deportation"; respondent's transfer from ship to shore on Ellis Island conferred no additional rights; in fact, no alien so situated "can force us to admit him at all." [6]

Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control. *The Chinese Exclusion Case,* 130 U. S. 581 (1889); *Fong Yue Ting* v. *United States,* 149 U. S. 698 (1893); *Knauff* v. *Shaughnessy,* 338 U. S. 537 (1950); *Harisiades* v. *Shaughnessy,* 342 U. S. 580 (1952). In the exercise of these powers, Congress expressly authorized the President to impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife. That authorization, originally enacted in the Passport Act of 1918, continues in effect during the present emergency. Under it, the Attorney General, acting for the President, may shut out aliens whose "entry would be prejudicial to the interests of the United States." [7] And he may exclude without a hearing when the exclusion is based on confidential information the

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[6] *Id.,* at 970.

[7] Section 1 of the Act of May 22, 1918, c. 81, 40 Stat. 559, as amended by the Act of June 21, 1941, c. 210, § 1, 55 Stat. 252, 22 U. S. C. § 223, provides in pertinent part:

"When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

"(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules,

disclosure of which may be prejudicial to the public interest.[8] The Attorney General in this case proceeded in accord with these provisions; he made the necessary determinations and barred the alien from entering the United States.

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regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe; . . . ."

That authorization has been extended to cover the dates relevant in this case. 66 Stat. 54, 96, 137, 330. Pursuant to that authority, Presidential Proclamation No. 2523, 6 Fed. Reg. 5821, as promulgated in 1941 in part provided:

"No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General."

The Secretary of State, with the concurrence of the Attorney General, issued applicable regulations codified as Part 175 of 8 CFR. Section 175.53 defines eleven categories of aliens whose entry is "deemed to be prejudicial to the interests of the United States." That delegation of authority has been upheld. *Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950). The regulations were ratified and confirmed by Presidential Proclamation No. 2850, 14 Fed. Reg. 5173, promulgated August 17, 1949.

[8] 8 CFR § 175.57 provides:

"§ 175.57 *Entry not permitted in special cases.* (a) Any alien, even though in possession of a permit to enter, or exempted under §§175.41 to 175.62, inclusive, from obtaining a permit to enter, may be excluded temporarily if at the time he applies for admission at a port of entry it appears that he is or may be excludable under one of the categories set forth in § 175.53. The official excluding the alien shall immediately report the facts to the head of his department, who will communicate such report to the Secretary of State. Any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be prejudicial to the interests of the United States. Any alien so temporarily excluded by any other official shall not be admitted and shall be excluded and deported unless the Secretary of State is satisfied that

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It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. *The Japanese Immigrant Case,* 189 U. S. 86, 100–101 (1903); *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 49–50 (1950); *Kwong Hai Chew* v. *Colding,* 344 U. S. 590, 598 (1953). But an alien on the threshold of initial entry stands on a different footing: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Knauff* v. *Shaughnessy, supra,* at 544; *Ekiu* v. *United States,* 142 U. S. 651, 660 (1892). And because the action of the executive officer under such authority is final and conclusive, the Attorney General cannot be compelled to disclose the evidence underlying his determinations in an exclusion case; "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government." *Knauff* v. *Shaughnessy, supra,* at 543; *Ekiu* v. *United States, supra,* at 660. In a case such as this, courts cannot retry the determination of the Attorney General. *Knauff* v. *Shaughnessy, supra,* at 546; *Ludecke* v. *Watkins,* 335 U. S. 160, 171–172 (1948).

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the admission of the alien would not be prejudicial to the interests of the United States.

"(b) In the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he is, or may be excludable under one or more of the categories set forth in § 175.53, no hearing by a board of special inquiry shall be held until after the case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in § 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."

Neither respondent's harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding. Concededly, his movements are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion. But that is true whether he enjoys temporary refuge on land, *Ekiu* v. *United States, supra,* or remains continuously aboard ship. *United States* v. *Jung Ah Lung,* 124 U. S. 621, 626 (1888); *Chin Yow* v. *United States,* 208 U. S. 8, 12 (1908). In sum, harborage at Ellis Island is not an entry into the United States. *Kaplan* v. *Tod,* 267 U. S. 228, 230 (1925); *United States* v. *Ju Toy,* 198 U. S. 253, 263 (1905); *Ekiu* v. *United States, supra,* at 661. For purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws. *E. g., Lem Moon Sing* v. *United States,* 158 U. S. 538, 547–548 (1895); *Polymeris* v. *Trudell,* 284 U. S. 279 (1932).

To be sure, a lawful resident alien may not captiously be deprived of his constitutional rights to procedural due process. *Kwong Hai Chew* v. *Colding,* 344 U. S. 590, 601 (1953); cf. *Delgadillo* v. *Carmichael,* 332 U. S. 388 (1947). Only the other day we held that under some circumstances temporary absence from our shores cannot constitutionally deprive a returning lawfully resident alien of his right to be heard. *Kwong Hai Chew* v. *Colding, supra.* Chew, an alien seaman admitted by an Act of Congress to permanent residence in the United States, signed articles of maritime employment as chief steward on a vessel of American registry with home port in New York City. Though cleared by the Coast Guard for his voyage, on his return from four months at sea he was "excluded" without a hearing on security grounds.

On the facts of that case, including reference to § 307 (d) (2) of the Nationality Act of 1940, we felt justified in "assimilating" his status for constitutional purposes to that of continuously present alien residents entitled to hearings at least before an executive or administrative tribunal. *Id.*, at 596, 599–601. Accordingly, to escape constitutional conflict we held the administrative regulations authorizing exclusion without hearing in certain security cases inapplicable to aliens so protected by the Fifth Amendment. *Id.*, at 600.

But respondent's history here drastically differs from that disclosed in Chew's case. Unlike Chew who with full security clearance and documentation pursued his vocation for four months aboard an American ship, respondent, apparently without authorization or reentry papers,[9] simply left the United States and remained behind the Iron Curtain for 19 months. Moreover, while § 307 of the 1940 Nationality Act regards maritime service such as Chew's to be continuous residence for naturalization purposes, that section deems protracted absence such as respondent's a clear break in an alien's continuous residence here.[10] In such circumstances, we have no difficulty in holding respondent an entrant alien or "assimilated to [that] status" for constitutional purposes. *Id.*, at 599. That being so, the Attorney General may lawfully exclude respondent without a hearing as authorized

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[9] See 8 U. S. C. § 210. Of course, neither a reentry permit, issuable upon proof of prior lawful admission to the United States, § 210 (b), nor an immigration visa entitles an otherwise inadmissible alien to entry. §§ 210 (f), 202 (g). An immigrant is not unaware of this; § 202 (g) directs those facts to be "printed conspicuously upon every immigration visa." For a recent study of entry procedures with recommendations, see Report of the President's Commission on Immigration and Naturalization (1953), cc. 10–11.

[10] 8 U. S. C. § 707; *United States* v. *Larsen*, 165 F. 2d 433 (C. A. 2d Cir. 1947).

by the emergency regulations promulgated pursuant to the Passport Act. Nor need he disclose the evidence upon which that determination rests. *Knauff* v. *Shaughnessy,* 338 U. S. 537 (1950).

There remains the issue of respondent's continued exclusion on Ellis Island. Aliens seeking entry from contiguous lands obviously can be turned back at the border without more. *Polymeris* v. *Trudell,* 284 U. S. 279 (1932). While the Government might keep entrants by sea aboard the vessel pending determination of their admissibility, resulting hardships to the alien and inconvenience to the carrier persuaded Congress to adopt a more generous course. By statute it authorized, in cases such as this, aliens' temporary removal from ship to shore.[11] But such temporary harborage, an act of legislative grace, bestows no additional rights. Congress meticulously specified that such shelter ashore "shall not be considered a landing" nor relieve the vessel of the duty to transport back the alien if ultimately excluded.[12] And this Court has long considered such temporary arrangements as not affecting an alien's status; he is treated as if stopped at the border. *Ekiu* v. *United States,* 142 U. S. 651, 661–662 (1892); *United States* v. *Ju Toy,* 198 U. S. 253, 263 (1905); *Kaplan* v. *Tod,* 267 U. S. 228, 230 (1925).

Thus we do not think that respondent's continued exclusion deprives him of any statutory or constitutional right. It is true that resident aliens temporarily detained pending expeditious consummation of deportation proceedings may be released on bond by the Attorney General whose discretion is subject to judicial review. *Carlson* v. *Landon,* 342 U. S. 524 (1952). By that procedure aliens uprooted from our midst may rejoin the

[11] 8 U. S. C. § 151.

[12] 8 U. S. C. §§ 151, 154.

community until the Government effects their leave.[13] An exclusion proceeding grounded on danger to the national security, however, presents different considerations; neither the rationale nor the statutory authority for such release exists.[14] Ordinarily to admit an alien barred from entry on security grounds nullifies the very purpose of the exclusion proceeding; Congress in 1950 declined to include such authority in the statute.[15] That exclusion by the United States plus other nations' inhospitality results in present hardship cannot be ignored. But, the times being what they are, Congress may well have felt that other countries ought not shift the onus to us; that an alien in respondent's position is no more ours than theirs. Whatever our individual estimate of that policy and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate. *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 590–591 (1952).

Reversed.

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

Mezei came to this country in 1923 and lived as a resident alien in Buffalo, New York, for twenty-five years.

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[13] 8 U. S. C. (Supp. V) § 156. We there noted that "the problem of habeas corpus after unusual delay in *deportation hearings* is not involved in this case." 342 U. S., at 546. (Emphasis added.)

[14] 8 U. S. C. § 154 permits temporary suspension of deportation of excluded aliens whose testimony is needed on behalf of the United States. Manifestly respondent does not fall within that class. While the essence of that provision is retained in § 237 (d) of the Immigration and Nationality Act of 1952, 66 Stat. 202, § 212 (d)(5) of that Act, 66 Stat. 188, vests new and broader discretion in the Attorney General. Cf. 8 U. S. C. §§ 136 (p)(q); 8 U. S. C. (Supp. V) § 137–5 (a)(b). Those provisions are not now here.

[15] See S. Rep. No. 1515, 81st Cong., 2d Sess. 643–644.

He made a trip to Europe in 1948 and was stopped at our shore on his return in 1950. Without charge of or conviction for any crime, he was for two years held a prisoner on Ellis Island by order of the Attorney General. Mezei sought habeas corpus in the District Court. He wanted to go to his wife and home in Buffalo. The Attorney General defended the imprisonment by alleging that it would be dangerous to the Nation's security to let Mezei go home even temporarily on bail. Asked for proof of this, the Attorney General answered the judge that all his information was "of a confidential nature" so much so that telling any of it or even telling the names of any of his secret informers would jeopardize the safety of the Nation. Finding that Mezei's life as a resident alien in Buffalo had been "unexceptionable" and that no facts had been proven to justify his continued imprisonment, the District Court granted bail. The Court of Appeals approved. Now this Court orders Mezei to leave his home and go back to his island prison to stay indefinitely, maybe for life.

MR. JUSTICE JACKSON forcefully points out the danger in the Court's holding that Mezei's liberty is completely at the mercy of the unreviewable discretion of the Attorney General. I join MR. JUSTICE JACKSON in the belief that Mezei's continued imprisonment without a hearing violates due process of law.

No society is free where government makes one person's liberty depend upon the arbitrary will of another. Dictatorships have done this since time immemorial. They do now. Russian laws of 1934 authorized the People's Commissariat to imprison, banish and exile Russian citizens as well as "foreign subjects who are socially dangerous."* Hitler's secret police were

*Decree of the Central Executive Committee and Council of People's Commissars, U. S. S. R., 5 Nov. 1934; Collection of Laws, U. S. S. R., 1935, No. 11, Art. 84. Hazard, Materials on Soviet Law

given like powers. German courts were forbidden to make any inquiry whatever as to the information on which the police acted. Our Bill of Rights was written to prevent such oppressive practices. Under it this Nation has fostered and protected individual freedom. The Founders abhorred arbitrary one-man imprisonments. Their belief was—our constitutional principles are—that no person of any faith, rich or poor, high or low, native or foreigner, white or colored, can have his life, liberty or property taken "without due process of law." This means to me that neither the federal police nor federal prosecutors nor any other governmental official, whatever his title, can put or keep people in prison without accountability to courts of justice. It means that individual liberty is too highly prized in this country to allow executive officials to imprison and hold people on the basis of information kept secret from courts. It means that Mezei should not be deprived of his liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court, not by the prosecutor.

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

Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial. Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive re-

(1947), 16. See Hazard, Reforming Soviet Criminal Law, 29 J. Crim. L. & Criminology 157, 168–169 (1938–1939). See also Berman, Principles of Soviet Criminal Law, 56 Yale L. J. 803 (1946).

straint. Under the best tradition of Anglo-American law, courts will not deny hearing to an unconvicted prisoner just because he is an alien whose keep, in legal theory, is just outside our gates. Lord Mansfield, in the celebrated case holding that slavery was unknown to the common law of England, ran his writ of habeas corpus in favor of an alien, an African Negro slave, and against the master of a ship at anchor in the Thames.[1]

I.

What is our case?[2] In contemplation of law, I agree, it is that of an alien who asks admission to the country. Concretely, however, it is that of a lawful and law-abiding inhabitant of our country for a quarter of a century, long ago admitted for permanent residence, who seeks to return home. After a foreign visit to his aged and ailing mother that was prolonged by disturbed conditions of Eastern Europe, he obtained a visa for admission issued by our consul and returned to New York. There the Attorney General refused to honor his documents and turned him back as a menace to this Nation's security. This man, who seems to have led a life of unrelieved insignificance, must have been astonished to find himself suddenly putting the Government of the United States in such fear that it was afraid to tell him why it was afraid of him. He was shipped and reshipped to France, which twice refused him landing. Great Britain declined, and no other European country has been found willing to open its doors to him. Twelve countries

[1] Sommersett's Case, 20 How. St. Tr. 1; 2 Campbell, Lives of The Chief Justices, 418; Fiddes, Lord Mansfield and The Sommersett Case, 50 L. Q. Rev. 499.

[2] I recite facts alleged in the petition for the writ. Since the Government declined to try the case on the merits, I think we must consider the question on well-pleaded allegations of the petition. Petitioner might fail to make good on a hearing; the question is, must he fail without one?

of the American Hemisphere refused his applications. Since we proclaimed him a Samson who might pull down the pillars of our temple, we should not be surprised if peoples less prosperous, less strongly established and less stable feared to take him off our timorous hands. With something of a record as an unwanted man, neither his efforts nor those of the United States Government any longer promise to find him an abiding place. For nearly two years he was held in custody of the immigration authorities of the United States at Ellis Island, and if the Government has its way he seems likely to be detained indefinitely, perhaps for life, for a cause known only to the Attorney General.

Is respondent deprived of liberty? The Government answers that he was "transferred to Ellis Island on August 1, 1950, for safekeeping," and "is not being detained in the usual sense but is in custody solely to prevent him from gaining entry to the United States in violation of law. He is free to depart from the United States to any country of his own choice." Government counsel ingeniously argued that Ellis Island is his "refuge" whence he is free to take leave in any direction except west. That might mean freedom, if only he were an amphibian! Realistically, this man is incarcerated by a combination of forces which keep him as effectually as a prison, the dominant and proximate of these forces being the United States immigration authority. It overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound. Despite the impeccable legal logic of the Government's argument on this point, it leads to an artificial and unreal conclusion.[3] We must

[3] Mr. Justice Holmes, for the Court, said in *Chin Yow* v. *United States*, 208 U. S. 8, 12–13:

"If we regard the petitioner, as in *Ju Toy's case* it was said that he should be regarded, as if he had been stopped and kept at the limit of our jurisdiction, 198 U. S. 263, still it would be difficult to say that

regard this alien as deprived of liberty, and the question is whether the deprivation is a denial of due process of law.

The Government on this point argues that "no alien has any constitutional right to entry into the United States"; that "the alien has only such rights as Congress sees fit to grant in exclusion proceedings"; that "the so-called detention is still merely a continuation of the exclusion which is specifically authorized by Congress"; that since "the restraint is not incidental to an order [of exclusion] but is, itself, the effectuation of the exclusion order, there is no limit to its continuance" other than statutory, which means no limit at all. The Government all but adopts the words of one of the officials responsible for the administration of this Act who testified before a congressional committee as to an alien applicant, that "He has no rights." [4]

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he was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China. The case would not be that of a person simply prevented from going in one direction that he desired and had a right to take, all others being left open to him, a case in which the judges were not unanimous in *Bird* v. *Jones*, 7 Q. B. 742. But we need not speculate upon niceties. It is true that the petitioner gains no additional right of entrance by being allowed to pass the frontier in custody for the determination of his case. But on the question whether he is wrongly imprisoned we must look at the actual facts. *De facto* he is locked up until carried out of the country against his will."

[4] Testimony of Almanza Tripp, an immigration service official, before the Senate Subcommittee on Immigration on February 15, 1950, included the following:

"Now, when we have a case of that sort, where central registry contains something derogatory of that nature, I do not believe we should make a finding of admissibility until it has been disproved. But the evidence that they had in central registry would not be sufficient for our Service to exclude by the normal board of special-inquiry proceedings, because those proceedings must be conducted in

The interpretations of the Fifth Amendment's command that no person shall be deprived of life, liberty or property without due process of law, come about to this: reasonable general legislation reasonably applied to the individual. The question is whether the Government's detention of respondent is compatible with these tests of substance and procedure.

II. SUBSTANTIVE DUE PROCESS.

Substantively, due process of law renders what is due to a strong state as well as to a free individual. It tolerates all reasonable measures to insure the national safety, and it leaves a large, at times a potentially dangerous, latitude for executive judgment as to policies and means.[5]

After all, the pillars which support our liberties are the three branches of government, and the burden could not be carried by our own power alone. Substantive due process will always pay a high degree of deference to congressional and executive judgment, especially when they concur, as to what is reasonable policy under conditions of particular times and circumstances. Close to the maximum of respect is due from the judiciary to the political departments in policies affecting security and alien exclusion. *Harisiades* v. *Shaughnessy,* 342 U. S. 580.

Due process does not invest any alien with a right to enter the United States, nor confer on those admitted

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a manner in which they could not be subject to attack in a court of the United States.

"You may say that it is unfair to the applicant not to give him that protection, but you must remember that the applicant is an applicant. He has no rights. . . ." (Hearings before the Subcommittee on Amendments to the Displaced Persons Act, Senate Committee on the Judiciary, 81st Cong., 1st and 2d Sessions 665.)

[5] Cf. *Korematsu* v. *United States,* 323 U. S. 214.

the right to remain against the national will. Nothing in the Constitution requires admission or sufferance of aliens hostile to our scheme of government.

Nor do I doubt that due process of law will tolerate some impounding of an alien where it is deemed essential to the safety of the state. Even the resident, friendly alien may be subject to executive detention without bail, for a reasonable period, pending consummation of deportation arrangements. *Carlson* v. *Landon,* 342 U. S. 524. The alien enemy may be confined or his property seized and administered because hostility is assumed from his continued allegiance to a hostile state. Cf. *Ludecke* v. *Watkins,* 335 U. S. 160; *Zittman* v. *McGrath,* 341 U. S. 446, and 341 U. S. 471.

If due process will permit confinement of resident aliens friendly in fact because of imputed hostility, I should suppose one personally at war with our institutions might be confined, even though his state is not at war with us. In both cases, the underlying consideration is the power of our system of government to defend itself, and changing strategy of attack by infiltration may be met with changed tactics of defense.

Nor do I think the concept of due process so paralyzing that it forbids all detention of an alien as a preventive measure against threatened dangers and makes confinement lawful only after the injuries have been suffered. In some circumstances, even the citizen in default of bail has long been subject to federal imprisonment for security of the peace and good behavior.[6] While it is usually applied for express verbal threats, no reason is known to me why the power is not the same in the case of threats inferred by proper procedures from circumstances. The British, with whom due process is a habit, if not a written

[6] 18 U. S. C. § 3043; cf. Criminal Code of New York, 66 McKinney's Consolidated Laws, Tit. II, c. II, § 84.

constitutional dictum, permit a court in a limited class of cases to pass a "sentence of preventive detention" if satisfied that it is expedient for the protection of the public.[7]

I conclude that detention of an alien would not be inconsistent with substantive due process, provided—and this is where my dissent begins—he is accorded procedural due process of law.

III. PROCEDURAL DUE PROCESS.

Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. Insofar as it is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which comprise substantive law.

If it be conceded that in some way this alien could be confined, does it matter what the procedure is? Only the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices. Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those

[7] Criminal Justice Act, 1948, § 21 (2).

blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* consideration. Cf. *Knauff* v. *Shaughnessy,* 338 U. S. 537, which was a near miss, saved by further administrative and congressional hearings from perpetrating an injustice. See Knauff, *The Ellen Knauff Story* (New York 1952).

Our law may, and rightly does, place more restrictions on the alien than on the citizen. But basic fairness in hearing procedures does not vary with the status of the accused. If the procedures used to judge this alien are fair and just, no good reason can be given why they should not be extended to simplify the condemnation of citizens. If they would be unfair to citizens, we cannot defend the fairness of them when applied to the more helpless and handicapped alien. This is at the root of our holdings that the resident alien must be given a fair hearing to test an official claim that he is one of a deportable class. *Wong Yang Sung* v. *McGrath,* 339 U. S. 33.

The most scrupulous observance of due process, including the right to know a charge, to be confronted with the accuser, to cross-examine informers and to produce evidence in one's behalf, is especially necessary where the occasion of detention is fear of future misconduct, rather than crimes committed. Both the old proceeding by which one may be bound to keep the peace and the newer British "preventive detention" are safeguarded with full rights to judicial hearings for the accused. On the contrary, the Nazi regime in Germany installed a system of "protective custody" by which the arrested could claim no judicial or other hearing process,[8] and as a result the con-

[8] Hermann Göring, on cross-examination, made the following statements:

". . . [T]hose who had committed some act of treason against the new state, or those who might be proved to have committed such an act, were naturally turned over to the courts. The others, however, of whom one might expect such acts, but who had not yet committed

centration camps were populated with victims of summary executive detention for secret reasons. That is what renders Communist justice such a travesty. There are other differences, to be sure, between authoritarian procedure and common law, but differences in the process of administration make all the difference between a reign of terror and one of law. Quite unconsciously, I am sure, the Government's theory of custody for "safekeeping" without disclosure to the victim of charges, evidence, informers or reasons, even in an administrative proceeding, has unmistakable overtones of the "protective custody" of the Nazis more than of any detaining procedure known to the common law. Such a practice, once established with the best of intentions, will drift into oppression of the disadvantaged in this country as surely as it has elsewhere. That these apprehensive surmises are not "such stuff as dreams are made on" appears from testimony of a top immigration official concerning an applicant that "He has no rights."

Because the respondent has no right of entry, does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate his exclusion to eject him bodily into the sea or to set him adrift in a rowboat.

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them, were taken into protective custody, and these were the people who were taken to concentration camps. . . . Likewise, if for political reasons . . . someone was taken into protective custody, that is, purely for reasons of state, this could not be reviewed or stopped by any court." He claimed (though the claim seemed specious) that twenty-four hours after being put in concentration camps they were informed of the reasons and after forty-eight hours were allowed an attorney. "But this by no means rescinded my order that a review was not permitted by the courts of a politically necessary measure of protective custody. These people were simply to be given an opportunity of making a protest." 9 International Military Tribunal Proceedings 420–421 (March 18, 1946).

Would not such measures be condemned judicially as a deprivation of life without due process of law? Suppose the authorities decide to disable an alien from entry by confiscating his valuables and money. Would we not hold this a taking of property without due process of law? Here we have a case that lies between the taking of life and the taking of property; it is the taking of liberty. It seems to me that this, occurring within the United States or its territorial waters, may be done only by proceedings which meet the test of due process of law.

Exclusion of an alien without judicial hearing, of course, does not deny due process when it can be accomplished merely by turning him back on land or returning him by sea. But when indefinite confinement becomes the means of enforcing exclusion, it seems to me that due process requires that the alien be informed of its grounds and have a fair chance to overcome them. This is the more due him when he is entrapped into leaving the other shore by reliance on a visa which the Attorney General refuses to honor.

It is evident that confinement of respondent no longer can be justified as a step in the process of turning him back to the country whence he came. Confinement is no longer ancillary to exclusion; it can now be justified only as the alternative to normal exclusion. It is an end in itself.

The Communist conspiratorial technique of infiltration poses a problem which sorely tempts the Government to resort to confinement of suspects on secret information secretly judged. I have not been one to discount the Communist evil. But my apprehensions about the security of our form of government are about equally aroused by those who refuse to recognize the dangers of Communism and those who will not see danger in anything else.

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Congress has ample power to determine whom we will admit to our shores and by what means it will effectuate its exclusion policy. The only limitation is that it may not do so by authorizing United States officers to take without due process of law the life, the liberty or the property of an alien who has come within our jurisdiction; and that means he must meet a fair hearing with fair notice of the charges.[9]

It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone.

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[9] The trial court sought to reconcile due process for the individual with claims of security by suggesting that the Attorney General disclose *in camera* enough to enable a judicial determination of the legality of the confinement. The Attorney General refused. I do not know just how an *in camera* proceeding would be handled in this kind of case. If respondent, with or without counsel, were present, disclosures to them might well result in disclosures by them. If they are not allowed to be present, it is hard to see how it would answer the purpose of testing the Government's case by cross-examination or counter-evidence, which is what a hearing is for. The questions raised by the proposal need not be discussed since they do not call for decision here.

HEIKKILA *v.* BARBER, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

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

No. 426. Argued February 4–5, 1953.—Decided March 16, 1953.

An alien whose deportation has been ordered by the Attorney General under § 19 (a) of the Immigration Act of 1917 may not obtain a review of the Attorney General's decision under § 10 of the Administrative Procedure Act, by a suit for a declaratory judgment or injunctive relief. Pp. 230–237.

(a) Section 19 (a) of the Immigration Act of 1917 is a statute which precludes judicial review within the meaning of the first exception to § 10 of the Administrative Procedure Act. Pp. 232–235.

(b) The reasons which prevent review of a deportation order under § 10 of the Administrative Procedure Act apply *a fortiori* to suits for injunction based on the general equity powers of the federal courts and suits for declaratory relief under the Declaratory Judgment Act. P. 237.

(c) Habeas corpus remains the only procedure by which an alien whose deportation has been ordered by the Attorney General may challenge such order in the courts. Pp. 234–235.

Affirmed.

Appellant's complaint seeking a "review of agency action" as well as injunctive and declaratory relief, was dismissed by a three-judge District Court. On direct appeal to this Court, *affirmed,* p. 237.

Joseph Forer and *Lloyd E. McMurray* argued the cause for appellant. With them on the brief was *Allan Brotsky.*

Robert W. Ginnane argued the cause for Barber, appellee. With him on the brief were *Solicitor General Cummings, Assistant Attorney General Murray, Beatrice*

Rosenberg and *John R. Wilkins*. *Robert L. Stern*, then Acting Solicitor General, filed a motion to dismiss the appeal and a statement in opposition to appellant's statement of jurisdiction.

MR. JUSTICE CLARK delivered the opinion of the Court.

Heikkila is an alien whose deportation has been ordered by the Attorney General. He began this action against the District Director of the Immigration and Naturalization Service by a complaint seeking a "review of agency action" as well as injunctive and declaratory relief. His main substantive claim is that § 22 of the Internal Security Act of 1950, 64 Stat. 1006, upon which the order was based, and which makes Communist Party membership *per se* ground for deportation, is unconstitutional. A three-judge District Court convened under 28 U. S. C. §§ 2282, 2284, dismissed the complaint without opinion. Together with the constitutional question, this appeal presents two important procedural questions: whether the validity of deportation orders may be tested by some procedure other than habeas corpus and, if so, whether the Commissioner of Immigration and Naturalization is an indispensable party to the action.

It is clear that prior to the Administrative Procedure Act habeas corpus was the only remedy by which deportation orders could be challenged in the courts.[1] The courts have consistently rejected attempts to use injunctions, declaratory judgments and other types of relief for this purpose.[2] Accordingly, in asserting the availability

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[1] Mr. Chief Justice Stone, dissenting (on other grounds), in *Bridges* v. *Wixon*, 326 U. S. 135, 167 (1945).

[2] *Fafalios* v. *Doak*, 60 App. D. C. 215, 50 F. 2d 640; *Poliszek* v. *Doak*, 61 App. D. C. 64, 57 F. 2d 430; *Kabadian* v. *Doak*, 62 App. D. C. 114, 65 F. 2d 202; *Darabi* v. *Northrup*, 54 F. 2d 70. See also *Impiriale* v. *Perkins*, 62 App. D. C. 279, 66 F. 2d 805; *Azzollini* v. *Watkins*, 172 F. 2d 897.

of judicial review of the type sought here, appellant relies primarily on § 10 of the Administrative Procedure Act,[3] conceding that the question has not yet been decided by this Court. The Government contends that because

[3] "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. . . .

. . . . . .

"(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the

§ 19 (a) of the Immigration Act of 1917 [4] makes the decision of the Attorney General "final" the underlying statute precludes judicial review and comes within the first exception to § 10.

Apart from the words quoted, the Administrative Procedure Act itself is silent on which "statutes preclude judicial review." Both the Senate and the House Committee Reports on the Act commented that "Very rarely do statutes withhold judicial review." [5] And the House Report added that "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." [6] The spirit of these statements together with the broadly remedial purposes of the Act counsel a judicial attitude of hospitality towards the claim that § 10 greatly expanded the availability of judicial review. However, such generalities are not dispositive of the issue here, else a balance would have to be struck between those in the Committee reports and material in the debates which indicates inconsistent legislative understandings as to how exten-

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facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." 60 Stat. 243, 5 U. S. C. § 1009.

[4] "In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final." 39 Stat. 889, as amended, 54 Stat. 1238, 8 U. S. C. § 155 (a). We do not consider the 1952 Act, 66 Stat. 163, which took effect after Heikkila's complaint was filed.

[5] Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., 212, 275.

[6] Legislative History, 275.

sively § 10 changed the prior law on judicial review.[7] No easy answer is found in our decisions on the subject. Each statute in question must be examined individually; its purpose and history as well as its text are to be considered in deciding whether the courts were intended to provide relief for those aggrieved by administrative action. Mere failure to provide for judicial intervention is not conclusive; neither is the presence of language which appears to bar it.[8]

That the Attorney General's decisions are "final" does not settle the question. The appellant properly emphasizes the ambiguity in that term. Read alone, it might refer to the doctrine requiring exhaustion of administrative remedies before judicial process can be invoked. But "final," as used in immigration legislation, has a history, both in the statutes and in the decisions of this Court. It begins with § 8 of the Immigration Act of 1891, 26 Stat. 1085, which provided in part that "All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury." The appellant in *Ekiu* v. *United States,* 142 U. S. 651 (1892) argued that if § 8 was interpreted as making the administrative exclusion decision conclusive, she was deprived of a constitutional right to have the courts on habeas corpus determine the legality of her detention and, incidental thereto, examine the facts on which it was based. Relying on the peculiarly political nature of the legislative power over aliens, the Court was clear on the power

[7] Legislative History, 311, 325.

[8] *Ludecke* v. *Watkins,* 335 U. S. 160 (1948); *American Federation of Labor* v. *Labor Board,* 308 U. S. 401 (1940); *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297 (1943); *Stark* v. *Wickard,* 321 U. S. 288 (1944).

of Congress to entrust the final determination of the facts in such cases to executive officers. Cf. *Harisiades* v. *Shaughnessy,* 342 U. S. 580 (1952). Mr. Justice Gray found that § 8 was "manifestly intended to prevent the question of an alien immigrant's right to land, when once decided adversely by an inspector, acting within the jurisdiction conferred upon him, from being impeached or reviewed, in the courts or otherwise, save only by appeal to the inspector's official superiors, and in accordance with the provisions of the act." 142 U. S., at 663. With changes unimportant here, this finality provision was carried forward in later immigration legislation. See, *e. g.,* § 25 of the 1903 Act, 32 Stat. 1220, and § 25 of the 1907 Act, 34 Stat. 906. During these years, the cases continued to recognize that Congress had intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution. *Fong Yue Ting* v. *United States,* 149 U. S. 698 (1893). In *Lem Moon Sing* v. *United States,* 158 U. S. 538 (1895), treating a comparable provision for the enforcement of the Chinese Exclusion Act, Mr. Justice Harlan observed that when Congress made the administrative decision final, "the authority of the courts to review the decision of the executive officers was taken away." *Id.,* at 549. And by 1901, Mr. Chief Justice Fuller was able to describe as "for many years the recognized and declared policy of the country" the congressional decision to place "the final determination of the right of admission in executive officers, without judicial intervention." *Fok Yung Yo* v. *United States,* 185 U. S. 296, 305 (1902). See also *The Japanese Immigrant Case* (*Yamataya* v. *Fisher*), 189 U. S. 86 (1903); *Pearson* v. *Williams,* 202 U. S. 281 (1906); *Zakonaite* v. *Wolf,* 226 U. S. 272 (1912).

Read against this background of a quarter of a century of consistent judicial interpretation, § 19 of the 1917 Immigration Act, 39 Stat. 889, clearly had the effect of pre-

cluding judicial intervention in deportation cases except insofar as it was required by the Constitution.[9] And the decisions have continued to regard this point as settled. *Kessler* v. *Strecker,* 307 U. S. 22, 34 (1939); *Bridges* v. *Wixon,* 326 U. S. 135, 149, 166, 167 (1945); *Estep* v. *United States,* 327 U. S. 114, 122, 123, n. 14 (1946); *Sunal* v. *Large,* 332 U. S. 174, 177, n. 3 (1947). Clearer evidence that for present purposes the Immigration Act of 1917 is a statute precluding judicial review would be hard to imagine. Whatever view be taken as to the breadth of § 10 of the Administrative Procedure Act, the first exception to that section applies to the case before us. The result is that appellant's rights were not enlarged by that Act. Now, as before, he may attack a deportation order only by habeas corpus.[10]

The three Court of Appeals decisions to the contrary have taken the position that habeas corpus itself represented judicial review, albeit of a limited nature. *United States ex rel. Trinler* v. *Carusi,* 166 F. 2d 457; *Kristensen* v. *McGrath,* 86 U. S. App. D. C. 48, 179 F. 2d 796; *Prince* v. *Commissioner,* 185 F. 2d 578. Under this approach, the finality of an administrative decision must be absolute before the first exception to § 10 can apply. Our difficulty with this position begins with the nature of the writ and

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[9] The Senate Committee said, "The last [finality] provision, while new in this particular location, is not new in the law, the courts having repeatedly held that in the cases of aliens arrested for deportation, as well as in the cases of those excluded at our ports, the decision of the administrative officers is final, and the Supreme Court having in several decisions regarded the case of the alien arrested for deportation as practically a deferred exclusion (The Japanese Immigrant Case, 189 U. S., 86; Pearson *v.* Williams, 202 U. S., 281; etc.)." S. Rep. No. 352, 64th Cong., 1st Sess., Vol. 2, 16.

[10] We need not consider whether the same result follows from the first part of § 10 (b), "The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute . . . ."

ends with the language of § 10. Regardless of whether or not the scope of inquiry on habeas corpus has been expanded,[11] the function of the courts has always been limited to the enforcement of due process requirements. To review those requirements under the Constitution, whatever the intermediate formulation of their constituents, is very different from applying a statutory standard of review, *e. g.*, deciding "on the whole record" whether there is substantial evidence to support administrative findings of fact under § 10 (e). Yet, for all that appears, § 10 (e) might be called into play as well as § 10 (b) if habeas corpus were regarded as judicial review.[12] In short, it is the scope of inquiry on habeas corpus that differentiates use of the writ from judicial review as that term is used in the Administrative Procedure Act. We hold that deportation orders remain immune to direct attack.

Heikkila suggests that *Perkins* v. *Elg,* 307 U. S. 325 (1939) (declaratory and injunctive relief), and *McGrath* v. *Kristensen,* 340 U. S. 162 (1950) (declaratory relief), were deviations from this rule. But neither of those cases involved an outstanding deportation order. Both Elg and Kristensen litigated erroneous determinations of their status, in one case citizenship, in the other eligibility for citizenship. Elg's right to a judicial hearing on her claim of citizenship had been recognized as early as 1922 in *Ng Fung Ho* v. *White,* 259 U. S. 276. And Kristensen's ineligibility for naturalization was set up in contesting the Attorney General's refusal to suspend deportation

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[11] Compare *The Japanese Immigrant Case,* 189 U. S. 86 (1903), with *United States ex rel. Vajtauer* v. *Commissioner,* 273 U. S. 103 (1927), and *Bridges* v. *Wixon,* 326 U. S. 135 (1945).

[12] The lower courts have split on this question and we express no opinion on it now. *Yiakoumis* v. *Hall,* 83 F. Supp. 469; *Lindenau* v. *Watkins,* 73 F. Supp. 216.

proceedings under the special provisions of § 19 (c) of the 1917 Immigration Act, as amended, 8 U. S. C. § 155 (c). Heikkila's status as an alien is not disputed and the relief he wants is against an outstanding deportation order. He has not brought himself within *Elg* or *Kristensen.*

Appellant's Administrative Procedure Act argument is his strongest one. The reasons which take his case out of § 10 apply *a fortiori* to arguments based on the general equity powers of the federal courts and the Declaratory Judgment Act. 28 U. S. C. § 2201. See *Skelly Oil Co.* v. *Phillips Co.*, 339 U. S. 667, 671–672 (1950). Because we decide the judgment below must be affirmed on this procedural ground, we do not reach the other questions briefed and argued by the parties.

The rule which we reaffirm recognizes the legislative power to prescribe applicable procedures for those who would contest deportation orders. Congress may well have thought that habeas corpus, despite its apparent inconvenience to the alien, should be the exclusive remedy in these cases in order to minimize opportunities for repetitious litigation and consequent delays as well as to avoid possible venue difficulties connected with any other type of action.[13] We are advised that the Government has recommended legislation which would permit what Heikkila has tried here. But the choice is not ours.

Affirmed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BLACK joins, dissenting.

Three Courts of Appeals have decided that under the Administrative Procedure Act an alien against whom a deportation order is outstanding may challenge the validity of that order by asking for a declaratory judg-

[13] See *Paolo* v. *Garfinkel*, 200 F. 2d 280.

ment. Since 1946, so they held, he has not been restricted to habeas corpus for the assertion of his rights, and therefore has not needed to wait till he is arrested for deportation. The careful opinions of Judge Goodrich for the Third Circuit in *United States ex rel. Trinler* v. *Carusi,* 166 F. 2d 457, of Judge Bazelon for the District of Columbia Circuit in *Kristensen* v. *McGrath,* 86 U. S. App. D. C. 48, 179 F. 2d 796, and of Judge McAllister for the Sixth Circuit in *Prince* v. *Commissioner,* 185 F. 2d 578, make it abundantly clear why the Administrative Procedure Act should be treated as a far-reaching remedial measure, affording ready access to courts for those who claim that the administrative process, once it has come to rest, has disregarded judicially enforceable rights. The legislative materials concerning the Administrative Procedure Act—the reports of Committees and especially the authoritative elucidation of the measure by Chairman McCarran—impressively support the direction of thought which underlies the decisions of the three Courts of Appeals. It is appropriate to say that in disagreeing with these decisions, this Court is aware that "the broadly remedial purposes of the Act counsel a judicial attitude of hospitality towards the claim that § 10 greatly expanded the availability of judicial review." The Court is inhibited from yielding to this "attitude of hospitality" because the only way in which a deportation order may be challenged under the existing Immigration Act is habeas corpus, and because the scope of inquiry on habeas corpus is what it is. The Court concludes that this limited scope of inquiry brings the Immigration Act within the exception to the provision authorizing an "action for a declaratory judgment" under § 10 (b), in that the Immigration Act is one of the statutes that "preclude judicial review." 60 Stat. 243, 5 U. S. C. § 1009. In short, the Court gives the phrase "judicial review" in § 10 a technical

content and thereby disregards the vital fact that although § 19 of the Immigration Act of 1917, 39 Stat. 874, 889, as amended in 1940, 54 Stat. 1238, 670, 671, makes the decisions of the Attorney General "final," they are not finally final. As the hundreds of cases in the lower courts demonstrate, the Attorney General's actions are voluminously challenged and frequently set aside. No doubt the respect accorded to his findings is much more extensive than that accorded to findings of other agencies, or, to put it technically, "the scope of inquiry" is more limited. But the decisive fact is that the findings of the Attorney General are subject to challenge in the courts and from time to time are upset, whatever the formulas may be by which what he has finally done is undone.

If anything is plain in the legislative history of the Administrative Procedure Act it is that the Congress was not concerned with formularies when it referred to statutes which "preclude judicial review." Senator McCarran was closely questioned about this matter and he had to satisfy Senators as to the very restricted meaning of this exception. He was not talking about "review" in any technical sense. He was talking about the opportunity to go into court and question what an administrative body had done. And he referred to those rare cases when "a statute denies resort to the court." The bill, he said, "would not set aside such statute." And then he repeated in a paraphrase what he had meant—a denial of "resort to the court"—in loose lawyers' language: "If a statute denies the right of review, the bill does not interfere with the statute." S. Doc. No. 248, 79th Cong., 2d Sess. 319. He had already made clear what his statement, "the bill does not interfere with the statute," meant by pointing out that the exception to ready access to the courts was limited to a "law enacted by statute by the Congress of the United States, grant-

ing a review or denying a review . . . . We were not setting ourselves up to abrogate acts of Congress." *Id.*, at 311.

To allow a proceeding for a declaratory judgment to test the same issues that are open on habeas corpus is to abrogate no Act of Congress. It is, rather, to adopt, as between two permissible constructions of the Administrative Procedure Act, the one that evinces "a judicial attitude of hospitality." The Court shrinks from such a construction, with obvious reluctance, because it thinks it cannot adopt it without subjecting an order of deportation to new and unlimited judicial scrutiny. Surely this is a needless fear. A declaratory judgment action under § 10 (b) can be limited—as it should be—to the scope of review appropriate to the extraordinary remedy of habeas corpus. The Administrative Procedure Act is not to be construed, and it is easy not to construe it, so as to modify the Immigration Act and to allow courts to examine what the Attorney General has done beyond those substantive limits to which habeas corpus is now confined. But it is equally easy, and therefore I believe compelling, to construe the Administrative Procedure Act so as to loosen up the means by which the scrutiny provided for by the Immigration Act may be undertaken, to the extent that the technical conditions for habeas corpus, namely that a person must be in physical custody, can be dispensed with where a claim, capable of being vindicated through habeas corpus, is found.

The point is legally narrow but practically important. It means that one against whom a deportation order is outstanding but not executed may at once move, by means of a declaratory judgment, to challenge the administrative process insofar as the substantive law pertaining to deportation permits challenge. Of course Congress may now explicitly afford this relief. It may

do so without opening the sluices of "review" in deportation cases. But it has already enabled us to do so under the Administrative Procedure Act. I think the Act is sufficiently supple not to require further legislation. The three opinions in the Courts of Appeals, to which reference has already been made, elaborate the grounds on which I would sustain the jurisdiction of the District Court.

ALBERTSON ET AL. *v.* MILLARD, ATTORNEY GENERAL OF MICHIGAN, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 384. Argued February 2, 1953.—Decided March 16, 1953.

Five days after enactment of the Michigan Communist Control Act of April 17, 1952, the Communist Party of Michigan and its Executive Secretary sued in a Federal District Court for a declaratory judgment that it violates the Federal Constitution and for an injunction against its enforcement. The District Court found the Act constitutional but temporarily restrained its enforcement pending appeal to this Court. A similar suit was brought in a state court but is being held in abeyance pending the decision of this Court. The Act has not been construed or applied by the Michigan courts or executive authorities. *Held:* Judgment vacated and cause remanded with directions to vacate the restraining order and to hold the proceedings in abeyance a reasonable time pending construction of the statute by the state courts. Pp. 242–245.

106 F. Supp. 635, judgment vacated and cause remanded.

Ernest Goodman argued the cause for appellants. With him on the brief was *Joseph A. Brown.*

Edmund E. Shepherd, Solicitor General of Michigan, argued the cause for appellees. With him on the brief were *Frank G. Millard,* Attorney General, and *Daniel J. O'Hara* and *Ben H. Cole,* Assistant Attorneys General.

Osmond K. Fraenkel and *Walter M. Nelson* filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

PER CURIAM.

On April 17, 1952, the Governor of Michigan signed the Michigan Communist Control Bill. On April 22, 1952, the Communist Party of Michigan and William Albertson, its Executive Secretary, filed a complaint in the United

States District Court for the Eastern District of Michigan. Sections 2–5, inclusive, and Section 7 of the Act were alleged to violate various provisions of the Federal Constitution. A declaratory judgment to that effect was sought, along with an injunction to prevent state officials and officers from enforcing the Act. A three-judge District Court found the Act constitutional, 106 F. Supp. 635, and an appeal was taken to this Court.

Section 5 of the Act requires the registration of Communists, the Communist Party and Communist front organizations, and Section 7 prevents them from appearing on any ballot in the State. "Communist," "Communist Party," and "Communist front organization" are given a statutory meaning by the Michigan Legislature.* Mich. Acts 1952, No. 117.

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*"Sec. 2. A 'communist' is a person who:

"(a) Is a member of the communist party, notwithstanding the fact that he may not pay dues to, or hold a card in, said party; or

"(b) Knowingly contributes funds or any character of property to the communist party; or

"(c) Commits or advocates the commission of any act reasonably calculated to further the overthrow of the government of the United States of America, the government of the state of Michigan, or the government of any political subdivision of either of them, by force or violence; or

"(d) Commits or advocates the commission of any act reasonably calculated to further the overthrow of the government of the United States, the government of the state of Michigan, or the government of any political subdivision of either of them, by unlawful or unconstitutional means, and the substitution of a communist government or a government intended to be substantially directed, dominated or controlled by the Union of Soviet Socialist Republics or its satellites.

"Sec. 3. The 'communist party' is any organization which is substantially directed, dominated or controlled by the Union of Soviet Socialist Republics or its satellites, or which in any manner advocates, or acts to further, the world communist movement.

"Sec. 4. A 'communist front organization' is any organization, the members of which are not all communists, but which is substantially directed, dominated or controlled by communists or by the

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These definitions are challenged by the appellants as void for vagueness. The definition of a Communist as ". . . a member of the communist party, notwithstanding the fact that he may not pay dues to, or hold a card in, said party . . . ." is said to be vague since once dues and cards are eliminated as criteria there are no readily apparent means of determining who is a member. As to the definition of the Communist Party as an organization ". . . substantially directed, dominated or controlled by the Union of Soviet Socialist Republics or its satellites" it is contended there are no standards as to what is a "satellite." In regard to the definition of both Communist Party and Communist front organization as an organization which ". . . in any manner advocates, or acts to further, the world communist movement" appellants point to the failure to define the "world communist movement" as creating vagueness. The answers given to these and possibly other problems of construction and interpretation arising under the definitions in Sections 2–4 will determine the ultimate scope of the Act.

Interpretation of state legislation is primarily the function of state authorities, judicial and administrative. The construction given to a state statute by the state courts is binding upon federal courts. There has been no interpretation of this statute by the state courts. The absence of such construction stems from the fact this action in federal court was commenced only five days after the statute became law.

There is pending in the Circuit Court for Wayne County, Michigan, a bill seeking a declaratory judgment that the Act is unconstitutional, both on federal and state

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communist party, or which in any manner advocates, or acts to further, the world communist movement. The attorney general of the state of Michigan annually shall prepare and cause to be published a list of all such communist front organizations."

grounds. That action is being held in abeyance pending our mandate and decision in this case.

We deem it appropriate in this case that the state courts construe this statute before the District Court further considers the action. See *Rescue Army* v. *Municipal Court,* 331 U. S. 549 (1947); *American Federation of Labor* v. *Watson,* 327 U. S. 582 (1946); and *Spector Motor Service* v. *McLaughlin,* 323 U. S. 101 (1944).

The judgment is vacated and the cause remanded to the District Court for the Eastern District of Michigan with directions to vacate the restraining order it issued and to hold the proceedings in abeyance a reasonable time pending construction of the statute by the state courts either in pending litigation or other litigation which may be instituted.

It is so ordered.

MR. JUSTICE BLACK dissents.

MR. JUSTICE DOUGLAS, dissenting.

There doubtless will be instances where it is uncertain whether a particular person is a "Communist" or whether a particular group is included in the "Communist Party" as those terms are defined in the Michigan Act. But as I read this record there cannot be the slightest doubt that the Communist Party of Michigan is what it purports to be and that appellant Albertson, its Executive Secretary, is one of its members. In other words, it is plain beyond argument that the appellants are covered by the Michigan Act.

The case is therefore ripe for decision. It is not clouded with abstract questions. There are no ambiguities involving these appellants. The constitutional questions do not turn on any niceties in the interpretation of the Michigan law. The case is therefore unlike *Rescue Army* v. *Municipal Court,* 331 U. S. 549, and its forebears where the nature of the constitutional issue

would depend on the manner in which uncertain and ambiguous state statutes were construed. See especially *A. F. of L.* v. *Watson,* 327 U. S. 582, 598. Here there are but two questions:

(1) Can Michigan require the Communist Party of Michigan and its Executive Secretary to register?

(2) Can Michigan forbid the name of any Communist or of any nominee of the Communist Party to be printed on the ballot in any primary or general election in the state?

In my view no decision of the Michigan state courts can make those two issues any more precise or specific than the present case makes them.

WESTERN PACIFIC RAILROAD CORP. ET AL. *v.* WESTERN PACIFIC RAILROAD CO. ET AL.

NO. 150. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.*

Argued December 15–16, 1952.—Decided April 6, 1953.

1. Referring to a United States Court of Appeals, 28 U. S. C. § 46 (c) provides that, "Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service." *Held:*

   (a) This statute is simply a grant of power to order hearings and rehearings *en banc* and to establish the procedure governing the exercise of that power. Pp. 250–259, 267.

   (b) Litigants are given no *statutory* right to compel each member of the court to give formal consideration to an application for a rehearing *en banc*. Pp. 256–259, 267.

   (c) The statute does not compel the court to adopt any particular procedure governing the exercise of the power; but, whatever procedure is adopted, it should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it. Pp. 259–261, 267.

   (d) Whatever procedure is adopted, it should not prevent a litigant from suggesting to those judges who, under the procedure established by the court, have the responsibility of initiating a rehearing *en banc*, that his case is an appropriate one for the exercise of the power. Pp. 261–262, 268.

2. Having lost their case in a three-judge division of a Court of Appeals, petitioners applied for a rehearing before the Court of Appeals *en banc*. The division of three judges denied rehearing and struck as unauthorized by law or practice the request that the rehearing be *en banc*. Petitioners then applied for leave to file a motion to reinstate their petition for rehearing *en banc*, claiming that such a request was authorized by statute and re-

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*Together with No. 160, *Metzger et al.* v. *Western Pacific Railroad Co. et al.*, also on certiorari to the same court.

quired the attention of the full court. The Court of Appeals, *en banc,* declined to entertain this second application and announced that *thereafter* each petition for rehearing *en banc* in a case determined by a division of three judges would be considered and disposed of by such division of three judges as an ordinary petition for rehearing. *Held:*

(a) The order of the division denying petitioners a rehearing and the order of the full court denying petitioners leave to file a motion to reinstate their petition for rehearing *en banc* are vacated; and the case is remanded to the Court of Appeals for further proceedings. Pp. 263–267.

(b) On remand, and in the light of this Court's interpretation of the statute and the basic requirements necessary for its efficient administration, the Court of Appeals should determine and clearly set forth the particular procedure it will follow, henceforth, in exercising its *en banc* power. P. 268.

(c) If the Court of Appeals chooses to abide by a procedure which entrusts the initiation of rehearings *en banc* to the division, then the court should give an opportunity to the division for appropriate consideration of that question in this case. P. 268.

197 F. 2d 1012, 1013, orders vacated and cause remanded.

In petitioners' suit for an accounting, relief was denied by the District Court. 85 F. Supp. 868. A division of the Court of Appeals affirmed, 197 F. 2d 994, and denied rehearing and struck a petition that rehearing be *en banc.* 197 F. 2d 1012. Sitting *en banc,* the Court of Appeals declined to entertain a petition for leave to file a motion to reinstate the petition for rehearing *en banc.* 197 F. 2d 1013. This Court granted certiorari. 344 U. S. 809. *Orders vacated and cause remanded,* pp. 267–268.

Herman Phleger argued the cause for petitioners in No. 150. With him on the brief were *Moses Lasky, Frank C. Nicodemus, Jr.* and *Norris Darrell.*

Julius Levy argued the cause for petitioners in No. 160. With him on the brief were *William E. Haudek* and *Webster V. Clark.*

Allan P. Matthew argued the cause for respondents. On the brief were *Mr. Matthew, James D. Adams, Robert L. Lipman, Burnham Enersen* and *Walker W. Lowry* for the Western Pacific Railroad Co. et al., and *Everett A. Mathews, A. Donald MacKinnon* and *Forbes D. Shaw* for the Western Realty Co., respondents.

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

The petitioners in these causes—a corporation and some of its stockholders—seek an accounting from respondents—certain other corporations which, prior to a reorganization in 1943, were subsidiaries of the petitioning corporation. It is petitioners' theory that respondents had unjustly enriched themselves by wrongfully appropriating a "tax loss" incurred by petitioner Western Pacific Railroad Corporation and applying it to the sole benefit of respondent Western Pacific Railroad Company.

The factual background upon which petitioners' complaint was founded is as complicated as it is unique. For present purposes, we may pass over it. Suffice it to say that the cause of action was founded on a theory of unjust enrichment; jurisdiction of the federal courts was invoked upon the grounds of the diverse citizenship of the parties.

The District Court denied relief, and the Court of Appeals affirmed by a two-to-one vote. Petitioners then applied for a rehearing before the Court of Appeals *en banc*. With one dissent, the rehearing was denied; the court in its order struck the request that the rehearing be *en banc*. Petitioners then filed a second application protesting that the action of the two judges, who struck out the request for a rehearing *en banc*, was error because such a request was authorized by statute and required the attention of the full court.

The Court of Appeals, *en banc,* declined to entertain this second application. Chief Judge Denman dissented. We granted certiorari; among other things, we deemed it important to resolve the *en banc* questions precipitated by this litigation. 344 U. S. 809.

The issues stem from 28 U. S. C. § 46 (c). It reads:

> "Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

It is petitioners' claim that the Code vests in a defeated party the right to ask for a rehearing *en banc;* the court as a whole must act upon such a petition; thus the Court of Appeals erred in refusing to entertain the application in this case.

Obviously, the claim calls for close analysis of § 46 (c). What particular right, if any, does it give to a litigant in a Court of Appeals? To what extent is he entitled to put the merits of his cause before each member of the court in pressing his demand for a hearing or a rehearing before the entire court?

In our view, § 46 (c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order hearings *en banc.* It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing *en banc.* The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing.

The statute, enacted in 1948, is but a legislative ratification of *Textile Mills Securities Corp.* v. *Commissioner,*

314 U. S. 326 (1941)—a decision which went no further than to sustain the power of a Court of Appeals to order a hearing *en banc*. When the statute is cast in historical perspective, this becomes more readily apparent.

As early as 1938, the Judicial Conference of Senior Circuit Judges [1] recommended that the Judicial Code be amended to make it clear that "the majority of the circuit judges may be able to provide for a court of more than three judges when in their opinion unusual circumstances make such action advisable." [2] The recommendation was renewed in 1939 and again in 1940.[3] Thereafter, in 1941, when a conflict developed between circuits [4] as to the power to sit *en banc* under the old Judicial Code, identical bills were introduced in both the House (H. R. 3390) and the Senate (S. 1053) to amend the Code as recommended by the Judicial Conference. The proposed amendment took the form of a proviso to § 117:

> ". . . *Provided,* That, in a circuit where there are more than three circuit judges, the majority of the circuit judges may provide for a court of all the active and available circuit judges of the circuit to sit in banc for the hearing of particular cases, when in their opinion such action is advisable." H. R. 3390, S. 1053, 77th Cong., 1st Sess.

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[1] Now the Judicial Conference of the United States.

[2] Annual Report of the Attorney General (1938) p. 23. For a full treatment of statutory difficulties which gave rise to some doubts as to the power to sit *en banc*, see *Textile Mills Securities Corp.* v. *Commissioner*, 314 U. S. 326, 328–330.

[3] Annual Report of the Attorney General (1939) pp. 15, 16. Report of the Judicial Conference of Senior Circuit Judges (1940) p. 7.

[4] *Lang's Estate* v. *Commissioner*, 97 F. 2d 867 (C. A. 9th Cir. 1938); *Commissioner* v. *Textile Mills Securities Corp.*, 117 F. 2d 62 (C. A. 3d Cir. 1940), discussed in text *infra*.

When this legislation came up for a hearing before the Senate Judiciary Committee, Senator Danaher expressly raised the problem, "On whose motion would the court assemble en banc?" He was told that counsel might make a "suggestion," but that "the convening of the full court would be at the initiative of the court," and that it would not be desirable "to encourage the initiation of this suggestion by counsel." Senator McFarland said that from looking at the provision he got the impression that "they [the court] would be the ones to do the acting." Senator Kilgore agreed. Senator Danaher concluded that the amendment would be "impractical unless we make it clear that . . . the judges themselves decide." [5]

This bit of legislative history is significant. Congress was attempting to frame legislation which would empower a majority of circuit judges in any Court of Appeals to "provide" for hearings *en banc*. The problem was immediately raised: how would a court be convened *en banc*—would the legislation, as framed, give litigants the right to compel every judge to act on an application for a full court? The proponents of the legislation, and those who studied it, worked out this answer in their study of the problem: the determination of how the *en banc* power was to be exercised was to rest with the court itself—litigants should be free to suggest that a particular case was appropriate for consideration by the full court, but they should be given no right to compel all circuit judges to take formal action on the suggestion.

Subsequent history of later proposals—drafted in substantially similar language—discloses no change in purpose. The amendment to § 117 of the old Judicial Code

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[5] The full text of this discussion is found in the Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 1053, 77th Cong., 1st Sess.

passed the House, but it was never acted upon by the Senate.[6] It may have died because this Court's decision in *Textile Mills* intervened.

The inter-circuit conflict which brought on the proposed amendment to § 117, and which was later resolved by the decision of this Court in *Textile Mills,* was purely a dispute over the *power* to sit *en banc;* it never reached the problem of how *en banc* proceedings were to be initiated. In *Lang's Estate* v. *Commissioner,* 97 F. 2d 867 (1938), the Ninth Circuit had held that under § 117 there was no way in which a circuit of more than three judges could provide the means to convene itself *en banc.* But the Third Circuit, in *Textile Mills,*[7] reached a contrary conclusion:

> ". . . we cannot agree with Judge Denman's contrary conclusion in Lang's Estate . . . . We conclude that *this court has power to provide,* as it has done by Rule 4 (1), for sessions of the court en banc, consisting of all the circuit judges of the circuit in active service." 117 F. 2d 62, 70–71. (Emphasis supplied.)

In affirming the Third Circuit, this Court did no more than sustain that court's exercise of the "power to provide . . . for sessions of the court en banc." There is nothing in that decision to indicate that we recognized any right in parties to have their cases passed upon by more than three circuit judges.

This was the state of the law in 1944, when the movement to revise the Judicial Code was in its early stages. At that time, Judge Maris, Chairman of the Judicial Conference Committee on the Revision of the Judicial

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[6] 87 Cong. Rec. 8117. See H. R. Rep. No. 1246, 77th Cong., 1st Sess. Much of this legislative history is set out in footnote 14 of Mr. Justice Douglas' opinion for the Court in *Textile Mills.*

[7] *Supra,* note 4.

Code, submitted a memorandum to the House Committee on Revision of Laws. Pointing to this Court's decision in *Textile Mills*, he urged that the new Code should expressly provide "that except in cases and controversies . . . which *the court by rule or special order* directs to be heard by the full court, all cases and controversies brought before the court shall be heard by not more than three judges." [8] This proposal was the genesis of the present § 46 (c).[9] It was motivated by a dual purpose: to give express recognition to the doctrine of *Textile Mills*, while at the same time securing the tradition of three-judge courts against any further intrusion.

The first legislative draft of § 46 (c) did not differ in any material respect from its present form,[10] and the provision passed through the succeeding drafts and stages of legislative development without attracting any specific comment. But we are not left unassisted when we seek to divine the legislators' understanding of § 46 (c). We

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[8] Memorandum of August 18, 1944, submitted to the Committee on Revision of Laws on August 21, 1944. (Emphasis supplied.) See note 9, *infra*.

[9] Revision of Federal Judicial Code, Preliminary Draft [of H. R. 3498, 79th Cong., 1st Sess.], Committee Print (1945), p. 11. The Reviser's Notes to § 46 (c) in this preliminary draft contained the following: "Such subsection (c) is based on recommendations of Circuit Judge Albert B. Maris of the third circuit in his memorandum dated August 18, 1944, and submitted to the Committee on Revision of the Laws on August 21, 1944."

[10] H. R. 3498, 79th Cong., 1st Sess. § 46 (c) read:

"(c) In each circuit cases shall be heard and determined by a court or division of not more than three judges unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges present and available in the circuit."

The section came into its present form in the next draft, H. R. 7124, 79th Cong., 2d Sess. § 46 (c).

have the Reviser's Notes, which are entitled to great weight.[11] These comments were before Congress when it reviewed the proposed revision of the Code, and were relied upon to "explain . . . the source of the law and the changes made in the course of the codification and revision." [12]

The Reviser's Notes tell us that their purpose was twofold: to "authorize the establishment of divisions of the court," and to "provide for the assignment of circuit judges for hearings" *en banc*.[13] Referring to the latter purpose, the Notes quote extensively from this Court's opinion in

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[11] *Ex parte Collett*, 337 U. S. 55, 68–71 (1949).

[12] S. Rep. No. 1559, 80th Cong., 2d Sess., p. 2.

[13] The full text of the Reviser's Note (6 U. S. Cong. Serv. '48, pp. 1707–1708) reads:

"Based in part on title 28, U. S. C., 1940 ed., § 212 (Mar. 3, 1911, ch. 231, § 117, 36 Stat. 1131).

"Subsections (a)–(c) authorize the establishment of divisions of the court and provide for the assignment of circuit judges for hearings and rehearings in banc.

"The Supreme Court of the United States has ruled that, notwithstanding the three-judge provision of section 212 of title 28, U. S. C., 1940 ed., a court of appeals might lawfully consist of a greater number of judges, and that the five active circuit judges of the third circuit might sit in banc for the determination of an appeal. (See Textile Mills Securities Corporation v. Commissioner of Internal Revenue, 1941, 62 S. Ct. 272, 314 U. S. 326, 86 L. Ed. 249.)

"The Supreme Court in upholding the unanimous view of the five judges as to their right to sit in banc, notwithstanding the contrary opinion in Langs Estate v. Commissioner of Internal Revenue, 1938, 97 F. 2d 867, said in the Textile Mills case: 'There are numerous functions of the court, as a "court of record, with appellate jurisdiction", other than hearing and deciding appeals. Under the Judicial Code these embrace: prescribing the form of writs and other process and the form and style of its seal (28 U. S. C., § 219); the making of rules and regulations (28 U. S. C., § 219); the appointment of a clerk (28 U. S. C., § 221) and the approval of the appointment and removal of deputy clerks (28 U. S. C., § 222); and the fixing of the "times" when court shall be held (28 U. S. C., § 223). Furthermore,

Textile Mills.[14] The language they quote is significant. It describes certain housekeeping functions of a Court of Appeals—functions which cannot be discharged by the court unless, on its own motion, it convenes itself as a body and acts as a body—such as rule making, appointing clerks and fixing the times when court shall be held. Clearly the Reviser's Notes assimilated the power to sit *en banc* to the power to discharge these housekeeping functions, and it was precisely that description of the power which the revisers saw fit to use in describing to Congress what they deemed to be the nature of the power conferred by § 46 (c).

Furthermore, the Notes make it apparent that if the revisers intended to do anything more than codify *Textile Mills,* their concern was with preserving the "tradition" of three-judge courts against any further inroads.[15] An interpretation of § 46 (c), which authorizes litigants, of right, to compel nonsitting judges to act in every case, is certainly a departure from the tradition of three-judge courts—a most controversial change which was plainly not anticipated by *Textile Mills.* Yet Congress' purpose was codification, not alteration, of the

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those various sections of the Judicial Code provide that each of these functions shall be performed by the court.'

"This section preserves the interpretation established by the Textile Mills case but provides in subsection (c) that cases shall be heard by a court of not more than three judges unless the court has provided for hearing in banc. This provision continues the tradition of a three-judge appellate court and makes the decision of a division, the decision of the court, unless rehearing in banc is ordered. It makes judges available for other assignments, and permits a rotation of judges in such manner as to give to each a maximum of time for the preparation of opinions.

"Whether divisions should sit simultaneously at the same or different places in the circuit is a matter for each court to determine."

[14] 314 U. S., at 332.

[15] See the next to final paragraph quoted in note 13, *supra.*

rules pertaining to the administration of the courts. The Senate was told by its Judiciary Committee that "great care has been exercised to make no changes in the existing law which would not meet with *substantially* unanimous approval." [16] Similarly, Judge Maris told the House Committee on the Judiciary that the new Code "embodies a number of practical improvements in the judicial machinery *of a wholly noncontroversial nature* which have resulted from suggestions originating with the judges whose day to day administration of the various provisions of the Judicial Code gives them a special knowledge of these matters." [17]

A first reading of § 46 (c) may well leave one with doubts. It reposes power in "a majority of active circuit judges," and says no more. Perhaps, without further study, one might be inclined to fall back upon the general experience of our jurisprudence, and determine that the litigant is, by implication, given the right to compel the full court to determine whether it will exercise its power in a given case. But a study of the legislative background of § 46 (c) dispels such an idea and makes it quite clear that the draftsmen intended to grant the *en banc* power and no more; the court itself was to establish the procedure for exercise of the power.

This interpretation makes for an harmonious reading of the whole of § 46.[18] In this Section, Congress speaks

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[16] S. Rep. No. 1559, 80th Cong., 2d Sess., p. 2. (Emphasis supplied.)

[17] Hearings before Subcommittee No. 1 of the Committee on the Judiciary of the House of Representatives on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess. 19. (Emphasis supplied.)

[18] The full text of 28 U. S. C. § 46 reads:

"Assignment of judges; divisions; hearings; quorum.

"(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

"(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each

to the Courts of Appeals: the court, itself, as a body, is authorized to arrange its calendar and distribute its work among its membership; the court, itself, as a body, may designate the places where it will sit. Ordinarily, added Congress, cases are to be heard by divisions of three. But Congress went further; it left no doubt that the court, by a majority vote, could convene itself *en banc* to hear or rehear particular cases.

The juxtaposition of this last enactment with the others negates petitioners' interpretation of the Act. Litigants are certainly given no special standing to partake, as of right, in the court's decisions pertaining to arrangement of its calendar and the assignment of its cases to divisions. Just as the statute makes no provision binding the court to entertain every request that a particular case be assigned to a particular division, so it should not be construed to compel the court to entertain, *en banc,* motions for a hearing or rehearing *en banc.*

A contrary reading—one which would sustain petitioners—would obviously require a practice which might thrust unwarranted extra burdens on the court. It is difficult to believe that Congress intended to give an automatic, second appeal to each litigant in a Court of Appeals composed of more than three judges. Yet petitioners would have us hold that such a "horizontal" appeal is implicit in § 46. And, if petitioners are correct as to

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consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

"(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

their claim that petitions for rehearing *en banc* must, as a matter of law, be passed upon by the full bench, the argument should apply equally to petitions requesting that the initial hearing of the case be *en banc,* because § 46 (c) treats "hearings" and "rehearings" with equality. But, again, there is nothing to suggest that every party in every case in every Court of Appeals may submit, as of right, a petition to every judge—a petition in the nature of a preliminary appeal—asking that the full bench examine his cause and formally rule on the question of whether it shall be heard *en banc.*

Accordingly, we hold that § 46 (c) does not require a Court of Appeals to do what petitioners claim should have been done in this case. The statute deals, not with rights, but with power. The manner in which that power is to be administered is left to the court itself. A majority may choose to abide by the decision of the division by entrusting the initiation of a hearing or rehearing *en banc* to the three judges who are selected to hear the case. On the other hand, there is nothing in § 46 (c) which *requires* the full bench to adhere to a rule which delegates that responsibility to the division. Because § 46 (c) is a grant of power, and nothing more, each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power shall be exercised.[19]

But even if the statute grants only power plus the discretion for its exercise, that does not mark the end

[19] Having wide discretion the court may provide that the power may be called into play by any procedure convenient to the court. The statute simply provides that "a majority of the circuit judges of the circuit who are in active service" may order the hearing or rehearing *en banc.* This should not compel the full court to assemble, formally, *en banc,* to issue an order convening the full court. A more informal procedure may be used; such an order may be issued by the Chief Judge through the individual action of the necessary circuit judges without the necessity of convening the full court.

of our review of the *en banc* phase of this case. The *en banc* power, confirmed by § 46 (c), is, as we emphasized in the *Textile Mills* case, a necessary and useful power—indeed too useful that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate.[20] If § 46 (c) is to achieve its fundamental purpose, certain fundamental requirements should be observed by the Courts of Appeals. In the exercise of our "general power to supervise the administration of justice in the federal courts," [21] the responsibility lies with this Court to define these requirements and insure their observance.

It is essential, of course, that a circuit court, and the litigants who appear before it, understand the practice—

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[20] See 314 U. S., at 334–336. For further discussion on the utility and importance of permitting courts of appeals to sit *en banc*, reflecting the purpose behind § 46 (c), see H. R. Rep. No. 1246, 77th Cong., 1st Sess.; Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 1053, 77th Cong., 1st Sess., pp. 39–40. See also Annual Report of the Attorney General (1939) pp. 15, 16; Report of the Judicial Conference of Senior Circuit Judges (1940) p. 7. That this Court has deemed the *en banc* power to be an important and useful device in the administration of justice in the courts of appeals is apparent from our action in *United States ex rel. Robinson* v. *Johnston*, 316 U. S. 649 (1942), and *Civil Aeronautics Board* v. *American Air Transport, Inc.*, 344 U. S. 4 (1952). In the *Robinson* case, *supra*, where it appeared that a "conflict of views" had arisen "among the judges of the Ninth Circuit," we remanded the case "for further proceedings, including leave to petitioner to apply for a hearing before the court *en banc*." 316 U. S. 649, 650. In the *American Air Transport* case, *supra*, where the division of the Court of Appeals "were unable to agree on a disposition of the case," we said, after dismissing the certificate: "Perhaps the Court of Appeals may now wish to hear this case *en banc* to resolve the deadlock indicated in the certificate and give full review to the entire case." 344 U. S., at 5.

[21] See *United States* v. *National City Lines*, 334 U. S. 573, 589 (1948).

whatever it may be—whereby the court convenes itself *en banc*. In promulgating the rules governing that procedure the court should recognize the full scope of its powers under § 46 (c). Consistent with the statute, the court may, as has been shown, adopt a practice whereby the majority of the full bench may determine whether there will be hearings or rehearings *en banc*, or they may delegate the responsibility for the initiation of the *en banc* power to the divisions of the court. But in recognizing the full scope of § 46 (c), the full membership of the court will be mindful, of course, that the statute commits the *en banc* power to the majority of active circuit judges so that a majority always retains the power to revise the procedure and withdraw whatever responsibility may have been delegated to the division. And, recognizing the value of an efficient use of the *en banc* power, the court should adopt such means as will enable its full membership to determine whether the court's administration of the power is achieving the full purpose of the statute so that the court will better be able to change its *en banc* procedure, should it deem change advisable.

It is also essential that litigants be left free to suggest to the court, or to the division—depending upon where power of initiation resides, as determined by the active circuit judges of the court—that a particular case is appropriate for consideration by all the judges. A court may take steps to use the *en banc* power sparingly, but it may not take steps to curtail its use indiscriminately. Counsel are often well equipped to point up special circumstances and important implications calling for *en banc* consideration of the cases which they ask the court to decide.[22] If, in the exercise of its discretion under

[22] Cf. *United States ex rel. Robinson* v. *Johnston*, 316 U. S. 649 (1942); *Civil Aeronautics Board* v. *American Air Transport, Inc.*, 344 U. S. 4 (1952).

§ 46 (c), a court denies litigants the privilege of reaching the ear of every circuit judge on the *en banc* question, there is still no reason to deny them access to the few circuit judges who must act initially, and perhaps decisively, on the matter for the others. Counsel's suggestion need not require any formal action by the court; it need not be treated as a motion; it is enough if the court simply gives each litigant an opportunity to call attention to circumstances in a particular case which might warrant a rehearing *en banc*.[23] And of course to hold that counsel are entitled to speak to the *en banc* question, is not to hold that the court itself is in any way deprived of the power to initiate *en banc* hearings *sua sponte*. The statute commits the power of initiation to the court; the litigants' function must therefore be limited; but, certainly, if the *en banc* power is to be wisely utilized, there is no reason to deny the litigants any chance to aid the court in its effective implementation of the statute.

Finally, it is essential to recognize that the question of whether a cause should be heard *en banc* is an issue which should be considered separate and apart from the question of whether there should be a rehearing by the division. The three judges who decide an appeal may be satisfied as to the correctness of their decision. Yet, upon reflection, after fully hearing an appeal, they may come to believe that the case is of such significance to

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[23] Similarly, to hold that counsel can "suggest" that the court exercise its *en banc* power is not to hold that counsel are entitled, as of right, to petition the full court to order that the initial hearing of a case be *en banc*. Suggestions filed with the court prior to the assignment of a case to a division or prior to the hearing before a division should not necessarily require special advance consideration by the court. They may be considered whenever the court or division deems it appropriate to consider them, and no formal action need be taken upon the suggestion.

the full court that it deserves the attention of the full court.

The foregoing should make it clear that rejection of petitioners' interpretation of § 46 (c) does not compel affirmance of all that was done below in disposing of the applications for a rehearing *en banc*. It should also be decided whether the *en banc* issue has been adequately treated by the Court of Appeals. A review of the proceedings below convinces us that further consideration by that court is appropriate.

After the division which heard the appeal had announced its decision, petitioners asked for a rehearing *en banc*. A per curiam issued from the division:

> "The petitions of the appellants and intervenors for a rehearing are denied. Insofar as the petitions seek a rehearing en banc, they are stricken as being without authority in law or in the rules or practice of the court. See Kronberg v. Hale, 9 Cir., 181 F. 2d 767." 197 F. 2d, at 1012.

The striking of petitioners' motion is certainly ambiguous. If we accord full legal significance to this order, we must conclude that the division ruled that counsel were not free to suggest, even to the division, that the case was appropriate for a rehearing *en banc*. Enough has already been said to show that this was error.

Indeed, if the three judges who decided the merits of this cause were of the opinion that counsel's request was "without authority in law," it may well be that they simply considered themselves powerless to act in any way on the *en banc* question. Two judges on the panel were district judges.[24] One district judge dissented from the

[24] That a Court of Appeals may be so constituted is, of course, clear. See 28 U. S. C. § 292 (a). And we do not mean to imply that the division which heard the merits of the appeal was any less a division of the Court of Appeals than would have been a division of three circuit judges.

denial of a rehearing, and his understanding of the procedure which the Court of Appeals utilized to convene its full bench seems to differ from what was subsequently announced by six members of the court.[25] Indeed, at that time, it was by no means clear just what procedure the court followed to convene itself *en banc*.[26]

Following the second decision of the division, petitioners renewed their demand for a rehearing *en banc* by asking the court to reinstate their petition. Chief Judge Denman convened the active circuit judges so that the court might determine its authority in the matter, set forth its interpretation of § 46 (c) and fully advise the bar of its determination. Accordingly the court, *en banc,* declined to entertain petitioners' application and proceeded to explain why. Construing § 46 (c) the court said, 197 F. 2d, at 1015:

> "The statute, it will be recalled, commits to a 'court or division of not more than three judges' the power to *hear* and *determine* the cases and controversies assigned to it. Obviously its determination of any such case or controversy is a decision of the Court of Appeals, and as such is a final decision, subject to review only as prescribed by 28 U. S. C. A. § 1254. Circuit judges other than those designated

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[25] The dissenting judge wrote, 197 F. 2d, at 1013:

"I therefore suggest to the Court of Appeals a rehearing en banc of all the Circuit Judges. For this there is precedent in this Circuit. The practice, as I understand it, substantially accords with that of the Third Circuit, which is admirable. Inasmuch as this might be the court of last resort in this case, it seems fairer to have the issues disposed of by Circuit Judges."

[26] Compare *Crutchfield* v. *United States,* 142 F. 2d 170, 178, note 3, (1943); *Independence Lead Mines Co.* v. *Kingsbury,* 175 F. 2d 983, 992 (1949); and *Kronberg* v. *Hale,* 181 F. 2d 767 (1950). See 63 Harv. L. Rev. 1449 (1950).

> to sit on such court or division are not members of it, and officially they play, and are entitled to play, no part in its deliberations at any stage. That this is so is made clear by subdivision (a) of § 46 . . . providing that 'Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.' If regard be had for this mandate circuit judges may not intrude themselves, or be compelled on petition of a losing party to intrude, upon a court or division on which they have not by order of the court been directed to sit.
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> "A petition for rehearing in any such case, whatever its form or wording, must necessarily be treated as addressed to and is solely for disposition by the court or division to which the case was assigned for determination. . . . From this time forward petitions, if any, for rehearing in banc in cases determined by divisions of three judges will be considered and disposed of by the latter as ordinary petitions for rehearing."

This language suggests that the full bench has refused completely to consider the merits of the *en banc* request. Instead, the court ruled that, "from this time forward," the division, alone, is entrusted with that responsibility. Yet there is nothing to show that this procedure, which the full bench said was to govern henceforth, had been followed by the division in this case. On the contrary, as has been shown, the division in this case apparently acted on the theory that it was "without authority in law" to consider the *en banc* request.

This language also suggests that the court thought that it had no discretion in administering the *en banc* power, that § 46 (c) "necessarily" limited consideration of the question of whether there should be a hearing *en banc* to the division. Perhaps other language in the

opinion [27] negates the inference that the full court ruled as it did because it believed the statute required that result and permitted no alternative practice. But, at the very least, we are left in doubt. Certainly Chief Judge Denman, who dissented vigorously, thought that the court's ruling came as a matter of statutory compulsion. And of course if it did, it rests on an erroneous interpretation of § 46 (c).

We have, then, a record which seems to tell us that the division of the Court of Appeals, which decided the merits of this difficult and complicated litigation, turned a deaf ear to counsel's request for a full bench—quite

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[27] Thus the Court wrote:

"On these considerations and in harmony with its understanding of the statutory scheme, the court has consistently retained to itself as a matter of administrative and intramural concern only the problem whether or not any given case should be heard or reheard in banc. Accordingly, in the exercise of its uncontrolled discretion the court has declined altogether to entertain petitions of litigants for such hearings. The position it takes is that, apart from the possible disqualification of a judge, the composition of the court to which a case may be assigned for determination is a matter wholly outside the province of the parties." 197 F. 2d, at 1016.

In *Bradley Mining Co.* v. *Boice,* 198 F. 2d 790 (C. A. 9th Cir. 1952), Judge Pope dissenting from the denial of a petition for a rehearing *en banc* wrote:

". . . I do not think the statute intended that I, not a member of the division which heard the Western Pacific case, should have to read all the record in that case, as I might well find necessary in order to vote intelligently upon the petition.

"There is language in subdivision (c) of § 46 of Title 28 which would seem to grant to a majority of the circuit judges of the circuit the right to order a hearing or rehearing in bank in any case, a procedure which I am of course not proposing here. That is a question which was not determined by the majority opinion in the Western Pacific case, although Judge Denman seems to think that it was. Upon that question I reserve judgment until such time as determination becomes necessary." 198 F. 2d, at 792, note 2.

conceivably on the theory that the division lacked the power to act. Likewise the full bench refused to countenance the request, saying that the initial responsibility "necessarily" lay with the division alone—although the division may have been unaware of that responsibility. Possibly acting under a misconception of the breadth of its powers, the full bench has promulgated rules for the hearing of cases *en banc,* and if the court has misconceived its powers perhaps it may now wish to adopt some other practice to administer § 46 (c).

The statute which we have construed is not without ambiguity; perhaps that difficulty is now resolved. The action of the court below is also not without ambiguity, for the court announced a practice which, "from this time forward," was to govern the ordering of rehearings *en banc,* but that practice was not followed in this case; neither the full bench nor the division—whose decision was to govern henceforth—gave any independent consideration to the merits of the *en banc* issue in this case.

Accordingly, we vacate the order of the division denying petitioners a rehearing and vacate the order of the full court denying petitioners leave to file a motion to reinstate their petition for rehearing *en banc;* we remand the case to the Court of Appeals for further proceedings. We hold that the statute is simply a grant of power to order hearings and rehearings *en banc* and to establish the procedure governing the exercise of that power. We hold that litigants are given no *statutory* right to compel each member of the court to give formal consideration to an application for a rehearing *en banc.* We hold that the statute does not compel the court to adopt any particular procedure governing the exercise of the power; but whatever the procedure which is adopted, it should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it; and fur-

ther, whatever the procedure which is adopted, it should not prevent a litigant from suggesting to those judges who, under the procedure established by the court, have the responsibility of initiating a rehearing *en banc,* that his case is an appropriate one for the exercise of the power. On remand, and in light of our interpretation of the statute and the basic requirements necessary for its efficient administration, the court should determine and clearly set forth the particular procedure it will follow, henceforth, in exercising its *en banc* power. If the court chooses to abide by a procedure which entrusts the initiation of rehearings *en banc* to the division, then the court should give an opportunity to the division for appropriate consideration of that question in this case.

MR. JUSTICE FRANKFURTER.

We held in *Textile Mills Securities Corp.* v. *Commissioner,* 314 U. S. 326, construing an ambiguous statute, that courts of appeals consisting of more than three active circuit judges had inherent power to sit *en banc.* Thereafter Congress placed this power on a statutory basis. 28 U. S. C. § 46 (c). Petitioners in this case claim that, in exercising the authority to sit *en banc* for the rehearing of a cause adjudicated by a three-judge panel, all the active judges of a court of appeals must formally consider the merits of the defeated party's formal motion for such a rehearing. I agree with the Court in its rejection of this claim. I equally agree that, as an abstract proposition, *en banc* sitting expresses the court's power and not the litigant's right. I agree, finally, that courts of appeals may have general rules, whether formally promulgated or traditionally recognized, concerning the exercise of this discretionary power, and that it is for them and not for us to establish such rules.

No one can feel more strongly than I do that the function of the courts of appeals in the federal judicial system

requires that their independence, within the area of their authority, be safeguarded. "Certainly this Court should in every possible way attribute to [them] a prestige which invites reliance for the burdens of appellate review except in those cases, relatively few, in which this Court is called upon to adjudicate constitutional issues or other questions of national importance." *Ex parte Peru,* 318 U. S. 578, 590, 602 (dissenting opinion). And so what follows is not to be read as suggesting subordination of the discretionary powers of the courts of appeals to our direction.

The language of 28 U. S. C. § 46 (c) and its history do not, I believe, indicate either that Congress expected courts of appeals to sit *en banc* for the disposition of motions praying that they hear or rehear causes *en banc,* or that Congress expected they would not do so. The hearings on S. 1053—the predecessor proposal of § 46 (c), which failed of passage—are equivocal on this point. Remarks, such as Senator McFarland's, that the courts "would be the ones to do the acting" graze the problem. It was not urged that counsel should do the "acting" in the sense that it would be mandatory to grant a motion for rehearing *en banc* whenever one was made. There was on the other hand the testimony of Chief Justice Groner of the Court of Appeals of the District, who indicated quite clearly that counsel would be expected to move the courts to sit *en banc.* Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 1050, S. 1051, S. 1052, S. 1053, S. 1054 and H. R. 138, 77th Cong., 1st Sess., at pp. 17, 40. The view of so experienced and wise a judge carries great weight. In any event, this is the legislative history of a bill which never became law. No legislative light was shed on § 46 (c).

It is right to conclude that Congress left it to the courts of appeals to decide how they would exercise their discretionary power to sit *en banc.* But it is no less rea-

sonable to conclude that the courts of appeals are to exercise their discretion so as to effectuate the purposes of the legislation. Before I proceed with consideration of the modes by which the power to sit *en banc* may be brought into play, in light of the ends to be achieved by it, a word about rehearings in general becomes relevant.

Rehearings are not a healthy step in the judicial process; surely they ought not to be deemed a normal procedure. Yet one who has paged the Federal Reporter for nearly fifty years is struck with what appears to be a growth in the tendency to file petitions for rehearing in the courts of appeals. I have not made a quantitative study of the facts, but one gains the impression that in some circuits these petitions are filed almost as a matter of course. This is an abuse of judicial energy. It results in needless delay. It arouses false hopes in defeated litigants and wastes their money. If petitions for rehearing were justified, except in rare instances, it would bespeak serious defects in the work of the courts of appeals, an assumption which must be rejected. It is important to bear this in mind in approaching 28 U. S. C. § 46 (c). That section is directed at those relatively few instances which call for rehearings, though again rarely, in the nine courts of appeals that sit in panels.

Rehearings *en banc* by these courts, which sit in panels, are to some extent necessary in order to resolve conflicts between panels. This is the dominant concern. Moreover, the most constructive way of resolving conflicts is to avoid them. Hence, insofar as possible, determinations *en banc* are indicated whenever it seems likely that a majority of all the active judges would reach a different result than the panel assigned to hear a case or which has heard it. Hearings *en banc* may be a resort also in cases extraordinary in scale—either because the amount in-

volved is stupendous or because the issues are intricate enough to invoke the pooled wisdom of the circuit. Any procedure devised by a court of appeals which is sensibly calculated to achieve these dominant ends of avoiding or resolving intra-circuit conflicts may be adopted agreeably with § 46 (c). A rule providing that petitions for rehearing *en banc* may be made to, and will be considered by, the court *en banc* would, of course, be so calculated. And, to repeat, that being so, it is not for us to pass on the advantages or disadvantages of such a rule, though one may think, as I do, that it is likely to impose an undue burden by unwittingly encouraging the lax inclination of counsel to file *pro forma* petitions automatically in every case.

The ends of § 46 (c) may be served in other ways than by permitting petitions for rehearing *en banc*. A court may decide that it will act under § 46 (c) only *sua sponte* and will do so whenever the need is made evident, not by wasteful use of judicial resources through excessive preliminary consideration *en banc* to determine whether or not the need exists, but by the process of having each panel circulate its opinions, before they are emitted, to all the active members of the court. This, it appears, was the practice of the Court of Appeals of the District under Chief Justice Groner. See Hearings before a Subcommittee of the Senate Committee on the Judiciary, *supra,* at p. 39. It accomplishes what is essential to the achievement of the purposes for which the power to sit *en banc* exists, since it acquaints all active judges on the court "with the proposed opinion that is coming down, so if they do have an opportunity to point out any conflict, or something of the kind, it may be done . . . ." *Ibid.* (testimony of Groner, C. J.). To be sure, the nonsitting judges have not heard the argument nor read the

briefs, and have no vote as far as the opinion of the panel is concerned. Presumably, however, an opinion states the issues and gives the grounds for its conclusion and thereby sufficiently alerts the minds of experienced judges to what is at stake. It taps their knowledge of legal considerations that may lead, on the initiative of a non-sitting or of a sitting judge, to a determination by the entire court of whether or not a rehearing *en banc* is called for.

There may be—there doubtless are—other ways in which a court of appeals, acting *sua sponte,* may accomplish all that needs to be accomplished in the exercise of the discretionary power to sit *en banc.* But I do not see how any procedure can do so whose effect is not to apprise all active judges either of all decisions of panels of the court, or of those decisions which counsel bring to the court's attention, by motion or suggestion—the nomenclature is immaterial—as raising the problems at which the grant of power in § 46 (c) is directed. For this reason I do not believe that a delegation of authority to the panel which heard the case to dispose finally, in behalf of the entire court, of petitions for rehearing *en banc*—if there are to be such petitions and if through them alone § 46 (c) is to be implemented—would constitute adoption of a permissible procedure for the exercise of the power conferred by § 46 (c). It may be proper to require petitions for rehearing *en banc* to be made to the panel in the first instance, but to allow the discretionary function under § 46 (c) to be discharged definitively by the panel whose judgment may call for *en banc* action is to treat the statute as an empty, purposeless form of words.

Since it does not appear in this case that the Court of Appeals, as a whole, at any time exercised its discretion under 28 U. S. C. § 46 (c) by considering the petition for a rehearing *en banc* on its merits, and since it does not appear that that court has established, and followed in this case, any other procedure for the exercise of its statu-

tory power in a manner consistent with the reasons for its grant, I concur in the judgment of the Court vacating the order below and remanding the cause.

MR. JUSTICE JACKSON, dissenting.

I would not prolong this already aged litigation by remanding it for the Court of Appeals to reconsider whether it will hold a rehearing *en banc*. The decision that an individual litigant has a right to have his petition for rehearing *en banc* considered by at least three judges of the Court of Appeals stems not from statute, but from this Court's exercise of its vague supervisory powers over federal courts.

If I felt it incumbent upon me to help settle for Courts of Appeals whether they will sanction a practice of petitioning by litigants for *en banc* rehearings, I would decide in the negative. In cases of intracircuit conflict or other exceptional situations which actually demand the attention of the full court, the judges of a court should be trusted to convene on their own initiative.[1] A successful party has good cause for complaint if he is put through the added expenditure of this dilatory step except where public interest in the administration of justice requires it. Rehearings *en banc* are not appropriate where the effect is simply to interpose another review by an enlarged Court of Appeals between decision by a conventional three-judge court and petition to this Court. Delay, cost, and uncertainty, which take their toll of both the successful and the unsuccessful, the just and the unjust litigant, are each increased by an additional appeal to a hybrid intermediate court. Moreover, the fact that the

[1] The Ninth Circuit has followed this procedure on several occasions. *Southern Pacific Co.* v. *Guthrie,* 186 F. 2d 926; *Hopper* v. *United States,* 142 F. 2d 181; *Pacific Gas & Electric Co.* v. *Securities and Exchange Commission,* 139 F. 2d 298; *Evaporated Milk Association* v. *Roche,* 130 F. 2d 843.

court leaves the precise nature of the right which it confers on the losing litigant so unsettled and equivocal would lead me to conclude that the *en banc* question is one which the litigant should not be given standing to raise.

If I were to predict, I would guess that today's decision will either be ignored or it will be regretted. Perhaps its requirements may be met if the panel which heard the case will append to its denial of rehearing the further statement "and rehearing *en banc* denied." This would be its most innocuous possible effect. Unfortunately, however, more significant results may follow. It is likely to open new complexities in federal practice and generate a new body of procedural law to vex courts and impoverish litigants. The litigant's petition for rehearing *en banc* is not a motion; it is a "suggestion." He is urged to point out to the judges the "circumstances in a particular case which might warrant a rehearing *en banc*." There may yet be chapters in future manuals of federal practice exploring the differences between a motion and a "suggestion," and cases in the courts deciding just what more the suggesting litigant is entitled to than the right to have the words "petition denied" instead of "petition stricken." This increase in the ponderousness of the federal court system may be a minor rather than a major evil, but it is counterbalanced, at most, only by a negligible good.

But just as surely as I am persuaded that *en banc* hearings should be discouraged in most cases and left to be initiated by the judges *sua sponte,* I am convinced that the whole practice on the subject is best left to each Court of Appeals. A diversity of practices has grown up in the various courts,[2] presumably in response to their different

[2] 5 Stan. L. Rev. 332, 337, notes the practices of some of the Courts of Appeals as follows, based on information received from the clerks of the respective courts: The Court of Appeals for the District of Columbia Circuit considers all motions for rehearing *en banc;* the Sixth Circuit and the Tenth Circuit sit only on the motion of one of the judges; the Second Circuit simply does not sit *en banc.*

conditions or prevailing desires. If Congress had required that litigants' petitions for rehearing *en banc* receive the consideration of the Courts of Appeals, the policy would be ours to enforce without questioning its desirability. But it is conceded that Congress has not done this. It is we ourselves who are making the policy, and so it is especially desirable to vindicate our new rule with reasons and bounds. Yet, all that we are vouchsafed in the Court's opinion is that the power to sit *en banc* is a "necessary and useful power," with a citation to our holding that a Court of Appeals has power to sit *en banc*. *Textile Mills Securities Corp.* v. *Commissioner*, 314 U. S. 326. When it is remembered that the question to be answered here is not whether Courts of Appeals have power to sit *en banc*, about which there is no dispute, but rather whether a litigant may compel the judges to hear and decide his petition for rehearing *en banc*, the feebleness of this reed is clear. I think both wisdom and humility would be well served by leaving this problem to the solutions from time to time suggested to each circuit by its own experience.

The case before us presents interesting questions on which there appears no conflict between panels; in fact, it is so unique that it is without precedent and is likely to be without progeny. A rehearing before the entire circuit *en banc* would simply be an appeal from the three-judge court to a swollen circuit court. Since I would not reverse on the procedural point, I reach the merits of the controversy.

The complaint alleges diversity of citizenship, presence of the requisite amount in controversy, and states that "this is a civil action in equity between citizens of different states." Because federal jurisdiction was grounded in diversity of citizenship, California law is the law of the forum and may govern the case. However, foreign corporations, acts committed in other states, federal bank-

ruptcy proceedings and federal tax rulings are scrambled in the legal situation and law of other states may be involved. California certainly recognizes a cause of action based on unjust enrichment, whether it be treated as a common count, *Minor* v. *Baldridge,* 123 Cal. 187, 190, 55 P. 783, 784–785, or as a waiver of a tort and suit in assumpsit, *Bank of America National Trust & Savings Assn.* v. *Hill,* 9 Cal. 2d 495, 71 P. 2d 258. Whether we resort to California law, other state law or federal law, none rejects the general doctrine of unjust enrichment and fiduciary duty of corporate managements, although it would be surprising if there were an exact precedent anywhere for this unique situation. Thus, the courts below would have to analyze the facts in the light of general principles of unjust enrichment, with such aid as they may obtain on the specific issues from analogy.

We have two affiliated corporations subject to considerable, if not complete, common control, but with different minority interests. One has realized a huge loss; the other has enjoyed large net income. If these two can be brought together, a tax saving amounting in this case to some seventeen million dollars can be made for the profitable company. Congress has authorized, but has not required, that these two be merged by means of a consolidated tax return. Each has the right, but no legal duty, under federal law to join in consolidated returns.

It may seem anomalous at first glance that a sustained loss can be realized upon as an asset. But it is not the loss; it is the right to use the loss as an offset that is valuable. The market for it is restricted, of course, but this detracts nothing from its value to one in a position to utilize it.

Each of these corporations had something to contribute to a tax-saving plan. Either one alone was helpless. But I know of no moral or legal obligation to give away

any legal opportunity or advantage just because its owner cannot utilize it himself.

There would have been nothing remotely illegal or improper if the management of the plaintiff corporation had demanded some compensation for its loss privileges. Indeed, it is probable that the intention of the statute permitting the consolidation of the two positions was to provide salvage for the loser, not profit for one which sustained no loss.

Each corporation then had a bargaining position. The stakes were high. Neither could win them alone, although each had an indispensable something that the other was without. It was as if a treasure of seventeen million dollars were offered by the Government to whoever might have two keys that would unlock it. Each of these parties had but one key, and how can it be said that the holder of the other key had nothing worth bargaining for?

The management, probably without improper intent, failed to claim for the plaintiff the advantages of its position, turning them over without compensation for the advantage and profit of another affiliated corporation. On the face of it, the conclusion would seem warranted that the plaintiff is entitled to what fair arm's-length bargaining would probably have yielded. To ask this can hardly be stigmatized as capitalizing mere nuisance value. This is not the blackmailing transaction which offers to forego doing another injury if bought off. This merely seeks a share in the benefit which it transferred.

I would reverse and remand to the District Court for findings in accordance with this sketchily stated doctrine of unjust enrichment.

HEALY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE.

NO. 76. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued December 12, 1952.—Decided April 6, 1953.

An individual taxpayer received a salary from a closely held corporation and reported it in full in his income tax return for the year in which it was received. In a subsequent year, it was determined that the salary was excessive and the taxpayer was required as transferee to make payments on tax deficiencies of the corporation for prior years. *Held:* The taxpayer's income tax for the year in which he received the excessive salary may not be recomputed so as to exclude from his income for that year that part of his salary held to be excessive and which resulted in his transferee liability. Pp. 279–285.

(a) Having received the salary under a "claim of right," the taxpayer was required to report it as income and to pay a tax thereon. Pp. 281–282.

(b) Funds are held under a "claim of right" within the meaning of *North American Oil* v. *Burnet*, 286 U. S. 417, when received and treated by a taxpayer as belonging to him, even though the claim may subsequently be found invalid. P. 282.

(c) That the receipt of the excessive portion of the salary resulted in transferee liability as a "constructive trustee" does not prevent application of the "claim of right" doctrine. Pp. 282–283.

(d) Nor can the salary be treated as money received subject to a "restriction on its use" within the scope of the "claim of right" doctrine, even though the facts which ultimately gave rise to the transferee liability were in existence at the end of the taxable year. Pp. 283–284.

(e) A different result is not required by the fact that, in this particular case, an inequity might result from requiring the taxpayer to treat as income an amount which eventually turned out not to be income. Pp. 284–285.

194 F. 2d 662, affirmed.

194 F. 2d 536, reversed.

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*Together with No. 138, *Commissioner of Internal Revenue* v. *Smith*, on certiorari to the United States Court of Appeals for the Sixth Circuit.

No. 76. The Tax Court held that the petitioners' income for a prior year should be recomputed to their advantage. 16 T. C. 200. The Court of Appeals reversed. 194 F. 2d 662. This Court granted certiorari. 344 U. S. 811. *Affirmed,* p. 285.

No. 138. The Tax Court held that respondent's income for a prior year should be recomputed to his advantage. 11 T. C. 174. The Court of Appeals affirmed. 194 F. 2d 536. This Court granted certiorari. 344 U. S. 813. *Reversed,* p. 285.

James H. Heffern argued the cause and filed a brief for petitioners in No. 76.

Assistant Attorney General Lyon argued the cause for petitioner in No. 138 and respondent in No. 76. With him on the briefs were *Ellis N. Slack, Lee A. Jackson* and *Melva M. Graney. Solicitor General Cummings* was also on the brief in No. 76. *Robert L. Stern,* then Acting Solicitor General, and *Philip Elman* were also on the brief in No. 138.

Sol Goodman argued the cause and filed a brief for respondent in No. 138.

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

The income tax liability of three individual taxpayers for a given year is here before the Court. Only a single question, common to all the cases, is involved. The Tax Court held a view favorable to the taxpayers.[1] The Commissioner of Internal Revenue sought review before the appropriate Courts of Appeals. As to two of the taxpayers, the Court of Appeals for the Second Circuit re-

[1] *Gordon W. Hartfield and Edwin E. Healy,* 16 T. C. 200 (1951) (consolidated proceedings); *Hall C. Smith,* 11 T. C. 174 (1948).

versed,[2] while the Court of Appeals for the Sixth Circuit took a contrary view of the law.[3] We granted certiorari to resolve the conflict.[4]

All controlling facts in the three situations are similar. Each taxpayer reports his income on the cash receipts and disbursements method. Each, in the respective years involved, received a salary from a closely held corporation in which he was both an officer and a stockholder. The full amount of salary so received was reported as income for the year received. Subsequently, after audit of the corporate returns, the Commissioner disallowed the deduction by the corporations of parts of the salaries as exceeding reasonable compensation. As a result, deficiencies in income taxes were determined against the corporations. The Commissioner also determined that the officers were liable as transferees under § 311 of the Internal Revenue Code for the corporate deficiencies. The receipt of excessive salary was the transfer upon which the transferee liability was predicated. As a result of either litigation [5] or negotiation, various amounts became established as deficiencies of the corporations and as transferee liabilities of each of the three officers. In each case, the entire process of determining these amounts—from the start of the audit by agents of the Commissioner to the final establishment of the liabilities—occurred after the end of the year in which the salary was received and reported.

The question before the Court is whether part of the salary should be excluded from taxable income in the year of receipt since part was excessive salary and led to

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[2] *Commissioner* v. *Hartfield,* 194 F. 2d 662 (1952).

[3] *Commissioner* v. *Smith,* 194 F. 2d 536 (1952).

[4] 344 U. S. 811, 813 (1952).

[5] *Charles E. Smith & Sons Co.* v. *Commissioner,* 184 F. 2d 1011 (1950).

transferee liability for the unpaid taxes of the corporations. The taxpayers contend that an adjustment should be made in the year of original receipt of the salary; the Government that an adjustment should be made in the year of payment of the transferee liability.

One of the basic aspects of the federal income tax is that there be an annual accounting of income.[6] Each item of income must be reported in the year in which it is properly reportable and in no other. For a cash basis taxpayer, as these three are, the correct year is the year in which received.[7]

Not infrequently, an adverse claimant will contest the right of the recipient to retain money or property, either in the year of receipt or subsequently. In *North American Oil* v. *Burnet,* 286 U. S. 417 (1932), we considered whether such uncertainty would result in an amount otherwise includible in income being deferred as reportable income beyond the annual period in which received. That decision established the claim of right doctrine "now deeply rooted in the federal tax system."[8] The usual statement of the rule is that by Mr. Justice Brandeis in the *North American Oil* opinion: "If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent." 286 U. S., at 424.

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[6] *Reo Motors* v. *Commissioner,* 338 U. S. 442 (1950); *Heiner* v. *Mellon,* 304 U. S. 271 (1938); *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359 (1931). See I. R. C., § 41.

[7] I. R. C., § 42 (a). Other permissive methods of accounting for tax purposes are the accrual basis, I. R. C., §§ 41 and 42, and the installment basis, I. R. C., § 44.

[8] *United States* v. *Lewis,* 340 U. S. 590, 592 (1951).

The phrase "claim of right" is a term known of old to lawyers. Its typical use has been in real property law in dealing with title by adverse possession, where the rule has been that title can be acquired by adverse possession only if the occupant claims that he has a right to be in possession as owner.[9] The use of the term in the field of income taxation is analogous. There is a claim of right when funds are received and treated by a taxpayer as belonging to him. The fact that subsequently the claim is found to be invalid by a court does not change the fact that the claim did exist. A mistaken claim is nonetheless a claim, *United States* v. *Lewis,* 340 U. S. 590 (1951).

However, we are told that the salaries were not received as belonging to the taxpayers, but rather they were received by the taxpayers as "constructive trustees" for the benefit of the creditors of the corporation. Admittedly, receipts by a trustee expressly for the benefit of another are not income to the trustee in his individual capacity, for he "has received nothing . . . for his separate use and benefit," *Eisner* v. *Macomber,* 252 U. S. 189, 211 (1920).

We do not believe that these taxpayers were trustees in the sense that the salaries were not received for their separate use and benefit. Under the equitable doctrine that the funds of a corporation are a trust fund for the benefit of creditors, a stockholder receiving funds without adequate consideration from an insolvent corporation may be held, in some jurisdictions, to hold the funds as a constructive trustee.[10] So it was that these taxpayers were declared constructive trustees and were liable as transferees in equity. A constructive trust is a fiction imposed as an equitable device for achieving justice.[11] It

[9] 4 Tiffany, Real Property, § 1147.

[10] 15A Fletcher, Cyclopedia Corporations, §§ 7369–7389.

[11] 3 Scott on Trusts, § 462.1; 3 Bogert, Trusts and Trustees, § 471.

lacks the attributes of a true trust, and is not based on any intention of the parties. Even though it has a retroactive existence in legal fiction, fiction cannot change the "readily realizable economic value" [12] and practical "use and benefit" [13] which these taxpayers enjoyed during a prior annual accounting period, antecedent to the declaration of the constructive trust.

We think it clear that the salaries were received under a claim of individual right—not under a claim of right as a trustee. Indeed one of the parties concedes, as is manifestly so, that the reporting of the salary on the income tax returns indicated that the income was held under a claim of individual right. The taxpayers argue that the salary was subject to a restriction on its use.[14] Since all the facts which ultimately gave rise to the transferee liability were in existence at the end of the taxable year, we are told those facts were a legal restriction on the use of the salary. Actually it could not have been said at the end of each of the years involved that the transferee liability would materialize. The Commissioner might not have audited one or all of these particular returns; the Commissioner might not have gone through the correct procedure or have produced enough admissible evidence to meet his burden of proving transferee liability; [15] or, through subsequent profitable operations,

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[12] *Rutkin* v. *United States,* 343 U. S. 130, 137 (1952).

[13] *Eisner* v. *Macomber,* 252 U. S. 189, 211 (1920).

[14] The rule announced in *North American Oil* v. *Burnet, supra,* requires a receipt without "restriction on use" as well as under a claim of right.

[15] I. R. C., § 1119 imposes upon the Commissioner the burden of proving transferee liability. This may be contrasted to the rule that normally the burden of proof is on the taxpayer contesting the determination of the Commissioner. I. R. C., § 1111; Rule 32, Tax Court of United States.

the corporations might have been able to have paid their taxes obviating the necessity of resort to the transferees.[16]

There is no need to attempt to list hypothetical situations not before us which put such restrictions on use as to prevent the receipt under claim of right from giving rise to taxable income. But a potential or dormant restriction, such as here involved, which depends upon the future application of rules of law to present facts, is not a "restriction on use" within the meaning of *North American Oil* v. *Burnet, supra.*

The inequities of treating an amount as income which eventually turns out not to be income are urged upon us. The Government concedes that each of these taxpayers is entitled to a deduction for a loss in the year of repayment of the amount earlier included in income.[17] In some cases, this treatment will benefit the taxpayer; in others it will not. Factors such as the tax rates in the years involved and the brackets in which the income of the taxpayer falls will be controlling. A rule which required that the adjustment be made in the earlier year of receipt instead of the later year of repayment would generally be unfavorable to taxpayers, for the statute of limitations would frequently bar any adjustment of the tax liability for the earlier year.[18] Congress has enacted an annual accounting system under which income is counted up at the end of each year. It would be disruptive of an orderly collection of the revenue to rule that the accounting must be done over again to reflect events occurring after the year for which the accounting is

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[16] Transferee liability is secondary to the primary liability of the transferor. To sustain transferee liability the Commissioner must prove that he is unable to collect the deficiency from the transferor. 9 Mertens, Law of Federal Income Taxation, § 53.29.

[17] G. C. M. 16730, XV–1 Cum. Bull. 179 (1936).

[18] I. R. C., § 322 (b). See also I. R. C., §§ 275 and 311 (b).

made, and would violate the spirit of the annual accounting system. This basic principle cannot be changed simply because it is of advantage to a taxpayer or to the Government in a particular case that a different rule be followed.

The judgment of the Court of Appeals for the Second Circuit in No. 76, being consistent with this opinion, is affirmed, while the contrary judgment of the Court of Appeals for the Sixth Circuit in No. 138 is reversed.

It is so ordered.

MR. JUSTICE DOUGLAS dissents.

IN RE DISBARMENT OF ISSERMAN.

ON RETURN TO RULE TO SHOW CAUSE.

No. 5, Misc. Decided April 6, 1953.

At the conclusion of the nine-months' trial of the eleven defendants whose convictions were affirmed by this Court in *Dennis* v. *United States*, 341 U. S. 494, the Federal District Judge sentenced the defense attorneys, including respondent, to jail for contempt. The contemptuous acts consisted mainly of repetitious and insolent objections and arguments after the trial judge made rulings and ordered a halt to further arguments on the points involved. Following affirmance of the contempt sentence here, 343 U. S. 1, the Supreme Court of New Jersey ordered respondent disbarred. In accordance with Rule 2, par. 5, of the Rules of this Court, an order was then issued by this Court requiring respondent to show cause why he should not be disbarred here. Upon the return to the rule to show cause, *held:* Respondent has failed to meet the burden which was upon him to show good cause why he should not be disbarred, and it is ordered that he be disbarred from practice in this Court. Pp. 286–290.

Leonard B. Boudin for Isserman, respondent.

MR. CHIEF JUSTICE VINSON announced the order of the Court and an opinion in which MR. JUSTICE REED, MR. JUSTICE BURTON and MR. JUSTICE MINTON join.

Abraham J. Isserman, respondent herein, was attorney for several of the eleven defendants whose convictions were affirmed by this Court in *Dennis* v. *United States*, 341 U. S. 494 (1951). At the conclusion of the trial proceedings, the trial judge sentenced all six defense attorneys, including respondent, to jail for contempt. There was one charge of conspiracy by the defense attorneys to obstruct the trial and thirty-nine charges of specific acts of contempt, six of which related to the respondent. The Court of Appeals reversed as to the conspiracy charge but affirmed as to thirty-seven of the specific acts of contempt, including all six naming the

respondent, *United States* v. *Sacher,* 182 F. 2d 416 (1950). Upon a limited grant of certiorari, this Court also affirmed, *Sacher* v. *United States,* 343 U. S. 1 (1952).

Respondent had been a member of the bar of New Jersey. Following the affirmance of the contempt sentence here, the Supreme Court of the State issued an order disbarring respondent.[1]

We then issued a rule for the respondent to show good cause why he should not be disbarred here.[2] This was done in accordance with Rule 2, par. 5, of this Court:

> "Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, or Insular Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court, and unless, upon notice mailed to him at the address shown in the clerk's records and to the clerk of the highest court of the State, Territory, District or Insular Possession, to which he belongs, he shows good cause to the contrary within forty days he will be disbarred."

This Court (as well as the federal courts in general) does not conduct independent examinations for admission to its bar. To do so would be to duplicate needlessly the machinery established by the states whose function it has traditionally been to determine who shall stand to the bar. Rather our rules provide for eligibility in our bar of those admitted to practice for the past three years before the highest court of any state.[3] The

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[1] *In re Isserman,* 9 N. J. 269, 87 A. 2d 903 (1952).

[2] Journal of the Supreme Court of the United States, June 2, 1952, p. 222.

[3] Rule 2, par. 1:

"It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three

obvious premise of the rule is the confidence which this Court has in the bars maintained by the states of the Union. Respondent himself came to our bar upon presenting a certificate of his admission to the bar of the highest court of New Jersey, which now no longer finds him qualified for its bar.

Disbarment by a state does not automatically disbar members of our bar, but this Court will, in the absence of some grave reason to the contrary, follow the finding of the state that the character requisite for membership in the bar is lacking, *Selling* v. *Radford,* 243 U. S. 46 (1917). But we do not follow the rule used in some state courts that disbarment in a sister state is followed as a matter of comity.[4]

The contemptuous acts have been catalogued elsewhere and need not be detailed here again.[5] In the main, they consisted of repetitious and insolent objections and arguments after the trial judge made rulings and then ordered a halt to further argument on the points involved. As we observed in affirming the contempt sentences, such ". . . conduct has been condemned by every judge who has examined this record under a duty to review the facts."[6] Now we have additional judicial voices condemning such conduct—the unanimous opinion of the New Jersey Supreme Court, speaking through Chief Justice Vanderbilt.

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years past in the highest court of a State, Territory, District, or Insular Possession, and that their private and professional characters shall appear to be good."

[4] *In re Van Bever,* 55 Ariz. 368, 101 P. 2d 790 (1940); *In re Leverson,* 195 Minn. 42, 261 N. W. 480 (1935); *Copren* v. *State Bar,* 64 Nev. 364, 183 P. 2d 833 (1947); *In re Brown,* 60 S. D. 628, 245 N. W. 824 (1932); *State Board of Law Examiners* v. *Brown,* 53 Wyo. 42, 77 P. 2d 626 (1938).

[5] The contempt certificate in full is set forth in *United States* v. *Sacher,* 182 F. 2d 416, at 430 (1950).

[6] *Sacher* v. *United States,* 343 U. S. 1, 13 (1952).

Our rule puts the burden upon respondent to show good cause why he should not be disbarred. Let us examine the reasons advanced as meeting that burden. It is said that respondent has already been punished enough for his contempt and that to disbar him is excessive, vindictive punishment. Such an attitude misconceives the purpose of disbarment. There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice. That to the individual disbarred there is a loss of status is incidental to the purpose of the Court and cannot deter the Court from its duty to strike from its rolls one who has engaged in conduct inconsistent with the standard expected of officers of the Court. In so doing, we do not lay down a rule of disbarment for mere contempt; [7] rather we have considered the basic nature of the actions which were contemptuous and their relationship to the functioning of the judiciary.

The absence of a conspiracy is given as a ground against disbarment. Nothing in our rules refers to conspiracy as a factor. To make it the turning point in this disbarment proceeding would be tantamount to our stating that recurring disobedience is not cause for disbarment unless accompanied by a conspiracy.

It is urged upon us that a period of suspension at most is appropriate, for the District Court for the Southern District of New York only saw fit to suspend respondent for two years. But that was before respondent was disbarred in New Jersey. It is premature to say what action may be taken by that court under its rules [8] as a result of respondent's disbarment in New Jersey.

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[7] See *Ex parte Tillinghast*, 4 Pet. 108 (1830).

[8] "The court shall make an order disbarring a member of the bar of this court (1) who has been convicted in any federal, state, or territorial court of an offense which is a felony in the jurisdiction of such conviction; or (2) who has been disbarred by any court of

The Supreme Court of New Jersey, in its nine-page opinion, devoted one sentence to noting that respondent had been convicted of statutory rape in 1925 and thereupon suspended from practice for a short period.[9] That one sentence is followed by this language: "The controlling consideration in reaching a determination as to the measure of discipline, however, is respondent's scandalous and inexcusable behaviour in seeking to bring the administration of justice into disrepute in a trial that lasted nine months." [10] It may be noted, however, that the files in the office of our Clerk show that the respondent did not disclose this conviction and suspension from practice in his application for admission to our bar,[11] so that we did not sanction that conduct in granting him admission.

The order of the Court placed the burden upon respondent to show good cause why he should not be disbarred. In our judgment, he has failed to meet this test. An order disbarring him from practice in this Court should issue.

It is so ordered.

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

MR. JUSTICE JACKSON, whom MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS join, delivered the following opinion.

This proceeding to disbar Abraham J. Isserman results from his being adjudged guilty of contemptuous conduct in the trial of *United States* v. *Dennis*, 183 F. 2d 201, 341 U. S. 494. The trial judge found that his con-

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record, federal, state or territorial." Rule 5 (b), District Court for the Southern District of New York.

[9] *In re Isserman*, 9 N. J. 269, 279, 87 A. 2d 903, 907 (1952).

[10] *Ibid.*

[11] Rule 2, par. 2, and the application form for admission did not require information as to prior suspensions at the time Isserman was admitted. Such information is now required by Rule 2, par. 2.

temptuous acts were pursuant to a conspiracy among counsel to obstruct justice and sentenced him, with others, to jail. But the Court of Appeals, while affirming the counts charging specific acts of contempt, reversed the conspiracy count. *United States* v. *Sacher,* 182 F. 2d 416. This Court limited its review to questions of law and affirmed. *Sacher* v. *United States,* 343 U. S. 1.

Disciplinary proceedings were instituted before the United States District Court for the Southern District of New York, in which Isserman was given a full hearing, and again the conspiracy charge was not sustained. A period of suspension from practice at the bar of the court against which the contempt was committed was considered adequate to the offense. However, the courts of New Jersey have disbarred Isserman and under our rule he must be disbarred here unless he shows good cause to the contrary.[1]

While we have expressed different views as to the merits of the contempt charges, and each adheres to his former expressions, we are agreed that there is good cause for withholding this Court's decree of disbarment.

Primarily because of these contempts, the Supreme Court of New Jersey disbarred Isserman. It also considered his conviction in that State of statutory rape in 1925. At the time of conviction, however, the New Jersey courts found such extenuating circumstances that only a small fine and a temporary suspension from practice were

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[1] Rule 2, par. 5, reads:

"Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, or Insular Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court, and unless, upon notice mailed to him at the address shown in the clerk's records and to the clerk of the highest court of the State, Territory, District or Insular Possession, to which he belongs, he shows good cause to the contrary within forty days he will be disbarred."

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deemed to make the punishment fit the crime.[2] Five years after this conviction, this Court, asking no question which would have called for disclosure of the conviction, admitted Isserman to its bar, it appearing that he was then in good standing before the courts of New Jersey. Under these circumstances, we do not think we can now attach any weight to this dereliction.

We think this Court should not accept for itself a doctrine that conviction of contempt *per se* is ground for a disbarment. It formerly held, in an opinion by Mr. Chief Justice Marshall, that a lawyer should be admitted to this bar even though for contempt he had been disbarred by a federal district court action—". . . one which the court do not mean to say was not done for sufficient cause, or that it is not one of a serious character; but this court does not consider itself authorised to punish here for contempts which may have been committed in that court." *Ex parte Tillinghast,* 4 Pet. 108, 109. The remedy for courtroom contempt should be prompt and direct punishment proportioned to the offense. Isserman has been severely punished. His penalty has included what is rare in the punishment of lawyers' contempts—a substantial jail sentence.

We do not recall any previous instance, though not venturing to assert that there is none, where a lawyer has been disbarred by any court of the United States or of a state merely because he had been convicted of a contempt.[3] But we do know of occasions when members of the bar have been found guilty of serious contempt without their standing at the bar being brought into question.

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[2] *In re Isserman,* 6 N. J. Misc. 146.

[3] In the trial of John Peter Zenger, in 1735, the Supreme Court of Judicature for the Province of New-York disbarred two of his defense counsel for "having presumed (notwithstanding they were forewarned by the Court of their DISPLEASURE if they should do it) to sign" and file a document questioning legality of the Judges'

It will sufficiently illustrate the point to refer to the tactics of counsel for the defense of William M. Tweed. Those eminent lawyers deliberately and in concert made an attack upon the qualifications of Presiding Judge Noah Davis, charging him with bias and prejudice. At the end of that trial, after he had pronounced sentence on Tweed, Judge Davis declared several defense counsel guilty of contempt. Not one of these lawyers, apparently, was subjected to disciplinary proceedings in consequence of that judgment. Among them were Elihu Root, later to become one of the most respected of American lawyer-statesmen, and Willard Bartlett, destined to become Chief Judge of the New York Court of Appeals. These two were excused from any penalty, beyond a lecture on their ethics, on the ground of youth and domination by their seniors—a rebuke perhaps more humiliating than a sentence.[4] One of the seniors who participated in the contempt, and certainly one of its chief architects, was David Dudley Field. He later was elected president of the American Bar Association.[5]

There has been hue and cry both for and against these lawyers for Communist defendants. There are those who think the respectability of the bar requires their expulsion. There are those who lament that any punishment of their conduct will so frighten the legal profession that it will not dare to discharge its duty to clients. We make common cause with neither. In defending the accused Communists, these men were performing a legitimate function of the legal profession, which is under a duty to leave no man without a defender when he is charged with

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Commissions, which was adjudged to be a contempt for which they were peremptorily excluded from further practice and their names struck from the roll of attorneys. Rutherford, John Peter Zenger, 50; 17 How. St. Tr. 683, 686.

[4] Jessup, Elihu Root, 80–93.

[5] Rogers, American Bar Leaders, 50.

crime. In performing that duty, it has been adjudged that they went beyond bounds that are tolerable even in our adversary system. For this, Isserman has paid a heavy penalty.

If the purpose of disciplinary proceedings be correction of the delinquent, the courts defeat the purpose by ruining him whom they would reform. If the purpose be to deter others, disbarment is belated and superfluous, for what lawyer would not find deterrent enough in the jail sentence, the two-year suspension from the bar of the United States District Court, and the disapproval of his profession? If the disbarment rests, not on these specific proven offenses, but on atmospheric considerations of general undesirability and Communistic leanings or affiliation, these have not been charged and he has had no chance to meet them. We cannot take judicial notice of them. On the occasions when Isserman has been before this Court, or before an individual Justice, his conduct has been unexceptionable and his professional ability considerable.

We would have a different case here if the record stood that Isserman, with others, entered into a deliberate conspiracy or plans to obstruct justice. But that charge has been found by the Court of Appeals to lack support in the evidence, and again in the disciplinary proceeding in District Court it was not found to be proven. What remains is a finding that he was guilty of several unplanned contumacious outbursts during a long and bitter trial.

Perhaps consciousness of our own short patience makes us unduly considerate of the failing tempers of others of our contentious craft. But to permanently and wholly deprive one of his profession at Isserman's time of life, and after he has paid so dearly for his fault, impresses us as a severity which will serve no useful purpose for the bar, the court or the delinquent.

Syllabus.

UNITED STATES *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

NO. 205. CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.*

Argued January 14, 1953.—Decided April 6, 1953.

Respondent power company produces electricity in California, partially by hydroelectric projects licensed under Part I of the Federal Power Act, as amended by Title II of the Public Utility Act of 1935, and sells a portion of it to the Navy Department and to a Nevada county for consumption in Nevada. The power is transmitted at high voltage to the company's substation in California, whence it is transmitted over lines owned by the Navy and by the County into Nevada, where it is stepped down for local distribution and consumption. The power sold to the Navy is used largely in official operations at a Navy depot, though part is distributed for private consumption at a nearby Navy housing project. The power sold to the County is practically all resold to local consumers. *Held:* The rates for such sales of power for resale are subject to regulation by the Federal Power Commission under Part II of the Federal Power Act. Pp. 299–318.

1. The Federal Power Commission has jurisdiction under § 201 (b) of the Act, which extends "to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce"; and regulation of the rates of such sales is authorized by §§ 205 (a) and 206 (a). Pp. 299–300.

(a) The operations in question are in interstate commerce within the meaning of § 201 (b) of the Act; and the fact that the electricity is transmitted across the state boundary over lines owned by the Navy and by the County, as purchasers, is irrelevant. Pp. 299–300.

(b) The limitation in Part II of the Act that federal regulation shall "extend only to those matters which are not subject to regulation by the States" does not apply to the facts of this case; and § 20 of Part I of the Act does not require a different result. Pp. 300–311.

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*Together with No. 206, *County of Mineral, Nevada,* v. *Public Utilities Commission of California et al.,* also on certiorari to the same court.

(c) Federal rate jurisdiction under Part II is not excluded by the fact that some portion of the power sold originated in hydroelectric projects federally licensed under Part I. P. 302.

(d) By § 20 of Part I, Congress did not confer on the States jurisdiction over hydroelectric energy transmitted across state lines for resale. Pp. 303–305.

(e) Congress in § 20 of Part I did not charge the States with the responsibility of regulating rates of interstate sales of electricity through the use of the federal power over government property. P. 305.

(f) The limitations of § 201 (a) on federal regulation cannot, and were not intended to, preserve an exclusive state regulation of wholesale hydroelectric sales across state borders. Pp. 310–311.

2. The Federal Power Commission has authority over the sales to the County and to the Navy. Pp. 312–316.

(a) The provision of subsection (c) of § 201 that "sale of electric energy at wholesale" means a sale to any "person" for resale, is not to be construed as excluding sales to a municipality or to the Navy. Pp. 312–316.

(b) The addition of the word "person" in the definitions in § 201 (d) was not intended as a limitation on the jurisdiction of the Commission. P. 313.

3. The sales here were not exempt from Commission jurisdiction under § 201 (b) as sales over "local distribution" facilities, and they were "for resale" though the contracts did not so specify. P. 316.

4. Whether the Federal Power Commission may exercise rate authority over the entire amount of power sold or merely that which is resold by the Navy is a question which is not ripe for consideration by this Court on the instant record. Pp. 316–318.

Reversed.

Orders of the California Public Utilities Commission asserted jurisdiction over rates for certain sales of electric power by the respondent power company. 50 Cal. P. U. C. 749; 89 P. U. R. (N. S.) 359. The State Supreme Court denied review, thus affirming the orders. This Court granted certiorari. 344 U. S. 810. *Reversed,* p. 318.

Solicitor General Cummings argued the cause for the United States in No. 205. With him on the brief were *Assistant Attorney General Baldridge, Robert L. Stern, Paul A. Sweeney* and *Melvin Richter.*

L. E. Blaisdell argued the cause and filed a brief for petitioner in No. 206.

Boris H. Lakusta argued the cause for respondents in No. 205. With him on the briefs were *Everett C. McKeage* and *Wilson E. Cline* for the Public Utilities Commission of California, respondent in Nos. 205 and 206.

Henry W. Coil argued the cause for respondents in No. 206. With him on the briefs was *Donald J. Carman* for the California Electric Power Co., respondent in Nos. 205 and 206.

MR. JUSTICE REED delivered the opinion of the Court.

Respondent California Electric Power Company produces electricity in California, partially by hydroelectric projects licensed under Part I of the Federal Power Act, 41 Stat. 1063, as amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U. S. C. § 791a *et seq.*, and markets the greater portion of it, subject to respondent Public Utilities Commission's authority, in that State. The jurisdictional dispute which is our present concern relates only to certain power sales by the Company to the Navy Department and to Mineral County, Nevada, for consumption there. This power, following production, is transmitted at 55,000 volts to the Company's Mill Creek substation in California, about 25 miles from the border, on its own lines. There it is figuratively taken over by the Navy and by the County, and delivered on their lines at the same high voltage to Hawthorne, Nevada, where it is stepped down for local distribution

and consumption. The Navy's power is used at its ammunition depot, largely in official industrial operations; between 15% and 29%, however, is distributed for consumption in the private households and enterprises of tenants at the Navy's low-cost housing project nearby. These sales are metered individually and each purchaser is billed according to his own use. The power purchased by the County is all resold to local consumers, with the exception of minor line losses and official use.

The Navy's contract for purchase of the power was negotiated in 1943, and provided for termination on 60-day notice; the County's was entered into in 1945 for a stated period of three years. In 1947 the Power Company applied to the State Commission for a general rate increase which, after hearings at which the Navy was represented, was granted. Thereafter, the Company terminated its Navy contract and failed to renew that with the County, giving notice of its intention to apply the new schedule to these sales. Both purchasers demurred, and the Company reapplied to the State Commission for a ruling as to the applicability of the general schedule to these particular operations. After some early state exploratory hearings, the Federal Power Commission, on February 15, 1950, issued an order to the Company to show cause as to why the rates were not subject to exclusive federal jurisdiction. Thus joined, the issues were heard by both agencies at a joint proceeding on March 20 and 21, 1950. Both eventually decided in favor of their own asserted authority.[1] The State

[1] *California Electric Power Co.*, 50 Cal. P. U. C. 749, and *California Electric Power Co.*, 89 P. U. R. (N. S.) 359, respectively.

There was some doubt as to the effect of the apparently conflicting orders, reflecting on the wisdom of our exercise of the power to review. The respondents contend that the state order merely permitted, but did not require, application of the higher rates to the Navy and County sales. The distinction, whatever its abstract

Commission's supporting opinion was denied review by the California Supreme Court on January 21, 1952, thus affirming its holding, while that of the Federal Power Commission was likewise approved by the Federal Court of Appeals for the Ninth Circuit, *California Electric Power Co.* v. *Federal Power Commission,* 199 F. 2d 206. As a federal question concerning the applicability of Part II of the Act was raised, certiorari was granted, 344 U. S. 810, to bring the record here from the state proceedings under 28 U. S. C. § 1257 (3).

I.

Federal authority, which we think obtains, is asserted under Part II of the Federal Power Act. This applies "to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." § 201 (b). Regulation of the rates of such sales—other types of authority in connection with such interstate transmission operations are granted in other sections—rests on §§ 205 (a) [2] and 206 (a).[3]

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attraction, misses the point that we are here considering whether or not the state agency had jurisdiction at the outset to consider these rates at all. That the order would have no concrete effect on the prices petitioners must pay is irrelevant and unlikely as well.

The Federal Power Commission merely ordered the Company to cease charging other than filed rates and so, while constituting a determinative assertion of its jurisdiction, apparently does not foreclose the submission of a new schedule, with usual rate-making procedures before the federal body. 18 CFR §§ 35.3, 35.5, 35.20.

[2] § 205 (a): "All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable . . . ."

[3] § 206 (a): "Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any

The preliminary issue as to whether the operations in question fall within the concept of interstate commerce, on which the federal power initially depends, can be shortly disposed of, for *Powell* v. *United States Cartridge Co.*, 339 U. S. 497, 509–515, firmly established that commerce includes the transportation of public property, while the irrelevance of the fact that this electricity is transmitted across the state boundary over lines owned by the Navy and by the County, as purchasers, may be seen from *Jersey Central Power & Light Co.* v. *Federal Power Commission,* 319 U. S. 61, 69, 71, and *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498.

The most serious contentions pressed in opposition to application of Part II, arise from the self-limiting statement therein that the Act is "to extend only to those matters which are not subject to regulation by the States." [4] So respondents contend that Power Commis-

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public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."

[4] § 201 (a): "It is hereby declared that the business of transmitting and selling electric energy . . . is affected with a public interest, and that Federal regulation of matters relating to . . . the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States."

Section 201 (b) states, in apparently similar vein, that the Act is not to "deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line." The provision certainly does not go beyond that of § 201 (a), noted in the opinion, in limiting federal

sion jurisdiction only begins where the local regulatory power ends, and point to Part I, § 20, as supporting their contention that the limitation applies to the facts of this case. Section 20 provides that when power from projects licensed under Part I, which that energy sold to the Navy and the County includes,

> "shall enter into interstate or foreign commerce the rates . . . and the service . . . by any . . . licensee . . . or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable . . . to the customer . . . and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State . . . or such States are unable to agree through their properly constituted authorities on the services . . . or on the rates . . . jurisdiction is hereby conferred upon the commission . . . to regulate . . . so much of the services . . . and . . . rates . . . therefor as constitute interstate or foreign commerce . . . ." 41 Stat. 1073, 16 U. S. C. § 813.

Both Nevada and California have regulatory agencies with certain rate powers. And we may assume, though the Government asserts otherwise, that both agencies can enforce reasonable rate orders and have not dis-

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authority. This is true, not only because of the substantial similarity of the language, but also because it appears not to have been drafted with state rate regulation in mind. Rather, 79 Cong. Rec. 10527 indicates that the provision was intended to preserve the validity of certain state statutes prohibiting or regulating the volume of state power exported. Compare S. 2796, 74th Cong., 1st Sess., as introduced, § 201 (b), and *idem* as reported in the House, Union Calendar No. 451, § 201 (b). It has been so construed. *Safe Harbor Water Power Corp.*, 5 F. P. C. 221, 235.

agreed.[5] Respondents point to this as satisfying § 20, and thus ousting any Part II regulation. In short, they contend—what at first blush may appear anomalous—that federal rate jurisdiction under Part II may be prohibited by the fact that some portion of the power sold originated in hydroelectric projects federally licensed under Part I. We do not agree.

Admittedly, § 20 contemplated state regulation. And it may well be, as indicated by the congressional hearings,[6] that Congress quite frankly chose the local authorities to regulate the bulk of interstate sales of electricity from licensed projects. In fact, a contrary view would have been almost astonishing as an historical proposition, for neither the large interstate operations of electric utilities that have developed during the last thirty years, nor the concomitant desirability of federal regulation, could have been foreseen in 1920. Long-range transmission was not then adequately developed, nor had the various local utilities by then undergone the integration into large centralized systems which later came about.[7] So we may assume that Congress, as a policy judgment, accepted and adapted the substantial tradition of local

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[5] Section 20's reference to state agreement has never been wholly clear. See footnotes 13, 16 and 19, *infra*. Our opinion, *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U. S. 414, did not settle the issue, and it has been judicially discussed only rarely.

[6] Hearings, House Committee on Water Power, 65th Cong., 2d Sess. 65.

[7] It was, of course, more than historical accident that caused the simultaneous passage of the Holding Company Act and the Federal Power Act; in fact, their mutual consideration by the 79th Congress, 1st Sess., see 79 Cong. Rec. *passim*, strikingly indicates Congress' realization that state regulation had failed, both because of the giantism of the holding company and because of inability to reach interstate sales. See Davis, Influence of Federal Trade Commission's Investigations, 14 Geo. Wash. L. Rev. 21.

utility regulation to power production licensed under the federal Act.

But there is no evidence that this was done with any firm intent to settle with the states a power essentially national. For whatever views of the draftsmen of § 20 as to the efficacy of state regulation, the jurisdictional lines between local and national authority were not finally determined until this Court's opinion in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83. This decision followed the Federal Water Power Act by some seven years. In short, that case established what has unquestionably become a fixed premise of our constitutional law but what was not at all clear in 1920, that the Commerce Clause forbade state regulation of some utility rates. State power was held not to extend to an interstate sale "in wholesale quantities, not to consumers, but to distributing companies for resale to consumers." 273 U. S., at 89. *Attleboro* reiterated and accepted the holding of *Pennsylvania Gas Co.* v. *Public Service Commission,* 252 U. S. 23, that sales across the state line direct to consumers is a local matter within the authority of the agency of the importing state. But it prohibited regulation of wholesale sales for resale by either interested commission.

Respondents seek to escape that doctrine, however, by pointing to the fact that there was not there involved sales of electricity produced at a project licensed under Part I. They admit that absent § 20 of that Part, the later Part II authority would apply exclusively and determine the result. But, they say, § 20 creates an exception, which the language of *Attleboro* did not reach, for hydroelectric energy transmitted across state lines under the aegis of coordinated state regulation. In short, it is alleged that § 20 "conferred jurisdiction" on the states.

We do not agree. *Attleboro* declared state regulation of interstate transmission of power for resale forbidden as a direct burden on commerce. The states may act as to such a subject only when Congress has specifically granted permission for the exercise of this state power over articles moving interstate which would otherwise be immune. *In re Rahrer,* 140 U. S. 545, 560–562.[8] Section 20 cannot bear this interpretation; it did not establish the source of the energy as a significant factor determining whether state or federal authority applied. It is quite different from those few unique federal statutes this Court has heretofore considered, "subjecting interstate commerce . . . to present and future state prohibitions," or regulation, *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311, 326, in the exercise of the constitutional commerce power. Its language indicates no consideration or desire to alter the limits of state power otherwise imposed by the Commerce Clause; it merely states that the federal power shall not be invoked unless certain conditions of state inability to regulate obtain.[9] Section 20 quite obviously is not based on any recognition of the constitutional barrier, but rather assumes what *Attleboro* held did not exist—state authority to reach interstate sales of energy for resale; its sole concern is the application of federal regulation on the possible failure of the

[8] See *Leisy* v. *Hardin,* 135 U. S. 100; *Adams Express Co.* v. *Kentucky,* 238 U. S. 190; *Rosenberger* v. *Pacific Express Co.,* 241 U. S. 48; *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311; *Whitfield* v. *Ohio,* 297 U. S. 431; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334, 350.

[9] Compare the Wilson Act, 26 Stat. 313 (alcoholic beverages), the Webb-Kenyon Act, 37 Stat. 699, 27 U. S. C. § 122 (same); 32 Stat. 193 (oleomargarine); the Reed Amendment to the National Appropriation Act of 1917, 39 Stat. 1069 (alcoholic beverages); the Hawes-Cooper Act, 45 Stat. 1084, 49 U. S. C. § 60; and the Ashurst-Sumners Act, 49 Stat. 494, 18 U. S. C. §§ 1761, 1762 (convict-made goods).

states to empower their regulatory agencies or their inability to agree.

Nor can it soundly be said that Congress in § 20 of Part I charged the states with responsibility of regulating rates of interstate sales of electricity through the use of the federal power over government property. U. S. Const., Art. 4, § 3, cl. 2. As indicated in our discussion of the commerce power, there was in 1920 when § 20 was enacted no full appreciation of the limits of state power over sales of electricity for export or import for resale. So the language of § 20 required reasonable rates to consumers of electricity moving interstate and then added the provision that when no state commission was provided to enforce reasonable rates, or the states interested could not agree, the Federal Power Commission could act.[10] We do not think such an arrangement for water

[10] Hearings, House Committee on Water Power, 65th Cong., 2d Sess. 62–66, 95–97, is most illuminating in this regard. O. C. Merrill presented the views of the Secretaries of Agriculture, Interior and War. He discussed at some length the problem of sales across state lines and suggested that the proposed § 20 solution was desirable. It left regulation to the interested states "if they do it; and they are doing it now." *Ibid.*, at 97. "The intention of the draft was this: That in so far as the local authorities have the power, and exercise it, over rates and service, the Federal commission should leave it alone." *Ibid.*, at 62. There is no suggestion that § 20 was conceived as an act of federal permission; indeed Merrill explicitly states his ignorance as to whether any permission was needed: "I do not know whether the question has even come before the courts as to whether such business is or is not interstate commerce, within the meaning of the commerce clause of the Constitution, so that exclusive jurisdiction would be vested in the Federal Government, if it wished to exercise it." Mr. Doremus: "It might be a power which Congress could exercise, or, if it failed to exercise it, could be left in the jurisdiction of the State." Mr. Merrill: "It is my judgment that so long as it is satisfactorily handled by the several States it had better be left with them." *Ibid.*, at 97.

power electricity as Part I, § 20, provides can be held to block the general authority of Part II. See note 13, *infra.*

The actions of the Congress following the *Attleboro* decision do not reflect any different interpretation of § 20. We note some interest in the application of that section in the light of the opinion, but nothing that is decisive of respondents' contentions. In 1929, Senator Couzens introduced an amendment to his then pending bill, S. 6, 71st Cong., 1st Sess., to establish federal regulation of communications. The amendment, § 47 *et seq.*, would have established a federal rate authority over all interstate power sales. "Power" was defined, § 47 (a)(4), to include electric energy, "whether or not produced by a licensee under the Federal Water Power Act." The bill was referred to Committee, but Congress took no final action.[11] In the next year, the same Committee held hearings on S. Res. 80, concerning a purported breakdown in the investigative powers of the Federal Power Commission as it then was constituted. The decision of the Commission of February 28, 1929, reported F. P. C. Ninth Ann. Rep. 119, was introduced.[12] This argued that, as a result of *Attleboro,* the Commission had exclusive jurisdiction over rates of interstate wholesale-for-resale sales of licensed hydroelectric power, until displaced by a § 20 agreement of the

[11] See Hearings, Senate Committee on Interstate Commerce on S. 6, 71st Cong., 2d Sess. Section 47 (h) stated that the purpose of the amendments was not to "abridge the jurisdiction or authority of any State to regulate, to the same extent as if this Act had not been passed, the rates and charges for the sale to consumers within the State of any power transmitted in interstate commerce," unless a "substantial number" of those consumers sought federal regulation.

[12] Hearings, Senate Committee on Interstate Commerce on S. Res. 80, 71st Cong., 2d Sess. 265.

interested states which received congressional approval as a compact.[13]

The first positive congressional action in the field, of course, was the Federal Power Act of 1935. The sweep of the statute is wholly inconsistent with any asserted state power as fixed by § 20 of the 1920 Act. We have examined the legislative history; its purport is quite clear. Part II was intended to "fill the gap"—the phrase is repeated many times in the hearings, congressional debates and contemporary literature—left by *Attleboro* in utility

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[13] "In cases of interstate and foreign commerce of the character illustrated in the Pennsylvania Gas Co. case [direct sales to consumers], *supra*, I [the Chief Counsel of the Commission; the Commission approved the statement as its own Decision February 28, 1929] am of the opinion that the Federal Power Commission has no jurisdiction over any matter for the regulation of which the State has already provided a commission with the requisite authority. This appears to be the very situation which Congress had in mind when it conferred a conditional jurisdiction upon the commission. If such a State commission does not exist, the jurisdiction of the Federal Power Commission applies in full. If the State has a commission with authority over a part only of the matters specified in section 20, the jurisdiction of the Federal Power Commission extends to the remainder of such matters.

"In cases of interstate and foreign commerce of the character illustrated in the Attleboro case, *supra*, it seems clear that the States individually have no jurisdiction at all; that having no individual jurisdiction they can not acquire it jointly by agreements between themselves, except by specific authorization of Congress in the manner hereinafter discussed; and that, in absence of such authorization, the only agency with authority to regulate, in cases of this kind, the specific matters set forth in section 20 is the Federal Power Commission." F. P. C. Ninth Ann. Rep. 123–124.

The Report went on to state that § 20 could not be interpreted as a "permissive" statute. *Ibid.*, 127–129. The "compact" interpretation of § 20 was adopted in *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 124 F. 2d 800.

See footnote 16, *infra*.

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regulation. Congress interpreted that case as prohibiting state control of wholesale rates in interstate commerce for resale, and so armed the Federal Power Commission with precisely that power.[14] There is nothing to indicate that Congress' conception of the states' disability in 1935, or of the power it gave the Commission by Part II, did not include Part I electricity. In fact, the unqualified statements concerning Part II favor the opposite construction, for we find the Act explained time and again as empowering the agency with rate authority over interstate wholesale sales for resale; not once is this authority spoken of as one conditioned on the electricity concerned having been produced by steam generators or at nonlicensed dams.[15]

This would largely determine our interpretation of the ambiguous reference to "matters . . . subject to regula-

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[14] The conception of the Federal Commission's new function was perhaps more revolutionary than could be gathered by merely comparing the new Act with § 20. For it appears that despite the latter provision for limited rate regulation, in fact substantially nothing in that direction had been attempted, at least by 1930. Hearings, Senate Committee on Interstate Commerce on S. Res. 80, 71st Cong., 2d Sess. 79, 262. The Commission had only three accountants, all of whom were concerned with evaluation of proposed licensed hydroelectric projects. *Ibid.*, 38.

In fact, Colonel Tyler, Chief Engineer, Federal Power Commission, expressly alluded to the fact that, for federal authority to be effective, it would have to reach all interstate electricity, and not just that which is produced at licensed dams. *Ibid.*, at 195. Here, of course, respondents theorize that a small admixture of hydroelectric power will defeat federal jurisdiction.

[15] In fact, the House Report on the bill, commenting on § 305 of the Act, stated that specific reference to officials of licensees had been deleted because "such licensees when interstate operating public-utility companies will be subject to the provisions of the section in any event." H. R. Rep. No. 1318, 74th Cong., 1st Sess. 31.

For general discussion of the scope of Part II, see Hearings, Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st

tion by the States," § 201 (a), if nothing more were available to work with. However, there is other proof that Congress did not have in mind § 20-type state regulation. The limiting clause is spoken of only as protecting state regulation of local affairs, including rates of intrastate and interstate-for-consumption sales: "Facilities for local distribution and for the production and transmission of energy solely for one's own use and not for resale are excluded." Hearings, House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess. 385.[16] The phrase is not once mentioned as the distinct affirmation of state power over interstate sales for resale under § 20 that respondents apparently would recognize it to be. There are indeed further reasons for rejecting respondents' construction of § 201 (a). The nature of the generating facilities, in the first place, has no functional significance for rate regulation; the same considerations that lead Congress to enact federal authority over interstate electricity in general would have been similarly applicable to power generated at licensed projects. Secondly, contemporary literature was frankly divided over whether any power over interstate sales for

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Sess. 250–251; H. R. Rep. No. 1318, 74th Cong., 1st Sess. 26–27; Hearings, House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess. 436, 521–530, 549, 1639, 1677–1680, 2143, 2169; H. R. Rep. No. 1903, 74th Cong., 1st Sess. 74; 79 Cong. Rec. 8431, 8442, 8444, 10377–10378.

[16] "[T]his language [the § 201 (a) proviso clause] is not pertinent in the instant controversy for it is designed to be applicable only to electric energy transmitted and sold in intrastate commerce. The control of rates referred to in the section is control by a single State and the language has no relation to possible joint control by two or more States under the compact clause of the Constitution." *Safe Harbor Water Power Corp.* v. *Federal Power Commission,* 179 F. 2d 179, 187. See also *Hartford Electric Light Co.* v. *Federal Power Commission,* 131 F. 2d 953; *Jersey Central Power & Light Co.* v. *Federal Power Commission,* 129 F. 2d 183.

resale remained with the states after *Attleboro*.[17] We cannot assume that Congress enacted Part II with the purpose of permitting the states to regulate hydroelectric energy through § 20. This is especially so in view of the dearth of legislative discussion of the matter.[18]

So we conclude that the limitations of § 201 (a) on federal regulation cannot, and were not intended to, preserve an exclusive state regulation of wholesale hydroelectric sales across state borders. Even if we conceived of the matter as one peculiarly limited to the statutory wording of § 201 (a), our statement that "[e]xceptions to the primary grant of jurisdiction in the section are to be strictly construed," *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682, 690–691, would be as applicable here as to § 1 (b) of the Natural Gas Act. "Production" and "distribution" are elsewhere specifically excluded from Commission jurisdiction, § 201 (b); the phrase relied on in § 201 (a) was originally drafted as a

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[17] Scott, Control of Power Transmission, 14 Proc. of Acad. of Pol. Sci. 135, followed by Note, 32 Col. L. Rev. 1171, admit the force of *Attleboro,* but cite § 20 as a permissive regulation statute. On the other hand, Arneson, Federal Regulation of Electric Utilities, 66 U. S. L. Rev. 133, and Updegraff, Extension of Federal Regulation of Public Utilities, 13 Iowa L. Rev. 369, hold that the states' power to regulate rates of sales for resale in interstate commerce was completely wiped out.

[18] Actually, an exception to federal commission authority for power generated at licensed hydroelectric projects would have had little real significance in 1935, in terms of limiting resort to that authority. Forty percent of the Nation's electric energy was produced at hydroelectric projects. F. P. C. Electric Power Statistics, 1920–1940, pp. VIII–IX. But only 12.3% of the total production came from licensed sources, which had merely 7.8% of the total national capacity. (Letter from Leon Fuquay, Secretary, Federal Power Commission, to Edward G. Hudon, Assistant Librarian, United States Supreme Court, March 16, 1953.) It would have been curious for Congress to have approved a very special type of regulatory scheme for such a minimal fraction of the country's total power.

declaration of "policy," and the rewording which gave it its present more succinct form was unaccompanied by any "mention [of] this change as one of substance." *Jersey Central Power & Light Co.* v. *Federal Power Commission,* 319 U. S. 61, 76, referring to H. R. Rep. No. 1318, 74th Cong., 1st Sess. 26. "It cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose." *Connecticut Light & Power Co.* v. *Federal Power Commission,* 324 U. S. 515, 527. To conceive of it now as a bench mark of the Commission's power, or an affirmation of state authority over any interstate sales for resale, would be to speculate about a congressional purpose for which there is no support.

Part II is a direct result of *Attleboro.* They are to be read together. The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales. Discussion of the constitutional problem as reflected in that statute and the Natural Gas Act in recent cases supports this conclusion. Especially in the litigation arising under the Gas Act has this Court expressed the view that the limitations established on Commission jurisdiction therein were designed to coordinate precisely with those constitutionally imposed on the states. *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 609–610; *Panhandle Pipe Line Co.* v. *Public Service Commission,* 332 U. S. 507, 514–515; *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682, 690–691; *Illinois Natural Gas Co.* v. *Public Service Co.,* 314 U. S. 498, 506.[19]

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[19] *Safe Harbor Water Power Corp.,* 5 F. P. C. 221, 239–243. See also 18 CFR §§ 35.3, 35.20.

In view of our holding that § 20 does not, of itself, confer jurisdiction on the state commission or commissions in this case, we need not discuss the much-briefed contention that its conditions have

II.

We turn next to a definitional problem raised by respondents, relating to the sales to Mineral County. In short, it is this: § 201 extends Commission jurisdiction to "sale of electric energy at wholesale in interstate commerce." Subsection (d) of that section states:

> "The term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to any person for resale."

And § 3 (4) [20] equates "person" with "individual or a corporation," while § 3 (3) [21] excludes municipalities defined in § 3 (7) [22] from the scope of the latter term. So respondents argue that the sales to Mineral County are neatly and decisively excluded from Part II rate regulation.

The use of these sections in support of an indirect exception to Part II has no support in the statutory scheme as a whole. Sections 306 and 313 (a), in fact, look quite the other way. They provide for complaints and petitions for rehearing by municipalities. And § 3 (7) contemplates municipalities as users and distributors of power. To accept respondents' contention as to Mineral

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been met. See, however, *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 124 F. 2d 800, 179 F. 2d 179; *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U. S. 414; and notes 13 and 16, *supra*.

[20] " 'Person' means an individual or a corporation." § 3 (4).

[21] " 'Corporation' means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include 'municipalities' as hereinafter defined." § 3 (3).

[22] " 'Municipality' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power." § 3 (7).

County would thwart the premise of these provisions: that such political subdivisions of the states can be aggrieved by the failure of a public utility selling power to them to satisfy the requirements of Part II.

Nor do we find any evidence of conscious coordination of §§ 3 (3), (4) and 201 (d) from the legislative history. True, they were simultaneously enacted, and, in fact, the interpolation of the word "person" into § 201 (d) occurred after the §§ 3 (3) and 3 (4) definitions were in existence in S. 2796, 74th Cong., 1st Sess., as passed by the Senate and reported to the House, June 13, 1935. But this alteration came at the insistence of the House. The Senate had provided for jurisdiction over sales occurring before or after interstate transmission, *ibid.*, § 201 (f), and the House amendment, from which § 201 (d) in its present form stemmed, covered sales during the transmission across state lines for the first time. So the House Report is, we think, significant in its redefinition of the section: "A 'wholesale' transaction is defined to mean the sale of electric energy for resale." H. R. Rep. No. 1318, 74th Cong., 1st Sess., p. 8. We conclude, therefore, that the Congress attached no significance of substance to the addition of the word "person," and in fact did not intend it as a limitation on Commission jurisdiction. Indeed quite the contrary was sought by the House amendment of § 201 (d).[23]

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[23] There is evidence, on the other hand, that the exclusion of producing municipalities from Commission jurisdiction was intended. For instance, DeVane, Solicitor of the Federal Power Commission at the time, testified as follows before the Senate Committee:

"Mr. DeVane. [The Act] does not apply to a publicly owned power plant.

. . . . . .

"Senator Hastings. Why was it drawn that way?

"Mr. DeVane. We did not feel that it was within our province to prepare a bill that would undertake to regulate municipal, State,

A third factor, in addition to the statutory scheme and legislative history of § 201 (d), is the rejection of respondents' contention by the Commission and courts. Three circuits have just recently done so,[24] and the Federal Power Commission's long assertion that it has authority over rates of sales to municipalities has probably risen to

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or Government utilities." Hearings, Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess. 256.

And before the House Committee, Commissioner Seavey recorded a similar interpretation:

"Mr. PETTENGILL. Mr. Commissioner, you just said a moment ago that as you construed the bill, a private power line could not be required to carry electric energy generated by the Tennessee Valley Authority or a municipal plant owned by a city, or a State; is that correct?

"Commissioner SEAVEY. Yes; that is my understanding of the bill.

"Mr. PETTENGILL. Because, as you said, the word 'person' does not include a municipality or a governmental body?

"Commissioner SEAVEY. I think that municipalities are particularly excluded, and it is my belief that any other Federal agency, any other governmental agency, would be excluded under the terms of the bill.

"Mr. PETTENGILL. Now then, suppose that a municipality acquires, by purchase, all of the common stock of a corporation, privately organized, so that the municipality is actually the owner of the power plant, although it was organized privately, as a private corporation. After that was done, could the private power plant competing in the same locality be required to carry the electric energy generated by a plant owned by the municipality, or State, or the nation?

"Commissioner SEAVEY. If it was controlled by the municipality and was subject wholly to municipal operation, I would say no, there it not be [*sic*]." Hearings, House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess. 397–398.

See § 201 (f).

[24] *California Electric Power Co.* v. *Federal Power Commission,* 199 F. 2d 206; *Wisconsin* v. *Federal Power Commission,* 91 U. S. App. D. C. 307, 201 F. 2d 183, and *Wisconsin-Michigan Power Co.* v. *Federal Power Commission,* 197 F. 2d 472.

the dignity of an agency "policy." [25] We have often stated our sympathy with established administrative interpretations such as this. Cf. *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 549.

Where the language and purpose of the questioned statute is clear, courts, of course, follow the legislative direction in interpretation. Where the words are ambiguous, the judiciary may properly use the legislative history to reach a conclusion. And that method of determining congressional purpose is likewise applicable when the literal words would bring about an end completely at variance with the purpose of the statute. *Texas & Pacific R. Co.* v. *Abilene Oil Co.,* 204 U. S. 426; *Feres* v. *United States,* 340 U. S. 135; *International*

[25] *Kansas Gas & Electric Co.,* 1 F. P. C. 536; *Otter Tail Power Co.,* 2 F. P. C. 134; *Los Angeles* v. *Nevada-California Electric Corp.,* 2 F. P. C. 104; *Connecticut Light & Power Co.,* 3 F. P. C. 132; Baum, The Federal Power Commission, 61–62. See the criticism of the § 201 (a) phrase as meaninglessly ambiguous, *Hartford Electric Light Co.,* 2 F. P. C. 359, and *Northwestern Elec. Co.,* 2 F. P. C. 327.

The Company has cited a brief by the Commission in another case with some force, as indicating that heretofore it has claimed that the United States is excluded from the Act by virtue of not being a "person." Respondent's brief, *U. S. ex rel. Chapman* v. *Federal Power Commission* (C. A. 4th Cir.), 191 F. 2d 796. We note, though, that the contention there was made in regard to the application of § 313 (a), that "no proceeding to review any order of the Commission shall be brought by any person unless such person" has applied to the Commission for a rehearing. The Court, however, chose to ignore the point, and rather held that the Secretary of the Interior could not petition for review in that case since he was not a "party aggrieved," § 313 (b). 191 F. 2d, at 799–800. On certiorari here, the Commission failed to press the "person" argument again, relying solely on the argument that petitioner, as a representative of federal interests, was not "aggrieved" by the Commission's order in support of its contention of lack of standing. Br. F. P. C. Nos. 28 and 29, 1952 Term, pp. 95–128. We did not consider the matter in our opinion. *United States* v. *Federal Power Commission,* 345 U. S. 153, 156.

Union v. *Juneau Spruce Corp.*, 342 U. S. 237, 243; *Johansen* v. *United States*, 343 U. S. 427, 432. So here, since it is our judgment that neither the legislative aim nor the realities of coordinated rate regulation compel it, we reject respondents' plea that the Federal Power Commission can exercise no authority over sales to Mineral County, and, for similar reasons, the Company's contention in No. 205 that the sales to the Navy are not sales to a "person."

III.

The claim that the sales here occurred over "local distribution" facilities, § 201 (b), and were not "for resale" because the contracts did not state as much, are insubstantial. The sales were made in California but the facilities supplied "local distribution" only after the current was subdivided for individual consumers.[26] But a final question—whether the Federal Power Commission may exercise rate authority over the entire amount of power sold or merely that which is resold by the Navy and the County—requires rather more extended discussion.

Certainly the concrete fact of resale of some portion of the electricity transmitted from a state to a point outside thereof invokes federal jurisdiction at the outset, despite the fact that the power thus used traveled along its interstate route "commingled" with other power sold by the same seller and eventually directly consumed by the same purchaser-distributor. But the Government argues from this that all the power exchanged between the same parties over the same facilities is subject to Commission order, irrespective of whether resold or not. For this proposition it relies on an alleged similarity be-

[26] See *East Ohio Gas Co.* v. *Tax Commission of Ohio*, 283 U. S. 465; *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464, 469.

tween the problem as thus stated and that decided in *Pennsylvania Water & Power Co.* v. *Federal Power Commission,* 343 U. S. 414, 419.[27] We held there that the federal rate authority must apply to all electricity sold, despite the fact that it was made up of power transmitted across state lines as well as that produced locally. The impossibility of separating interstate from intrastate electricity consumed by each purchaser is patent. In such a case, federal rate jurisdiction must attach to each distributor's negotiated agreement with the seller irrespective of occasional and unpredictable use of nonjurisdictional intrastate power.

There, however, the problem was whether the sales of electricity were in "interstate commerce." Here, it is a different one whether the entire sale is a "sale for resale." For purposes of this case, we need not decide the question of whether a somewhat similar "commingling"—of power resold with that consumed directly by the purchaser—requires entire federal jurisdiction. For, even assuming *arguendo* respondents' proposition that it may be proportionally limited, we hold that the record before us in this case does not present a set of facts or findings justifying that result. By the statute, Commission jurisdiction extends to "sales for resale," "but not to any other sale." § 201 (b). The problem, then, in applying respondents' suggested interpretation, is to decide just what power transaction falls within this category of "sale for resale"—whether one involving the entire volume of electricity transmitted to the Navy or merely that which the buyer resells to others; the determinant is the delineation of "sale for resale." See *Panhandle Pipe Line Co.* v. *Public Service Commission,* 332 U. S. 507, 516–517. Assuming respondents' theory, this would turn, of course, on

[27] See *California Electric Power Co.* v. *Federal Power Commission,* 199 F. 2d 206, 209.

whether an essentially separate transaction covering the power directly consumed by the purchaser is identifiable. The present record will not permit such a finding. It may be that as an engineering proposition, accurate measurement of the volume resold and the volume directly consumed by the two parties is possible for each billing period. But there is no record evidence of separate rates, separate negotiations, separate contracts or separate rate regulation by official bodies, in short that the "sales" themselves were separate, and it is in these terms that the Act would require us to fix the limits of the jurisdictional grant.[28] The attention of the Commission was not directed towards this matter. The question will not be ripe for our consideration until the California Commission has had an opportunity to perfect the record and to consider the problem.

Reversed.

MR. JUSTICE BLACK, concurring.

The question involved in both these cases is whether the Federal Power Commission or the Public Utilities Commission of California has power to regulate certain sales of electricity. The California Supreme Court here sustained an order of the State Commission regulating the sales. The Court of Appeals has sustained an order of the Federal Commission. *California Electric Power Co.* v. *Federal Power Commission,* 199 F. 2d 206. I agree

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[28] The Ninth Circuit, in *California Electric Power Co.* v. *Federal Power Commission,* No. 495, now pending before us on a petition for certiorari, 199 F. 2d 206, with the more complete record before it from the Power Commission, held that *Penn Water* controlled. We do not decide the question but rather note that the Commission's own view of the matter may still be in the formative stage. See *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 185 F. 2d 357; *City of Hastings* v. *Kansas-Nebraska Natural Gas Co.,* 12 F. P. C. 3, 98 P. U. R. (N. S.) 1.

with the Ninth Circuit for the reasons it gave and consequently concur here in reversal of the Supreme Court of California's contrary holding.

MR. JUSTICE JACKSON, concurring.

I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute.

I will forego repeating what I have said about this practice in *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384, 395. But I do point out that this case is a dramatic demonstration of the evil of it. Neither counsel who argued the case for the State Commission nor the Supreme Court of California had access to the material used by the Court today. Counsel for the Public Utilities Commission of that State stated at the bar, and confirmed by letter, that he had tried without success over a period of four months to obtain the legislative history of § 20 of Part I of the Federal Power Act. He obtained it only four days before argument, in Washington at the Library of this Court. He stated that the City and County Library of San Francisco, the Library of the University of California, and the library of the largest law office in San Francisco were unable to supply it. The City and County Library tried to obtain the material by interlibrary loan from the Library of Congress, but the request was refused. Counsel then attempted to ob-

tain the material from the Harvard Law School Library, but it advised that "our rules do not permit this kind of material to be sent out on loan."

The practice of the Federal Government relying on inaccessible law has heretofore been condemned. Some of us remember vividly the argument in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, in which the Government was obliged to admit that the Executive Orders upon which it had proceeded below had been repealed by another Executive Order deposited with the State Department. No regularized system for their publication had been established. Copies could be obtained at nominal cost by writing to the Department. Having discovered the error, the Government brought it to the attention of the Court. At the argument, however, the Court, led by Mr. Justice Brandeis, subjected government counsel to a raking fire of criticism because of the failure of the Government to make Executive Orders available in official form. The Court refused to pass on some aspects of the case, and the result was the establishment of a Federal Register.*

Today's decision marks a regression from this modern tendency. It pulls federal law, not only out of the dark where it has been hidden, but into a fog in which little can be seen if found. Legislative history here as usual is more vague than the statute we are called upon to interpret.

If this were an action to enforce a civil liability or to punish for a crime, I should protest this decision strenuously. However, the decision seems to have operation in the future only. If Congress does not like our legislation, it can repeal it—as it has done a number of times

*This history is set out in more detail in Jackson, Struggle for Judicial Supremacy, pp. 89–91.

in the past. I therefore concur in the interpretation unanimously approved by the members of the Court who have had legislative experience.

MR. JUSTICE FRANKFURTER.

The light shed by MR. JUSTICE JACKSON on the underpinning of the Court's opinion makes me unwilling to share responsibility for a decision resting on such underpinning. It is one thing to construe a section of a comprehensive statute in the context of its general scheme, as that scheme is indicated by its terms and by the gloss of those authorized to speak for Congress, either through reports or statements on the floor. It is a very different thing to extrapolate meaning from surmises and speculation and free-wheeling utterances, especially to do so in disregard of the terms in which Congress has chosen to express its purpose.

Were I confined to the mere text of the legislation we have to construe, with such authoritative elucidation as obviously relevant legislative materials furnish, I would be compelled to find the considerations for fusing, as the Court does, the amended Federal Water Power Act of 1920, 41 Stat. 1063, with Part II of the Federal Power Act of 1935, 49 Stat. 838, 847, too tenuous. In saying this I am wholly mindful of the significance of the decision in *Public Utilities Commission* v. *Attleboro Co.*, 273 U. S. 83. Preoccupation with other matters pending before the Court precludes an independent pursuit by me of all the tributaries in search of legislative purpose that the Court has followed. I am therefore constrained to leave the decision of this case to those who have no doubts about the matter.

DAMERON *v.* BRODHEAD, MANAGER OF REVENUE & EX-OFFICIO TREASURER OF THE CITY & COUNTY OF DENVER.

CERTIORARI TO THE SUPREME COURT OF COLORADO.

No. 302. Argued February 4, 1953.—Decided April 6, 1953.

1. Where a serviceman domiciled in one state is assigned to military duty in another state, the latter state is barred by § 514 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, from imposing a tax on his tangible personal property temporarily located within its borders—even when the state of his domicile has not taxed such property. Pp. 322–327.
2. As thus construed and applied, the statute is within the constitutional power of Congress. Pp. 324–325.

125 Colo. 477, 244 P. 2d 1082, reversed.

Petitioner's suit to recover personal property taxes paid under protest was sustained by a state trial court. The Supreme Court of Colorado reversed. 125 Colo. 477, 244 P. 2d 1082. This Court granted certiorari. 344 U. S. 891. *Reversed,* p. 327.

Philip Elman argued the cause for petitioner. With him on the brief were *Solicitor General Cummings, Assistant Attorney General Lyon, Ellis N. Slack* and *Berryman Green.*

Leonard M. Campbell argued the cause for respondent. With him on the brief was *John C. Banks.*

MR. JUSTICE REED delivered the opinion of the Court.

The facts here are simple and undisputed. Petitioner is a commissioned officer of the United States Air Force. He was assigned to duty at Lowry Field, near Denver, Colorado, in 1948 and, throughout that year, resided in

a privately rented apartment in that city. Respondent, acting Manager of Revenue and ex-officio Treasurer and Assessor of the City and County of Denver, assessed a tax of $23.51 on his personal property, mostly household goods in the apartment, which he valued at $460, by virtue of 4A Colorado Statutes Annotated (1935 ed.), c. 142.[1] Petitioner paid the tax under protest, and sued to recover. His complaint pleaded as a fact that he, "during the whole of the calendar year 1948, and for many years prior thereto, was, and at the present time is, a citizen and a resident of the State of Louisiana, domiciled in the Town of Port Allen, in the Parish of West Baton Rouge, in the State of Louisiana, and remains a domiciliary of that town, parish, and state, and a citizen and resident of said state, in which during all of the period of time pertinent hereto the plaintiff was and is a qualified voter." He claimed that § 514 of the Soldiers' and Sailors' Civil Relief Act, 54 Stat. 1186, as amended, 56 Stat. 777, 58 Stat. 722, 50 U. S. C. App. §§ 501, 574, therefore forbade imposition of the Colorado tax. Respondent moved to dismiss, argument was had and the trial court entered judgment for petitioner. The Colorado Supreme Court, on appeal, reversed. *Cass* v. *Dameron,* 125 Colo. 477, 244 P. 2d 1082. It held that the purpose of the statute was to prevent multiple taxation of military personnel, but that since Louisiana had not taxed petitioner's personal property, Colorado was free to do so. Our grant of certiorari rested on 28 U. S. C. § 1257 (3). 344 U. S. 891.

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[1] This statute, in standard form, provides that "[a]ll personal property within this state on March first at twelve o'clock meridian in the then current year shall be listed and assessed," § 72, and that the taxes so assessed "shall be and remain a perpetual lien upon the property so levied upon," § 197 (a).

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Section 514 of the Act was added, in large part, in 1942. It then provided essentially that:

> "For the purposes of taxation in respect of any person, or of his property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent."

The 1944 Amendment thereto, which is crucial here, first concerned personal property taxes. It stated:

> "personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district."

It also interpolated "personal" in the second line of § 514 (1). 58 Stat. 722.

Respondent's argument that the statute in this form cannot affect Colorado's attempt to tax petitioner is twofold—either it does not apply or is unconstitutional.

The constitutionality of federal legislation exempting servicemen from the substantial burdens of seriate taxation by the states in which they may be required to be present by virtue of their service, cannot be doubted. Generally similar relief has often been accorded other types of federal operations or functions. And we have

upheld the validity of such enactments, even when they reach beyond the activities of federal agencies and corporations to private parties who have seen fit to contract to carry on functions of the Federal Government. *Carson* v. *Roane-Anderson Co.,* 342 U. S. 232, and cases cited; cf. *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 160–161.

Nor do we see any distinction between those cases and this. Surely, respondent may not rely on the fact that petitioner here is not a business contractor. He is not the less engaged in a function of the Federal Government merely because his relationship is not entirely economic. We have, in fact, generally recognized the especial burdens of required service with the armed forces in discussing the compensating benefits Congress provides. *Le Maistre* v. *Leffers,* 333 U. S. 1; *Boone* v. *Lightner,* 319 U. S. 561. Cf. *Board of Commissioners* v. *Seber,* 318 U. S. 705. Petitioner's duties are directly related to an activity which the Constitution delegated to the National Government, that "to declare War," U. S. Const., Art. I, § 8, cl. 11, and "to raise and support Armies." *Ibid.,* cl. 12. Since this is so, congressional exercise of a "necessary and proper" supplementary power such as this statute must be upheld. *Pittman* v. *Home Owners' Corp.,* 308 U. S. 21, 32–33; *Federal Land Bank* v. *Bismarck Co.,* 314 U. S. 95, 102–104. *Carson* v. *Roane-Anderson Co., supra,* at 234. What has been said in no way affects the reserved powers of the states to tax. For this statute merely states that the taxable domicile of servicemen shall not be changed by military assignments. This we think is within the federal power.

We turn, then, to the interpretation of the statute within the factual confines of this particular case. Respondent's theory here also has no merit. It is based on the statements of the legislative history that, for instance, the provision was "designed to prevent multiple State

taxation." H. R. Rep. No. 2198, 77th Cong., 2d Sess., p. 6.[2] The short answer to the argument that it therefore only applies where multiple taxation is a real possibility is that the plain words of the statute do not say so. In fact, they are much broader: "personal property shall not be deemed to be located or present in or to have a situs for taxation" in the state of temporary presence in any case. There is no suggestion that the state of original residence must have imposed a property tax. Since the language of the section does not establish a condition to its application, we would not be justified in doing so. For we are shown nothing that indicates that a straightforward application of the language as written would violate or affect the clear purpose of the enactment. See *United States* v. *Public Utilities Comm'n, ante,* p. 295, decided today, and cases cited. In fact, though the evils of potential multiple taxation may have given rise to this provision, Congress appears to have chosen the broader technique of the statute carefully, freeing servicemen from both income and property taxes imposed by any state by virtue of their presence there as a result of military orders. It saved the sole right of taxation to the state of original residence whether or not that state exercised the right.[3] Congress, manifestly, thought that compulsory presence in a state should not alter the benefits and burdens of our system of dual federalism during service with the armed forces.

For similar reasons, we reject the argument that the word "deemed" as used implies a rebuttable presumption so as to permit taxation by the state of temporary presence in some cases. Such a construction would nullify

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[2] See also Hearings, House Committee on Military Affairs on H. R. 7029, 77th Cong., 2d Sess.; S. Rep. No. 959, 78th Cong., 2d Sess.; H. R. Rep. No. 1514, 78th Cong., 2d Sess.

[3] Hearings, note 2, *supra,* p. 28.

the statute. For in every case, the absence of the property from the state of the serviceman's temporary presence would be a fiction, rebuttable by further evidence.

Reversed.

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

The power to tax is basic to the sovereignty of the states. *Railroad Co.* v. *Peniston,* 18 Wall. 5. There are few express restrictions of that power contained in the Constitution. See Art. I, § 10; *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69; *Canton R. Co.* v. *Rogan,* 340 U. S. 511. And the implied restrictions are not numerous. A privilege secured by the Constitution, such as the right to free speech or the right to intercourse among the states, may not be taxed by a state. *Murdock* v. *Pennsylvania,* 319 U. S. 105. A state may not tax that part of an interstate operation which has no relation to the opportunities or benefits which it confers. *Standard Oil Co.* v. *Peck,* 342 U. S. 382. Nor may it discriminate in its tax scheme against interstate commerce or place an undue burden on it. *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307; *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434; *Nippert* v. *Richmond,* 327 U. S. 416.

Closer in point are those instances where the state tax is levied on a federal instrumentality or on the means with which that instrumentality performs its functions. This exception is also represented by a rather narrow group of cases. See *Pittman* v. *Home Owners' Corp.,* 308 U. S. 21; *Federal Land Bank* v. *Bismarck Co.,* 314 U. S. 95; *Maricopa County* v. *Valley Bank,* 318 U. S. 357; *United States* v. *Allegheny County,* 322 U. S. 174. Cf. *Board of Commissioners* v. *Seber,* 318 U. S. 705. Some of those immunities were made explicit by an act of Congress. Some were implied. But the implied immunity,

which derives from a forbidden interference with a federal function, has a limited scope. It does not, for example, extend to salaries of federal functionaries (*Graves* v. *New York,* 306 U. S. 466), to the proceeds under a contractor's contract with the Federal Government (*James* v. *Dravo Contracting Co.,* 302 U. S. 134, 149 *et seq.*), or to sales taxes on goods and supplies furnished contractors with the Federal Government. *Alabama* v. *King & Boozer,* 314 U. S. 1. Cf. *Buckstaff Co.* v. *McKinley,* 308 U. S. 358. The power of Congress to *withhold* tax immunity is clear. But to date the power of Congress to *create* a tax immunity has been narrowly confined. It stems from "the power to preserve and protect functions validly authorized." See *Carson* v. *Roane-Anderson Co.,* 342 U. S. 232, 234. Up to the present the Court has never held that the *private* affairs of a federal employee can be made *public* affairs by Congress and immune from state taxation. The question was indeed reserved in *Graves* v. *New York, supra,* at 478–479. As MR. JUSTICE FRANKFURTER stated in his concurring opinion, *id.,* at 492, "Whether Congress may, by express legislation, relieve its functionaries from their civic obligations to pay for the benefits of the State governments under which they live is matter for another day."

The federal property used by the soldier, his activities as a federal employee, every phase of the functions he performs for the Army are immune from state taxation because his work is the work of the National Government. But the wages that he makes, as *Graves* v. *New York, supra,* held, can be taxed on a nondiscriminating basis by the states. So can his real and personal property. For in his private capacity a federal employee is no different from any other citizen. He receives protection and benefits from the society which the states create and maintain. Their police, their courts, their parks, their sanitary districts, their schools are all part of the civilization

which he enjoys. If he gets tax immunity, it means that other citizens must pay his share.

The Court does not profess to go so far. It merely says that this case turns on changing military assignments and the burden placed on service men and women as a result of that feature of their work. But we also know that service men and women receive salaries much lower than those earned in civilian life. Can Congress remove those salaries from the reach of state taxing officials because they are burdensome to our military personnel? Certainly the burden, the harassment, the unpleasantness of those taxes would be as easy to establish as the burden of the present tax. And the relation of the burden to the federal service would be as close and intimate in one case as in the other.

The private affairs of our military personnel—the disposition of their salary, the furniture they purchase, the apartments they rent, the personal contracts that they make—by the very definition are not in the federal public domain. When Congress undertakes to protect them from state taxation or regulation, it is not acting to protect either a federal instrumentality or any function which a federal agency performs. Congress, therefore, acts without constitutional authority.

In sum, the power to tax is basic to the sovereignty of the states. The creation of islands of tax immunity should therefore be sparingly made. The tax immunity here recognized is not contained in the Constitution. It cannot be fairly implied because Denver's tax does not burden the performance of any federal function.

FORD MOTOR CO. *v.* HUFFMAN ET AL.

NO. 193. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.*

Argued December 18–19, 1952.—Decided April 6, 1953.

1. A collective-bargaining agreement whereby an employer, in determining relative seniority of employment among its employees, gives them credit for pre-employment military service, as well as the credit for post-employment military service required by the Selective Training and Service Act of 1940, is valid—although it works to the disadvantage of other employees, including those who were employed prior to their military service. Pp. 331–336.
2. By accepting such a provision in a collective-bargaining agreement, a union does not exceed its authority as a certified collective-bargaining representative under the National Labor Relations Act, as amended. Pp. 336–343.

195 F. 2d 170, reversed.

The District Court dismissed a class suit for a declaratory judgment and injunctive relief brought by an employee to invalidate a seniority clause in a collective-bargaining agreement between his union and his employer. The Court of Appeals reversed. 195 F. 2d 170. This Court granted certiorari. 344 U. S. 814. *Reversed and remanded,* p. 343.

William T. Gossett argued the cause for petitioner in No. 193. With him on the brief were *L. Homer Surbeck* and *Richard W. Hogue, Jr.*

Harold A. Cranefield argued the cause for petitioner in No. 194. With him on the brief were *Lowell Goerlich* and *Sol Goodman.*

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*Together with No. 194, *International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, CIO,* v. *Huffman et al.,* also on certiorari to the same court.

Herbert H. Monsky argued the cause for respondents. With him on a brief was *Samuel M. Rosenstein* for Huffman, respondent.

Briefs of *amici curiae* urging reversal were filed by *Solicitor General Cummings, George J. Bott, David P. Findling* and *Mozart G. Ratner* for the National Labor Relations Board; and by *Nicholas Kelley, Francis S. Bensel* and *Hancock Griffin, Jr.* for the Chrysler Corporation, in Nos. 193 and 194; and by *Arthur J. Goldberg* for the Congress of Industrial Organizations in No. 194.

MR. JUSTICE BURTON delivered the opinion of the Court.

In these cases we sustain the validity of collective-bargaining agreements whereby an employer, in determining relative seniority of employment among its employees, gives them credit for pre-employment military service as well as the credit required by statute for post-employment military service.[1]

These proceedings were begun in the United States District Court for the Western District of Kentucky by respondent Huffman, acting individually and on behalf of a class of about 275 fellow employees of the Ford Motor Company, petitioner in Case No. 193 (here called Ford). His complaint is that his position, and that of each member of his class, has been lowered on the seniority roster at Ford's Louisville works, because of certain provisions in collective-bargaining agreements between Ford and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, petitioner in Case No. 194 (here called International). He contends that those provisions have

[1] Where the context permits, "military service" in this opinion includes service in the land or naval forces or Merchant Marine of the United States or its allies.

violated his rights, and those of each member of his class, under the Selective Training and Service Act of 1940, as amended.[2] He contends also that International's acceptance of those provisions exceeded its authority as a collective-bargaining representative under the National Labor Relations Act, as amended.[3] He asks, accordingly, that the provisions be declared invalid insofar as they prejudice the seniority rights of members of his class, and that appropriate injunctive relief be granted against Ford and International. After answer, both sides asked for summary judgment.[4]

The District Court dismissed the action without opinion but said in its order that it was "of the opinion that the collective bargaining agreement expresses an honest desire for the protection of the interests of all members of the union and is not a device of hostility to veterans. The Court finds that said collective bargaining agreement

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[2] 54 Stat. 890, 56 Stat. 724, 58 Stat. 798, 60 Stat. 341, 50 U. S. C. App. § 308.

[3] 49 Stat. 452, 61 Stat. 140, 65 Stat. 601, 29 U. S. C. (Supp. V) §§ 157–159.

[4] In No. 194, International also questions the jurisdiction of the District Court. International recognizes that one issue in the case is whether it engaged in an unfair labor practice when it agreed to the allowance of credit for pre-employment military service in computations of employment seniority. It then argues that the National Labor Relations Act, as amended, 61 Stat. 146, 29 U. S. C. (Supp. V) § 160 (a), vests the initial jurisdiction over such an issue exclusively in the National Labor Relations Board. This question was not argued in the Court of Appeals nor mentioned in its opinion and, in view of our position on the merits, it is not discussed here. Our decision interprets the statutory authority of a collective-bargaining representative to have such breadth that it removes all ground for a substantial charge that International, by exceeding its authority, committed an unfair labor practice. As to a somewhat comparable question considered in connection with the Railway Labor Act, see *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U. S. 210; *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 204–207.

sets up a seniority system which the Court deems not to be arbitrary, discriminatory or in any respect unlawful." The Court of Appeals for the Sixth Circuit reversed, one judge dissenting. 195 F. 2d 170. Ford and International filed separate petitions for certiorari seeking to review the same decision of the Court of Appeals. We granted both because of the widespread use of contractual provisions comparable to those before us, and because of the general importance of the issue in relation to collective bargaining. 344 U. S. 814.

The pleadings state that Huffman entered the employ of Ford September 23, 1943, was inducted into military service November 18, 1944, was discharged July 1, 1946, and, within 30 days, was reemployed by Ford with seniority dating from September 23, 1943, as provided by statute.[5] It does not appear whether the other members of his class are veterans but, like him, all have seniority computed from their respective dates of employment by Ford.

The pleadings allege further that Huffman and the members of his class all have been laid off or furloughed from their respective employments at times and for

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[5] "SEC. 8. . . .

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate [of satisfactory completion of his period of training and service], (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service . . .

. . . . . .

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; . . . ." 54 Stat. 890, 58 Stat. 798, 50 U. S. C. App. § 308 (b)(B).

periods when they would not have been so laid off or furloughed except for the provisions complained of in the collective-bargaining agreements. Those provisions state, in substance, that after July 30, 1946, in determining the order of retention of employees, all veterans in the employ of Ford "shall receive seniority credit for their period of service, subsequent to June 21, 1941 in the land or naval forces or Merchant Marine of the United States or its allies, upon completion of their probationary period" of six months.[6]

The effect of these provisions is that whereas Huffman's seniority, and that of the members of his class, is com-

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[6] Article VIII of a supplementary agreement between Ford and International, dated July 30, 1946, contained the following:

"Section 13— . . . .

. . . . . .

"(c) *Any veteran of World War II who was not employed by any person or company at the time of his entry into the service of the land or naval forces or the Merchant Marine* and who is a citizen of the United States and served with the allies and who has been honorably discharged from such training and service and *who is hired by the company after he is relieved from training and service* in the land or naval forces or after completion of service in the Merchant Marine *shall, upon having been employed for six (6) months and not before, receive seniority credit for the period of such service subsequent to June 21, 1941,* provided:

"(1) Such veteran must apply for employment within ninety (90) days from the time he is relieved from such training or service in the land or naval forces or the time of his completion of such service in the Merchant Marine, and must obtain such employment within twelve (12) months from the time he is relieved from such training and service in the land or naval forces or the time of his completion of such service in the Merchant Marine.

"(2) Such veteran shall not have previously exercised his right in any plant of this or any other company.

"(3) A veteran so employed shall submit his service discharge papers to the company at the end of aforesaid probationary period of employment and the company shall place thereon in permanent form a statement showing that the veteran has exercised this right,

puted from their respective dates of employment by Ford and they have been credited with their subsequent military service, if any, yet in some instances they are now surpassed in seniority by employees who entered the employ of Ford after they did but who are credited with certain military service which they rendered before their employment by Ford.[7]

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such statement to be signed by representatives of the company and the Union, and a copy thereof placed in the employee's record and a copy furnished to the Union.

"(d) It is further understood and agreed that, regardless of any of the foregoing, *all veterans in the* [*employ*] *of the company at the time the Contract is thus amended shall receive seniority credit for their period of service, subsequent to June 21, 1941 in the land or naval forces or Merchant Marine of the United States or its allies, upon completion of their probationary period.*" (Emphasis supplied.)

The above provisions were continued in effect, in substantially identical form, in an agreement of August 21, 1947. An agreement of September 28, 1949, provided:

"Section 12. . . .

. . . . . .

"(c) Any employee who, prior to the effective date of this Agreement, has received the seniority credit provided for in Article VIII, Section 13 (c) or (d) of the Agreement between the Company and the Union dated August 21, 1947, or the comparable provision in the Supplementary Agreement between the Company and the Union dated July 30, 1946, shall continue to receive such seniority credit."

[7] On Huffman's return to Ford in July, 1946, his employment seniority, including his military service, dated from September 23, 1943. It totaled about 33 months, including about 14 months of pre-service company employment and 19 of post-employment military service. An example of a veteran who, due to the agreements before us, outranks Huffman in employment seniority is one who entered military service July 1, 1943, without any prior employment, served honorably until discharged March 1, 1945, and, thereafter, has been employed continuously by Ford, including six months of satisfactory probationary employment. His seniority dates from July 1, 1943. By July 1, 1946, it totaled 36 months, including 20 months of pre-employment military service, and 16 of post-service company em-

Respondent contended in the Court of Appeals that allowance of credit for pre-employment military service was invalid because it went beyond the credit prescribed by the Selective Training and Service Act of 1940. That argument was rejected unanimously. 195 F. 2d 170, 173. It has not been pressed here. There is nothing in that statute which prohibits allowing such a credit if the employer and employees agree to do so. The statutory rights of returning veterans are subject to changes in the conditions of their employment which have occurred in regular course during their absence in military service, where the changes are not hostile devices discriminating against veterans. *Aeronautical Lodge* v. *Campbell,* 337 U. S. 521; and see *Trailmobile Co.* v. *Whirls,* 331 U. S. 40; *Fishgold* v. *Sullivan Drydock & Repair Corp.,* 328 U. S. 275. See also, *Oakley* v. *Louisville & N. R. Co.,* 338 U. S. 278, as to a veteran's seniority status more than one year after his reemployment.

On the other hand, the second objection raised by respondent was sustained by a majority of the members of the Court of Appeals. This objection was that the authority of International, as a certified bargaining representative, was limited by statute and was exceeded when International agreed to the provisions that are before us.

The authority of every bargaining representative under the National Labor Relations Act, as amended, is stated in broad terms:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organiza-

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ployment. However, except for the collective-bargaining agreements, Huffman would then have outranked such a veteran by about 17 months, although Huffman's military service totaled one month less, his employment by Ford two months less and his combined military service and company employment three months less than that of such a veteran.

> tions, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of *collective bargaining or other mutual aid or protection* . . . .
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> . . . . . .
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> "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:* . . . ." (Emphasis supplied.) 61 Stat. 140, 143, 29 U. S. C. (Supp. V) §§ 157, 159 (a).

In the absence of limiting factors, the above purposes, including "mutual aid or protection" and "other conditions of employment," are broad enough to cover terms of seniority. The National Labor Relations Act, as passed in 1935 and as amended in 1947, exemplifies the faith of Congress in free collective bargaining between employers and their employees when conducted by freely and fairly chosen representatives of appropriate units of employees. That the authority of bargaining representatives, however, is not absolute is recognized in *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192, 198–199, in connection with comparable provisions of the Railway Labor Act. Their statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those members, without hostility to any. *Id.,* at 198, 202–204; *Tunstall* v. *Brotherhood of Locomotive Firemen,* 323 U. S. 210, 211; *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U. S. 768.

Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discre-

tion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals. A bargaining representative, under the National Labor Relations Act, as amended, often is a labor organization but it is not essential that it be such. The employees represented often are members of the labor organization which represents them at the bargaining table, but it is not essential that they be such. The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents. In the instant controversy, International represented, with certain exceptions not material here, all employees at the Louisville works, including both the veterans with, and those without, prior employment by Ford, as well as the employees having no military service. Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Compromises on a temporary basis, with a view to long-range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables. Seniority rules governing promotions, transfers, layoffs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include dif-

ferences based upon such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in course of service, and time or labor devoted to related public service, whether civil or military, voluntary or involuntary. See, *e. g., Hartley* v. *Brotherhood of Clerks,* 283 Mich. 201, 277 N. W. 885; and see also, Williamson & Harris, Trends in Collective Bargaining (1945), 100–103.

The National Labor Relations Act, as amended, gives a bargaining representative not only wide responsibility but authority to meet that responsibility. We have held that a collective-bargaining representative is within its authority when, in the general interest of those it represents, it agrees to allow union chairmen certain advantages in the retention of their employment, even to the prejudice of veterans otherwise entitled to greater seniority. *Aeronautical Lodge* v. *Campbell, supra,* at 526–529.

The public policy and fairness inherent in crediting employees with time spent in military service in time of war or national emergency is so clear that Congress, in the Selective Training and Service Act of 1940, required some credit to be given for it in computing seniority both in governmental and in private employment. See note 5, *supra.* Congress there prescribed that employees who left their private civilian employment to enter military service should receive seniority credit for such military service, provided their prior civilian employment, however brief, was bona fide and not on a temporary basis. There is little that justifies giving such a substantial benefit to a veteran with brief prior civilian employment that does not equally justify giving it to a veteran who was inducted into military service before having a chance to enter any civilian employment, or to a veteran who never worked

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for the particular employer who hired him after his return from military service. The respective values of all such veterans, as employees, are substantially the same. From the point of view of public policy and industrial stability, there is much to be said, especially in time of war or emergency, for allowing credit for all military service. Any other course adopts the doubtful policy of favoring those who stay out of military service over those who enter it.

The above considerations took concrete form in the Veterans' Preference Act of 1944 which added the requirement that credit for military service be given by every civilian federal agency, whether the military service preceded or followed civilian employment.[8] Apparently recognizing the countless variations in conditions affecting private employment, Congress, however, did not make credit for such pre-employment military service compulsory in private civilian employment. A little later, the Administrator of the Retraining and Reemployment Administration of the United States Department of Labor assembled a representative committee to recommend principles to serve as guides to private employers in their employment of veterans and others.[9] Among 15 princi-

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[8] "SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: . . . ." 58 Stat. 390, 5 U. S. C. § 861.

[9] This "Committee of Nine" consisted of representatives from the Business Advisory Council to the Secretary of Commerce, National Association of Manufacturers, U. S. Chamber of Commerce, American Federation of Labor, Congress of Industrial Organizations, Railway Labor Executives' Association, American Legion, Disabled American Veterans and Veterans of Foreign Wars.

ples developed by that committee, and "wholeheartedly" endorsed by the Secretary of Labor, in 1946, were the following:

> "8. All veterans having reemployment rights under Federal statutes should be accorded these statutory rights *as a minimum.*
>
> . . . . . .
>
> "13. Newly hired veterans who have served a probationary period and qualified for employment should be allowed seniority credit, at least for purposes of job retention, equal to time spent in the armed services plus time spent in recuperation from service-connected injuries or disabilities either through hospitalization or vocational training." [10]

The provisions before us reflect such a policy.[11] It

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[10] Reemployment of Veterans Under Collective Bargaining, United States Department of Labor, Bureau of Labor Statistics, October, 1947, Statement of Employment Principles dated October 7, 1946, App. D, pp. 46–48; and see Bulletin of Retraining and Reemployment Administration, United States Department of Labor, October 10, 1946, p. 5; Harbison, Seniority Problems During Demobilization and Reconversion, Industrial Relations Section, Department of Economics and Social Institutions, Princeton University (1944) 12–14.

[11] Collective Bargaining Provisions—Seniority, Bull. No. 908–11, United States Department of Labor, Bureau of Labor Statistics (1949), quotes many seniority clauses as examples of those then in use and including many factors other than length of employment. Among those quoted is the following:

"61. *Veteran Not Previously Employed Given Seniority Credit for Time Spent in Armed Forces*

"Any veteran of World War II who has been discharged, other than dishonorably, from the armed forces of the United States and who immediately prior to his acceptance in the armed forces was not previously employed by [name of company] and who is employed by [name of company] within twelve (12) months after his discharge, provided it is his first place of employment after his discharge, shall

is not necessary to define here the limits to which a collective-bargaining representative may go in accepting proposals to promote the long-range social or economic welfare of those it represents. Nothing in the National Labor Relations Act, as amended, so limits the vision and action of a bargaining representative that it must disregard public policy and national security. Nor does anything in that Act compel a bargaining representative to limit seniority clauses solely to the relative lengths of employment of the respective employees. *Aeronautical Lodge* v. *Campbell, supra,* at 526, and 528–529, n. 5. For examples of negotiated provisions protecting veterans from loss of seniority upon their return to private civilian employment, recognized by the National War Labor Board as coming within the proper scope of collective bargaining, in 1945, see, *In re American Can Co.,* 27 War Lab. Rep. 634, 28 War Lab. Rep. 764, and *In re Firestone Tire & Rubber Co.,* 24 War Lab. Rep. 322, 28 War Lab. Rep. 483. See also, Bureau of National Affairs, Inc., Collective Bargaining Contracts (1941), 369 *et seq.*

The provisions before us are within reasonable bounds of relevancy. They extended but slightly, during a period of war and emergency, the acceptance of credits for military service under circumstances where comparable credit already was required, by statute, in favor of all who had been regularly employed by Ford before entering military service. These provisions conform to the recommendation of responsible Government officials and round out a statutory requirement which, unless so rounded out, produces discriminations of its own. A failure to adopt these provisions might have resulted in

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take his place on the seniority list after completing the sixty (60) day trial period. His seniority shall be computed from the day of his acceptance into the armed forces. However, no veteran covered by this section shall have seniority prior to December 7, 1941." P. 13.

more friction among employees represented by International than did their adoption.

The several briefs of *amici curiae,* filed here by consent of all parties, demonstrate the widespread acceptance and relevance of the type of provisions before us.

We hold that International, as a collective-bargaining representative, had authority to accept these provisions. Accordingly, we find no ground sufficient to establish the invalidity of the provisions before us or to sustain an injunction against either petitioner. In accord: *Haynes* v. *United Chemical Workers,* 190 Tenn. 165, 228 S. W. 2d 101.

The judgment of the Court of Appeals which reversed that of the District Court therefore is reversed. The judgment of the District Court is affirmed and the cause is remanded to it.

Reversed and remanded.

UNITED STATES *v.* CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, VIRGINIA, ET AL.

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

No. 253. Argued January 9, 1953.—Decided April 6, 1953.

Under the Lanham Act of 1940, as amended, the Government filed a petition in the Federal District Court for the condemnation of certain easements in land and title to sewer mains which together comprised the sewerage system of a Virginia community. The 1943 amendment of the Act provided that "none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof. . . ." *Held:*

1. The 1943 amendment authorized the condemnation of such property, subject to the conditions stated. Pp. 345–348.

2. Under the 1943 amendment, householders having easements or rights of user in the sewer system were not "owners" whose consent to the acquisition was required. Pp. 349–350.

196 F. 2d 657, reversed.

A petition by the Government for condemnation under the Lanham Act, as amended, was dismissed by the District Court. 101 F. Supp. 172. The Court of Appeals affirmed. 196 F. 2d 657. This Court granted certiorari. 344 U. S. 812. *Reversed*, p. 350.

Assistant Attorney General Kirks argued the cause for the United States. With him on the brief were *Solicitor General Cummings* and *Assistant Attorney General McInerney.*

Frederick A. Ballard argued the cause for respondents. With him on the brief was *Joseph W. Wyatt.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This nine-year-old proceeding is for the condemnation of certain easements in land and title to sewer mains which together comprise the sewerage system of Belle Haven, a residential subdivision in Fairfax County, Virginia. It was brought under the authority of Title II, § 202 of the Act of June 28, 1941, 55 Stat. 361,[1] and a rider on the Appropriation Act of July 15, 1943, 57 Stat. 565,[2] both amendments to the Lanham Act of October 14, 1940, 54 Stat. 1125, 42 U. S. C. § 1521 *et seq.* Questions important in the administration of the Act moved us to grant certiorari, 344 U. S. 812, to review the dismissal of the government petition. 196 F. 2d 657, aff'g 101 F. Supp. 172.

During World War II, defense housing needs in the Washington area led the government to construct a large sewer project to serve defense housing properties in Fair-

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[1] "SEC. 202. Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-defense activities, and that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the Federal Works Administrator is authorized, with the approval of the President, in order to relieve such shortage—

"(a) To acquire, . . . improved or unimproved lands or interests in lands by purchase, donation, exchange, lease . . . or condemnation . . . for such public works."

[2] ". . . none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof . . . ."

fax County. It sought to utilize, as a part of its trunk-line sewer, existing easements containing sewer pipes in the system originally constructed by respondent Belle Haven Realty Corporation. Negotiations produced an agreement under which the corporation, still holder of the fee, was to accept nominal compensation for its sewer properties on the condition that the government take the entire system and that the final order protect the Belle Haven householders against any future charges for its use. The government then filed a condemnation petition together with a declaration of taking and deposited estimated just compensation of $2. Possession was taken under court order, Belle Haven's outfalls into the Potomac River blocked off, and its sewage diverted into the government's trunk-line system. In 1948, a group of Belle Haven householders intervened as defendants, alleging that the government had leased the integrated system to the Fairfax County Board of Supervisors and that the latter had undertaken to assess a use charge of $2 per month against each householder in Belle Haven subdivision. The intervenors claimed that they were the equitable owners in fee of the Belle Haven system since the developing corporation had included its construction cost in the purchase price of their lots, that they had been granted easements of user in that system and that the use charges assessed exceeded reasonable maintenance and operation costs. The prayer was that the court, in lieu of direct compensation for their interests, protect them against having to contribute to the amortization of the integrated system. The court decided that the householders had acquired implied easements in the Belle Haven system for which they were entitled to claim compensation, and intervention was granted. 89 F. Supp. 571. But the district judge held that he could not make an award in the form of a limitation on future use charges and he denied a temporary injunction against

the collection of current bills. 89 F. Supp. 567. The intervenors then amended their answer to attack the taking as unauthorized under the Lanham Act. The Belle Haven Realty Corporation, which had not previously answered the government's petition, did so in 1950, claiming it was the legal owner of the system and entitled to its present reproduction cost, less depreciation, as just compensation.

The District Court dismissed the petition on the ground that the Lanham Act, as amended, required the consent of the intervenors as well as the realty corporation, that the corporation had only conditionally consented to the taking and that the householders had not consented at all. While the Court of Appeals approved the trial court's reading of the statutory consent requirement, it declined to base its affirmance on that ground because, "It is perfectly clear . . . that the power of condemnation given by the Lanham Act extends only to lands or interests in lands; . . . there is nothing in the act which authorizes the condemnation of a public works system such as this." 196 F. 2d 657, 662, relying on *Puerto Rico R. Light & Power Co.* v. *United States,* 131 F. 2d 491.

The original Lanham Act of October 14, 1940, 54 Stat. 1125, was designed to provide relief for defense areas found by the President to be suffering from an existing or impending housing shortage. In such cases, the Federal Works Administrator was empowered to acquire "improved or unimproved lands or interests in lands" for construction sites by purchase, donation, exchange, lease or condemnation. The quoted language describing the kind of property which the Administrator could condemn was carried over into Title II of the Act, added in 1941, which extended the statute to public works shortages in defense areas. "Public work," as defined, included sewers and sewage facilities. § 201. While the general lan-

guage "improved or unimproved lands or interests in lands" included within § 202 of Title II of the Lanham Act appears to authorize the taking here, *United States* v. *Carmack,* 329 U. S. 230, 242, 243, n. 13 (1946), it is not necessary to depend on that section alone. In 1943, the Act was amended to provide that "none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof . . . ." 57 Stat. 565, 42 U. S. C. § 1534, note. The 1943 amendment was in effect when the present petition was filed and its applicability here is common ground among the parties. It explicitly authorized the condemnation of such property subject to the conditions stated.

In this connection, we do not believe that the consent requirement bars acquisitions by condemnation. This interpretation would strip it of significance since the other means of acquiring property described in the statute necessarily rest on consensual transactions. Although condemnation is sometimes regarded as a taking without the owner's consent, 1 Lewis, Eminent Domain (3d ed.), § 1, it is not anomalous to provide for such consent which can, in effect, represent an election to have value determined by a court rather than by the parties. In addition, "friendly" condemnation proceedings are often used to obtain clear title where price is already settled. Cf. *Danforth* v. *United States,* 308 U. S. 271 (1939). Thus construed, all of the statutory terms are given effect.

Here, the consent of Belle Haven Realty Corporation was implicit in its promise to accept nominal damages. That consent cannot be characterized as conditional. Indeed, the corporation's answer, filed six years later, recognized this; rather than resisting the taking, it merely asserted a claim for more than nominal compensation.

Whether the intervening householders were "owners" whose consent was required is a different matter. Their interests were regarded by both courts below as implied easements or rights of user in the sewer system. It is true that easement holders have been held to be "owners" as that term is used in condemnation statutes. *Swanson* v. *United States,* 156 F. 2d 442, 445; *United States* v. *Welch,* 217 U. S. 333 (1910); cf. *United States* v. *General Motors Corp.,* 323 U. S. 373, 378 (1945). But the relevant question in those cases is whether the holders of such interests are entitled to compensation under the Constitution. The compensability of these interests is not in issue here; it follows that the cases on which intervenors rely are not controlling.[3] In deciding who are "owners" here, we look to the scheme of the Act itself. We think it unlikely that, in providing for the condemnation of public works, Congress at the same time intended to make preliminary negotiations so cumbersome as to virtually nullify the power granted. Yet the interpretation pressed by respondents would have that effect. It would compel the government, before taking public works, to deal with the holder of every servitude to which the property might be subject. We hold that intervenors were not "owners" under the 1943 amendment and that the government was not required before condemning to engage in a round robin to secure from each of them a self-serving "Barkis is willin'."

[3] Since the district judge deemed himself unable to order the government to restore the Belle Haven system to its original condition, the householders were remitted by dismissal of the condemnation petition to a separate action for any compensable damage they suffered because of the taking. Under this ruling, the property taken would remain part of the integrated system whether title is in the government or the realty corporation. In each case, the rights of the householders, if any, to an award remain to be determined. One effect of upholding the condemnation is to have that question tried on remand in this proceeding.

We do not pass on other issues raised by respondents, some of which if decided adversely to the government might be cured by amendment, and others we deem not ripe for adjudication because of factual questions not yet resolved.

Reversed.

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

MR. CHIEF JUSTICE VINSON, with whom MR. JUSTICE REED joins, dissenting.

Respondent-intervenors, the Belle Haven property owners, have paid for the property under condemnation. They are held to be "owners, *pro tanto*," of the sewerage system under Virginia law,[1] and their interest in the system is characterized as constituting ". . . the only real value that it had." [2] Yet, this Court holds that they are not "owners" for the purposes of a federal law, in which Congress reluctantly authorized acquisition of privately owned utilities on the condition that consent of the owners first be obtained.

One basic error underlies the decision—the assumption that Congress intended to facilitate national acquisition of going private utilities by the amended provisions of the Lanham Act.[3] 54 Stat. 1125, 55 Stat. 361, 57 Stat.

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[1] *United States* v. *Certain Parcels of Land in Fairfax County*, 101 F. Supp. 172, 175 (D. C. E. D. Va. 1951); 89 F. Supp. 567 (1950); 89 F. Supp. 571 (1948).

[2] *United States* v. *Certain Parcels of Land in Fairfax County*, 196 F. 2d 657, 662 (C. A. 4th Cir. 1952).

[3] As I read the opinion, this must be the assumption which compels the majority to place a limiting construction on the word "owners," as used in the consent *proviso* of the 1943 Amendment, 57 Stat. 565, lest the Government be forced "to deal with the holder of every servitude to which the property might be subject," thereby making national acquisition of public works "cumbersome."

565; 42 U. S. C. § 1521 *et seq.* This error is signaled in the proposition that the 1941 Amendment to the Lanham Act, 55 Stat. 361, 42 U. S. C. § 1532, was broad enough to authorize the condemnation of utilities. The proposition is immediately glossed over with the assertion that it is unnecessary to depend on it, since the 1943 Amendment, 57 Stat. 565, 42 U. S. C. § 1534, note, which is admittedly applicable, authorizes the condemnation of such property in any event. But it makes a great deal of difference in interpreting the consent provision of the 1943 Amendment, depending on whether it is approached as a narrow restriction on an otherwise broad program for the acquisition of public utilities, or as a conditional grant of a power, theretofore withheld because of a hostility which could be avoided only by strict adherence to the condition imposed.

The purpose of the original Lanham Act of 1940, 54 Stat. 1125, 42 U. S. C. §§ 1521–1524, was to relieve housing shortages in defense areas. The 1941 Amendment added Title II to meet public utility shortages in the defense housing areas. Eminent domain powers were authorized for the accomplishment of that purpose, but only as an integrated part of a careful statutory scheme. Section 202 (a) of Title II authorized acquisition of ". . . improved or unimproved lands or interests in lands by purchase, donation, exchange, lease . . . or condemnation . . . for such public works." And Subsection (b) authorized the Federal Works Administrator ". . . to plan, design, construct, . . . or lease public works . . . on lands or interests in lands acquired under the provisions of subsection (a) . . . ." Subsection (c) authorized the Administrator "To make loans or grants, or both, to public and private agencies for public works and equipment therefor . . . ."

Simply stated, Title II authorized the Government to meet the public utilities shortage by giving aid to going

utilities, by leasing going utilities, and by constructing new utilities on land or interests in land acquired for that purpose under the Act. Nowhere is there any express or implied power to acquire going utilities.

The administrators of the law understood the statutory scheme to be as outlined above, as evidenced by their communications to Congress in pressing for enactment of the Amendment [4] and in reporting on its operation after enactment.[5] Indeed, any open request for authority to acquire going utilities undoubtedly would have precipitated a debate on the sensitive issue of public versus privately-owned utilities. Immediate post-enactment events show that had the issue been raised, the power to condemn going utilities might have been rejected out of hand.

In 1942, the Federal Works Agency attempted to condemn an entire electric system in Puerto Rico under the

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[4] At the hearings the General Counsel to the Federal Works Agency testified with respect to H. R. 3213 (a preliminary draft, the language of which is substantially the same as Title II, for present purposes) as follows:

"And then authority is given to acquire land, improved or unimproved, and *upon the land so acquired to construct public works,* to maintain them and operate them, administer them and to lease them, to sell them, to transfer them, and also to make loans and grants for all of these purposes." (Emphasis supplied.) Hearings before the House Committee on Public Buildings and Grounds on H. R. 3213 and H. R. 3570, 77th Cong., 1st Sess. 59.

[5] "*Authority of the Federal Works Administrator under Title II.*— Under title II the Federal Works Administrator is authorized:

"(1) To construct community facilities as federal projects.

"(2) To make loans or grants, or both, for the non-Federal construction of community facilities.

"(3) To make contributions for the maintenance and operation of community facilities."

Memorandum of Federal Works Administrator attached to Report of Senate Committee on Public Buildings and Grounds, S. Rep. No. 376, 78th Cong., 1st Sess. 3.

authority of Title II of the Lanham Act. The Court of Appeals for the First Circuit held that the Lanham Act did not authorize the taking of going public utilities. *Puerto Rico Ry. Light & Power Co.* v. *United States,* 131 F. 2d 491 (1942). When Congress learned of this attempt to condemn the Puerto Rican power system, there was an immediate reaction. In 1943, when a bill was introduced to increase the appropriation authority under Title II, Senator Taft offered an amendment providing in part that

> "none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies." 89 Cong. Rec. 7286.

Senator Taft explained this amendment by reference to the Puerto Rican power case, concluding as follows:

> "*. . . certainly there was nothing in the Lanham Act which authorized any such proceeding. It was intended to provide new facilities, it was not intended to provide for taking over old facilities. I think it is perfectly clear that no such power should be included in the act.*" (Emphasis supplied.) *Ibid.*

Senator Maloney, who was in charge of the pending bill and had been in charge of the Lanham Act, concurred in Senator Taft's interpretation of the Lanham Act:

> "Mr. President, I can see no objection to the amendments offered by the Senator from Ohio. I agree with him that Lanham Act funds, at least in my opinion—and I was one of those who helped to write the act—were not intended to be used for such a purpose as the acquisition of a public utility in Puerto Rico. So I have no objection to the language, and as a matter of fact I share the feeling of the Senator from Ohio." *Id.,* at 7287.

The original amendment was an outright prohibition against using the Lanham Act to acquire going utilities. The comments of the legislators make it clear that the Amendment was declaratory of what Congress had understood to be the correct interpretation of the Lanham Act. But Congress was not content to leave the legislation in any form subject to doubt, lest some other Court of Appeals or this Court should place a different interpretation on the Act than did the Court of Appeals for the First Circuit.

It was not until the following day that the excepting clause was added to the Amendment. It was introduced and explained by Senator Taft. The Public Works Agency had called to the Senator's attention a case where the Navy needed to expand a railroad by a project which would require expenditure of about double the present value of the railroad. The Agency asked that in such a case they be authorized to take over the existing utility. Senator Taft said that "Even in such cases I do not think the authority should be given except with the consent of those who own the existing public works." 89 Cong. Rec. 7314. Thus the 1943 Amendment came into its present form.[6]

This legislative background shows that the excepting clause in the 1943 Amendment constitutes the entire authority given to acquire going utilities. That authority should be strictly construed in keeping with the spirit of guarded caution under which it was granted. Therefore, I would construe the class of "owners," whose consent must be had, to be at least as broad as the normal usage of that term in the eminent domain context.

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[6] ". . . none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof . . . ." 57 Stat. 565.

I can agree with the majority opinion that the consent requirement does not necessarily bar acquisition by use of condemnation proceedings, but where consent of the owner is interposed as a statutory limitation on the exercise of the right of eminent domain, it makes obvious sense to interpret the consent required as being the consent of those persons having compensable interests affected by the exercise of eminent domain. The correct rule of construction has been suggested in these terms: ". . . where the law seeks to divest all and every title to land or estate and substitute the price therefor, . . . the word 'owner' should receive a broad and liberal construction so as to embrace every right in and to the land . . . ." *Glover* v. *United States,* 164 U. S. 294, 299–300 (1896). The proposition was recently restated in *Swanson* v. *United States,* 156 F. 2d 442, 445 (C. A. 9th Cir. 1946): "The term 'owner' in statutes relating to the exercise of eminent domain includes any person having a legal or equitable interest in the property condemned." [7]

The persuasion of common sense is to interpret the word "owners" as the equivalent of persons having a compensable interest under the Fifth Amendment, simply because when Congress speaks of owners in the eminent domain context, its most obvious source of reference is the Fifth Amendment. That is not to say that some other meaning might not be given by express definition, or by implication, where clearly necessary to carry out some overriding policy of the statute.[8] If there were in

[7] Cf. *Dubois* v. *Hepburn,* 10 Pet. 1, 23 (1836), interpreting a statute which permitted the "owner" to redeem tax delinquent land: "Any right, which in law or equity amounts to an ownership in the land; any right of entry upon it to its possession, or enjoyment, or any part of it . . . makes the person the owner . . . ."

[8] Thus in *Glover* v. *United States,* 164 U. S. 294 (1896), a mortgage creditor was held not to be an "owner" for purposes of a statute making a land tax refund, since the obvious statutory scheme was to reimburse persons who had been liable to pay the tax.

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the Lanham Act what the majority opinion reads into it—a congressional policy to facilitate national acquisition of privately owned utilities—then there might be some justification to interpret "owners" from a narrower source of reference, such as administrative convenience.

The sewerage system under condemnation was built in 1925 by the Belle Haven Realty Corp. as part of the development of a residential subdivision. As lots were sold, a proportionate part of the cost of the sewer system was included in the price paid by the purchaser of each lot. The conveyance of each lot included a grant of all "appurtenances to the same in any wise belonging." Belle Haven Realty Corp. retained nominal title to the system and responsibility for maintaining it, but no charge was made for its use. On this state of facts, the District Court held that the property owners had property rights by way of easements appurtenant to the Belle Haven sewer system. *United States* v. *Certain Parcels of Land in Fairfax County,* 89 F. Supp. 571 (1948).

The District Court's finding on the nature of the property interest under Virginia law is not questioned by this Court. It has been decided that such a property interest would give the owners thereof a compensable interest in a taking by power of eminent domain. *United States* v. *Welch,* 217 U. S. 333 (1910). It should follow, from the principles of statutory construction that I have urged above, that the consent of these easement owners was required.

Perhaps there may be some practical limitation on the consents which Congress required. Thus, where there is a legal entity which may speak with proper authority for all who have an interest in the property, as in the case of a corporation or a trustee speaking for the shareholders or beneficiaries, consent of each individual owner might not be required. But the corporation cannot be

held to represent the interests of the intervenors in the present case because it had a potentially adverse interest. The corporation stood to gain relief from its burden of maintenance if the system was taken, while the property owners stood to lose their right of free use. The District Judge noted in his opinion, "It seems never to have occurred . . . to Belle Haven Realty Corporation that the individual lot owners had any interest or ownership in the sewer system." 101 F. Supp. 172, 174. It seems absurd to say that the consent provision of the statute is satisfied by getting the consent of the corporation under the circumstances. The legal inadequacy of the corporation's consent is not changed because the corporation, despite its potentially adverse interest, made a genuine effort to do what it thought best for the property owners. Intervenors' interests are not so inconsequential in the law of eminent domain that they can be left to the beneficence of someone having a potentially adverse interest. That much is admitted by the inference that they are entitled to claim just compensation in their own right. Why are they any less entitled to give or withhold consent in their own right?

Even if consent of the corporation would satisfy the statute, I cannot agree that its consent was ever obtained. In 1943, when the Federal Works Agency was seeking only an easement of flowage through the lower end of the Belle Haven trunk line, the corporation consented to the taking if the Agency would take the entire system and provide in the decree that no service charges would be imposed against the Belle Haven property owners.[9] The original petition of condemnation, filed in 1944, evidences

[9] It is interesting to note that this agreement was apparently reached in the "spring of 1943," which would place it prior to the enactment of the 1943 Amendment, which was on July 15, 1943. Thus, it is a little difficult to believe that the Corporation was giving or the Government seeking a consent under the statute.

no intent to proceed under terms of this consent. The petition did not plead consent. It did not seek to condemn the entire sewer system, nor did it make any provision for the protection of the property owners. Not until 1948, when the Government's lessee, Fairfax County, ran into trouble in trying to levy a uniform sewerage assessment, did the Government try to take the entire system. Even then, its amended petition did not plead consent nor make any provision for protection of the property owners. Indeed, the only apparent purpose behind its amended petition was to acquire clear title to the whole system so that its lessee could assess charges against the Belle Haven property owners.[10] I can only conclude that the attempt to find a consent in the 1943 agreement came as a happy afterthought with the awakening realization that this taking could not be justified except under the 1943 Amendment.[11]

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[10] This is the conclusion reached by the Court of Appeals. 196 F. 2d 657, 662–663. To some extent the conclusion depends upon questions of fact which have never been tried. But most of what there presently is in the records supports the inference that the federal power of eminent domain was exercised here to help a local county solve a problem of sewerage assessments. If this be true, I think the whole affair is completely unworthy of the high trust which should attend use of the sovereign power of eminent domain. However, that raises a question of fact going to whether or not the taking was for a public purpose. That question, as well as the factual questions of whether the President approved this specific project as required by Title II, *Puerto Rico Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491, 495–496 (C. A. 1st Cir. 1942), and whether funds were allotted "for substantial additions or improvements" to the Belle Haven system, as required by the 1943 Amendment, will still be left open on remand.

[11] In proceedings in the District Court the Government referred to Belle Haven Realty Corp. as the "*purported owner*" of the system, 101 F. Supp. 172, 175, a position quite inconsistent with its later position that the corporation was *the* "owner" whose consent brings the taking within the 1943 Amendment.

In any event, it was found as a fact that the corporation's consent ". . . was given upon a condition which the government is unwilling to accept." [12] Unless there is something in the foregoing pattern of facts which amounts to an absolute consent as a matter of law, that finding of fact cannot be dismissed with the rhetorical response that the consent cannot be characterized as conditional. I would not allow the Government to justify this taking by resort to an agreement which it has refused to honor.

I do not think a consent can be salvaged out of the corporation's answer seeking just compensation. That answer came in 1950, only after the decision of the District Court that the property owners had a compensable interest in the system and a right to intervene. 89 F. Supp. 567. The answer pleads a belief that the conditional consent had been violated and states its primary purpose to serve the interest of the property owners. Thus, though it does ask for just compensation, the only fair construction that can be given to the answer in its entirety is that it is an alternative plea, attacking the right to take on the belief that the conditional consent had been dishonored, or alternatively seeking just compensation for its interest in the sewer if the Government's right to take should be upheld.

The condemnation of one small sewerage system may seem an insignificant thing in view of the vast scope of federal eminent domain powers, and much of the impact of the present decision may be balmed over with the assurance that intervenors can claim just compensation for their losses. But there is something at stake here which transcends the immediate interests of the parties. That

[12] 196 F. 2d 657, 662. There were no formal findings of fact. But as the Court of Appeals pointed out, "The [district] judge found it [the language quoted in text] as a fact, . . . after hearing the parties in a number of pre-trial conferences."

is the duty of the courts and administrators to keep faith with Congress in the interpretation and execution of a statute in which Congress carefully limited the powers of eminent domain because of sensitive policy considerations which were for Congress alone to evaluate. Because I think the instant condemnation clearly exceeds the scope of congressional authorization, I would affirm the judgment of the courts below.

UNITED STATES *v.* GILBERT ASSOCIATES, INC.

CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE.

No. 440. Argued March 11, 1953.—Decided April 6, 1953.

1. Under § 3672 of the Internal Revenue Code, which provides that the tax lien of the United States shall not be valid against any "judgment creditor" until the collector has filed the required notice, a New Hampshire town which had made an assessment of an ad valorem tax on certain property of a corporation was not a "judgment creditor," even though such tax assessments are, under New Hampshire law, "in the nature of a judgment." Pp. 362–365.

   (a) In § 3672, Congress used the words "judgment creditor" in the usual, conventional sense of a judgment of a court of record. P. 364.

   (b) The phrase "judgment creditor" does not extend to the action of taxing authorities who may be acting judicially, where the end result is something "in the nature of a judgment." P. 364.

2. Where the tax lien of a town and that of the United States are both general, and the taxpayer is insolvent, the United States is entitled to priority under R. S. § 3466. Pp. 365–366.

3. Here the town had only a general lien, because it had not divested the taxpayer of either title or possession. Pp. 365–366.

97 N. H. 411, 90 A. 2d 499, reversed.

The State Supreme Court awarded priority to the claim of a town as against a claim of the United States in the estate of an insolvent corporation. 97 N. H. 411, 90 A. 2d 499. This Court granted certiorari. 344 U. S. 911. *Reversed,* p. 366.

Harry Baum argued the cause for the United States. With him on the brief were *Solicitor General Cummings, Assistant Attorney General Holland, Ellis N. Slack* and *A. F. Prescott.*

No appearance for respondent.

MR. JUSTICE MINTON delivered the opinion of the Court.

This case involves the question of whether the Town of Walpole, New Hampshire, or the Federal Government has the prior right to a fund in the hands of a state court receiver of the respondent-taxpayer, an insolvent corporation. The Supreme Court of New Hampshire held the Town was entitled to priority, 97 N. H. 411, 90 A. 2d 499, and we granted certiorari, 344 U. S. 911.

The claims of both arise from tax liens. The Town's lien grew out of an assessment of an ad valorem tax upon certain machinery of Gilbert Associates, Inc., the respondent, for the years 1947 and 1948 in the amounts of $612.95 and $690.85, respectively. The corporation was thereafter declared insolvent, and a temporary receiver was appointed August 12, 1949, and made permanent January 30, 1950. The Town's taxes were assessed April 1, 1947, and April 1, 1948. On September 25, 1948, the Town sold the taxpayer's property at a tax sale to pay the taxes accrued for the year 1947. On September 24, 1949, the Town sold the same property at a tax sale for taxes accrued for the year 1948. The record does not disclose the nature of these tax-sale proceedings. We are informed that the Town bid in the property at its own sales. At least, the Town never took possession of the property, which was later sold by the receiver, creating the fund involved here. The Federal Government's lien was for employment, withholding, and income taxes that became due between 1943 and June 30, 1948, in the sum of $3,171.97. Notice of this lien was filed in the office of the Clerk of the United States District Court for the District of New Hampshire on August 6, 1948.

Under § 3672 of the Internal Revenue Code, 56 Stat. 798, 26 U. S. C. (1946 ed.) § 3672, the lien of the United States "shall not be valid as against any mortgagee,

pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector— . . . In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated . . . ." The Supreme Court of New Hampshire held that since notice of the Government's lien was not filed until August 6, 1948, and the Town's taxes were assessed on April 1, 1947, and April 1, 1948, respectively, and such tax assessments are "in the nature of a judgment" under the law of New Hampshire, the Town was a judgment creditor within the meaning of § 3672, and the Government's lien was not valid as against the Town's.

Was the Town a judgment creditor within the meaning of § 3672? The New Hampshire Supreme Court in the instant case said:

> "It is settled by our decisions that the assessment of a tax is in the nature of a judgment, enforced by a warrant instead of an execution. *Boody* v. *Watson,* 64 N. H. 162, 167; *Jaffrey* v. *Smith,* 76 N. H. 168, 171; *Nottingham* v. *Company,* 84 N. H. 419. See also, *Automatic Sprinkler Corp.* v. *Marston,* 94 N. H. 375." 97 N. H. 411, 414, 90 A. 2d 499, 502.

We would not question or presume to say what the nature and effect of a tax proceeding is in New Hampshire. The state is free to give its own interpretation for the purpose of its own internal administration. *United States* v. *Waddill Co.,* 323 U. S. 353. See also *Howard* v. *Commissioners of Louisville Sinking Fund,* 344 U. S. 624.

The Supreme Court of New Hampshire freely concedes, however, as it must, that the meaning of a federal statute is for this Court to decide. *United States* v. *Security Trust & Savings Bank,* 340 U. S. 47. Congress enacted § 3672 to meet the harsh condition created by the holding in *United States* v. *Snyder,* 149 U. S. 210, when federal

liens were few, that a secret federal tax lien was good against a purchaser for value without notice.

A cardinal principle of Congress in its tax scheme is uniformity, as far as may be. Therefore, a "judgment creditor" should have the same application in all the states. In this instance, we think Congress used the words "judgment creditor" in § 3672 in the usual, conventional sense of a judgment of a court of record, since all states have such courts.[1] We do not think Congress had in mind the action of taxing authorities who may be acting judicially as in New Hampshire and some other states,[2] where the end result is something "in the nature of a judgment," while in other states the taxing authorities act quasi-judicially and are considered administrative bodies.[3]

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[1] See concurring opinion of MR. JUSTICE JACKSON in *United States* v. *Security Trust & Savings Bank, supra,* at p. 52.

[2] The decisions have arrived at the conclusion that assessments are judgments for purposes of preventing collateral attacks upon them, ascertaining rights to a hearing in connection with them, or deciding under local procedure on the applicable method of collecting them. These cases, prior to the instant decision, have never actually declared that the status of a technical judgment creditor has been created. *People ex rel. Harding* v. *Hart,* 332 Ill. 467, 163 N. E. 769; *Nottingham* v. *Newmarket Mfg. Co.,* 84 N. H. 419, 151 A. 709; *People ex rel. Glens Falls Ins. Co.* v. *Ferguson,* 38 N. Y. 89; *Williams* v. *Weaver,* 75 N. Y. 30; *State* v. *Georgia Co.,* 112 N. C. 34, 17 S. E. 10; *Union Tanning Co.* v. *Commonwealth,* 123 Va. 610, 96 S. E. 780. But see *Hibbard* v. *Clark,* 56 N. H. 155, holding that it is not a judgment. 1 Cooley, Taxation (4th ed., 1924), 91–92, points out that assessments, though they may be enough like judgments to definitely establish a demand for taxes, are not technical judgments.

[3] *First National Bank of Remsen* v. *Hayes,* 186 Iowa 892, 171 N. W. 715; *Alexander* v. *Commonwealth,* 137 Va. 477, 120 S. E. 296; *Weyerhaeuser Timber Co.* v. *Pierce County,* 97 Wash. 534, 167 P. 35; *Stimson Timber Co.* v. *Mason County,* 112 Wash. 603, 192 P. 994.

We conclude that whatever the tax proceedings of the Town of Walpole may amount to for the purposes of the State of New Hampshire, they were not such proceedings as resulted in making the Town a judgment creditor within the meaning of § 3672.

While the Town was not a judgment creditor, it was the holder of a general lien on all the taxpayer's property. So was the United States a general lienholder on all the taxpayer's property.[4] But since the taxpayer was insolvent, the United States claims the benefit of another statute to give it priority, § 3466 of the Revised Statutes, 31 U. S. C. (1946 ed.) § 191, the provisions of which are set forth in the margin.[5]

As is usual in cases like this, the Town asserts that its lien is a perfected and specific lien which is impliedly excepted from this statute. This Court has never actually held that there is such an exception. Once again, we find it unnecessary to meet this issue because the lien asserted here does not raise the question.

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[4] "§ 3670. Property subject to lien.

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." § 3670 I. R. C., 26 U. S. C. (1946 ed.) § 3670.

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

In claims of this type, "specificity" requires that the lien be attached to certain property by reducing it to possession, on the theory that the United States has no claim against property no longer in the possession of the debtor. *Thelusson* v. *Smith,* 2 Wheat. 396. Until such possession, it remains a general lien. There is no ground for the contention here that the Town had perfected its lien by reducing the property to possession. The record reveals no such action. The mere attachment of the Town's lien before the recording of the federal lien does not, contrary to the holding of the Supreme Court of New Hampshire, give the Town priority over the United States. The taxpayer had not been divested by the Town of either title or possession. The Town, therefore, had only a general, unperfected lien. *United States* v. *Waddill Co., supra; Illinois* v. *Campbell,* 329 U. S. 362, 370. Where the lien of the Town and that of the Federal Government are both general, and the taxpayer is insolvent, § 3466 clearly awards priority to the United States. *United States* v. *Texas,* 314 U. S. 480, 488.

The judgment of the Supreme Court of New Hampshire is

Reversed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE REED joins, dissenting.

I cannot agree with the opinion of the Court insofar as it supposes that § 3672 of the Internal Revenue Code is to be read as requiring that certain procedures—and the same procedures—be complied with in each State before a creditor becomes the magic "judgment creditor." Section 3672 gives the United States priority over other creditors but not over judgment creditors. This is the rule of uniformity enacted by Congress. But it does not demand that the same procedure be followed in every

State. Nor does it demand that any particular procedure be followed, that the creditor formally prosecute his claim in the courts and obtain judgment, or even that the common-law requirements be satisfied.

Of course, the State courts cannot by the wand of a label wave away the requirement, which I agree is a matter for federal interpretation, that a creditor be a "judgment creditor." But federal law does not insist on anything more than that the creditor be in the same position as a creditor who holds a judgment "in the usual, conventional sense." Federal law refers to State law, as it does in the closely comparable bankruptcy provisions, to determine whether action taken by a taxing authority of New Hampshire has substantially the same effect as would be given the judgment of a court of record, that is, whether the Town stands—along with creditors who have obtained judgment from a court of record—on a higher footing than those who have yet to establish their claims in court. If the assessment here has, as the New Hampshire Supreme Court informs us, the normal attributes of a judgment, I see no way of escaping the conclusion that the Town is a judgment creditor within the meaning of § 3672. In the light of the New Hampshire decisions, see *Nottingham* v. *Newmarket Mfg. Co.,* 84 N. H. 419, 151 A. 709; *Jaffrey* v. *Smith,* 76 N. H. 168, 80 A. 504; cf. *Automatic Sprinkler Corp.* v. *Marston,* 94 N. H. 375, 376, 54 A. 2d 154, 155, there is no reason for believing that the State ruling here simply applies a label and does not express the controlling law of the State unrelated to the implications of § 3672. Nothing more ought to be required.

In view of the Court's reluctance not only today but for almost a century and a half to decide the issues that may arise under § 3466 of the Revised Statutes, I do not think I ought to embarrass later consideration by the Court of these issues by speaking on them at this time.

Compare *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386, 441, 444, with *United States* v. *Waddill Co.*, 323 U. S. 353, 355; see 56 Yale L. J. 1258. But cf. *Illinois* v. *Campbell*, 329 U. S. 362, 376 (dissenting opinion). It would be particularly inappropriate to do so in this case, because we are not told what kind of lien has arisen and what effect the tax sales may have in the circumstances of this case.

Syllabus.

NEW JERSEY *v.* NEW YORK ET AL.

ON MOTION OF THE CITY OF PHILADELPHIA FOR LEAVE TO INTERVENE.

No. 5, Original, October Term, 1950. Argued March 9, 1953.—Decided April 6, 1953.

New Jersey brought an original suit in this Court against the State of New York and the City of New York to enjoin a proposed diversion of Delaware River water by the City of New York from tributaries within the State of New York. Pennsylvania intervened *pro interesse suo* and participated actively in the litigation. In 1931, this Court entered a decree, 283 U. S. 805, enjoining the State of New York and the City of New York from diverting more than a specified amount of water per day and providing that any party might apply for a modification of the decree at any time. In 1952, the City of New York, with the approval and support of the State of New York, moved to modify the decree so as to provide for the diversion of additional quantities of water. New Jersey and Pennsylvania filed answers opposing such modification. Subsequently, the City of Philadelphia moved for leave to intervene, asserting its interest in the use of Delaware River water and pointing to the recent grant of a Home Rule Charter as justification for intervention at this point. *Held:* The motion for leave to intervene is denied. Pp. 370–375.

(a) Since Pennsylvania is a party to this suit, which involves a matter of its sovereign interest, it must be deemed to represent all of its citizens and creatures. *Kentucky* v. *Indiana,* 281 U. S. 163. Pp. 372–373.

(b) An intervenor whose state is already a party to an original action has the burden of showing some compelling interest in its own right, apart from its interest in a class with all other citizens and creatures of the state, which interest is not properly represented by its state; and Philadelphia has not met that burden. Pp. 373–374.

(c) That Philadelphia now has a Home Rule Charter and is now responsible for her own water system does not require a different result, since that responsibility is invariably served by the Commonwealth's position. P. 374.

(d) The presence in this litigation of New York City, which was joined as a defendant to the original action, is not a sufficient justification for permitting the City of Philadelphia to intervene. Pp. 374–375.

Abraham L. Freedman argued the cause for the City of Philadelphia. With him on the brief was *Robert M. Landis.*

John P. McGrath argued the cause for the City of New York, defendant. With him on the brief were *Denis M. Hurley, Jeremiah M. Evarts, James J. Thornton* and *Richard H. Burke.*

Edward L. Ryan, Assistant Attorney General, argued the cause for the State of New York, defendant. With him on the brief were *Nathaniel L. Goldstein,* Attorney General, and *Wendell P. Brown,* Solicitor General.

Bernard G. Segal argued the cause for the State of Pennsylvania, intervenor. With him on the brief were *Robert E. Woodside,* Attorney General, *George G. Chandler, Wm. A. Schnader* and *Harry F. Stambaugh.*

Kenneth H. Murray argued the cause for the State of New Jersey, complainant. With him on the brief were *Theodore D. Parsons,* Attorney General, *Robert Peacock,* Deputy Attorney General, and *Oscar R. Wilensky.*

PER CURIAM.

The City of Philadelphia has moved this Court for leave to intervene in this original action concerning distribution of Delaware River water. Argument was heard on the motion on March 9, 1953, with all interested parties appearing.

The suit, addressed to this Court's original jurisdiction, was brought by the State of New Jersey, in 1929, against the State of New York and the City of New York, praying for injunctive relief against a proposed diversion of Delaware River water from tributaries within the State of New York. New Jersey joined the City of New York as a defendant, because the City, acting under State authority, was planning the actual diversion of the water

for its use. The Commonwealth of Pennsylvania immediately petitioned for leave to intervene *pro interesse suo*. Leave to intervene was granted, upon condition that the Commonwealth file a statement of her interest in the cause and of the relief, if any, which she sought. 280 U. S. 528. Pennsylvania filed her Statement of Interest and Relief on January 10, 1930, and thereafter became an active party in the proceedings before the Special Master. In 1931, this Court confirmed the Special Master's Report, 283 U. S. 336, and entered its decree in conformity therewith, 283 U. S. 805.

The 1931 decree enjoined the State of New York and the City of New York from diverting from the Delaware River or its tributaries more than 440 million gallons daily, subject to a prescribed formula for the release of storage water during periods of low flow. The decree further provided:

> "6. Any of the parties hereto, complainant, defendants or intervener, may apply at the foot of this decree for other or further action or relief and this Court retains jurisdiction of the suit for the purpose of any order or direction or modification of this decree, or any supplemental decree that it may deem at any time to be proper in relation to the subject matter in controversy." *Id.*, at p. 807.

On April 1, 1952, the City of New York, with the approval and support of the State of New York, moved under paragraph 6 of the 1931 decree for leave to file its petition to modify the decree by providing for diversion of additional quantities of water and for changes in the prescribed formula for releasing water during low flow. The motion was granted. 343 U. S. 974. New Jersey and Pennsylvania filed answers opposing the proposed modifications, and the whole matter was referred to a Special Master. *Ibid.*

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On December 13, 1952, the City of Philadelphia filed this motion for leave to intervene. The petition asserts Philadelphia's unquestioned interest in the use of Delaware River water and points to the recent grant of her Home Rule Charter as justification for intervention at this point. All of the present parties to the litigation have formally opposed the motion to intervene on grounds (1) that the intervention would permit a suit against a state by a citizen of another state in contravention of the Eleventh Amendment; (2) that the Commonwealth of Pennsylvania has the exclusive right to represent the interest of Philadelphia as *parens patriae;* and (3) that intervention should be denied, in any event, as a matter of sound discretion. Philadelphia contends that the matter is entirely within the sound discretion of this Court, which should be exercised as prayed to assure that every worth-while interest is represented in the ultimate decree.

The view we take of the matter makes it unnecessary to decide whether Philadelphia's intervention in the pending litigation would amount to a ". . . suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . ." in violation of the Eleventh Amendment. For the same reasons, we are not concerned with so much of the *"parens patriae"* argument as may be only a restatement of the proposition that original jurisdiction against a state can only be invoked by another state acting in its sovereign capacity on behalf of its citizens. Cf. *New Hampshire* v. *Louisiana,* 108 U. S. 76 (1883); *North Dakota* v. *Minnesota,* 263 U. S. 365 (1923). The *"parens patriae"* doctrine, however, has aspects which go beyond mere restatement of the Eleventh Amendment; it is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all its citizens." *Kentucky* v. *In-*

diana, 281 U. S. 163, 173–174 (1930). The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

The case before us demonstrates the wisdom of the rule. The City of Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters.* If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth. Furthermore, we are told by New Jersey that there are cities along the Delaware River in that State which, like Philadelphia, are responsible for their own water systems, and which will insist upon a right to intervene if Philadelphia is admitted. Nor is there any assurance that the list of intervenors could be closed with political subdivisions of the states. Large industrial plants which, like cities, are corporate creatures of the state may represent interests just as substantial.

Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions. An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state. See *Kentucky* v. *Indiana, supra.* Philadelphia has not met that burden and,

*Census figures for 1950 show that there were 4,061,420 Pennsylvania citizens within the watershed, of which 2,071,605, or about half, are in Philadelphia.

therefore, even if her intervention would not amount to a suit against a state within the proscription of the Eleventh Amendment (and we do not intend to give any basis for implying that it does), leave to intervene must be denied.

Pennsylvania intervened in 1930, *pro interesse suo,* to protect the rights and interests of Philadelphia and Eastern Pennsylvania in the Delaware River. The Commonwealth opposed New Jersey's position based on common-law riparian rights, since that proposition threatened the right of Philadelphia and Eastern Pennsylvania to continue their use and development of the Delaware River and its Pennsylvania tributaries. Pennsylvania's position was based upon the doctrine of fair and equitable apportionment, and New York's proposed diversion had to be resisted to the extent it might amount to a diversion of more than a fair and equitable share. This Court recognized the propriety of Pennsylvania's peculiar position, based on the interests of its citizens, and permitted intervention over vigorous opposition that the intervenor must be aligned either with plaintiff or defendant.

Pennsylvania's position remains vigorous and unchanged in the face of the petition for additional diversion. She is opposed to any such additional diversion not justified under the doctrine of equitable apportionment. Counsel for the City of Philadelphia have been unable to point out a single concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests. We do not see how Philadelphia's Home Rule Charter changes the situation. Though Philadelphia is now responsible for her own water system under the Charter, that responsibility is invariably served by the Commonwealth's position.

The presence of New York City in this litigation is urged as a reason for permitting Philadelphia to intervene. But the argument misconstrues New York City's

position in the case. New York City was not admitted into this litigation as a matter of discretion at her request. She was forcibly joined as a defendant to the original action since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey. Because of this position as a defendant, subordinate to the parent state as the primary defendant, New York City's position in the case raises no problems under the Eleventh Amendment. *Wisconsin* v. *Illinois and Sanitary District of Chicago,* 278 U. S. 367 (1929), and 281 U. S. 179 (1930); cf. *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230 (1907). New York City's position is not changed by virtue of the fact that she is presently the moving party, so long as the motion for modification of the 1931 decree comes within the scope of the authorization of paragraph 6 of that decree.

The motion for leave to intervene and file an answer is, therefore,

Denied.

MR. JUSTICE JACKSON, whom MR. JUSTICE BLACK joins, dissenting.

We desire the record to show why we would allow Philadelphia to intervene in this case.

The city, of course, is not an indispensable party, and it is generally bad policy to encumber any case with unnecessary intervenors. We have no doubt whatever that counsel for the Commonwealth will faithfully and ably represent the interests of all of its inhabitants, including those of Philadelphia. Nonetheless, we would allow the intervention because of circumstances peculiar to this case.

We do not write today upon a clean slate. New York City, as well as New York State, is a party to this action. It is true that the city was made a defendant in the origi-

nal case. But that case was long ago decided. New York City is the moving party now, in reopening the decree. The interests of municipality and state are no more separate in the case of New York than of Philadelphia. Both cities have home-rule powers and vital interests in this litigation. New York City is the real party in interest in the current application for a modification of an existing decree and it is in a position to present its own claims. We would allow Philadelphia's motion to present any proper evidence that it deems protective of its interest. This would not be merely a favor to that city. It would also protect the position of this Court if the master should report in favor of New York, and Philadelphia, with the wisdom that comes from hindsight, should ask to oppose confirmation upon the ground that its interests had not had full consideration.

It is objected that, if Philadelphia is admitted, other municipalities may apply. That may be so. We are not believers in town-meeting lawsuits. But certainly few others could show comparable home-rule power and magnitude of interest, and we must not forget that this is no ordinary lawsuit. It may have grave consequences upon one or the other or both municipalities. Since the Court is hearing one of them, we would bear with some inconvenience rather than have the other aggrieved from the beginning by being shut out.

UNITED STATES *v.* JONES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 556. Decided April 13, 1953.

Invoking the Criminal Appeals Act, 18 U. S. C. § 3731, the Government appealed directly to this Court from the District Court's dismissal of an information charging appellee with violations of the Civil Rights Act, 18 U. S. C. § 242. The initial issue—and a critical issue—raised by the Government's appeal involved questions relating to the District Court's construction of the information and not to that court's interpretation of the scope of the Civil Rights Act. *Held:* This Court is of the opinion that the appeal should have been taken to a court of appeals; and, in exercise of the power conferred upon it in such circumstances by 18 U. S. C. § 3731, this Court remands the appeal to the Court of Appeals for further proceedings in that court. Pp. 377–378.

108 F. Supp. 266, remanded to the Court of Appeals.

Solicitor General Cummings for the United States.

Patrick C. Whitaker and *Thomas P. Whitaker* for appellee.

PER CURIAM.

Invoking the Criminal Appeals Act, 18 U. S. C. § 3731, the Government appeals from a dismissal of a two-count information charging appellee with violations of the Civil Rights Act, 18 U. S. C. § 242.

The District Court construed the information to charge that appellee, an officer in a Florida state prison, whipped certain prisoners entrusted to his custody "for the purpose and with the intent of disciplining said prisoners." The District Court held that mere disciplinary action by state prison officials is no offense under the Civil Rights Act, *supra,* and dismissed the information. 108 F. Supp. 266.

On appeal, the Government predicates its argument for reversal upon the assumption that the information charges far more than the District Court found it charged. The Government construes the information to charge that appellee wilfully extorted confessions of violations of prison rules from the prisoners and wilfully inflicted illegal summary punishment upon them, in violation of the laws of Florida and the Constitution of the United States. Thus, the Government's appeal—the theory of the prosecution—is based upon a construction of the information which differs significantly from the construction which the District Court has placed upon it.

The Criminal Appeals Act, *supra,* strictly limits the scope of our jurisdiction over this appeal. We may only entertain questions relating to the construction of the Civil Rights Act, *supra,* and its applicability to this information. We cannot re-examine the information and construe it *de novo,* for we are bound by the District Court's construction. *United States* v. *Borden Co.*, 308 U. S. 188 (1939).

Under the Criminal Appeals Act, we have the power to remand this case to the Court of Appeals if we are of the "opinion" that the appeal "should have been taken to a court of appeals." 18 U. S. C. § 3731. We think this case is appropriate for the exercise of the power which Congress has entrusted to our discretion. The initial issue—and a critical issue—raised by the Government's appeal obviously involves questions relating to the correctness of the District Court's construction of the information and not to that court's interpretation of the scope of the Civil Rights Act, *supra.* Those questions cannot be resolved in a direct appeal to this Court, but they can be reviewed should the case be remanded to the Court of Appeals for the Fifth Circuit. Accordingly, we remand this appeal to the Court of Appeals for further proceedings in that court.

It is so ordered.

POPE ET AL. *v.* ATLANTIC COAST LINE RAILROAD CO.

CERTIORARI TO THE SUPREME COURT OF GEORGIA.

No. 322. Argued January 16, 1953.—Decided April 27, 1953.

1. A Georgia trial court sustained a general demurrer to respondent's suit to enjoin petitioner from prosecuting a suit against respondent in an Alabama state court under the Federal Employers' Liability Act. The State Supreme Court reversed, holding that Georgia law gave Georgia courts power to enjoin Georgia residents from bringing vexatious suits in foreign jurisdictions. Under Georgia procedure, petitioner could have returned to the Georgia trial court and interposed some other defense to respondent's suit for injunction; but petitioner conceded that his case rested solely upon his federal claim and that he had no other defense to interpose. *Held:* Under these particular circumstances, the decision of the Georgia Supreme Court was "final," within the meaning of 28 U. S. C. § 1257, and this Court has jurisdiction over this case. Pp. 380–383.
2. Under the Federal Employers' Liability Act, petitioner sued respondent, an interstate railroad, in an Alabama state court for injuries sustained during the course of his employment—although the injury occurred in Georgia, which was also the place of petitioner's employment and residence. Respondent sued in a Georgia state court to enjoin petitioner from prosecuting his suit in Alabama, alleging that petitioner deliberately sought to "harass" respondent by subjecting it to the burden and expense of defending the claim in a distant forum. *Held:* Under § 6 of the Act, petitioner had a right to sue in Alabama, where respondent was doing business, and the Georgia court was without power to enjoin prosecution of the suit in an Alabama state court. Pp. 383–387.

   (a) Section 6 displaces the traditional power of a state court to enjoin its citizens, on the ground of oppressiveness, from suing under the Act in the courts of another state. *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698. P. 383.

   (b) The provision of 28 U. S. C. § 1404 (a) that, "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought" is applicable only to cases brought in federal courts and does not grant to a state

court any authority to enjoin a citizen of its state from prosecuting in a court of another state a suit under the Federal Employers' Liability Act. *Ex parte Collett*, 337 U. S. 55, distinguished. Pp. 383–384.

(c) The Reviser's Note to § 1404 (a), citing *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, as "an example of the need" for its enactment, does not require a different result in this case. Pp. 384–387.

209 Ga. 187, 71 S. E. 2d 243, reversed.

A Georgia trial court sustained a general demurrer to a suit by respondent to enjoin petitioner from prosecuting in an Alabama court a suit against respondent under the Federal Employers' Liability Act. The Supreme Court of Georgia reversed. 209 Ga. 187, 71 S. E. 2d 243. This Court granted certiorari. 344 U. S. 863. *Reversed,* p. 387.

Richard M. Maxwell argued the cause for petitioners. With him on the brief was *Thomas J. Lewis.*

Allan C. Garden and *Charles Cook Howell* argued the cause for respondent. With them on the brief was *Douglas W. Matthews.*

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

Invoking the Federal Employers' Liability Act,[1] petitioner sued his employer, an interstate railroad company, for injuries sustained during the course of his employment, allegedly through respondent's negligence. The injury occurred in Ben Hill County, Georgia, which was the place of petitioner's employment as well as the place of his residence. But petitioner filed his complaint in the Circuit Court of Jefferson County, Alabama; jurisdiction and venue were grounded on § 6 of the Act.[2]

[1] 45 U. S. C. § 51.

[2] 45 U. S. C. § 56.

Respondent then initiated a suit in equity in the Superior Court of Ben Hill County and asked that petitioner be restrained from prosecuting his action in Alabama. Respondent's petition to the Ben Hill County Court contained allegations that petitioner had deliberately sought to "harass" his employer by subjecting it to the burden and expense of defending the claim in a distant forum, far from the scene of the accident and the residences of the witnesses.

The trial court sustained a general demurrer to this petition. The Georgia Supreme Court reversed—holding that Georgia law provided Georgia courts with the power to enjoin Georgia residents from bringing vexatious suits in foreign jurisdictions. Petitioner's claim that § 6 of the Federal Employers' Liability Act prohibited such an injunction in this case was overruled. 209 Ga. 187, 71 S. E. 2d 243. We granted certiorari, 344 U. S. 863, for the decision had interpreted an important federal statute, and the interpretation was asserted to be in conflict with decisions of this Court in *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698 (1942), and *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44 (1941).

In our grant of certiorari, we also directed counsel to brief and argue the question of whether the judgment of the Georgia Supreme Court was "final." The statute which vests us with jurisdiction to review the decisions of state courts provides that the judgment must come from the "highest court of a State in which a decision could be had," and it must be "final." 28 U. S. C. § 1257. The case at bar clearly met the first requirement, but we were in doubt as to whether it satisfied the second.

Congress has limited our power to review judgments from state courts lest the Court's jurisdiction be exercised in piecemeal proceedings to render advisory opinions. Were our reviewing power not limited to "final" judgments, litigants would be free to come here and seek

a decision on federal questions which, after later proceedings, might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation.[3] Ordinarily, then, the overruling of a demurrer, like the issuance of a temporary injunction,[4] is not a "final" judgment.

Yet we are not bound to determine the presence or absence of finality from a mere examination of the "face of the judgment." [5] We have not interpreted § 1257 so as to preclude review of federal questions which are in fact ripe for adjudication when tested against the policy of § 1257.[6]

The finality problem arises in this case because the judgment of the Georgia Supreme Court did not, on its face, end the litigation. Both parties agree that Georgia procedure would permit petitioner to return to the Superior Court of Ben Hill County and interpose some other defense to respondent's suit for an injunction. But petitioner has no other defense to interpose. He has been both explicit and free with his concession that his case rests upon his federal claim and nothing more. If the court below decided that claim correctly, then nothing remains to be done but the mechanical entry of judgment by the trial court. Thus, as the case comes to us, the federal question is the controlling question; "there is nothing more to be decided." [7] Under these particular circumstances, we have jurisdiction over the cause, *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69 (1946); and

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[3] See *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 123–124 (1945); *Gospel Army* v. *Los Angeles,* 331 U. S. 543 (1947). Cf. *Herb* v. *Pitcairn,* 324 U. S. 117, 125–126 (1945).

[4] Cf. *Montgomery Building & Construction Trades Council* v. *Ledbetter Co.,* 344 U. S. 178 (1952).

[5] See *Gospel Army* v. *Los Angeles, supra,* 331 U. S., at 546.

[6] See *Radio Station WOW* v. *Johnson, supra.*

[7] *Clark* v. *Williard,* 292 U. S. 112, 118 (1934).

we reach the merits of petitioner's contention that the Georgia Supreme Court has failed to give proper effect to the venue provisions of the Federal Employers' Liability Act.

Section 6 of that Act establishes petitioner's right to sue in Alabama. It provides that the employee may bring his suit wherever the carrier "shall be doing business," and admittedly respondent does business in Jefferson County, Alabama. Congress has deliberately chosen to give petitioner a transitory cause of action; and we have held before, in a case indistinguishable from this one, that § 6 displaces the traditional "power of a state court to enjoin its citizens, on the ground of oppressiveness . . . from suing . . . in the state courts of another state . . . ." *Miles* v. *Illinois Central R. Co., supra,* 315 U. S., at 699. Respondent admits that the *Miles* case dealt with precisely the issue before us, but respondent tells us that *Miles* is now no longer the law because Congress overruled it, by implication, with the passage of § 1404 (a) of the Judicial Code in 1948.[8] Section 1404 (a) provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

We have heretofore held that § 1404 (a) makes the doctrine of *forum non conveniens* applicable to Federal Employers' Liability Act cases brought in federal courts and provides for the transfer of such actions to a more convenient forum. *Ex parte Collett,* 337 U. S. 55 (1949). Respondent would have us extend that decision, to hold that § 1404 (a) also provides for the power asserted by the Georgia court in this case. We do not agree; we do

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[8] 28 U. S. C. § 1404 (a).

not think the language of the statute suggests any such implied grant of broad power to the state courts.

Section 1404 (a), by its very terms, speaks to federal courts; it addresses itself only to that federal forum in which a lawsuit has been initiated; its function is to vest such a federal forum with the power to transfer a transitory cause of action to a more convenient federal court. It does not speak to state courts, and it says nothing concerning the power of some court other than the forum where a lawsuit is initiated to enjoin the litigant from further prosecuting a transitory cause of action in some other jurisdiction. Nor does § 1404 (a) contemplate the collateral attack on venue now urged by respondent; it contains no suggestion that the venue question may be raised and settled by the initiation of a second lawsuit in a court in a foreign jurisdiction; its limited purpose is to authorize, under certain circumstances, the transfer of a civil action from one federal forum to another federal forum in which the action "might have been brought."

Although the statutory language of § 1404 (a) contains no authorization for the power asserted in this case, respondent directs our attention to remarks in the Reviser's Note to that provision of the Code. The Reviser's Notes were before Congress when it considered enactment of the various provisions of the 1948 Judicial Code and Congress relied upon them to explain the significance and scope of each section.[9]

Basing its argument upon the text of the Reviser's Note to § 1404 (a), respondent argues that it must have been the intent of Congress, if not its expressed purpose, that § 1404 (a) be construed as respondent would construe it.

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[9] *Ex parte Collett, supra,* 337 U. S., at 65–70.

The Reviser's Note to § 1404 (a) recites that this Court's decision in *Baltimore & Ohio R. Co.* v. *Kepner, supra,* furnished "an example of the need" for enactment of § 1404 (a). In the *Kepner* case, we held that a state court was not free to exercise its equity jurisdiction to enjoin a resident of the state from prosecuting a Federal Employers' Liability Act suit in a distant federal court. We reasoned that Congress had purposely given the employee a right to establish venue in the federal court where he had sued, and, what Congress had so expressly given, the courts should not take away.

The reference to the *Kepner* case in the Reviser's Note in nowise conflicts with what we think is the plain meaning of the language of § 1404 (a) itself. The *Kepner* case was simply cited as an apt example of an inequitable situation which could be cured by providing the federal courts with the power to transfer an action on grounds of *forum non conveniens.* The full text of the Reviser's Note [10] makes it clear that it was the power of the federal court to transfer, and not the power of the state court to enjoin, which was the remedy envisioned for any injustice wrought by § 6 in the *Kepner* case.

Thus, with the exception of the transfer powers conferred upon the federal courts by § 1404 (a), Congress deliberately chose to leave this Court's decision in the

[10] The pertinent part of the Reviser's Note reads:

"Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

Kepner case intact. Indeed, we have said as much before:

> "Section 6 of the Liability Act defines the proper forum; § 1404 (a) of the Code deals with the right to transfer an action properly brought. The two sections deal with two separate and distinct problems. Section 1404 (a) does not limit or otherwise modify any right granted in § 6 of the Liability Act or elsewhere to bring suit in a particular district. . . ." *Ex parte Collett, supra,* 337 U. S., at 60.

Congress might have gone further; it might have vested state courts with the power asserted here. In fact, the same Congress which enacted § 1404 (a) refused to enact a bill which would have amended § 6 of the Federal Employers' Liability Act by limiting the employee's choice of venue to the place of his injury or to the place of his residence.

This proposed amendment—the Jennings Bill [11]—focused Congress' attention on the decisions of this Court in both the *Miles* and the *Kepner* cases. The broad question—involving many policy considerations—of whether venue should be more narrowly restricted, was reopened; cogent arguments—both pro and con—were restated. Proponents of the amendment asserted that, as a result of the *Miles* and *Kepner* decisions, injured employees were left free to abuse their venue rights under § 6 and "harass" their employers in distant forums without restriction. They insisted that these abuses be curtailed.[12]

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[11] H. R. 1639, 80th Cong., 1st Sess.

[12] See H. R. Rep. No. 613, 80th Cong., 1st Sess. (1947); Hearings before Subcommittee No. 4 of the House Committee on the Judiciary on H. R. 1639, 80th Cong., 1st Sess. (1947); Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 1567 and H. R. 1639, 80th Cong., 2d Sess. (1948). The Jennings Bill was debated extensively on the floor of the House. See 93 Cong. Rec. 9178–9193.

These arguments prevailed in the House, which passed the Jennings Bill,[13] but the proposed amendment died in the Senate Judiciary Committee, and § 6 of the Federal Employers' Liability Act was left just as this Court had construed it.[14]

Since the narrow question in this case is simply whether the *Miles* case is still controlling; since we find no legislation which has devitalized it in any way, and since we find affirmative evidence that Congress chose to let it stand, the judgment below must be

Reversed.

MR. JUSTICE BLACK agrees that the Georgia Supreme Court's judgment was "final" and concurs in reversing that judgment for the reasons given in this Court's opinion.

MR. JUSTICE REED, concurring. I am of the opinion that the Georgia judgment is not final. Compare *Clark* v. *Williard,* 292 U. S. 112. As this view does not prevail, I join in the rest of the opinion and the judgment of the Court.

MR. JUSTICE FRANKFURTER, dissenting.

Pope brought an action under the Federal Employers' Liability Act against the Atlantic Coast Line Railroad, a Virginia corporation, in the Circuit Court of Jefferson County, Alabama. The action derived from an injury sustained by Pope while employed in the railroad's shops at Fitzgerald, Georgia. Fitzgerald is a town in Ben Hill County, of which Pope is, and for many years has been, a resident. Before the Alabama action came to trial, the railroad filed this suit in the Superior Court of Ben Hill County to enjoin Pope from

[13] 93 Cong. Rec. 9194.

[14] See *Ex parte Collett, supra,* 337 U. S., at 62–65.

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proceeding with his action. In addition to averring the facts just recited, the railroad made allegations relating to the availability of witnesses for both parties and other factors relevant to a determination of the fairness of pursuing the litigation in Alabama. A general demurrer to this attempt to enjoin Pope from seeking to enforce his claim in Alabama was sustained by the Superior Court. The Supreme Court of Georgia, acting under the equitable doctrine of Georgia law which permits restraining a person within the State's jurisdiction "from doing an inequitable thing," reversed. 209 Ga. 187, 71 S. E. 2d 243. "The inequitable thing" which the court deemed it proper to restrain here was the accomplishment of "the employee's purpose . . . to obtain an inequitable and unconscionable advantage over the employer" by bringing his action in Alabama. 209 Ga., at 196, 71 S. E. 2d, at 249.

Had Pope's action against the railroad in Alabama not been based on the Federal Employers' Liability Act, or had it been a negligence action by a passenger, a Georgia court could, no doubt, under the circumstances alleged in this suit, have enjoined Pope or the passenger from proceeding. Do the decisions in *Baltimore & O. R. Co.* v. *Kepner,* 314 U. S. 44, and *Miles* v. *Illinois Central R. Co.,* 315 U. S. 698, in light of their basis and of the congressional response to them in § 1404 (a) of Title 28 of the United States Code, as revised in 1948, restrict the exercise of such general equity powers by Georgia?

I accept the *Kepner* and *Miles* decisions in the sense that I would not overrule them had Congress left them undisturbed. But Congress has cut the ground from under them.

The Court found in those two cases that Congress, by § 6 of the Federal Employers' Liability Act, had given plaintiffs unrestrainable freedom in the choice of a forum among the courts—State and federal—which were au-

thorized to entertain actions under the Act. Following the decisions in *Kepner* and *Miles,* Congress enacted § 1404 (a), permitting the transfer of "any civil action" from one federal district court to another. The rationale of *Kepner* and *Miles* foreclosed, so we had indicated, the possibility of such a transfer in Federal Employers' Liability cases. See *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, 505. In *Ex parte Collett,* 337 U. S. 55, we held that § 1404 (a) had removed the barrier of the *Kepner* and *Miles* decisions and made the doctrine of *forum non conveniens* applicable to cases arising in the federal courts under the Federal Employers' Liability Act as well as to the generality of cases. Congress, we said, naturally enough, had not repealed § 6, which *Kepner* and *Miles* construed, but had removed the "judicial gloss" represented by the Court's opinions in those two cases. 337 U. S., at 61.

The Court now reaffirms this "gloss" by treating it as an iron restriction not to be touched beyond the literal scope of its congressional rejection. In the *Collett* opinion the Court examined in detail the legislative materials pertaining to § 1404 (a). It gave no intimation that Congress did any less than to remove the entire gloss of *Kepner* and *Miles,* thereby freeing us from the compulsions these two cases found in § 6. Congress plainly indicated that the compulsions were the Court's artifact, not the purpose of Congress. The *Collett* case rests to no small extent on the illumination cast on § 1404 (a) by the Reviser's Notes in their explicit reference to *Kepner* as "an example of the need of . . . a provision" "permitting transfer to a more convenient forum." H. R. Rep. No. 308, 80th Cong., 1st Sess., App. 132. *Kepner* was of course not a case of transfer from one federal forum to another. It seems strange to derive from the Reviser's reference an intention to remedy a situation not presented by the facts of the *Kepner* case, and yet to leave

untouched a result very much like that of *Kepner,* which, indeed, as was found in *Miles,* was a necessary consequence of *Kepner.*

Such treatment of legislation seems to me the opposite of obedience to a statutory command. It is beside the point to urge that § 1404 (a) speaks only of *forum non conveniens* in the federal courts and not of State court injunctions against out-of-State suits. If § 1404 (a) is to be given a strictly literal scope, what is to be made of the Reviser's citation of the *Kepner* case, which is an inapt reference on the score of literalness, but quite apt if we consider the "need" that Congress was meeting?

Legislation was read in this hostile spirit in the mid-Victorian days when it was regarded, in the main, as wilful and arbitrary interference with the harmony of the common law and with its rational unfolding by judges. This is an attitude that treats words as ends and not as vehicles to convey meaning. One had supposed that this niggardly view of the function of legislation had long since become outmoded. Statutes, even as decisions, are not to be deemed self-enclosed instances; they are to be regarded as starting points of reasoning, as means for securing coherence and for effectuating purpose. See Landis, Statutes and the Sources of Law, Harvard Legal Essays 213–246.

Section 1404 (a) expresses a policy with respect to the enforcement of the Federal Employers' Liability Act; a policy, as the Reviser's Notes were astute to indicate, contrary to that represented by *Kepner,* and its offspring, *Miles.*[1] It is more than difficult to assume that Congress aimed at the result which this Court reached in the *Col-*

[1] No suggestion of a policy inconsistent with that expressed by § 1404 (a), as illumined by the Reviser's Note concerning it, can be derived from the failure of Congress to enact the Jennings Bill, H. R. 1639, 80th Cong., 1st Sess. That bill proposed to amend "the Fed-

lett case, and at the same time desired the result of *Miles* and of *Kepner* to continue to be law. Not to reject such an assumption is to attribute to Congress a disregard of the desirability of uniformity in the administration of the Federal Employers' Liability Act; more than that, it is to attribute to Congress a wish to create what may fairly be called, as we shall see, capricious and whimsical results.

The problem of avoiding abuse of the judicial process is not one that arises only in actions under the Federal Employers' Liability Act in the federal courts. Indeed,

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eral Employers' Liability Act by removing from section 6 (45 U. S. C. 56) the provision permitting actions to be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." The bill proposed as well to amend "the Judicial Code by adding a new paragraph to section 51 (28 U. S. C. 112) to provide the venue in any action brought against interstate common carriers by railroad for damages resulting from wrongful death or personal injuries." H. R. Rep. No. 613, 80th Cong., 1st Sess., at p. 2. In both actions under the Federal Employers' Liability Act and the other specified actions against railroads, the Jennings Bill would have permitted suit only in the district or county in which the plaintiff resided or the accident occurred. No doubt the abuses which are curable by discretionary dismissals under the doctrine of *forum non conveniens* or, as in this case, by means of an injunction, could be cured also in the manner of the Jennings Bill. But the difference between the two methods of attack is quite plain. The Jennings Bill represented a meat-ax approach and was opposed on precisely that ground by the minority in the House Committee on the Judiciary. The minority pointed out that the evil of "trafficking in, and solicitation of, lawsuits" originated with our *Kepner* and *Miles* decisions. The minority's aim was to have lawsuits "moved around for the convenience of witnesses and for other purposes in accordance with the provisions of the State laws" rather than be governed by the inflexible venue provisions of the Jennings Bill. *Id.*, at Part 2, pp. 3–4. If a congressional policy can be derived from rejection of the Jennings Bill, it is a policy which coincides with that expressed in the Reviser's Note to § 1404 (a), the policy, that is, which the Court disregards.

most of the actions under that Act are brought in the State courts. There is no rhyme or reason in assuming that Congress was eager to shut off abuses in the federal courts but forbade their prevention by State courts.[2] Congress dealt specifically with the abuses in the federal courts since, in Title 28, it was addressing itself to federal courts. But the central fact is that Congress was formulating a policy. To disregard the natural implications of a statute and to imprison our reading of it in the shell of the mere words is to commit the cardinal sin in statutory construction, blind literalness.

The doctrine enunciated by *Kepner* and *Miles* at least made for uniformity in the operation of § 6, in that those cases treated the grant of authority to State and federal courts to entertain Federal Employers' Liability actions as the grant of an unqualified right to plaintiffs, indefeasible regardless of the interests of justice affected in its exercise.[3] Now, under § 1404 (a), federal courts may freely apply, and do apply, the doctrine of *forum non conveniens* to Federal Employers' Liability cases. *Ex parte Collett, supra.* So may State courts. *Southern R. Co.* v. *Mayfield,* 340 U. S. 1. Alabama is one of a minority of the States which has ruled that it will not recognize the doctrine of *forum non conveniens.* See

[2] To suggest that Congress, if it saw fit, could "vest" in State courts the power which this Court now denies them is, of course, to misconceive our problem. The issue is not what Congress might grant to State judiciaries but whether it has deprived them of a power which inheres in them.

[3] To be sure, *Douglas* v. *New York, N. H. & H. R. Co.,* 279 U. S. 377, was not overruled, and a State court was presumably free to try to dismiss an action under the Federal Employers' Liability Act on the ground that it was brought in a *forum non conveniens.* This, however, was not a very likely occurrence in view of the language of the *Kepner* and *Miles* opinions, and so the plaintiff's choice of a forum was almost always certain to be respected in both federal and State courts.

Barrett, The Doctrine of *Forum non Conveniens,* 35 Calif. L. Rev. 380, at 388, n. 40. Only if he brings his action in a court of one of these States can a plaintiff be sure, under today's decision, that no matter how unjustifiable his choice, the forum in which the action is brought will be the forum in which it is tried. The sole effect of our adherence to *Kepner–Miles* now is the creation of a haven in which the choice of a harassing forum, an activity which Congress has condemned in § 1404 (a) and which therefore we no longer ought to regard as legitimate, may be carried on by virtue of our "judicial gloss," although it would not be tolerated in other courts in the United States, including those over which we have supervising authority.

Is it reasonable to suggest that Congress contemplated this situation? Is it fair to infer that Congress removed the "judicial gloss" only to the extent that the strictest reading of its words indicates, no matter how mutilated this left the policy which Congress, as the Reviser's Notes show, clearly avowed?

If the suit now before us had been brought in a federal court outside Georgia, or in any one of a number of other State courts, it would in all probability have been tried in Georgia, since under the doctrine of *forum non conveniens* the criteria which determined the exercise by Georgia of its equity powers would have been equally decisive. This result, that is, trial in Georgia on defendant's motion in the circumstances here present, does not run counter to the policy of the Federal Employers' Liability Act; we decreed its equivalent in *Collett.* Nor is it that the device employed by Georgia to prevent trial in Alabama is objectionable, for it is a familiar remedy of equity employed in the interests of justice. We have sanctioned its use in other appropriate instances, see *Cole* v. *Cunningham,* 133 U. S. 107, and should not deny its use to Georgia

in effectuating an end whose desirability is no longer open to question.

By nothing that I have said do I mean to imply that every application by a State court of the doctrine of *forum non conveniens* in an action under the Federal Employers' Liability Act, or every cognate injunction, is necessarily proper, and that none may run afoul of that Act. By no technical or local procedural device can a State defeat the effective enjoyment of a federal right. See *American Railway Express Co.* v. *Levee,* 263 U. S. 19; *Davis* v. *Wechsler,* 263 U. S. 22. But on the admitted facts now before us there can be no doubt that the choice of Alabama as a forum was purely vexatious. On this record there is not the least shred of relevant connection between this litigation and Alabama.

POULOS *v.* NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

No. 341. Argued February 3, 1953.—Decided April 27, 1953.

1. A city ordinance forbade the holding of a religious meeting in a public park without a license. The State Supreme Court construed it as leaving to the licensing officials no discretion as to the granting of licenses, no power to discriminate, and no control over speech, and as calling merely for the adjustment of the unrestrained exercise of religions with the reasonable comfort and convenience of the whole city. *Held:* As thus construed, the ordinance does not violate the principles of the First Amendment, made applicable to the States by the Fourteenth Amendment. Pp. 402–408.

   (a) Appellant's attack on the ordinance as applied to him, on the ground that it was repugnant to the principles of the First Amendment, and a determination of its validity by the State Supreme Court, required this Court to take jurisdiction on appeal under 28 U. S. C. § 1257 (2). P. 402.

   (b) The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction. P. 405.

   (c) *Kunz* v. *New York*, 340 U. S. 290, and *Saia* v. *New York*, 334 U. S. 558, distinguished. Pp. 406–408.

2. Having been arbitrarily and unlawfully denied a license, appellant proceeded to hold a religious meeting in a public park without a license and was convicted and fined for a violation of the ordinance. The State Supreme Court held that the proper state remedy for wrongful denial of the license was by certiorari to review the unlawful action of the licensing officials, not by holding public religious services in the park without a license and then defending because the refusal of the license was arbitrary. *Held:* The conviction did not violate appellant's rights under the First Amendment, made applicable to the States by the Fourteenth Amendment. Pp. 408–414.

(a) It cannot be said that failure of officials to act in accordance with state law, redressable by state judicial procedures, are state acts violative of the Federal Constitution. P. 409.

(b) Nor can it be said that a State's requirement that redress for unlawful denial of the license be sought through appropriate judicial procedure violates due process. P. 409.

(c) *Royall* v. *Virginia,* 116 U. S. 572; *Cantwell* v. *Connecticut,* 310 U. S. 296; and *Thomas* v. *Collins,* 323 U. S. 516, distinguished. Pp. 410–414.

(d) The Constitution does not require approval of the violation of a reasonable requirement for a license to speak in public parks because an official error occurred in refusing a proper application. P. 414.

97 N. H. 352, 88 A. 2d 860, affirmed.

Appellant's conviction of a violation of a city ordinance forbidding the holding of a religious meeting in a public park without a license was sustained by the Supreme Court of New Hampshire. 97 N. H. 352, 88 A. 2d 860. On appeal to this Court, *affirmed,* p. 414.

Hayden C. Covington argued the cause and filed a brief for appellant.

Gordon M. Tiffany argued the cause for appellee. With him on the brief were *Louis C. Wyman,* Attorney General of New Hampshire, and *Henry Dowst, Jr.,* Assistant Attorney General. *Mr. Tiffany,* then Attorney General of New Hampshire, was also on a Statement Opposing Jurisdiction and a Motion to Dismiss or Affirm.

Mr. Justice Reed delivered the opinion of the Court.

This appeal presents the validity of a conviction of appellant for conducting religious services in a public park of Portsmouth, New Hampshire, without a required license, when proper application for the license had been arbitrarily and unreasonably refused by the City Council. The conclusion depends upon consideration of the prin-

ciples of the First Amendment secured against state abridgment by the Fourteenth.[1]

Appellant is one of Jehovah's Witnesses. Permission for appellant and another Witness, now deceased, was sought to conduct services in Goodwin Park on June 25 and July 2. They offered to pay all proper fees and charges, and complied with the procedural requirements for obtaining permission to use the park. When the license was refused on May 4, appellant nevertheless held the planned services and continued them until arrested. He was charged with violation of § 22 of the city ordinance set out below.[2] On conviction in the Municipal Court he was fined $20 and took an appeal which entitled him to a plenary trial before the Superior Court. Before that trial appellant moved to dismiss the complaints on the

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[1] *Schneider* v. *State*, 308 U. S. 147, 160.

Constitution, First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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."

Id., Fourteenth Amendment:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[2] "Section 22. License Required. No theatrical or dramatic representation shall be performed or exhibited and no parade or procession upon any public street or way, and no open air public meeting upon any ground abutting thereon shall be permitted unless a license therefor shall first be obtained from the City Council.

"Section 23. License Form. Every such license shall be in writing and shall specify the day and hour of the permit to perform or exhibit, or of such parade, procession or open air public meeting.

"Section 24. Fee. The fee for such license shall be not more than Three Hundred Dollars for each day such licensee shall perform

ground that "the ordinance as applied was unconstitutional and void." This motion on the constitutional question, pursuant to New Hampshire practice, was transferred to the Supreme Court. It ruled, as it had on a former prosecution under a different clause of an identical section, so far as pertinent, of a New Hampshire statute, against one Cox, *State* v. *Cox,* 91 N. H. 137, 143, 16 A. 2d 508, 513, that:

> "The discretion thus vested in the authority [city council] is limited in its exercise by the bounds of reason, in uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate. The licensing authority has no delegation of power in excess of that which the legislature granting the power has and the legislature attempted to delegate no power it did not possess." *State* v. *Derrickson,* 97 N. H. 91, 93, 81 A. 2d 312, 313.

In *Cox* v. *New Hampshire,* 312 U. S. 569, we affirmed on appeal from the New Hampshire conviction of Cox, acknowledging the usefulness, p. 576, of the state court's carefully phrased interpretive limitation on the licensing authority. The Supreme Court of New Hampshire went on to hold the challenged clause in this present prosecution valid also in these words:

> "The issue which this case presents is whether the city of Portsmouth can prohibit religious and church

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or exhibit or such parade, procession, or open air public meeting shall take place, but the fee for a license to exhibit in any hall shall not exceed Fifty Dollars.

"Section 25. Penalty. Any person who violates section 22 of this Article shall be fined Twenty Dollars."

> meetings in Goodwin Park on Sundays under a licensing system which treats all religious groups in the same manner. Whether a city could prohibit religious meetings in all of its parks is a doubtful question which we need not decide in this case. What we do decide is that a city may take one of its small parks and devote it to public and nonreligious purposes under a system which is administered fairly and without bias or discrimination." 97 N. H., at 95, 81 A. 2d, at 315.

Thereupon it discharged the case.

The result of this action was to open the case now here in the Superior Court for trial. At the conclusion of the evidence, appellant raised federal issues by a motion to dismiss the complaint set out below.[3] The Superior Court passed upon the issues raised. It held that *Cox* v. *New Hampshire,* 312 U. S. 569, determined the validity of the section of the ordinance under attack; that the

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[3] "1. The undisputed evidence shows that the members of the city council and the city council itself acted arbitrarily, capriciously and without support of law and of fact when they denied the application made by Jehovah's witnesses in behalf of the defendants to deliver the public talks upon the occasions in question.

"2. The undisputed evidence shows that the park in question is a public park, dedicated as such without any limitations in the deed of dedication or in the ordinances of the City of Portsmouth and the defendants had the legal right to deliver the talks in the park and it was the duty of the city council to issue to the defendants permits to use the public park in question for public meetings and public talks.

"3. If the ordinance is construed and applied so as to justify convictions of the defendants under the facts in this case, then the ordinance is unconstitutional as construed and applied because it abridges the rights of the defendants to freedom of assembly, freedom of speech and freedom of worship, contrary to the Bill of Rights of the New Hampshire Constitution and the First and Fourteenth Amendments to the Constitution of the United States."

refusal of the licenses by the City Council was arbitrary and unreasonable, but refused to dismiss the prosecution on that ground because:

> "The respondents could have raised the question of their right to licenses to speak in Goodwin Park by proper civil proceedings in this Court, but they chose to deliberately violate the ordinance."

On appeal, the Supreme Court of New Hampshire affirmed.[4] It held the ordinance valid on its face under *Cox* v. *New Hampshire,* 312 U. S. 569. While the *Cox* case involved the clause of the ordinance, § 22, relating to "parade or procession upon any public street or way," the New Hampshire Supreme Court thought the present prosecution was "under a valid ordinance which requires a license before open air public meetings may be held." This was the first ruling on the public speech clause. Cf. *State* v. *Cox,* 91 N. H., at 143, 16 A. 2d, at 513; *Cox* v. *New Hampshire,* 312 U. S., at 573. As the ordinance was valid on its face the state court determined the remedy was by certiorari to review the unlawful refusal of the Council to grant the license, not by holding public religious services in the park without a license, and then defending because the refusal of the license was arbitrary.

Appellant's challenge on federal grounds to the action and conclusion of the New Hampshire courts is difficult to epitomize. By paragraph 3 of his motion to dismiss, note 3, *supra,* appellant relied on the principles of the First Amendment for protection against the city ordinance. In his statement of jurisdiction, the question presented, No. I, the illegal denial of his application for a license, was urged as a denial of First Amendment principles.[5] In his

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[4] *State* v. *Poulos,* 97 N. H. 352, 88 A. 2d 860.

[5] "Is the construction of the laws of New Hampshire and the ordinance in question—so as to completely deny the appellant the right to challenge the federal constitutionality of the ordinance, as enforced,

brief, he phrases the issue differently as indicated below.[6] We conclude that appellant's contentions are, first, no license for conducting religious ceremonies in Goodwin Park may be required because such a requirement would abridge the freedom of speech and religion guaranteed by the Fourteenth Amendment; second, even though a license may be required, the arbitrary refusal of such a license by the Council, resulting in delay, if appellant must, as New Hampshire decided, pursue judicial remedies, was unconstitutional, as an abridgment of free speech and a prohibition of the free exercise of religion. The abridgment would be because of delay through judicial proceedings to obtain the right of speech and to carry out religious exercises. The due process question raised

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construed and applied in criminal proceedings brought to punish appellant for holding a meeting and giving a speech in the city park of Portsmouth without a permit, which was applied for and illegally denied according to the holdings of the courts below—an abridgment of the rights of appellant to freedom of speech and assembly contrary to the First and Fourteenth Amendments to the Constitution of the United States?"

[6] "Is the administration and enforcement of the ordinance by the City Council, requiring a permit for holding meetings in the parks of Portsmouth so as to deny all applications made by religious organizations to hold religious meetings and deliver religious talks in the parks of Portsmouth, an abridgment of freedom of speech, assembly and worship in violation of the First and Fourteenth Amendments to the United States Constitution?"

"Does the construction and application of the ordinance and the law of New Hampshire so as to require appellant to apply for a writ of mandamus or certiorari as the only remedies to correct the unconstitutional administration of the ordinance, and also so as to deny the defense in the criminal prosecution that the construction and application of the ordinance by the City Council was in violation of his rights guaranteed by the federal Constitution, amount to an abridgment of freedom of speech, assembly and worship contrary to the First and Fourteenth Amendments to the United States Constitution?"

by appellant as a part of the latter constitutional contention disappears by our holding, as indicated later in this opinion, that the challenged clause of the ordinance and New Hampshire's requirement for following a judicial remedy for the arbitrary refusal are valid. This analysis showing an attack on the ordinance as applied as repugnant to the principles of the First Amendment and a determination of its validity by the New Hampshire Supreme Court requires us to take jurisdiction by appeal.[7] The state ground for affirmance, *i. e.*, the failure to take certiorari from the action refusing a license, depends upon the constitutionality of the ordinance.

First. We consider the constitutionality of the requirement that a license from the city must be obtained before conducting religious exercises in Goodwin Park. Our conclusion takes into consideration the interpretive limitation repeated from *State* v. *Cox,* quoted at p. 398 of this opinion. This state interpretation is as though written into the ordinance itself. *Winters* v. *New York,* 333 U. S. 507, 514. It requires uniform, nondiscriminatory and consistent administration of the granting of licenses for public meetings on public streets or ways or such a park as Goodwin Park, abutting thereon.[8] The two opinions of the Supreme Court of New Hampshire do not state in precise words that reasonable opportunities for public religious or other meetings on public property must be granted under this ordinance to such religious organizations as Jehovah's Witnesses. In the former appeal of this controversy in the *Derrickson* case, *supra,* New Hampshire decided that the city could exclude, without discrimination, all religious meetings from Goodwin Park,

[7] *King Mfg. Co.* v. *Augusta,* 277 U. S. 100; *Jamison* v. *Texas,* 318 U. S. 413. When the appeal was docketed we postponed determination of jurisdiction of the appeal to the hearing on the merits. 28 U. S. C. § 1257 (2); Rules of the Supreme Court, No. 12 (5).

[8] *State* v. *Derrickson,* 97 N. H. 91, 94, 81 A. 2d 312, 314.

if it so desired, leaving that one park, among several, there being no showing of its unique advantages for religious meetings, as a retreat for quietness, contemplation or other nonreligious activities. The Supreme Court refused to determine whether religious meetings could be excluded from all parks at all times. That has not been decided in this appeal. Informed witnesses at this trial without contradiction testified that no public religious services were ever licensed in any Portsmouth park. There was no allocation of parks between religious and nonreligious meetings. The Superior Court held the refusal of this license arbitrary and unreasonable. Obviously the license required is not the kind of prepublication license deemed a denial of liberty since the time of John Milton but a ministerial, police routine for adjusting the rights of citizens so that the opportunity for effective freedom of speech may be preserved.[9] While there was no assertion of the invalidity of the ordinance on its face, the Supreme Court determined the validity of the ordinance as applied. See *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 287; *Charleston Assn.* v. *Alderson,* 324 U. S. 182, 185–186.[10] We can only conclude from these decisions that the Supreme Court of New Hampshire has held that the ordinance is valid and, as now

[9] *Niemotko* v. *Maryland,* 340 U. S. 268, concurrence at 282: "A licensing standard which gives an official authority to censor the content of a speech differs *toto caelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like."

[10] "It has been conceded by the defense on this transfer, as well as on the first one, that the ordinance is valid on its face. It is identical in language with the statute that was construed as valid in *State* v. *Cox,* 91 N. H. 137, which was affirmed in *Cox* v. *New Hampshire,* 312 U. S. 569. It is not disputed that the ordinance applies to the park that was the scene of the open air meetings in question. No objection has been made to the application of the ordinance to the areas where the meetings took place, and no exception taken

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written, made it obligatory upon Portsmouth to grant a license for these religious services in Goodwin Park. The appellant's contention that the Council's application of the ordinance so as to bar all religious meetings in Goodwin Park without a license, made the ordinance unconstitutional, was not sustained by the Supreme Court of New Hampshire. Appellant's brief, p. 3, continues the claim in this Court as follows:

> "This exception presented to the Supreme Court of New Hampshire the question. It is whether the ordinance as enforced by the City Council, under its policy to refuse religious meetings in the park, was a violation of the federal Constitution."

By its construction of the ordinance the state left to the licensing officials no discretion as to granting permits, no power to discriminate, no control over speech. There is therefore no place for narrowly drawn regulatory require-

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to any finding or ruling with respect thereto." 97 N. H. 352, 354, 88 A. 2d 860, 861.

"Again we call attention to the fact that in this jurisdiction if a licensing statute is constitutional and applies to those seeking a license, the remedy here provided consists of proceedings against the licensing authority that has wrongfully denied the license." 97 N. H., at 356, 88 A. 2d, at 862–863.

Distinguishing *Hague* v. *C. I. O.*, 307 U. S. 496, where a defense of unconstitutionality was allowed in a prosecution for holding a public meeting without a license, the State Court said: "Permits had been refused for public meetings, but, unlike the case at bar, the prosecutions were contemplated under ordinances that were invalid." 97 N. H., at 356–357, 88 A. 2d, at 863.

"The remedy of the defendant Poulos for any arbitrary and unreasonable conduct of the city council was accordingly in *certiorari* or other appropriate civil proceedings." 97 N. H., at 357, 88 A. 2d, at 863.

This conclusion follows the rule in *State* v. *Stevens*, 78 N. H. 268, 269–270, 99 A. 723, 724–725, that where a license statute is valid an erroneous refusal of the license cannot be attacked collaterally on prosecution for acting without a license.

ments or authority. The ordinance merely calls for the adjustment of the unrestrained exercise of religions with the reasonable comfort and convenience of the whole city. Had the refusal of the license not been in violation of the ordinance, the Supreme Court would not, we are sure, have required the appellant in its next application to go through the futile gesture of certiorari only to be told the Portsmouth Council's refusal of a license was a valid exercise of municipal discretion under the ordinance and the Fourteenth Amendment. Such state conclusions are not invalid, although they leave opportunity for arbitrary refusals that delay the exercise of rights.

The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction. It is a *non sequitur* to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated the contrary. It has indicated approval of reasonable nondiscriminatory regulation by governmental authority that preserves peace, order and tranquillity without deprivation of the First Amendment guarantees of free speech, press and the exercise of religion.[11] When considering specifically the regulation of

[11] Constitutionally protected right to circulate publications does not include door-to-door canvassing for subscriptions contrary to the reasonable limitations of a municipal ordinance. See *Breard* v. *Alexandria,* 341 U. S. 622, 641.

Lovell v. *Griffin,* 303 U. S. 444, 451:

"The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse

the use of public parks, this Court has taken the same position. See the quotation from the *Hague* case (below) and *Kunz* v. *New York,* 340 U. S. 290, 293–294; *Saia* v. *New York,* 334 U. S. 558, 562. In these cases, the ordinances were held invalid, not because they regu-

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or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager."

In considering a required permit in *Hague* v. *C. I. O.,* 307 U. S. 496, Mr. Justice Roberts, in considering an ordinance that gave the Director of Public Safety discretion as to issue of park permits, p. 502, wrote:

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied." Pp. 515–516.

Schneider v. *State,* 308 U. S. 147, 160–161:

"Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of

lated the use of the parks for meeting and instruction but because they left complete discretion to refuse the use in the hands of officials. "The right to be heard is placed in the uncontrolled discretion of the Chief of Police." 334 U. S., at 560. "[W]e have consistently

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such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion."

Cantwell v. *Connecticut*, 310 U. S. 296, 306–307:

"Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury. Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The State is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience. But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution."

In considering conviction, for an unlicensed religious parade, under a statute with provisions similar to this ordinance, we said:

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public

condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." 340 U. S., at 294.

There is no basis for saying that freedom and order are not compatible. That would be a decision of desperation. Regulation and suppression are not the same,[12] either in purpose or result, and courts of justice can tell the difference. We must and do assume that with the determination of the Supreme Court of New Hampshire that the present ordinance entitles Jehovah's Witnesses to hold religious services in Goodwin Park at reasonable hours and times, the Portsmouth Council will promptly and fairly administer their responsibility in issuing permits on request.

Second. New Hampshire's determination that the ordinance is valid and that the Council could be compelled to issue the requested license on demand brings us face to face with another constitutional problem. May this man be convicted for holding a religious meeting without a license when the permit required by a valid enactment—the ordinance in this case—has been wrongfully refused by the municipality?

Appellant's contention is that since the Constitution guarantees the free exercise of religion, the Council's un-

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attention to an announcement of his opinions." *Cox* v. *New Hampshire,* 312 U. S. 569, 574.

"If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state court contravened any constitutional right." *Id.,* at 576.

[12] *Near* v. *Minnesota,* 283 U. S. 697, 712; *Breard* v. *Alexandria,* 341 U. S. 622, 641; First Amendment.

lawful refusal to issue the license is a complete defense to this prosecution. His argument asserts that if he can be punished for violation of the valid ordinance because he exercised his right of free speech, after the wrongful refusal of the license, the protection of the Constitution is illusory. He objects that by the Council's refusal of a license, his right to preach may be postponed until a case, possibly after years, reaches this Court for final adjudication of constitutional rights. Poulos takes the position that he may risk speaking without a license and defeat prosecution by showing the license was arbitrarily withheld.

It must be admitted that judicial correction of arbitrary refusal by administrators to perform official duties under valid laws is exulcerating and costly. But to allow applicants to proceed without the required permits to run businesses, erect structures, purchase firearms, transport or store explosives or inflammatory products, hold public meetings without prior safety arrangements or take other unauthorized action is apt to cause breaches of the peace or create public dangers. The valid requirements of license are for the good of the applicants and the public. It would be unreal to say that such official failures to act in accordance with state law, redressable by state judicial procedures, are state acts violative of the Federal Constitution. Delay is unfortunate, but the expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning. Nor can we say that a state's requirement that redress must be sought through appropriate judicial procedure violates due process.[13]

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[13] It may be that in some states, the proof of proper application and unlawful refusal is a sufficient defense. It is also true that others punish activities without a license, following an unlawful

It is said that *Royall* v. *Virginia,* 116 U. S. 572; *Cantwell* v. *Connecticut,* 310 U. S. 296, 306, and *Thomas* v. *Collins,* 323 U. S. 516, stand as decisions contrary to the New Hampshire judgment. In the *Royall* case two statutes were involved. One laid down the requirement that before attorneys could practice law in Virginia they had to obtain a special "revenue license." At the time this statute was enacted, Virginia law permitted license fees to be paid in either "tax due coupons" or money. Subsequently Virginia passed another statute with which the *Royall* case was concerned. It provided that license fees could only be paid in "lawful money of the United States." Royall tendered "tax due coupons" for the amount of the license fee, had them refused, and Royall then proceeded to practice law without the license.

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refusal. *Commonwealth* v. *McCarthy,* 225 Mass. 192, 114 N. E. 287; *State* v. *Stevens,* 78 N. H. 268, 99 A. 723; *Phoenix Carpet Co.* v. *State,* 118 Ala. 143, 22 So. 627; *City of Montpelier* v. *Mills,* 171 Ind. 175, 85 N. E. 6; *Commonwealth* v. *Gardner,* 241 Mass. 86, 134 N. E. 638; *State* v. *Orr,* 68 Conn. 101, 35 A. 770; *City of Malden* v. *Flynn,* 318 Mass. 276, 61 N. E. 2d 107. A close parallel exists between unlawful refusals and failure to apply for license on the ground that such application would be unavailing. Such a defense is not allowed. "It is well settled that where a licensing ordinance, valid on its face, prohibits certain conduct unless the person has a license, one who without a license engages in that conduct can be criminally prosecuted without being allowed to show that the application for a license would have been unavailing. . . . In short, the individual is given the choice of securing a license, or staying out of the occupation, or, before he acts, seeking a review in the civil courts of the licensing authority's refusal to issue him a license. Likewise in the case at bar the defendants are given the choice of complying with the regulation, or not engaging in the regulated activity, or, before they act, petitioning the appropriate civil tribunals for a modification of or exception from the regulation." *United States* v. *Slobodkin,* 48 F. Supp. 913, 917. See cases cited, particularly *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 554.

The statute requiring payment in money was held unconstitutional:

> "Admitting this, it is still contended, on behalf of the Commonwealth, that it was unlawful for the plaintiff in error to practice his profession without a license, and that his remedy was against the officers to compel them to issue it. It is doubtless true, as a general rule, that where the officer, whose duty it is to issue a license, refuses to do so, and that duty is merely ministerial, and the applicant has complied with all the conditions that entitle him to it, the remedy by *mandamus* would be appropriate to compel the officer to issue it. That rule would apply to cases where the refusal of the officer was wilful and contrary to the statute under which he was commissioned to act. But here the case is different. The action of the officer is based on the authority of an act of the General Assembly of the State, which, although it may be null and void, because unconstitutional, as against the applicant, gives the color of official character to the conduct of the officer in his refusal; and, although at the election of the aggrieved party the officer might be subjected to the compulsory process of *mandamus* to compel the performance of an official duty, nevertheless the applicant, who has done everything on his part required by the law, cannot be regarded as violating the law if, without the formality of a license wrongfully withheld from him, he pursues the business of his calling, which is not unlawful in itself, and which, under the circumstances, he has a constitutional right to prosecute. As to the plaintiff in error, the act of the General Assembly of the State of Virginia forbidding payment of his license tax in its coupons, receivable for that tax by a contract protected by the

> Constitution of the United States, is unconstitutional, and its unconstitutionality infects and nullifies the antecedent legislation of the State, of which it becomes a part, when applied, as in this case, to enforce an unconstitutional enactment against a party, not only without fault, but seeking merely to exercise a right secured to him by the Constitution. . . .
>
> "In the present case the plaintiff in error has been prevented from obtaining a license to practice his profession in violation of his rights under the Constitution of the United States. To punish him for practicing it without a license thus withheld is equally a denial of his rights under the Constitution of the United States, and the law, under the authority of which this is attempted, must on that account and in his case be regarded as null and void." 116 U. S., at 582–583.

In *Cantwell* v. *Connecticut*, the statute in question forbade solicitation for religious causes without a license with this discretionary power in the secretary of the public welfare council:

> "Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect." 310 U. S., at 302.

We said, speaking of the secretary:

> "If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exer-

> cise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth." *Id.*, at 305.

In the *Thomas* case, a statute of Texas was involved that required labor union organizers to obtain an organizer's card before soliciting membership. § 5, 323 U. S., at 519, note 1. He was enjoined from soliciting membership without the card and violated the injunction. *Id.*, at 518. This Court concluded that Thomas was forbidden by the statute from making labor union speeches anywhere in Texas without a permit for solicitation of membership. *Id.*, at 532 *et seq.* The Court treated the statute as a prohibition of labor union discussion without an organizer's card anywhere within the bounds of Texas legislative power. It said:

> "We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." *Id.*, at 540.

The Court allowed the unconstitutionality of the statute to be used as a complete defense to contempt of the injunction.

It is clear to us that neither of these decisions is contrary to the determination of the Supreme Court of New Hampshire. In both of the above cases the challenged statutes were held unconstitutional. In the *Royall* case, the statute requiring payment of the license fee in money was unconstitutional. In the *Cantwell* case, the statute

had not been construed by the state court "to impose a mere ministerial duty on the secretary of the welfare council." The right to solicit depended on his decision as to a "religious cause." 310 U. S., at 306. Therefore we held that a statute authorizing this previous restraint was unconstitutional even though an error might be corrected after trial. In the *Thomas* case, the section of the Texas Act was held prohibitory of labor speeches anywhere on private or public property without registration. This made § 5 unconstitutional. The statutes were as though they did not exist. Therefore there were no offenses in violation of a valid law. In the present prosecution there was a valid ordinance, an unlawful refusal of a license, with remedial state procedure for the correction of the error. The state had authority to determine, in the public interest, the reasonable method for correction of the error, that is, by certiorari. Our Constitution does not require that we approve the violation of a reasonable requirement for a license to speak in public parks because an official error occurred in refusing a proper application.

Affirmed.

MR. JUSTICE FRANKFURTER, concurring in the result.

I am constrained to protest against the Court's discussion under *First* because it deals with an issue that is not here.

In no area of adjudication is the adage "silence is golden" more pertinent, when there is no duty to speak, than in the series of problems to which a judicial reconciliation between liberty and order gives rise. It is more than a counsel of wisdom. When there is no duty to speak on such issues there is a duty not to speak. This is not so merely because constitutional pronouncements, when a case before the Court does not call for them, vio-

late a constitutional practice sanctioned by history and reinforced by the costly experience of occasional departures from it. The practice is especially compelling in cases involving the scope and limits of judicial protection of religious freedom and freedom of speech. These present perhaps the most difficult issues for courts. By their very vastness, the themes to be translated into law lend themselves too readily to the innocent deceptions of rhetoric. Every new attempt to translate the legal content of these liberties impliedly brings into question prior attempts; at the least it encourages further efforts at exegesis.

The Court's opinion has carefully and, if I may say so, correctly defined the question to which it addresses itself in *First*. The Court finds that Poulos presents two contentions:

> "first, no license for conducting religious ceremonies in Goodwin Park may be required because such a requirement would abridge the freedom of speech and religion guaranteed by the Fourteenth Amendment; second, even though a license may be required, the arbitrary refusal of such a license by the Council, resulting in delay, if appellant must, as New Hampshire decided, pursue judicial remedies, was unconstitutional, as an abridgment of free speech and a prohibition of the free exercise of religion."

If lucid English means what it unambiguously says, the "first" contention in the above quotation—"no license for conducting religious ceremonies in Goodwin Park may be required because such a requirement would abridge the freedom of speech and religion guaranteed by the Fourteenth Amendment"—means that the Due Process Clause of the Fourteenth Amendment bars New Hampshire from requiring a license for "an open air public

meeting," as is required by the ordinance of Portsmouth.[1] And this in legal terms is a claim by the appellant that the ordinance (for jurisdictional purposes, a statute) is void on its face. Such precisely was the explicit claim made in *Cox* v. *New Hampshire,* 312 U. S. 569. In the *Cox* case the claim was that the scheme of licensing as such was out of constitutional bounds. It was to that issue that our unanimous decision was directed. From the beginning of the litigation that claim was explicitly rejected in the present case and at no subsequent stage of the litigation has Poulos claimed that the licensing scheme as such was void. No such claim is made in his statement as to jurisdiction, in his reply to the statement in opposition, or in his brief and reply brief on the merits. *Kai gar,* as the expressive Greek phrase ran—naturally so. Experienced counsel for Poulos tried to take himself from under the *Cox* decision and distinguished it from this case in that here "the respondents [the codefendant, Derrickson, died after the trial in the New Hampshire Superior Court] have attempted to comply with the ordinance and offered to pay the necessary fee and expenses." It is not that

[1] When the case was first before the New Hampshire Supreme Court on a stipulation of facts essentially different from the findings on which the decision in the present case must rest, there was in issue the claim that the city may not refuse a license for religious meetings in one park even "if there are still adequate places of assembly for those who wish to hold public open air church meetings." This question was taken out of the case upon remand for the trial which resulted in the conviction now before us. It was then found that the refusal to grant a license in this case was "arbitrary and unreasonable." In its second review of the case, in the only decision that is now here, the New Hampshire Supreme Court assumed that the Council's action was unlawful. Accordingly all that is subject to review now is the question whether the procedural law of New Hampshire, in relation to an illegally withheld license, may constitutionally operate in the circumstances of this case.

Poulos estopped himself, by applying for a license, from thereafter assailing the statute as void. It is that throughout he conceded the ordinance to be "valid on its face." *State* v. *Poulos,* 97 N. H. 352, 354, 88 A. 2d 860, 861.

The real constitutional attack that Poulos makes in the proceedings which are here under review, in all the briefs that are here filed, and in the oral argument, is founded on the fact that he was denied the opportunity to set up in a prosecution, under § 25 of the Portsmouth ordinance, for speaking without a license, the claim that in denying the license for which he applied the Portsmouth City Council acted arbitrarily and unreasonably. The only issue that arises from the proceedings had in the Portsmouth Municipal Court, which fined Poulos $20, in the Superior Court, which sustained the fine, and in the Supreme Court of New Hampshire, which affirmed the Superior Court, was whether the remedy for the concededly wrongful refusal to grant Poulos a license was mandamus to the City Council. These courts all agreed that he could not set up as a defense in the prosecution for speaking without a license the arbitrary conduct of the City Council in denying him one.

The matter was put with entire accuracy in the ruling of the Superior Court, which the Supreme Court found unexceptionable:

> "Counsel have tried these cases on the theory that the refusal of the City Council to grant licenses to the respondents was in issue. It is found as a fact that the action of the City Council in refusing to grant licenses to the respondents was arbitrary and unreasonable, but the Court rules as a matter of law that this issue is not properly before it in these proceedings." See *State* v. *Poulos, supra,* 97 N. H., at 353, 88 A. 2d, at 861.

The validity of this procedural requirement of New Hampshire—that the remedy for an unlawful denial of a license is mandamus or certiorari—is the only issue which the New Hampshire Supreme Court had before it:

> "According to the [Superior] Court, the defendants misconceived their remedy. It has been conceded by the defense on this transfer [of the case from the Superior Court], as well as on the first one, that the ordinance is valid on its face. It is identical in language with the statute that was construed as valid in *State* v. *Cox,* 91 N. H. 137, which was affirmed in *Cox* v. *New Hampshire,* 312 U. S. 569. It is not disputed that the ordinance applies to the park that was the scene of the open air meetings in question. No objection has been made to the application of the ordinance to the areas where the meetings took place, and no exception taken to any finding or ruling with respect thereto." See *State* v. *Poulos, supra,* 97 N. H., at 354, 88 A. 2d, at 861.

Nowhere in any one of the four documents submitted to this Court on behalf of Poulos is there any showing that more than this procedural issue is before us. The grievance that is here is not that a license was required for speaking in Goodwin Park. The claim is that, having duly complied with this requirement by applying for a license that was then wrongfully refused, Poulos was free to speak without a license, and that he was not required to go to the Superior Court for a mandamus against the City Council.

In short, what is discussed under *First* in the Court's opinion would have been precisely appropriate had Poulos made the claim made in *Cox,* namely, that the congregation of Jehovah's Witnesses were not required to apply for a license, but is wholly without pertinence on the present record.

To be sure, Poulos makes the claim—having conceded that the statute is valid on its face—that the ordinance is unconstitutional "as applied" "under the facts in this case." But what "facts"? The facts are these: having complied with the statute requiring a license, he was not allowed to set up as a defense for its violation the fact that the want of a license was due to the illegal conduct of the licensing agency.

That is precisely what is correctly defined by the Court as the "second" contention:

> "second, even though a license may be required, the arbitrary refusal of such a license by the Council, resulting in delay, if appellant must, as New Hampshire decided, pursue judicial remedies, was unconstitutional, as an abridgment of free speech and a prohibition of the free exercise of religion."

But that is not the "second" contention. It is the only contention. It is the only contention that was before the New Hampshire Supreme Court in the proceeding we are reviewing, and it is the only contention, however variously phrased, on which Poulos can obtain review here.[2] And this is the contention—the statute "as applied" in this sense—that the Court treats in its discussion under *Second*.

On this, the only issue that is here, I agree that New Hampshire was not barred by the Due Process Clause from requiring Poulos to mandamus the City Council after it had unlawfully refused him a permit. New Hampshire may in these circumstances, I agree, refuse him permission to set up the Council's arbitrary denial of his application as a defense to prosecution under the ordinance, which fixes the penalty at $20. There is nothing in the record to suggest that the remedy to which

[2] See note 1, *supra*.

the Supreme Court of New Hampshire confined Poulos effectively frustrated his right of utterance, let alone that it circumvented his constitutional right by a procedural pretense. Poulos' application for a permit was denied on May 4, 1950, and the meetings for which he sought the permit were to be held on June 25 and July 2. In the absence of any showing that Poulos did not have available a prompt judicial remedy [3] to secure from the Council his right, judicially acknowledged and emphatically confirmed on behalf of the State at the bar of this Court, the requirement by New Hampshire that Poulos invoke relief by way of mandamus or certiorari and not take the law into his own hands did not here infringe the limitations which the Due Process Clause of the Fourteenth Amendment places upon New Hampshire. It would trivialize that Clause to bar New Hampshire from determining that legal issues raised by denial of a license, under a constitutionally valid system, should not be adjudicated in the first instance in police courts or, in any event, should be determined in an appropriately designed procedure and not as a defense to a penal action.

In reaching this conclusion the New Hampshire Supreme Court did not construe the ordinance; it did not, in the technical meaning of the phrase, apply the statute. "We see no reason," said that Court, "for overruling the law as stated in this jurisdiction that a wrongful refusal to license is not a bar to a prosecution for acting without a license." *State* v. *Poulos, supra,* 97 N. H., at 354, 88 A. 2d, at 861. What the Supreme Court of New Hampshire enforced was not a part of the licensing ordinance but the general procedural law of New Hampshire. It stretches the doctrine of *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, beyond reasonable limits to find that a re-

[3] See, *e. g., Nelson* v. *Morse,* 91 N. H. 177, 178, 16 A. 2d 61, 62.

quirement of New Hampshire procedure is an application of the licensing statute, rather than an application of the common law of New Hampshire. Therefore, I think, the case is properly here on certiorari and not appeal.

MR. JUSTICE BLACK, dissenting.

The Court's holding in this case is one more in a series of recent decisions which fail to protect the right of Americans to speak freely. I join MR. JUSTICE DOUGLAS' forceful dissent and wish to add only a few words.

I agree with the Court that the validity of the speech licensing phase of this New Hampshire law was not upheld in *Cox* v. *New Hampshire,* 312 U. S. 569. That case merely recognized that the power of a state to regulate streets for traffic purposes carried with it a right to regulate street parades.[1] Nothing said there indicated that a state's power to regulate traffic carried with it a right to censor public speeches or speakers merely because the state did not wish certain speakers to be heard. Here the record shows beyond doubt that objection to Poulos' talking was not rooted in a permissible regulation as to the time and place street or park speeches could be made. For the New Hampshire Supreme Court tells us that its officials "arbitrarily and unreasonably" refused to grant Poulos a "license" to talk. This shows that the state's speech licensing officials actually denied Poulos his con-

[1] "They [appellants] were not prosecuted for distributing leaflets, or for conveying information by placards or otherwise, or for issuing invitations to a public meeting, or for holding a public meeting, or for maintaining or expressing religious beliefs. Their right to do any one of these things apart from engaging in a 'parade or procession' upon a public street is not here involved and the question of the validity of a statute addressed to any other sort of conduct than that complained of is not before us." *Cox* v. *New Hampshire,* 312 U. S. 569, 573.

stitutional right of free speech.[2] The Court now holds Poulos can be branded a criminal for making a talk at the very time and place which the State Supreme Court has held its licensing officials could not legally forbid. I do not challenge the Court's argument that New Hampshire could prosecute a man who refused to follow the letter of the law to procure a license to "run businesses," "erect structures," "purchase firearms," "store explosives," or, I may add, to run a pawnshop. But the First Amendment affords freedom of speech a special protection; I believe it prohibits a state from convicting a man of crime whose only offense is that he makes an orderly religious appeal after he has been illegally, "arbitrarily and unreasonably" denied a "license" to talk. This to me is a subtle use of a creeping censorship loose in the land.

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

The Court concedes, as indeed it must under our decisions (see *Royall* v. *Virginia,* 116 U. S. 572; *Thomas* v. *Collins,* 323 U. S. 516), that if denial of the right to speak had been contained in a statute, appellant would have been entitled to flout the law, to exercise his constitutional right to free speech, to make the address on July 2, 1950, and when arrested and tried for violating the statute, to defend on the ground that the law was unconstitutional. An unconstitutional statute is not necessarily a nullity; it may have intermediate consequences binding upon people. See *Chicot County Dist.* v. *Bank,*

[2] In the Superior Court Poulos took the position that the city council's refusal to "license" him to speak was "arbitrary and unreasonable" and in violation of the right freely to assemble, speak and worship guaranteed by the First and Fourteenth Amendments. The State Supreme Court affirmed the Superior Court's holding that the council's refusal was arbitrary and unreasonable.

308 U. S. 371. But when a legislature undertakes to proscribe the exercise of a citizen's constitutional right to free speech, it acts lawlessly; and the citizen can take matters in his own hands and proceed on the basis that such a law is no law at all. See *De Jonge* v. *Oregon,* 299 U. S. 353, 365.

The reason is the preferred position granted freedom of speech, freedom of press, freedom of assembly, and freedom of religion by the First Amendment. See *Thomas* v. *Collins, supra,* p. 530; *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115. The command of the First Amendment (made applicable to the States by the Fourteenth) is that there shall be *no* law which abridges those civil rights. The matter is beyond the power of the legislature to regulate, control, or condition. The case is therefore quite different from a legislative program in the field of business, labor, housing, and the like where regulation is permissible and the claim of unconstitutionality usually can be determined only by the manner or degree of application of the statute to an aggrieved person.

A legislature that undertakes to license or censor the right of free speech is imposing a prior restraint (see *Near* v. *Minnesota,* 283 U. S. 697), odious in our history. The Constitution commands that government keep its hands off the exercise of First Amendment rights. No matter what the legislature may say, a man has the right to make his speech, print his handbill, compose his newspaper, and deliver his sermon without asking anyone's permission. The contrary suggestion is abhorrent to our traditions.

If the citizen can flout the legislature when it undertakes to tamper with his First Amendment rights, I fail to see why he may not flout the official or agency who administers a licensing law designed to regulate the exercise of the right of free speech. Defiance of a statute

is hardly less harmful to an orderly society than defiance of an administrative order. The vice of a statute, which exacts a license for the right to make a speech, is that it adds a burden to the right. The burden is the same when the officials administering the licensing system withhold the license and require the applicant to spend months or years in the courts in order to win a right which the Constitution says no government shall deny.

It was said by way of dictum in *Royall* v. *Virginia, supra,* p. 582, that "as a general rule," if an officer, entrusted with a licensing power, has only "ministerial" duties to perform, "the remedy by *mandamus* would be appropriate to compel the officer" to issue the license. I do not agree that the present statute, as construed by the New Hampshire court, imposes merely a ministerial duty on the city council. The construction, by which we are bound, gives wide range to the discretion of the city council:

> "The discretion thus vested in the authority is limited in its exercise by the bounds of reason, in uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways [here the parks], is the statutory mandate. The licensing authority has no delegation of power in excess of that which the legislature granting the power has and the legislature attempted to delegate no power it did not possess." *State* v. *Cox,* 91 N. H. 137, 143, 16 A. 2d 508, 513.

The requirement that the licensing authority stay within "the bounds of reason" and that it be "free from improper or inappropriate considerations and from unfair discrimination" is a command that it act reasonably, not

capriciously or arbitrarily. But even a reasonable regulation of the right to free speech is not compatible with the First Amendment.[1] Of course, a state could deny the use of a park to one religious group if a prior application had been granted to another group and the meetings would conflict. But there is no suggestion by New Hampshire that its system of regulation vests the licensing authority with only that limited power. The gloss which the New Hampshire court has placed on the statute grants a power reasonably to regulate free speech. That unfortunately is a doctrine that has been slowly creeping into our constitutional law.[2] It has no place there. It is a doctrine dangerous to liberty and destructive of the great rights guaranteed by the First Amendment.

So, one answer to the Court's holding that appellant should have gone into court to compel the issuance of a license is that the licensing power was discretionary not

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[1] This marks a distinction between the present case and *Cox* v. *New Hampshire,* 312 U. S. 569. There the sole charge against appellants was that they were "taking part in a parade or procession" on public streets without a license. We only held that New Hampshire's method of controlling travel on the streets of cities was permissible under the police power of the states. We distinguished that problem from like cases arising under the First Amendment, p. 573,

"The sole charge against appellants was that they were 'taking part in a parade or procession' on public streets without a permit as the statute required. They were not prosecuted for distributing leaflets, or for conveying information by placards or otherwise, or for issuing invitations to a public meeting, or for holding a public meeting, or for maintaining or expressing religious beliefs. Their right to do any one of these things apart from engaging in a 'parade or procession' upon a public street is not here involved and the question of the validity of a statute addressed to any other sort of conduct than that complained of is not before us."

[2] *Beauharnais* v. *Illinois,* 343 U. S. 250; *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.

ministerial and that a discretionary power to license free speech is unconstitutional.

There is another answer which is found in *Cantwell* v. *Connecticut,* 310 U. S. 296. In that case it was argued that a licensing power in a state statute be construed so as to limit the power of the licensing authority to ministerial acts. We rejected that offer on two grounds. In the first place, the statute had not been so narrowly construed by the state court. In the second place, the availability of judicial relief would not *in any event* save the statute. What Mr. Justice Roberts, writing for a unanimous Court, said was this (310 U. S., at 306):

> ". . . the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action."

What Mr. Justice Roberts said needs to be repeated over and again. There is no free speech in the sense of the Constitution when permission must be obtained from an official before a speech can be made. That is a previous restraint condemned by history and at war with the First Amendment. The nature of the particular official who has the power to grant or deny the authority does not matter. Those who wrote the First Amendment conceived of the right to free speech as wholly independent of the prior restraint of anyone. The judiciary was not granted a privilege of restraint withheld from other officials. For history proved that judges too were sometimes tyrants.

CALMAR STEAMSHIP CORP. *v.* SCOTT ET AL.

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

No. 303. Argued January 15, 1953.—Decided April 27, 1953.

Petitioner chartered a vessel to the United States for a voyage in the winter of 1941–42 to a port or ports in the Philippines and return, and British underwriters issued a policy of war-risk insurance on the vessel for the voyage. After the voyage had commenced, Australia was duly substituted for the Philippines as the outbound destination. In Australia the vessel was requisitioned by Allied authorities and employed for military purposes. It was damaged by enemy aircraft and abandoned. A warranty in the policy provided: "[F]ree of claims arising from [British or Allied] Capture [or] . . . Requisition . . . but unless the insured vessel is condemned this warranty shall not exclude losses . . . caused by . . . implements of war . . . ." *Held:* This policy insured against the loss in this case, and it was in force when that loss occurred, since no explicit decision had been reached by the requisitioning authorities to prevent the vessel from completing, within a reasonable time, the voyage for which the insurance was issued. Pp. 428–444.

197 F. 2d 795, judgment vacated and cause remanded.

In a suit in admiralty to recover upon a policy of war-risk insurance issued to cover a voyage by petitioner's vessel, the District Court held the underwriters liable. 103 F. Supp. 243. The Court of Appeals reversed. 197 F. 2d 795. This Court granted certiorari. 344 U. S. 853. *Judgment of the Court of Appeals vacated and cause remanded to that court,* p. 444.

Edwin S. Murphy argued the cause for petitioner. With him on the brief were *Ira A. Campbell* and *Helen C. Cunningham.*

By special leave of Court, *Hubert H. Margolies* argued the cause for the United States, as *amicus curiae,* urging

reversal. With him on the brief were *Solicitor General Cummings, Assistant Attorney General Baldridge* and *Samuel D. Slade.*

Russell T. Mount argued the cause for respondents. With him on the brief were *Walter B. Hall* and *Wilbur H. Hecht.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a suit in admiralty against British underwriters on a war-risk policy issued to cover the Calmar Corporation's S. S. *Portmar* for a voyage, in the winter of 1941–1942, from the United States to a port or ports in the Philippine Islands and return to an Atlantic or Pacific port in the United States. After the voyage had commenced Australia was duly substituted for the Philippine Islands as the outbound destination. The *Portmar* was under charter to the United States. This suit, based on damage inflicted by enemy aircraft, was tried together with a libel against the United States claiming recovery for the same damage as well as additional charter hire. See *post,* p. 446. The District Court held the underwriters liable for a constructive total loss of the vessel. 103 F. Supp. 243. The Court of Appeals reversed. 197 F. 2d 795. We granted certiorari, 344 U. S. 853, because wide use, so the Court was advised, of the clauses of this policy makes their construction, a necessary issue here, a matter of more than individual concern.

Pursuant to the charter agreement between the Calmar Corporation and the United States, the *Portmar* left San Francisco for Manila on November 28, 1941. She carried high-octane gasoline, ammunition and other military supplies and equipment. She was some 600 miles southeast of the Hawaiian Islands on December 7, when Pearl Harbor was attacked. Her master at that time put her

on a southerly course so as to avoid the combat area. On December 11, United States naval routing orders were received by radio on the *Portmar*. From that day until she was damaged and abandoned, a little over two months later, her every movement was in obedience to orders issued by competent United States and Australian authorities. The *Portmar,* which flew the American flag, was subject to these orders.

On December 30, the *Portmar* arrived at Sydney, Australia.[1] Without being permitted to discharge cargo, she was dispatched up the coast to Brisbane. There her cargo was unloaded and sorted, part of it was put back on her, and she was sent almost half-way around the island to Port Darwin. She had been in Brisbane a week and had left on January 9, 1942. She was in Darwin on the 19th and lay at anchor till the 31st, waiting to dock and discharge cargo. This she then did, in part. Still carrying two thousand drums of her original load of gasoline, she left on February 4 for a relatively short trip across Joseph Bonaparte Gulf to Wyndham, where she arrived on the 8th. She returned empty to Darwin

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[1] Not until January 19 did word reach Calmar that the *Portmar* had been diverted to Australia from the original course she had set for Manila. This was not due to any negligence on the part of the master, who throughout the adventure made sturdy and insistent efforts to keep in touch with his owners. It was simply the result of security regulations imposed by the proper authorities, and of difficulties of communication. When Calmar received this news, it chose to act under a clause in the policy providing:

"Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required." Calmar communicated the change in destination to the underwriters. The latter agreed to hold the *Portmar* covered by letter dated February 6, 1942. This agreement was retroactive. No additional premium was required.

on the 12th. She then took aboard troops with equipment and armament and joined an exceedingly perilous expedition to Koepang, on the Island of Timor, some 500-odd miles northwest of Darwin. This expedition ran into heavy air attacks and turned back. On the 18th of February, the *Portmar* was at Darwin again, awaiting her turn to dock and discharge the personnel and equipment she had taken on. While thus at anchor on the morning of the 19th, she underwent bombing and strafing by Japanese airplanes and sustained the damage which forced her master to beach her and caused him to abandon her.

Article 2.17 of the charter agreement under which the *Portmar* sailed provided that her owners might obtain war-risk insurance, to be paid for by the United States. Before commencement of the voyage, Calmar took out the war-risk policy now in question on the hull and machinery of the *Portmar,* valued at $860,000. This policy insured "only against the risks of war, strikes, riots and civil commotions." It was assembled—that seems an appropriate word—by superimposing on the age-old Lloyd's form layer upon layer of warranties and riders. Warranties free the underwriters from obligations imposed by riders, and subsequent riders then reimpose obligations thus avoided.

"Touching the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage," the basic Lloyd's policy states, "they are, of the Seas, Men-of-War . . . Enemies . . . Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People . . . ." The policy is then "warranted free from . . . capture, seizure, arrest, restraint or detainment, or the consequences thereof . . . or any taking of the Vessel, by requisition or otherwise . . . also from all consequences of hostilities or warlike operations . . . ." This warranty is known as the capture and seizure war-

ranty. It is superseded by a war-risk rider, which provides:

> "It is agreed that this insurance covers only those risks which would be covered by the attached policy . . . in the absence of the C. & S. warranty . . . but which are excluded by that warranty.
>
> "This insurance is also subject, however, to the following warranties and additional clauses:—
>
> "The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion or insurrection or civil strife arising therefrom, floating and/or stationary mines and/or torpedoes whether derelict or not and/or military or naval aircraft . . . and warlike operations and the enforcement of sanctions by members of the League of Nations . . . but excluding arrest . . . under customs or quarantine regulations, and similar arrests, restraints or detainments not arising from actual or impending hostilities or sanctions."

A further warranty, known as the free of British capture warranty, carves a specific exception out of the war-risk rider. It holds the underwriters

> "free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions . . . or allies, or by any forces acting in cooperation with or under the control of them or any of them."

But a saving clause, following immediately, provides that

> "unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention."

Construing such conglomerate provisions requires a skill not unlike that called for in the decipherment of obscure palimpsest texts. A judicial sigh recently uttered at the seat of Lloyd's evokes a sympathetic echo. "Freight insurance entered into on the old form of marine insurance policy with deletions or additions to adapt the form to the intended contract [has] almost invariably given rise to difficulties, and the present case [is] no exception." Mr. Justice Sellers in *Atlantic Maritime Co.* v. *Gibbon,* [1953] 1 All E. R. 893, 899.[2] One envies not merely the perceptiveness of Lord Mansfield in matters of commercial law but his genial means of informing himself. We cannot resort to the elastic procedure by which Mansfield sought enlightenment at dinners with "knowing and considerable merchants," [3] nor have we any Elder Brethren of Trinity House to help us. To be sure,

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[2] "The truth is that [the] law of marine insurance is nothing more than a collection of rules for the construction of the ancient form of policy and such additions as are from time to time annexed to it. The ancient form dates back at least to the sixteenth century, and it is a document which the late Sir Frederick Pollock characterized, with justifiable asperity, as 'clumsy, imperfect, and obscure.' . . .

"Innumerable clauses have from time to time been devised to supplement the ancient form. Unhappily tradition seems to have caused them also in very many cases to be 'clumsy, imperfect, and obscure,' . . . . Oddly enough, the tradition has even infected the Legislature with a microbe of inaccuracy. In 1746 an Act . . . made re-insurance illegal, except in the case where 'the assurer shall be insolvent, become a bankrupt, or die.' It is inconceivable that an insolvent underwriter should desire to re-insure, and obviously the evil aimed at was double insurance by the assured. 'Re-insurance,' however, had then its present well known meaning, and the draftsman of the Act used the wrong word in order to maintain the tradition of obscurity." MacKinnon, L. J., in *Forestal Land, Timber and Railways Co.* v. *Rickards,* [1941] 1 K. B. 225, 246–247.

[3] *Lewis* v. *Rucker,* 2 Burr. 1167, 1168.

"Lord Mansfield converted an occasional into a regular institution, and trained a corps of jurors as a permanent liaison between law

we have in this case the benefit of the views of the most experienced of admiralty judges. Considering the scanty contact this Court has these days with maritime law, we pay especial deference to the weighty judgment before us. But since it is before us, we cannot abdicate the duty to decide and must in the end exercise our own judgment however unsure it be.

Assuming that the policy was in force when the *Portmar* was attacked, there is no doubt whatever that the underwriters would be liable for the damage under the basic adventures and perils clause taken alone. Cf. *Standard Oil Co.* v. *United States,* 267 U. S. 76. The capture and seizure warranty, on the other hand, would, of course, hold the underwriters free. We understand the war-risk rider to provide as follows: Risks which are covered by the adventures and perils clause, but which are excluded by the capture and seizure warranty, and only such risks, remain covered. These risks include, in the language of the adventures and perils clause, "Restraints and Detainments of all Kings, Princes and People," or, in that of the capture and seizure warranty, "restraint or detainment, or the consequences thereof . . . or any taking of the Vessel, by requisition or otherwise." [4]

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and commerce. He won their confidence by social, as by professional, condescension, 'not only conversing freely with them in court, but inviting them to dine with him.'" Fifoot, Lord Mansfield, 105, quoting from 2 Campbell, Lives of Chief Justices, 407.

[4] The war-risk rider is not without its slight ambiguity. The word "only" in its first paragraph could be read to indicate that that paragraph simply sets the outer limit of the coverage but is not itself an insuring clause, that is, does not reinstate any of the coverage of the adventures and perils clause. We do not understand the underwriters to urge such a reading, and we do not think they could reasonably do so. Following its first paragraph, the rider insures against some risks not specifically mentioned in the adventures and perils clause, and also excludes from coverage certain detainments not connected with "actual or impending hostilities." If the first

The free of British capture warranty would, in turn, again very likely avoid liability in this case. But the war-risk rider makes the loss of the *Portmar* one which is "otherwise covered by this policy" within the terms of the saving clause in the British capture warranty. The loss is "otherwise covered by this policy" because it is insured against elsewhere within it, that is, in the war-risk rider. Since the *Portmar* had not been "condemned" when she was damaged by "implements of war," the saving clause thus reinstates, in this case, coverage avoided by the free of British capture warranty, still assuming, of course, that the policy was in force at the time of the loss.[5]

The underwriters contend that the phrase "losses otherwise covered by this policy" in the saving clause refers

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paragraph of the rider is not to be read as an insuring clause, why is the subsequent insuring clause referred to in the rider as an "additional" one? What sense is there in singling out as risks to be insured against exclusively those risks which might be thought not to be clearly covered in the adventures and perils clause? Why should war-risk insurance, purchased at a time of impending war and covering "only against the risks of war, strikes, riots and civil commotions," insure comprehensively against the perils of civil war but not against those of war itself? Finally, why should insurance be written in language construing a non-operative clause?

[5] The final proviso in the saving clause—that the losses must be such as would not be covered by a policy in which the capture and seizure warranty is in full force—is automatically complied with once it is established that the loss in this case is "otherwise covered by this policy." For it is "otherwise covered" by virtue of the war-risk rider, which in turn covers only losses excluded by the capture and seizure warranty. These riders and warranties, which, when assembled, constitute the policy, are often independently developed. That may explain overlapping provisions such as these. Moreover, it is not hard to understand why extreme caution is exercised in making certain that only war risks are insured against by war-risk riders and saving clauses. For war-risk insurance is often—as it was in this case—written separately from ordinary marine insurance, and it is important to exclude losses, caused by collision or stranding, for example, which are attributable to the ordinary hazards of navigation.

to losses which the policy would cover if they were not the consequences of an Allied restraint or detainment. A loss such as that of the *Portmar,* they say, is not otherwise covered because it followed a deviation which, had it not occurred pursuant to naval orders, would not be excusable and would have terminated coverage. The phrase in its context precludes such sophistical reading. It is plainly intended, together with the proviso at the end restricting the clause to losses which the capture and seizure warranty would exclude and which the war-risk rider therefore takes in, to make certain and doubly certain that the coverage of the policy as a whole is in no event enlarged.[6] Moreover, if the sense were given to the "otherwise covered" phrase which the underwriters press upon us, the saving clause as a whole would be left quite devoid of any meaning. It would then uselessly preserve coverage only for losses which are securely covered anyway, despite the presence of the free of British capture warranty.

The underwriters resort to a second argument concerning the saving clause. They contend, not quite consistently with the earlier argument, that the clause was meant to save losses which occur while a vessel is under certain Allied restraints, limited in number, but not under others. The underwriters, upon the trial, offered to prove as much by an expert witness. No more need be said than that to vary the terms of the saving clause so as to make it mean what the expert in the District Court said it meant [7]—which on its face it cannot mean—would be to reform the contract, and that the requirements of the equitable doctrine of reformation are not met in this case.

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[6] See n. 5, *supra.*

[7] The witness, William D. Winter, chairman of the board of a leading marine insurance company in the United States, manager, for a number of years, of the American Marine Insurance Syndicate,

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We thus read the provisions of this policy as insuring against a loss such as that of the *Portmar,* though it be the consequence of seizure by a British ally. So, reasoning substantially along these lines, did the District Court, and it proceeded to hold the underwriters liable. The Court of Appeals assumed that the "labyrinth of verbiage, within which lurks whatever contract was made, is to be understood to agree that, although the ship might at the time be under the 'restraint of princes,' the policy should cover her loss . . . ." But it held that "the policy

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and a former president of the American Institute of Marine Underwriters, testified as follows:

"During the war . . . Great Britain and her Allies took vessels into control ports in order to see whether they had contraband . . . on them. The ship at that point . . . was in the control of the Government authorities, or it was captured. . . . [G]oing into those control ports, [was] a very dangerous operation . . . .

"The cases had been settled, that the underwriters were not liable. The underwriters didn't think that was doing their part of their job. So they constructed . . . this clause to go on hull policies . . . to show that they were willing, notwithstanding the fact that this vessel had been captured, nevertheless, if in entering a control port she was blown up by a mine, or if she went ashore . . . they would not refuse the claim because of that happening. It was to save the assured from something over which he had no control in a very limited situation, where the British Government had not captured it for the purpose of, at that point, condemning the boat because we say that if condemned, we were not liable, but for the purpose of finding out whether the boat, perhaps, should be condemned, and the underwriters felt that under those circumstances it was their duty to go ahead with their assured and take care of this unusual situation. But it was always within the framework of that voyage, of that particular incident of the voyage. The words are general, I agree . . . ."

The District Court heard this testimony subject to a later ruling on its admissibility, based on a finding that the language of the free of British capture warranty was or was not ambiguous. The court found that the language was not, and ruled that Mr. Winter's testimony was inadmissible.

was no longer in force when the loss occurred, the insured voyage having before then come to an end and the policy with it." 197 F. 2d., at 796. The voyage had ended, the court said, because the dominion exercised over the *Portmar* by Allied authorities was complete, and was very probably intended to continue indefinitely. The policy, in turn, was no longer in force because it was written for a voyage and could not outlast it, any more than a voyage charter would. Precisely as frustration of the voyage would end the latter, so it releases an underwriter from further liability.

The facts from which the Court of Appeals deduced that the detainment of the *Portmar* was to be prolonged indefinitely are these. When the *Portmar* reached Sydney, the Japanese had a working naval command of the Pacific, and Australia was threatened with invasion. The need for shipping was dire, as the use made of the *Portmar* herself shows. Indeed, after she was damaged and beached, military authorities salved her and patched her up hastily. The United States eventually requisitioned title to her, and she was used till finally destroyed. An American colonel in charge of transportation in Australia when the *Portmar* was there testified at the trial to the serious shortage of shipping, which, he said, continued throughout the year 1942. But as late as January 19, when the *Portmar* was in Darwin, the owners learned from an agent of the United States Maritime Commission that she would load chrome ore late in February and could be expected in Philadelphia in April. Australia was not, of course, the only place where there was a dearth of shipping at the time, and there is nothing in the record to show that a colonel on the spot had the last word as to the future use of an ocean-going vessel; if there were, it would strain credulity. Two further points are to be noted. First, when the Army salved and used the *Portmar* after she was damaged, she was

no longer in any condition to make ocean voyages, and could not readily be returned to such a condition. And it was at that time that the United States formally requisitioned her—at that time for the first time. Second, there was testimony indicating that other vessels detained in Australia early in 1942 were held through the year. But there is no testimony that any vessels similar to the *Portmar* were so held. The witness—the Army colonel in charge—spoke of "[s]ome 21 small Dutch vessels."

In point of time, the Court of Appeals fixed frustration of the voyage as having taken place at Brisbane, during the period of January 5 to 9, 1942. And so the underwriters contend here. Part of the *Portmar's* cargo, which was unloaded at Brisbane for sorting, was, as we have seen, put back on her there, and she was sent with it to Darwin. It can hardly be maintained that the vessel's trips along the Australian coast after Brisbane, while she was still carrying parts of her original cargo, or the trip from Sydney to Brisbane, constituted a departure from her voyage, whether or not excusable. For the voyage specified in the *Portmar's* insurance policy was not to a single port as the outbound destination, but to a "port or ports" and back, "via port or ports in any order." [8] That being so, we cannot find that the voyage ended at Brisbane on the theory that it was there that dominion over the *Portmar* by requisitioning authorities became complete

[8] To be sure, going from Brisbane to Darwin instead of discharging all cargo at Sydney or Brisbane meant exposing the vessel to greater risk. The same may be said of returning to an Atlantic rather than a Pacific port in the United States. The policy permitted either. The underwriters could have avoided all these potential additional risks by writing a policy for a voyage from one specific port to another and back. They did not. Nor can the underwriters complain that in going from Brisbane to Darwin the *Portmar* hugged the coast, thus increasing her sailing time and, in one sense, again, the risk. For she did it for her safety, just as she justifiably turned south on the day Pearl Harbor was attacked.

and hence there that the intention to cause her to abandon her voyage was formed or manifested. It is not maintained, nor could it be, that an explicit decision, objectively provable, not to allow the *Portmar* to continue on her voyage was ever reached by the authorities, and there is no showing whatever that her owners or charterer had any intention of discontinuing the voyage. On the evidence, this is not a case in which a change of voyage, releasing the underwriters, can be shown before the vessel is overtly employed in a manner inconsistent with the purpose or route of the original voyage. Compare *Thellusson* v. *Ferguson,* 1 Doug. 361, with *Tasker* v. *Cunninghame,* 1 Bligh 87, and *Wooldridge* v. *Boydell,* 1 Doug. 16; see 1 Arnould, Marine Insurance (13th ed., by Lord Chorley 1950), §§ 381, 385. Consequently, dominion or no, the *Portmar* was covered by her insurance at Brisbane and later, till she started on the Koepang expedition, or just before, as she is conceded to have been covered before Brisbane, while under equally complete dominion of naval authorities. Cf. *Rickards* v. *Forestal Land, Timber and Railways Co.,* [1942] A. C. 50, 80.

The Koepang expedition was undoubtedly a venture inconsistent with the voyage specified in the *Portmar's* insurance.[9] We are prepared to assume, though

[9] It was a deviation, but it is worth noting that, in view precisely of the fact that the *Portmar* was under the complete and inescapable dominion of competent naval authorities, it was excusable, and hence not such a deviation as might, without more, release the underwriters from all further obligations. This would probably be true even had the *Portmar's* policy been warranted free of all war risks, in which case the Koepang trip would have been a deviation occasioned by a peril not insured against. Cf. *Robinson* v. *Marine Ins. Co.,* 2 Johns. (N. Y.) 89, and *Scott* v. *Thompson,* 1 Bos. & Pul. (N. R.) 181; see 1 Arnould, *supra,* § 435. But cf. *Aktiebolaget M. Bank* v. *American Merchant Marine Ins. Co.,* 241 N. Y. 197, 149 N. E. 830. Not unless the Koepang trip marked a permanent change of voyage, an abandonment of the original one, could it be said that the coverage of even such a policy had undoubtedly come to an end.

of course we do not decide, that the Koepang trip would have terminated, on grounds of abandonment of voyage, the coverage of a policy warranted free of war risks or of one warranted completely free of British capture, and that, under such a policy, had the *Portmar* subsequently sustained damage not attributable to war causes, cf., *e. g.*, *Standard Oil Co.* v. *United States,* 340 U. S. 54, there would have been no recovery. We assume that in those circumstances the Court of Appeals could have inferred as it did, on the basis of the Koepang venture and of the military situation, that the *Portmar* was to be retained indefinitely under requisition, and that her voyage was therefore over. But the point of this policy is that here the underwriters, by virtue of the saving clause, did insure against risks of British requisition. They insured, in other words, against consequences of a forced interruption of the voyage, which must necessarily throw into doubt the chances of completing the voyage as planned. Circumstances which may make out a change of voyage and cause termination of coverage under a policy warranted free of risks arising from seizure need not do so under one of insurance against such risks. In one as in the other, if they are both written for a voyage, there is an implied warranty that no different voyage will be undertaken. But it is a warranty which must be construed in light of the express provisions of the policy, and which may mean different things in different policies.

If, in the circumstances of this case, an owner who bought insurance against damage resulting from Allied requisition and one who bought a policy excluding such losses entirely stand on no different footing in respect of a sovereign's intention to retain their vessels indefinitely, they hardly stand on a different footing in any substantial respect. And the one received very little, if anything, more than the other. For inferences of permanence, as strong as those in this case, will surely be permissible from

most every requisition by a friendly sovereign for military uses. It is hard to imagine a military situation serious enough to lead a commander in the field to take it upon himself to requisition a friendly vessel, which is not sufficiently serious to make that requisition of presumptively indefinite, or at least uncertain, duration in his mind. Thus the difference between a policy containing a free of British capture warranty with a saving clause, such as we have in this case, and one without a like saving clause narrows down, under the holding of the Court of Appeals, to this: On the first policy, underwriters may be held liable for losses attributable to a small class of Allied restraints which are by their nature limited in duration, the most common example being detainment for inspection. On the second policy, underwriters may not be so held. This, of course, is exactly the result which would flow from the construction placed on the saving clause by the underwriters' expert witness,[10] a construction contrary to that assumed by the Court of Appeals to be the correct one. As to other restraints, the Court of Appeals would normally allow no recourse against the underwriters to either owner, the one who bought the first type of policy or the one who bought the second; to one on one theory, to the other on another; to one because he expressly agreed himself to bear all risks arising from Allied restraints, to the other despite the fact that he paid for insurance against such risks and could have had every expectation, on the face of the policy written for him, that he had effectively obtained it. Thus a significant part of the coverage of war-risk insurance, which is purchased separately, over and above ordinary insurance, and at great expense, would be rendered nugatory.

The provisions of the policy contain no time limitations on the detainments against which they insure. The

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[10] See n. 7, *supra*.

District Court consequently, although recognizing that "[i]ndeed, that is broad coverage!", felt constrained to hold that coverage would extend throughout the period of a detainment, no matter what its nature, and past the time when the voyage insured for had definitely been frustrated. The court thus, in effect, read the implied warranty concerning changes of voyage as referring, in this policy, to voluntary changes of voyage only. *Rickards* v. *Forestal Land, Timber and Railways Co.*, [1942] A. C. 50, may support the position of the District Court.[11] It

[11] In the *Rickards* case, the House of Lords dealt with voyage policies on cargo, insuring against detainments. No free of British capture warranty was involved. Upon declaration of war with Germany in September 1939, the masters of the three vessels in question put into neutral ports and then, under orders of the German Government, of which they were subjects, proceeded to run the blockade and try to make German ports. This constituted abandonment of the voyages insured for. One of the vessels made a German port. The other two were intercepted and, again under orders from the German Government, scuttled by their masters to avoid capture. The House of Lords held that the abandonment of the voyages, occasioned by restraint of princes—*i. e.*, the orders of the German Government, which were binding on the masters—did not relieve the underwriters of liability. The underwriters here attempt to distinguish the *Rickards* case on the ground that it dealt with cargo rather than hull insurance, and on other grounds. We do not pass on the validity of these grounds of distinction. But the *Rickards* case does definitely dispose of an argument based on the following clause, which appeared in the *Rickards* policies and which is present in the policy before us now: "Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure caused by arrests, restraints or detainments, of kings, princes, or peoples." It was urged in *Rickards* that this warranty means that whenever damage or loss resulting from a restraint frustrates the voyage, the underwriters are relieved of any liability arising from that restraint. It is hence unnecessary to decide whether or not frustration of the voyage before the damage occurred ended coverage. The simple answer to this argument was that the claim made was not "based upon loss of or frustration of the insured voyage"; it was based upon loss of the

is persuasive authority, since "[t]here are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business . . . ." *Queen Ins. Co.* v. *Globe Ins. Co.*, 263 U. S. 487, 493. But we are not required to accept the broad ground on which the District Court rested. It is not contended here that anything done by any officer or official on the scene or elsewhere before the *Portmar* was damaged made it explicit—and now objectively provable—that she would be detained indefinitely or even for such a period of time as might be thought to postpone her return voyage unreasonably. Such an explicit decision might at least more likely have come to the prompt attention of the owners, whereas in its absence, as here, no owner, whether on the scene or not, could so much as make an informed guess concerning the fate of the voyage. We do not decide that case, but we do hold that if a policy such as this is to provide any appreciable and safely predictable protection over and above that of a policy which does not insure at all against consequences of Allied detainments, coverage cannot be said to have ended before an unambiguous, objectively provable decision has been made by the requisitioning sovereign to cause abandonment of the voyage.

A number of subsidiary questions in the case were all decided in favor of the owners by the District Court.

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cargo, as in this case it is based upon loss of the vessel. Of course, whenever as a consequence of a restraint a vessel or cargo is lost, or even severely damaged, the voyage is frustrated. If the frustration warranty applies in such cases, therefore, its effect is to hold the underwriters free of liability for any total loss, indeed, for most losses, resulting from detainment. We are authoritatively told that the clause was not intended to achieve such a sweeping result. See the observations of Viscount Maugham, [1942] A. C., at 72–73, of Lord Porter, *id.*, at 106, and of MacKinnon, L. J., [1941] 1 K. B., at 252.

The most important is raised by the contention that the vessel was never a constructive total loss and was not validly abandoned as such. The Court of Appeals, in view of its disposition of the case, found it unnecessary to consider any of these questions. They are not related to the major issue in the case, and so we remit them to the Court of Appeals.

The judgment of the Court of Appeals must be vacated and the cause remanded to that court for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MINTON dissents for the reasons stated in the opinion of Circuit Judge Learned Hand, 197 F. 2d 795.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE concurs, dissenting.

THE CHIEF JUSTICE and I, having voted to grant certiorari in this case, would now dismiss it as having been improvidently granted. No principle of law, requiring restatement or clarification,* is involved. We have here only a question whether under the special circumstances of this case there was a frustration of the venture by the seizure of the vessel at Brisbane or at some later point. The District Court found there was not. The Court of Appeals, speaking unanimously through Judge Learned Hand, found that there was. The decision turns on the weighing of many factors and conditions against a background of admiralty practice and custom with which we are nowhere near as familiar as the experienced admiralty judges below. It seems to me quite improvident for us to reweigh the fragments of the evidence which Learned

*There is, for example, no usurpation of the fact finding function such as we commonly find in cases arising under the Federal Employers' Liability Act. See *Wilkerson* v. *McCarthy*, 336 U. S. 53.

Hand, Augustus N. Hand, and Harrie B. Chase, JJ., weighed (see 197 F. 2d 795, 799–801) and to revise the decision which their experienced minds reached on the totality of the facts of the case. Yet if we were to do so we could not escape the conclusion that the voyage had been frustrated at least by the time the *Portmar* reached Darwin on February 12, 1942. For as the opinion of the Court concedes, by that time the vessel had been emptied of her original cargo and was being loaded with troops, equipment, and armament for "an exceedingly perilous expedition to Koepang, on the Island of Timor, some 500-odd miles northwest of Darwin." As the Court says:

> "This expedition ran into heavy air attacks and turned back. On the 18th of February, the *Portmar* was at Darwin again, awaiting her turn to dock and discharge the personnel and equipment she had taken on. While thus at anchor on the morning of the 19th, she underwent bombing and strafing by Japanese airplanes and sustained the damage which forced her master to beach her and caused him to abandon her."

Certainly by the 12th of February the purposes of the venture, commercially speaking, had ended. The ship was now engaged in an enterprise far beyond the voyage contemplated by the parties.

CALMAR STEAMSHIP CORP. *v.* UNITED STATES.

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

No. 262. Argued January 15, 1953.—Decided April 27, 1953.

Under the Suits in Admiralty Act, which authorizes the filing against the United States in the District Courts of libels *in personam* concerning vessels "operated by or for the United States" and "employed as merchant vessels," a privately owned vessel operated for hire for the United States is "employed as a merchant vessel" although the vessel be engaged on a war mission. Pp. 446–456.

197 F. 2d 795, judgment vacated and cause remanded.

The District Court assumed jurisdiction of a libel under the Suits in Admiralty Act and awarded a decree against the United States on part of the libellant's claim. 103 F. Supp. 243. The Court of Appeals reversed. 197 F. 2d 795. This Court granted certiorari. 344 U. S. 853. *Judgment of the Court of Appeals vacated and cause remanded to that court,* p. 456.

Edwin S. Murphy argued the cause for petitioner. With him on the brief were *Ira A. Campbell* and *Helen C. Cunningham.*

Hubert H. Margolies argued the cause for the United States. With him on the brief were *Solicitor General Cummings, Assistant Attorney General Baldridge* and *Samuel D. Slade.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

By the Suits in Admiralty Act[1] the United States consents, under defined conditions, to the filing against

[1] Section 1 of the Act reads as follows:

"No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire

it in the District Courts of libels *in personam*. Libels which concern vessels "operated by or for the United States" and "employed as merchant vessels" are authorized. The question in this case is whether a privately owned steamship, undoubtedly "operated . . . for the United States," was "employed as a merchant vessel" within the meaning of the Act while carrying military supplies and equipment for hire. Since a considerable volume of litigation appears to be affected, we granted certiorari, 344 U. S. 853, on a petition which the Government did not oppose.

The vessel here, the S. S. *Portmar,* and the voyage are those involved in No. 303, *Calmar Steamship Corp.* v. *Scott, ante,* p. 427, which was tried together with this suit. Calmar's claim against the United States is for additional charter hire and for the loss of its vessel. The latter claim is based on two theories. The United States,

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outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this chapter shall not apply to the Panama Railroad Company." 41 Stat. 525, 46 U. S. C. § 741.

Section 2 provides:

"In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section [1] of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. . . ." 41 Stat. 525, 46 U. S. C. § 742.

it is said, is liable as an insurer to the extent that war-risk insurance purchased pursuant to the provisions of Article 2.17 of the charter [2] does not cover the loss. The United States is also liable, Calmar contends, because the loss of the *Portmar* was a result of compliance by its master with orders issued under authority of the United States, and the latter agreed in Article 2.11 of the charter [3] to hold the owners harmless from all consequences of such compliance.

Other relevant provisions of the charter are as follows: The "good steel steamship *Portmar* . . . with hull, machinery and equipment in a thoroughly efficient state" was chartered "for trading for one round voyage." Calmar agreed to deliver the *Portmar* to the United States "ready to receive cargo with clean-swept holds and . . . tight, staunch, strong and in every way fitted for service" and manned by "a Master and a full complement of officers and crew for a vessel of her tonnage." Calmar was to exercise due diligence "to maintain [the vessel]

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[2] "ARTICLE 2.17. The Owner may provide, and the Charterer shall pay for, or, if the Charterer shall so elect and give notice of such election to the Owner at or prior to the date of delivery of the Vessel . . . the Charterer shall provide . . . insurance on the Vessel, which shall be made payable to the Owner . . . under full form of . . . war risk policies . . . .

"The Vessel shall not be required to sail on any voyage until the insurance contemplated by this Article has been placed by the Owner or provided or assumed by the Charterer, as the case may be, provided, however, that written or telegraphic notice of assumption by the Charterer shall be sufficient."

[3] "ARTICLE 2.11. Subject always to the direction of the Charterer, the Master shall prosecute his voyages with the utmost dispatch . . . .

"The Charterer shall indemnify and hold harmless the Owner, the Master and the Vessel from all consequences and liabilities whatsoever arising from compliance with any orders or directions of the Charterer or its agents, given pursuant to this Article or any other Article of this Charter."

in such state during the currency of this Charter." The *Portmar* was to be employed, the charter further provided, "in carrying lawful merchandise, including petroleum or its products in proper containers, between safe ports or places, in lawful trades within the trading limits of this Charter, as the Charterer or its agents shall direct." Hire was to be payable, "in the case of a constructive total loss, to the time of the casualty resulting in such constructive total loss." Otherwise hire was due for periods during which the vessel was prevented from working by damage resulting from warlike acts or caused by the fault of the United States. The wages of the Master, officers and crew were to be paid by Calmar. Drydocking, cleaning and painting expenses were likewise to be borne by Calmar. "The Master (although appointed by the Owner) [was to] be under the orders and directions of the Charterer as regards employment, agency, and prosecution of the voyages; and Charterer [was to] load, stow, trim and discharge the cargo at its expense under the supervision of the Master, who [was] to sign bills of lading for cargo as presented . . . . The Master, officers and crew of the Vessel in supervising loading, stowing, trimming, tallying and discharging, [were to] be deemed the agents of the Charterer, except in so far as such supervision pertain[ed] to the safety of the Vessel." Calmar agreed to investigate complaints of the United States against the Master, officers and crew and make necessary changes in appointments. Finally, the charter specifically provided that "[n]othing herein stated is to be construed as a demise of the Vessel to the Charterer."

The District Court found that the *Portmar*

> "was privately owned and operated for the profit of the owner, in charge of a master and crew, selected and employed by the owner and responsible to it alone. That the cargo was public stores and muni-

> tions did not render 'public' the character of the vessel. She was owned neither absolutely nor *pro hac vice* by the United States. Public service did not alter the merchant character of the vessel . . . ." 103 F. Supp. 243, 263.

Consequently the District Court assumed jurisdiction under the Suits in Admiralty Act. It awarded Calmar a decree against the United States for $238.50 due, in addition to the charter hire paid by the Government, as reimbursement for expenses incurred prior to February 19, 1942, when the *Portmar* was damaged and abandoned.[4] But the court held against Calmar on the merits of the latter's claim for charter hire for the period following that date. It held also that the United States was not on any theory liable for the loss of the vessel. *Id.*, at 269.

The Court of Appeals reversed. While, it said, the *Portmar* could, indeed, under its charter, have been employed as a "merchant vessel" in foreign commerce, the cargo she in fact carried indicated that she was not so employed. For her load consisted entirely of "war materiel." She carried military supplies and equipment, ammunition, and high-octane gasoline for use in war planes. A ship "while so employed," that is, while carrying such cargo, the court held, is not "employed as a merchant vessel." This was said to have been "abundantly established" by *The Western Maid,* 257 U. S. 419, and by *Bradey* v. *United States,* 151 F. 2d 742, *United States* v. *City of New York,* 8 F. 2d 270, and *The Norman Bridge,* 290 F. 575, and to have been "at least recognized" in *United States Grain Corporation* v. *Phillips,* 261 U. S. 106. 197 F. 2d 795, 801–802.

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[4] The Government's appeal to the Court of Appeals from the decree of the District Court was restricted to the jurisdictional issue, and the Government has not intimated that the award of $238.50 to Calmar was in error on the merits.

In reaching its conclusion, the Court of Appeals adopted the Government's position below. In this Court, the Government changed its tune. Mildly suggesting that the view it pressed on the Court of Appeals "has some support," the Government urges now "that the view that jurisdiction existed under the Suits in Admiralty Act is better grounded." The cases relied on by the Court of Appeals, the Government now argues, dealt with a significantly different problem than arises under the Suits in Admiralty Act and do not support the conclusion that the nature of the cargo is a necessary criterion for determining whether a privately owned vessel is "employed as a merchant vessel" within the terms of that Act. The language of the Act does not impose this criterion. The phrase, "employed as a merchant vessel," the Government now contends, is more appropriately read to refer simply to privately owned vessels operated for the United States for hire. Such a reading is not inconsistent with the legislative history, and, unlike that adopted by the Court of Appeals, tends to regard the Suits in Admiralty Act and its sister statute, the Public Vessels Act, 43 Stat. 1112, 46 U. S. C. § 781, which permits suits "for damages caused by a public vessel of the United States," [5] as manifestations of a single larger purpose, jointly forming a rational system free of random omissions and exceptions. Moreover, the Government points out, a test under which the arrangements effectuated by a charter-party are the controlling facts lends

[5] Section 1 of the Act provides:

"A libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920." 46 U. S. C. § 781.

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itself, unlike the cargo test, to simple and expeditious application, reasonably predictable in result. We agree with the Government's position here.

The Western Maid, supra, dealt with attempts to bring in the District Courts "proceedings *in rem* for collisions that occurred while the vessels libeled were owned, absolutely or *pro hac vice,* by the United States, and employed in the public service." 257 U. S., at 429. The *Western Maid* itself was government property. The *Liberty* and the *Carolinian,* the other two vessels involved, were, at the time of the collisions, operated by the United States under bareboat charters. The *Carolinian* was an army transport manned by an army crew. The *Liberty* was commissioned and employed as a naval dispatch boat, manned, of course, by a navy crew. The *Western Maid* served as a transport. She carried foodstuffs for European relief, which, if not distributed in what had been enemy territory, were to be sold by the appropriate government official. But while, as we have noted, all three vessels were in government hands at the time of the collisions on which the libels were based, at the time of suit the *Carolinian* and the *Liberty,* though not the *Western Maid,* were privately owned. And so the principal question in the case, "[t]he only question really open to debate," *id.,* at 432, to which Mr. Justice Holmes, for the Court, addressed himself, was whether an enforceable liability could have been created when those two vessels passed into private ownership, although no such liability arose when the collisions occurred. The *Western Maid,* it was claimed, although publicly owned, was employed "solely" as a merchant vessel, and hence as to it the collision at the time it occurred gave rise to a liability enforceable against the United States by virtue of the Shipping Act of 1916 as construed, a liability enforceable *in rem* and subjecting the

vessel to seizure.[6] It was this contention, on these facts, under this Act so construed, that Mr. Justice Holmes disposed of in passing by stating "the obvious truth, that [the *Western Maid*] was engaged in a public service that

[6] Section 9 of the Shipping Act of 1916, 39 Stat. 728, 730, as amended, 40 Stat. 900, 41 Stat. 994, 49 Stat. 1987, 2016, 52 Stat. 964, 46 U. S. C. § 808, provides in part:

"Every vessel purchased, chartered, or leased from the [United States Maritime Commission] shall, unless otherwise authorized by the [commission], be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

The Lake Monroe, 250 U. S. 246, permitted seizure, under the provision just quoted, "of a steam vessel . . . owned and operated by the Government of the United States," 250 U. S., at 248. We have said that the Suits in Admiralty Act "was passed to avoid the embarrassment to which the Government found itself subjected by the Act of September 7, 1916, c. 451, 39 Stat. 728, by the ninth section of which vessels in which the United States had an interest and which were employed as merchant vessels were made liable as such to arrest or seizure for enforcement of maritime liens. *The Lake Monroe*, 250 U. S. 246." *Blamberg Bros.* v. *United States*, 260 U. S. 452, 458. Congress, in passing the Suits in Admiralty Act, was not unmindful of the considerations of fairness which prompted passage of the Shipping Act of 1916, and later of the Public Vessels Act. Congress compensated for the prohibition against seizures in § 1 of the Suits in Admiralty Act with the waiver of immunity in § 2. Section 1 states: "No vessel owned . . . shall, in view of the provision herein made for a libel in personam, be subject to arrest . . . ." See *supra*, n. 1. Surely the considerations of fairness which have weighed with Congress in all its actions in this field indicate that, for want of valid reasons to the contrary, the prohibition of § 1 and the waiver of § 2 and of the Public Vessels Act should be more or less coextensive. We do not in any way imply that this attitude of fairness can decide concrete cases, or that Congress meant it to. But it points a direction.

was one of the constituents of our activity in the war and its sequel and that had no more to do with ordinary merchandizing than if she had carried a regiment of troops." *Idem.*

Of the other cases relied on by the Court of Appeals, *The Norman Bridge, supra,* like *The Western Maid,* involved an attempted seizure under the Shipping Act of 1916. The vessel was owned by the United States *pro hac vice. United States* v. *City of New York, supra,* arose under the Suits in Admiralty Act, but the vessel in question was owned by the United States and engaged in public business. She was in no sense operated for hire. The vessel in *Bradey* v. *United States, supra,* was also owned by the United States and in no sense operated for hire. *United States Grain Corporation* v. *Phillips, supra,* did not concern the Suits in Admiralty or Public Vessels or Shipping Acts. It was a suit by a naval officer under an ancient statute for a commission on gold carried by the destroyer he commanded. The citation by the Court in *Phillips* of *The Western Maid* was apt, but it fails to render the *Phillips* case an apt citation here.

The United States today would be subject to suit on the facts of *The Western Maid* under the Public Vessels Act. But a vessel operated for, or owned by, the United States cannot now, by virtue of § 1 of the Suits in Admiralty Act, be seized, whether or not she was "employed as a merchant vessel." It is for that reason that construction of the phrase, "employed as a merchant vessel," presented a materially different problem under the Shipping Act of 1916 than it does under the Suits in Admiralty Act. Nor is the problem the same when a vessel owned, absolutely or *pro hac vice,* by the United States is involved as when one privately owned and operated is in question. In the former case the consequence of holding that a vessel was not "employed as a merchant vessel"

is, in the great number of instances, that the libel is dismissed under the Suits in Admiralty Act only to be heard under the Public Vessels Act in the same admiralty court. When as here the vessel is privately owned and operated, however, to hold that she was not employed as a merchant vessel is to relegate the libelant, on a contract claim substantial enough not to be cognizable on the law side under the Tucker Act, 28 U. S. C. (Supp. III) § 1346, to the Court of Claims.[7] Yet the District Courts are, in our judicial system, the accustomed forum in matters of admiralty; everything else being equal, no efforts should be made to divert this type of litigation to judges less experienced in admiralty. The Suits in Admiralty Act and the Public Vessels Act are not to be regarded as discrete enactments treating related situations in isolation. Hence there is no reason why a claim arising in connection with a vessel bareboat chartered by the United States and carrying war materiel should be heard by a District Court, while a like claim relating to a vessel chartered as was the *Portmar* and carrying the same type of cargo, should

[7] 28 U. S. C. (Supp. III) § 1491. The litigant cannot hedge by filing a suit in the Court of Claims simultaneously with one under the Suits in Admiralty Act, as he might well want to do because of the uncertainties inherent in the cargo test applied by the Court of Appeals. (The owner, as was true in this case, may not know the nature of the cargo. The manifest here was secret. The vessel may carry mixed cargo, or it may, between voyages, be without cargo.) 28 U. S. C. (Supp. III) § 1500 provides that the "Court of Claims shall not have jurisdiction of any claim . . . in respect to which the plaintiff or his assignee has pending in any other court any suit . . . against the United States . . . ." Time limitations differ under the Suits in Admiralty Act and in the Court of Claims. The limitation is two years under the former, 41 Stat. 526, 46 U. S. C. § 745, and six years in the latter, 28 U. S. C. (Supp. III) § 2501. The starting points for accrual of interest vary as well. Compare 41 Stat. 526, 46 U. S. C. § 745, with 28 U. S. C. (Supp. III) § 2516; see *De La Rama S. S. Co.* v. *United States*, 344 U. S. 386, 390.

require an action to be filed in the Court of Claims.[8] Nor is there any reason why a collision involving the one vessel should result in an admiralty suit under the Public Vessels Act, while on the same facts, recovery in the case of the other vessel should have to be sought on the law side.[9] We have no authoritative indication that Congress wished such results, and it is quite another thing for us, in the absence of guidance from Congress, to assume that it did.

We hold that the *Portmar,* a privately owned vessel operated for hire for the United States, was "employed as a merchant vessel" within the meaning of the Suits in Admiralty Act, although engaged on a war mission. We do not consider the merits of Calmar's claims against the United States, which the Court of Appeals did not, in view of its disposition of the libel, pass on.

The judgment of the Court of Appeals must be vacated and the cause remanded to that court for proceedings not inconsistent with this opinion.

It is so ordered.

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[8] It is not to be assumed that all claims sounding in contract can form the basis of a suit under the Public Vessels Act. The Act expressly authorizes towage and salvage claims. We intimate no opinion as to other claims, and do not suggest that all or any of the causes of action in this very suit would or would not qualify under the Public Vessels Act. There are cases in which jurisdiction over contract claims other than towage or salvage has been assumed. *Thomason* v. *United States,* 184 F. 2d 105; *United States* v. *Loyola,* 161 F. 2d 126. But cf. *Eastern S. S. Lines* v. *United States,* 187 F. 2d 956. All that matters for our purpose is that there is a class of cases, no matter how narrow, which, if the cargo test of jurisdiction is applied, will be heard by the District Courts in admiralty when a vessel owned by the United States is involved, and in the Court of Claims when the vessel was chartered as was the *Portmar.* It is not our task, of course, to torture the Suits in Admiralty and Public Vessels Acts into an all-inclusive grant of jurisdiction to the District Courts. But equivocal language should be construed so as to secure the most harmonious results.

[9] Suit would lie in most instances under the Tort Claims Act, 60 Stat. 842.

UNITED STATES *v.* CARROLL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

No. 442. Argued March 11–12, 1953.—Decided April 27, 1953.

1. Appellee was indicted on 101 counts under § 145 (a) of the Internal Revenue Code, as amended, for willful failure to file "returns" on Treasury Form 1099 covering 101 payments in excess of $600 made to a named individual. Under Treasury Regulations 111, § 29.147–1, such forms are not required to be signed but are to be filed "with return Form 1096" signed by the payor. *Held:* The "return" specified in § 145 (a) is that provided in Form 1096, not the one provided in Form 1099; and, since the only offenses charged in the 101 counts were failures to file Form 1099, the indictment was properly dismissed. Pp. 458–460.
2. This direct appeal under 18 U. S. C. § 3731 from a decision of a Federal District Court dismissing the indictment, is properly before this Court, because the District Court rested its decision on the "construction of the statute." Whether there are other objections to the indictment, such as questions of venue, which might also lead to dismissal is not properly before this Court on this appeal. P. 459, footnote.

Affirmed.

The District Court dismissed an indictment of appellee on 101 counts under § 145 of the Internal Revenue Code. On direct appeal to this Court under 18 U. S. C. § 3731, *affirmed,* p. 460.

Marvin E. Frankel argued the cause for the United States. With him on the brief were *Solicitor General Cummings, Assistant Attorney General Holland, Ellis N. Slack* and *Joseph M. Howard. Robert L. Stern,* then Acting Solicitor General, was on the Statement as to Jurisdiction.

Morris A. Shenker argued the cause for appellee. With him on the brief were *Bernard J. Mellman* and *Sidney M. Glazer.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is an appeal under the Criminal Appeals Act, 18 U. S. C. § 3731, from an order of the District Court dismissing an indictment. The indictment contains 101 counts. Each count alleges that appellee made payment of a sum in excess of $600 a year to a named individual—some in 1948, some in 1949, and the rest in 1950. The offense charged as to each such payment is a wilful failure to make a return on Treasury Form 1099 in violation of § 145 (a) of the Internal Revenue Code, as amended, § 5 (c), Current Tax Payment Act of 1943, 57 Stat. 126, 26 U. S. C. § 145 (a).

Section 147 of the Act, as amended by § 202 (c)(3) of the Revenue Act of 1948, 62 Stat. 110, provides that any person making a payment to another of $600 or more in any calendar year "shall render a true and accurate return to the Commissioner, under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary."

Treasury Regulations 111, § 29.147–1, as amended T. D. 5313, 1944 Cum. Bull. 308, T. D. 5687, 1949–1 Cum. Bull. 9, provides that all persons making any such payment in any calendar year (with exceptions not relevant here) shall make a "return" on Form 1099, "accompanied by transmittal Form 1096 showing the number of returns filed." Form 1099 is required to be prepared and filed for each payee, showing the name and address of the payee, the kind and amount of income paid, and the name and address of the person making the payment. Form 1099 on its face is called an "Information Return"; and its instructions say that it is to be forwarded "with return Form 1096." Form 1099 contains no formal declaration by the payor nor any signature by him. Those are provided in Form 1096.

Form 1096 is called "Annual Information Return." It must be signed by the payor with a statement of the number of reports on Form 1099 which are attached. It contains a declaration that "to the best of my knowledge and belief the accompanying reports on Form 1099" constitute "a true and complete return of payments" of the prescribed character made during the specified calendar year.

Section 145 (a) of the Act provides that any person required by law or regulations "to make a return . . . for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to . . . make such return" shall be guilty of a misdemeanor and on conviction be fined not more than $10,000 or imprisoned for not more than one year, or both.

The District Court ruled that the "return" specified in § 145 (a) was that provided in Form 1096, not the one provided in Form 1099, and that since the only offenses charged in the 101 counts were failures to file Form 1099 the indictment should be dismissed.*

The question is not without difficulty. But we conclude that the District Court reached the correct result.

The "return" required by § 147 (a) is to be made "in such form and manner" as are prescribed in the Regula-

*We postponed the question of jurisdiction to a hearing on the merits in view of appellee's contention in his statement opposing jurisdiction that the dismissal was based not only upon the "construction of the statute" within the meaning of the Criminal Appeals Act, 18 U. S. C. § 3731, but also, as respects the first 45 counts, on a question of venue. We do not read the oral opinion of the District Court that way. We think the District Court rested its decision as respects all 101 counts on the construction of the statute. Whether there are other objections to the indictment which might also lead to dismissal is therefore not properly here on this appeal. See *United States* v. *Borden Co.*, 308 U. S. 188, 193.

tions. The Regulations provide in § 29.147–1, as we have noted, that a "return shall be made in each case on Form 1099, accompanied by transmittal Form 1096 showing the number of returns filed." The "form and manner" prescribed therefore seem to consist of the verified Form 1096 together with the Forms 1099. All of them together apparently constitute the "return" referred to in § 147 (a). The various Forms 1099 seem to have the same relation to Form 1096 as schedules have to an ordinary income tax return. Form 1099 supplies the details which underlie Form 1096. That conclusion is supported by the fact that Form 1096 is the only one which is signed and verified.

We hesitate to conclude that a failure to file an unverified schedule is given the same dignity as the failure to file the verified return. We are dealing with criminal sanctions in the complicated, technical field of the revenue law. The code and the regulations must be construed in light of the purpose to locate and check upon recipients of income and the amounts they receive. See S. Rep. No. 103, 65th Cong., 1st Sess. 20. But at the same time every citizen is entitled to fair warning of the traps which the criminal law lays. Where the "return" prescribed is a verified Form 1096 together with all the unverified Forms 1099 it does not seem fair warning to charge a person for more than the failure to make that return. To multiply the crimes by the number of Forms 1099 required to be filed is to revise the regulatory scheme. So far as these information returns are concerned, the purpose of § 145 (a) seems to us to be fulfilled when the sanction is applied only to a failure to file Form 1096.

Affirmed.

Syllabus.

TERRY ET AL. *v.* ADAMS ET AL.

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

No. 52. Argued January 16, 1953.—Decided May 4, 1953.

Petitioners, qualified Negro voters of a Texas County, sued to determine the legality of their being excluded, solely because of their race and color, from voting in elections held by an Association consisting of all qualified white voters in the County. The Association held an election in each election year to select candidates for county offices to run for nomination in the official Democratic primary. The Association's elections were not governed by state laws and did not utilize state elective machinery or funds. Candidates elected by the Association were not certified by the Association as its candidates in the Democratic primary, but filed their own names as candidates. However, for more than 60 years, the Association's county-wide candidates had invariably been nominated in the Democratic primaries and elected to office. The District Court found that the Association was a political organization or party and that its chief object had always been to deny Negroes any voice or part in the election of county officials. *Held:*

1. The combined election machinery of the Association and the Democratic Party deprives petitioners of their right to vote on account of their race and color, contrary to the Fifteenth Amendment. P. 470.

2. The case is remanded to the District Court to enter such orders and decrees as are necessary and proper under the jurisdiction it has retained under 28 U. S. C. § 2202. P. 470.

3. In exercising this jurisdiction, the District Court is left free to hold hearings to consider and determine what provisions are essential to afford Negro citizens of the County full protection from such future discriminatory election practices which deprive citizens of voting rights because of their color. P. 470.

193 F. 2d 600, reversed.

For opinion of MR. JUSTICE BLACK, joined by MR. JUSTICE DOUGLAS and MR. JUSTICE BURTON, see *post*, p. 462.

For opinion of MR. JUSTICE FRANKFURTER, see *post*, p. 470.

For concurring opinion of MR. JUSTICE CLARK, joined by THE CHIEF JUSTICE, MR. JUSTICE REED and MR. JUSTICE JACKSON, see *post*, p. 477.

For dissenting opinion of MR. JUSTICE MINTON, see *post*, p. 484.

The District Court issued a declaratory judgment holding invalid racial discriminations in a pre-primary election in a Texas County, declined to issue an injunction, but retained jurisdiction to grant further appropriate relief. 90 F. Supp. 595. The Court of Appeals reversed. 193 F. 2d 600. This Court granted certiorari. 344 U. S. 883. *Judgment of the Court of Appeals reversed and cause remanded to the District Court for further proceedings,* p. 470.

J. Edwin Smith and *James M. Nabrit* argued the cause for petitioners. With *Mr. Smith* on the brief was *Ira J. Allen.*

Edgar E. Townes, Jr. and *Clarence I. McFarlane* argued the cause for respondents. With them on the brief was *E. E. Townes.*

MR. JUSTICE BLACK announced the judgment of the Court and an opinion in which MR. JUSTICE DOUGLAS and MR. JUSTICE BURTON join.

In *Smith* v. *Allwright,* 321 U. S. 649, we held that rules of the Democratic Party of Texas excluding Negroes from voting in the party's primaries violated the Fifteenth Amendment. While no state law directed such exclusion, our decision pointed out that many party activities were subject to considerable statutory control. This case raises questions concerning the constitutional power of a Texas county political organization called the Jaybird Democratic Association or Jaybird Party to exclude Negroes from its primaries on racial grounds. The Jaybirds deny that their racial exclusions violate the

Fifteenth Amendment. They contend that the Amendment applies only to elections or primaries held under state regulation, that their association is not regulated by the state at all, and that it is not a political party but a self-governing voluntary club. The District Court held the Jaybird racial discriminations invalid and entered judgment accordingly. 90 F. Supp. 595. The Court of Appeals reversed, holding that there was no constitutional or congressional bar to the admitted discriminatory exclusion of Negroes because Jaybird's primaries were not to any extent state controlled. 193 F. 2d 600. We granted certiorari. 344 U. S. 883.

There was evidence that:

The Jaybird Association or Party was organized in 1889. Its membership was then and always has been limited to white people; they are automatically members if their names appear on the official list of county voters. It has been run like other political parties with an executive committee named from the county's voting precincts. Expenses of the party are paid by the assessment of candidates for office in its primaries. Candidates for county offices submit their names to the Jaybird Committee in accordance with the normal practice followed by regular political parties all over the country. Advertisements and posters proclaim that these candidates are running subject to the action of the Jaybird primary. While there is no legal compulsion on successful Jaybird candidates to enter Democratic primaries, they have nearly always done so and with few exceptions since 1889 have run and won without opposition in the Democratic primaries and the general elections that followed. Thus the party has been the dominant political group in the county since organization, having endorsed every county-wide official elected since 1889.

It is apparent that Jaybird activities follow a plan purposefully designed to exclude Negroes from voting and

at the same time to escape the Fifteenth Amendment's command that the right of citizens to vote shall neither be denied nor abridged on account of race. These were the admitted party purposes according to the following testimony of the Jaybird's president:

> Q. . . . Now Mr. Adams, will you tell me specifically what is the specific purpose of holding these elections and carrying on this organization like you do?
>
> A. Good government.
>
> Q. Now I will ask you to state whether or not it is the opinion and policy of the Association that to carry on good government they must exclude negro citizens?
>
> A. Well, when we started it was and it is still that way, I think.
>
> Q. And then one of the purposes of your organization is for the specific purpose of excluding negroes from voting, isn't it?
>
> A. Yes.
>
> Q. And that is your policy?
>
> A. Yes.
>
> Q. I will ask you, that is the reason you hold your election in May rather than in June or July, isn't it?
>
> A. Yes.
>
> Q. Because if you held it in July you would have to abide by the statutes and the law by letting them vote?
>
> A. They do vote in July.
>
> Q. And if you held yours at that time they would have to vote too, wouldn't they?
>
> A. Why sure.
>
> Q. And you hold it in May so they won't have to?
>
> A. Well, they don't vote in ours but they can vote on anybody in the July election they want to.

Q. But you are not answering my question. My question is that you hold yours in May so you won't have to let them vote, don't you?

A. Yes.

Q. And that is your purpose?

A. Yes.

Q. And your intention?

A. Yes.

Q. And to have a vote of the white population at a time when the negroes can't vote, isn't that right?

A. That's right.

Q. That is the whole policy of your Association?

A. Yes.

Q. And that is its purpose?

A. Yes.

The District Court found that the Jaybird Association was a political organization or party; that the majority of white voters generally abide by the results of its primaries and support in the Democratic primaries the persons endorsed by the Jaybird primaries; and that the chief object of the Association has always been to deny Negroes any voice or part in the election of Fort Bend County officials.

The facts and findings bring this case squarely within the reasoning and holding of the Court of Appeals for the Fourth Circuit in its two recent decisions about excluding Negroes from Democratic primaries in South Carolina. *Rice* v. *Elmore,* 165 F. 2d 387, and *Baskin* v. *Brown,* 174 F. 2d 391.[1] South Carolina had repealed

[1] It has been suggested that there is a crucial distinction between this case and the South Carolina primary cases. There, it is said, the names of Democratic nominees were placed on the state's general election ballots as Democratic nominees. Here Jaybird nominees are not put on any ballot as Jaybird nominees; they enter their own names as candidates in the Democratic primary. This distinction is not one of substance but of form, and a statement of this Court

every trace of statutory or constitutional control of the Democratic primaries. It did this in the hope that thereafter the Democratic Party or Democratic "Clubs" of South Carolina would be free to continue discriminatory practices against Negroes as voters. The contention there was that the Democratic "Clubs" were mere private groups; the contention here is that the Jaybird Association is a mere private group. The Court of Appeals in invalidating the South Carolina practices answered these formalistic arguments by holding that no election machinery could be sustained if its purpose or effect was to deny Negroes on account of their race an effective voice in the governmental affairs of their country, state, or community. In doing so the Court relied on the principle announced in *Smith* v. *Allwright, supra,* at 664, that the constitutional right to be free from racial discrimination in voting ". . . is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election."

The South Carolina cases are in accord with the commands of the Fifteenth Amendment and the laws passed pursuant to it. That Amendment provides as follows:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

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in *Smith* v. *Allwright, supra,* at 661, seems appropriate: *"Such a variation in the result from so slight a change in form* influences us to consider anew the legal validity of the distinction which has resulted in barring Negroes from participating in the nominations of candidates of the Democratic party in Texas." (Emphasis supplied.) The same may be said about the attempted distinction between the "two-step" exclusion process in South Carolina and the "three-step" exclusion process in Texas.

The Amendment bans racial discrimination in voting by both state and nation. It thus establishes a national policy, obviously applicable to the right of Negroes not to be discriminated against as voters in elections to determine public governmental policies or to select public officials, national, state, or local. Shortly after its adoption Mr. Chief Justice Waite speaking for this Court said:

> "It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude." *United States* v. *Reese,* 92 U. S. 214, 218.

Other cases have reemphasized the Fifteenth Amendment's specific grant of this new constitutional right.[2] Not content to rest congressional power to protect this new constitutional right on the necessary and proper

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[2] "In *United States* v. *Reese et al., supra,* p. 214, we hold that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, &c., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been." *United States* v. *Cruikshank,* 92 U. S. 542, 555–556. To the same effect, see *Ex parte Yarbrough,* 110 U. S. 651, 664–665; *Logan* v. *United States,* 144 U. S. 263, 286. The Amendment has been held "self-executing." See *Guinn* v. *United States,* 238 U. S. 347, 362–363.

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clause of the Constitution, the Fifteenth Amendment's framers added § 2, reading:

> "The Congress shall have power to enforce this article by appropriate legislation."

And Mr. Justice Miller speaking for this Court declared that the Amendment's granted right to be free from racial discrimination ". . . should be kept free and pure by congressional enactments whenever that is necessary." *Ex parte Yarbrough,* 110 U. S. 651, 665. See also *United States* v. *Reese, supra,* at 218. And see Mr. Justice Bradley's opinion on circuit in *United States* v. *Cruikshank,* 1 Woods 308, 314–316, 320–323. Acting pursuant to the power granted by the second section of the Fifteenth Amendment, Congress in 1870 provided as follows:

> "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding." 8 U. S. C. § 31.

The Amendment, the congressional enactment and the cases make explicit the rule against racial discrimination in the conduct of elections. Together they show the meaning of "elections." Clearly the Amendment includes any election in which public issues are decided or public officials selected.[3] Just as clearly the Amendment

[3] "We may mystify any thing. But if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation." *Ex parte Siebold,* 100 U. S. 371, 393.

excludes social or business clubs. And the statute shows the congressional mandate against discrimination whether the voting on public issues and officials is conducted in community, state or nation. Size is not a standard.

It is significant that precisely the same qualifications as those prescribed by Texas entitling electors to vote at county-operated primaries are adopted as the sole qualifications entitling electors to vote at the county-wide Jaybird primaries with a single proviso—Negroes are excluded. Everyone concedes that such a proviso in the county-operated primaries would be unconstitutional. The Jaybird Party thus brings into being and holds precisely the kind of election that the Fifteenth Amendment seeks to prevent. When it produces the equivalent of the prohibited election, the damage has been done.

For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment. The use of the county-operated primary to ratify the result of the prohibited election merely compounds the offense. It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election.

The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded. The Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections from which Negroes have been excluded. It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county. The effect of the whole

procedure, Jaybird primary plus Democratic primary plus general election, is to do precisely that which the Fifteenth Amendment forbids—strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens.

We reverse the Court of Appeals' judgment reversing that of the District Court. We affirm the District Court's holding that the combined Jaybird-Democratic-general election machinery has deprived these petitioners of their right to vote on account of their race and color. The case is remanded to the District Court to enter such orders and decrees as are necessary and proper under the jurisdiction it has retained under 28 U. S. C. § 2202. In exercising this jurisdiction, the Court is left free to hold hearings to consider and determine what provisions are essential to afford Negro citizens of Fort Bend County full protection from future discriminatory Jaybird-Democratic-general election practices which deprive citizens of voting rights because of their color.

Reversed and remanded.

MR. JUSTICE FRANKFURTER.

Petitioners are Negroes who claim that they and all Negroes similarly situated in Fort Bend County, Texas, are denied all voice in the primary elections for county offices by the activities of respondent association, the Jaybird Democratic Association. The Jaybird Association was organized in 1889 and from that time until the present has selected, first in mass meetings but for some time by ballot of its members, persons whom the organization indorses for election in the Democratic primary for county office. The Association has never permitted Negroes to participate in its selection of the candidates to be indorsed; balloting is open only to all white citizens

of the county qualified under State law to vote. The District Court granted a declaratory judgment that Negroes in the county be allowed to participate in the balloting of the Association. The Court of Appeals reversed, saying that although the white voters in the county are "vainly holding" to "outworn and outmoded" practices, the action of the Association was not "action under color of state law" and therefore not in violation of federal law.

The evidence, summarized by formal stipulation, shows that all rules of the Association are made by its members themselves or by its Executive Committee. Membership, defined by the rules of the Association, consists of the entire white voting population as shown in poll lists prepared by the county. The time of balloting, in what are called the Jaybird primaries, is set by the Executive Committee of the Association for a day early in May of each election year. The expenses of these primaries, the officiating personnel, the balloting places, the determination of the winner—all aspects of these primaries are exclusively controlled by the Association. The balloting rules in general follow those prescribed by the State laws regulating primaries. See Vernon's Tex. Stat., 1948 (Rev. Civ. Stat.), Tit. 50, c. 13, now revised, 9 Vernon's Tex. Civ. Stat., 1952, c. 13. But formal State action, either by way of legislative recognition or official authorization, is wholly wanting.

The successful candidates in the Jaybird primaries, in formal compliance with State rules in that regard, file individually as candidates in the Democratic primary held on the fourth Saturday in July. No mention is made in the filing or in the listing of the candidates on the Democratic primary ballot that they are the Jaybird indorsees. That fact is conveyed to the public by word of mouth, through newspapers, and by other private means. There is no restriction on filing by anyone else

as a candidate in the Democratic primary, nor on voting by Negroes in that official primary.

For the sixty years of the Association's existence, the candidate ultimately successful in the Democratic primary for every county-wide office was the man indorsed by the Jaybird Association. Indeed, other candidates almost never file in the Democratic primary. This continuous success over such a period of time has been the result of action by practically the entire qualified electorate of the county, barring Negroes.

This case is for me by no means free of difficulty. Whenever the law draws a line between permissive and forbidden conduct cases are bound to arise which are not obviously on one side or the other. These dubious situations disclose the limited utility of the figure of speech, a "line," in the law. Drawing a "line" is necessarily exercising a judgment, however confined the conscientious judgment may be within the bounds of constitutional and statutory provisions, the course of decisions, and the presuppositions of the judicial process. If "line" is in the main a fruitful tool for dividing the sheep from the goats, it must not be forgotten that since the "line" is figurative the place of this or that case in relation to it cannot be ascertained externally but is a matter of the mind.

Close analysis of what it is that the Fifteenth Amendment prohibits must be made before it can be determined what the relevant line is in the situation presented by this case. The Fifteenth Amendment, not the Fourteenth, outlawed discrimination on the basis of race or color with respect to the right to vote. Concretely, of course, it was directed against attempts to bar Negroes from having the same political franchise as white folk. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of

servitude." U. S. Const., Amend. XV, § 1. The command against such denial or abridgment is directed to the United States and to the individual States. Therefore, violation of this Amendment and the enactments passed in enforcement of it must involve the United States or a State. In this case the conduct that is assailed pertains to the election of local Texas officials. To find a denial or abridgment of the guaranteed voting right to colored citizens of Texas solely because they are colored, one must find that the State has had a hand in it.

The State, in these situations, must mean not private citizens but those clothed with the authority and the influence which official position affords. The application of the prohibition of the Fifteenth Amendment to "any State" is translated by legal jargon to read "State action." This phrase gives rise to a false direction in that it implies some impressive machinery or deliberative conduct normally associated with what orators call a sovereign state. The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored.

As the action of the entire white voting community, the Jaybird primary is as a practical matter the instrument of those few in this small county who are politically active—the officials of the local Democratic party and, we may assume, the elected officials of the county. As a matter of practical politics, those charged by State law with the duty of assuring all eligible voters an opportunity to participate in the selection of candidates at the primary—the county election officials who are normally leaders in their communities—participate by voting in the Jaybird primary. They join the white voting community in proceeding with elaborate formality, in almost all respects parallel to the procedures dictated by Texas

law for the primary itself, to express their preferences in a wholly successful effort to withdraw significance from the State-prescribed primary, to subvert the operation of what is formally the law of the State for primaries in this county.

The legal significance of the Jaybird primary must be tested against the cases which, in an endeavor to screen what is effectively an exertion of State authority in preventing Negroes from exercising their constitutional right of franchise, have pierced the various manifestations of astuteness. In the last of the series, *Smith* v. *Allwright,* 321 U. S. 649, we held that the State regulation there of primaries conducted by a political party made the party "required to follow these legislative directions an agency of the State in so far as it determines the participants in a primary election." *Id.,* at 663. Alternative routes have been suggested for concluding that the Jaybird primary is "so slight a change in form," *id.,* at 661, that the result should not differ in substance from that of *Smith* v. *Allwright.* The District Court found that the Jaybird Association is a political party within the meaning of the Texas legislation regulating the administration of primaries by political parties; it said that the Association could not avoid that result by holding its primary on a different date and by utilizing different methods than those prescribed by the statutes.

Whether the Association is a political party regulated by Texas and thus subject to a duty of nondiscrimination, or is, as it claims, clearly not a party within the meaning of that legislation, failing as it does to attempt to comply with a number of the State requirements, particularly as to the date of the "primary," is a question of State law not to be answered in the first instance by a federal court. We do not know what the Texas Supreme Court would say. An operation such

as the Jaybird primary may be found by the Texas court to satisfy Texas law although it does not come within the formal definition; it may so be found because long-accepted customs and the habits of a people may generate "law" as surely as a formal legislative declaration, and indeed, sometimes even in the face of it. See, *e. g., Nashville, Chattanooga & St. Louis R. Co.* v. *Browning,* 310 U. S. 362, 369. But even if the Jaybird Association is a political party, a federal court cannot say that a political party in Texas is to hold a primary open to all on a day other than that fixed by Texas statute. This would be an inadmissible intervention of the federal judiciary into the political process of a State. If such a remedy is to be derived from a finding that the Jaybird Association is a political party, it is one that must be devised by the Texas courts. For the same reason, we cannot say that the Jaybird primary is a "primary" within the meaning of Texas law and so regulated by Texas law that *Smith* v. *Allwright* would apply.

But assuming, as I think we must, that the Jaybird Association is not a political party holding a State-regulated primary, we should nonetheless decide this case against respondents on the ground that in the precise situation before us the State authority has come into play.

The State of Texas has entered into a comprehensive scheme of regulation of political primaries, including procedures by which election officials shall be chosen. The county election officials are thus clothed with the authority of the State to secure observance of the State's interest in "fair methods and a fair expression" of preferences in the selection of nominees. Cf. *Waples* v. *Marrast,* 108 Tex. 5, 12, 184 S. W. 180, 183. If the Jaybird Association, although not a political party, is a device to defeat the law of Texas regulating primaries, and if the electoral officials, clothed with State power in the county, share in that subversion, they cannot divest themselves of the State au-

thority and help as participants in the scheme. Unlawful administration of a State statute fair on its face may be shown "by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself," *Snowden* v. *Hughes,* 321 U. S. 1, 8; here, the county election officials aid in this subversion of the State's official scheme of which they are trustees, by helping as participants in the scheme.

This is not a case of occasional efforts to mass voting strength. Nor is this a case of boss-control, whether crudely or subtly exercised. Nor is this a case of spontaneous efforts by citizens to influence votes or even continued efforts by a fraction of the electorate in support of good government. This is a case in which county election officials have participated in and condoned a continued effort effectively to exclude Negroes from voting. Though the action of the Association as such may not be proscribed by the Fifteenth Amendment, its role in the entire scheme to subvert the operation of the official primary brings it "within reach of the law. . . . [T]hey are bound together as the parts of a single plan. The plan may make the parts unlawful." Mr. Justice Holmes, speaking for the Court, in *Swift and Company* v. *United States,* 196 U. S. 375, 396.

The State here devised a process for primary elections. The right of all citizens to share in it, and not to be excluded by unconstitutional bars, is emphasized by the fact that in Texas nomination in the Democratic primary is tantamount to election. The exclusion of the Negroes from meaningful participation in the only primary scheme set up by the State was not an accidental, unsought consequence of the exercise of civic rights by voters to make their common viewpoint count. It was the design, the very purpose of this arrangement that the Jaybird primary in May exclude Negro participation in July. That it was the action in part of the election officials charged by

Texas law with the fair administration of the primaries, brings it within the reach of the law. The officials made themselves party to means whereby the machinery with which they are entrusted does not discharge the functions for which it was designed.

It does not follow, however, that the relief granted below was proper. Since the vice of this situation is not that the Jaybird primary itself is the primary discriminatorily conducted under State law but is that the determination there made becomes, in fact, the determination in the Democratic primary by virtue of the participation and acquiescence of State authorities, a federal court cannot require that petitioners be allowed to vote in the Jaybird primary. The evil here is that the State, through the action and abdication of those whom it has clothed with authority, has permitted white voters to go through a procedure which predetermines the legally devised primary. To say that Negroes should be allowed to vote in the Jaybird primary would be to say that the State is under a duty to see to it that Negroes may vote in that primary. We cannot tell the State that it must participate in and regulate this primary; we cannot tell the State what machinery it will use. But a court of equity can free the lawful political agency from the combination that subverts its capacity to function. What must be done is that this county be rid of the means by which the unlawful "usage," R. S. § 2004, 8 U. S. C. § 31, in this case asserts itself.

MR. JUSTICE CLARK, with whom THE CHIEF JUSTICE, MR. JUSTICE REED, and MR. JUSTICE JACKSON join, concurring.

The issue is whether the Jaybird Democratic Association of Fort Bend County, Texas, by excluding Negroes from its primaries has denied to Negro citizens of the county a right to vote secured by the Fifteenth Amend-

ment. On March 16, 1950, petitioners on behalf of themselves and similarly situated Negro citizens in Fort Bend County instituted a class action against respondents individually and as officers of the Jaybird Democratic Association.[1] The complaint, in substance, charged that the Negro petitioners were duly qualified voters of the State of Texas who for many years and solely because of their race and color had been denied the right to vote in the primaries of the Association, a political party. Contending that these practices transgressed the Constitution and laws of the United States,[2] petitioners sought declaratory and injunctive relief.[3] Respondents insisted

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[1] See Fed. Rules Civ. Proc. 23.

[2] Petitioners mainly rested their claims on the Fourteenth and Fifteenth Amendments, and 8 U. S. C. § 31.

Article XIV. "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article XV. "SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"SECTION 2. The Congress shall have power to enforce this article by appropriate legislation."

8 U. S. C. § 31: "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

[3] 28 U. S. C. (Supp. V) §§ 1331, 2201. Petitioners abandoned a claim to money damages, apparently grounded on 8 U. S. C. §§ 43, 47.

that the Jaybird Democratic Association was not a political party regulated by Texas statutes but merely a private voluntary group. The District Court held that the Jaybird Democratic Association was a political party, and ruled its discriminatory exclusion of Negroes from the primary invalid.[4] Judgment accordingly entered declared petitioners legally entitled to vote in the Jaybird primary. The District Court refused an injunction but retained jurisdiction to grant further appropriate relief.[5] The Court of Appeals reversed; in

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[4] 90 F. Supp. 595 (D. C. S. D. Tex. 1950). The District Judge supported his conclusions by reference to Art. 3163, Vernon's Texas Civil Statutes (1925):

"Art. 3163. Parties without State organization

"Any political party without a State organization desiring to nominate candidates for county and precinct offices only may nominate such candidates therefor under the provisions of this title by primary elections or by a county convention held on the legal primary election day, which convention shall be composed of delegates from various election precincts in said county, elected therein at primary conventions held in such precincts between the hours of eight a. m. and ten p. m. of the preceding Saturday. All nominations made by any such parties shall be certified to the county clerk by the chairman of the county committee of such party, and, after taking the same course as nominations of other parties so certified, shall be printed on the official ballot in a separate column, headed by the name of the party; provided, a written application for such printing shall have been made to the county judge, signed and sworn to by three per cent of the entire vote cast in such county at the last general election." This provision has been substantially recodified as Art. 13.54, Vernon's Texas Election Code (1952).

[5] "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U. S. C. (Supp. V) § 2202.

The District Judge refused injunctive relief because the affairs of the Jaybird Democratic Association are controlled by an Executive Committee of twenty-two persons; the four named defendants before the court had not the power to permit petitioners to vote in the Jaybird balloting.

its view the discriminatory exclusions were not reached by the terms of the Constitution and congressional enactments.[6]

An old pattern in new guise is revealed by the record.[7] The Jaybird Democratic Association of Fort Bend County was founded in 1889 to promote "good government" in the post-Reconstruction period. During its entire life span the Association has restricted membership to whites. In earlier years, the members at mass meetings determined their choice of candidates to support at forthcoming official elections. Subsequently the Association developed a system closely paralleling the structure of the Democratic Party. The Association is governed by an Executive Committee of twenty-two persons, one from each voting precinct in the county. The Committee in each election year sets the date of the Jaybird primary for selecting by ballot the candidates to be endorsed by the Association for public office in the county. The machinery of the Jaybird Democratic Association primary now differs from the state-regulated Democratic Party primary mainly in the Association's prohibition of more than two consecutive terms for officeholders, the absence of a pledge on the ballot at the Jaybird primary, and the Association's practice of not officially filing as a ticket the names of candidates successful in its balloting. And for more than a half century the Association has adhered to its guiding principle: to deny the Negro voters of Fort Bend County any effective voice in their government.

The Court of Appeals, in reversing the District Court, largely relied on what it deemed "the settled course of decision culminating in Collins v. Hardyman, 341 U. S.

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[6] 193 F. 2d 600 (C. A. 5th Cir. 1952).

[7] Cf. *Nixon* v. *Herndon*, 273 U. S. 536 (1927); *Nixon* v. *Condon*, 286 U. S. 73 (1932); *Smith* v. *Allwright*, 321 U. S. 649 (1944).

651, . . . that it was not against individual, but against state, action that the Fourteenth and Fifteenth Amendments and 8 U. S. C. A. §§ 43 and 47 were, and are, directed." [8] But *Collins* dealt not with racial discrimination at the ballot box but merely "a lawless political brawl, precipitated by a handful of white citizens against other white citizens." 341 U. S., at 662. In any event, *Collins* adjudicated that Congress in the narrow class of conspiracies defined by the Civil Rights Statutes had not included the conspiracy charged in that particular complaint; expressly refraining from constitutional questions, *ibid.*, that case cannot be held controlling here.[9]

In our view, the Court of Appeals has misconceived the thrust of our recent decisions. The Fifteenth Amendment secures the franchise exercised by citizens of the United States against abridgment by any state on the basis of race or color. In *Smith* v. *Allwright,* 321 U. S. 649 (1944), this Court held that the Democratic Party of itself, and perforce any other political party, is prohibited by that Amendment from conducting a racially discriminatory primary election. By the rule of that case, any "part of the machinery for choosing officials" becomes subject to the Constitution's restraints. *Id.,* at 664. There, as here, we dealt with an organization that took the form of "voluntary association" of unofficial character. But because in fact it functioned as a part of the state's electoral machinery, we held it controlled

[8] 193 F. 2d, at 602. And see *id.*, at 605.

[9] Since in this case we deem the activities of the Jaybird Democratic Association unlawful under the independent reach of the Fifteenth Amendment, the applicability of 8 U. S. C. § 31 need not be considered now. See *United States* v. *Reese,* 92 U. S. 214, 218 (1876); *United States* v. *Cruikshank,* 92 U. S. 542, 555–556 (1876). Cf. *James* v. *Bowman,* 190 U. S. 127 (1903), with *Ex parte Yarbrough,* 110 U. S. 651 (1884), and *Myers* v. *Anderson,* 238 U. S. 368, 379 (1915).

by the same constitutional limitations that ruled the official general election.

We agree with Chief District Judge Kennerly that the Jaybird Democratic Association is a political party [10] whose activities fall within the Fifteenth Amendment's self-executing ban. See *Guinn* v. *United States,* 238 U. S. 347, 363 (1915); *Myers* v. *Anderson,* 238 U. S. 368, 379–380 (1915).[11] Not every private club, association or league organized to influence public candidacies or political action must conform to the Constitution's restrictions on political parties. Certainly a large area of freedom permits peaceable assembly and concerted private action for political purposes to be exercised separately by white and colored citizens alike. More, however, is involved here.

The record discloses that the Jaybird Democratic Association operates as part and parcel of the Democratic Party, an organization existing under the auspices of Texas law.[12] Each maintains the same basic qualification for membership: eligibility to vote under Texas law. Although the state Democratic Party in Texas since *Smith* v. *Allwright, supra,* no longer can restrict its membership to whites, the Jaybird Democratic Association bars Negroes from its ranks. In May of each election year it conducts a full-scale white primary in which each candidate campaigns for his candidacy subject to the action of that primary *and the Democratic primary of July,* linking

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[10] See *Smith* v. *Allwright,* 321 U. S. 649, 662 (1944); *Nixon* v. *Condon,* 286 U. S. 73, 88–89 (1932). See note 4, *supra.*

[11] See also *Neal* v. *Delaware,* 103 U. S. 370, 389–390 (1881); *Ex parte Yarbrough,* 110 U. S. 651, 665 (1884).

[12] The record in this case comprises not only a concise stipulation of facts, but also 43 additional pages of directly relevant testimony. Obviously the whole of the record underlay the determinations of the courts below, and must be considered in an appellate review of their decisions.

the two primaries together. After gaining the Jaybird Democratic Association's endorsement, the announced winners after full publicity then file in the July Democratic primary. The record reveals that 3,910 eligible voters were listed in Fort Bend County in the presidential year 1944; though only 2,032 participated in the July primary under the Democratic banner, 3,790 members voted in the May balloting of the Jaybird Democratic Association. In 1946, an off-year for presidential balloting, eligible voters numbered 4,460; the Association's May primary polled 3,309 votes, and the Democratic July primary counted but 2,996. And while the lists in 1948, again a presidential year, show only 3,856 eligible electors in the County, the Jaybird primary mustered a total vote of 4,055, compared with 3,108 in the primary voting in July. Significantly, since 1889 the winners of the Jaybird Democratic Association balloting, with but a single exception shown by this record,[13] ran unopposed and invariably won in the Democratic July primary and the subsequent general elections for county-wide office.

Quite evidently the Jaybird Democratic Association operates as an auxiliary of the local Democratic Party organization, selecting its nominees and using its machinery for carrying out an admitted design of destroying the weight and effect of Negro ballots in Fort Bend

[13] In 1944, Mr. Charles Schultz emerged victorious from the Jaybird balloting and was indorsed as its candidate for County Judge. In the July Democratic primary, Schultz triumphed by a vote of 2,025 to 1 for Mr. Mike Dornak. Schultz held office for two terms until 1948. In that year, in accord with a Jaybird Association rule prohibiting more than two consecutive terms in office, Mr. Baker received the Jaybird indorsement for the county judgeship. Schultz, however, insisted on running in the Democratic primary; he lost out to Baker by a vote of 2,209 to 803. See R. 34, 79. The record reveals, however, that the Jaybird-indorsed candidates for *precinct* office were not quite as consistently successful.

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County. To be sure, the Democratic primary and the general election are nominally open to the colored elector. But his must be an empty vote cast after the real decisions are made. And because the Jaybird-indorsed nominee meets no opposition in the Democratic primary, the Negro minority's vote is nullified at the sole stage of the local political process where the bargaining and interplay of rival political forces would make it count.

The Jaybird Democratic Association device, as a result, strikes to the core of the electoral process in Fort Bend County. Whether viewed as a separate political organization or as an adjunct of the local Democratic Party, the Jaybird Democratic Association is the decisive power in the county's recognized electoral process. Over the years its balloting has emerged as the locus of effective political choice. Consonant with the broad and lofty aims of its Framers, the Fifteenth Amendment, as the Fourteenth, "refers to exertions of state power in all forms." *Shelley* v. *Kraemer,* 334 U. S. 1, 20 (1948). Accordingly, when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play. *Smith* v. *Allwright, supra,* at 664; cf. *United States* v. *Classic,* 313 U. S. 299, 324 (1941); *Lane* v. *Wilson,* 307 U. S. 268, 275 (1939).

In sum, we believe that the activities of the Jaybird Democratic Association fall within the broad principle laid down in *Smith* v. *Allwright, supra.* For that reason we join the judgment of the Court.

MR. JUSTICE MINTON, dissenting.

I am not concerned in the least as to what happens to the Jaybirds or their unworthy scheme. I am concerned about what this Court says is state action within the

meaning of the Fifteenth Amendment to the Constitution. For, after all, this Court has power to redress a wrong under that Amendment only if the wrong is done by the State. That has been the holding of this Court since the earliest cases. THE CHIEF JUSTICE for a unanimous Court in the recent case of *Shelley* v. *Kraemer*, 334 U. S. 1, 13, stated the law as follows:

> "Since the decision of this Court in the *Civil Rights Cases*, 109 U. S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. *That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.*" (Emphasis supplied.)*

As I understand MR. JUSTICE BLACK'S opinion, he would have this Court redress the wrong even if it was individual action alone. I can understand that praiseworthy position, but it seems to me it is not in accord with the Constitution. State action must be shown.

MR. JUSTICE FRANKFURTER recognizes that it must be state action but he seems to think it is enough to constitute state action if a state official participates in the Jaybird primary. That I cannot follow. For it seems clear to me that everything done by a person who is an official is not done officially and as a representative of the State. However, I find nothing in this record that shows the state or county officials participating in the Jaybird primary.

MR. JUSTICE CLARK seems to recognize that state action must be shown. He finds state action in assumption, not in facts. This record will be searched in vain for

*The Fifteenth Amendment as here involved is also directed at state action only.

one iota of state action sufficient to support an anemic inference that the Jaybird Association is in any way associated with or forms a part of or cooperates in any manner with the Democratic Party of the County or State, or with the State. It calls itself the Jaybird Democratic Association because its interest is only in the candidates of the Democratic Party in the county, a position understandable in Texas. It is a gratuitous assumption on the part of MR. JUSTICE CLARK that: "Quite evidently the Jaybird Democratic Association operates as an auxiliary of the local Democratic Party organization, selecting its nominees and using its machinery for carrying out an admitted design of destroying the weight and effect of Negro ballots in Fort Bend County." The following stipulation in the record shows the unsubstantiality of that statement just quoted from MR. JUSTICE CLARK'S opinion. I quote the stipulation:

> "There is no compulsion upon any person who receives the indorsement of the Jaybird Democratic Association of Fort Bend County, Texas, for a particular office, to run for that office or any other office. In the event such indorsee of the Association does desire to run for such office he may do so; but if he does so run for such office he must himself file his application with the Executive Chairman or Committee of the Democratic Party for the position on the Democratic Party ballot for the July primary of such Democratic Party, and must himself pay the fee as provided by law. Neither the Jaybird Democratic Association nor its Executive Committee files an application with the Democratic Party Executive Committee or Chairman that the Jaybird Democratic Association nominee be placed on the ballot for the Democratic Party July primary election.

There is nothing on the ballot of the Democratic Party primary to indicate that any person appearing thereon does or does not have the indorsement of the Jaybird Democratic Association.

"The name of the applicant for a place on the Democratic Party ballot is not placed on said ballot unless he complies with the laws of the State of Texas, even though such applicant were indorsed by the Jaybird Democratic Association; and every qualified applicant who makes the required application to the Democratic Executive Committee and pays the requisite fee is placed on the Democratic Party primary ballot for the July Democratic primary though not indorsed by the Jaybird Democratic Association.

"No member of the Negro race, nor any other person qualified under the laws of the State of Texas to become a candidate, has been refused a place on the Democratic Party primary ballot for Fort Bend County, Texas, by the Democratic Party."

Neither is there any more evidence that the Jaybird Association avails itself of or conforms in any manner to any law of the State of Texas. As to the Jaybird Association's relation to the State, I again quote the stipulation in the record:

"There is no political organization in Fort Bend County, Texas, by the official name or designation 'Jaybird Party'. At all times since 1889, however, there has been and still is, an organization in Fort Bend County, Texas, by the name of 'Jaybird Democratic Association of Fort Bend County, Texas'. Said Association, however, has not since 1938, and it does not: (a) Have a State organization; (b) Follow or attempt to comply with any of the provisions of Article 3163 of the Revised Statutes of Texas, or

of any other statutes of the State of Texas with reference to primary elections or general elections; (c) Hold any convention or 'primary election' on the legal primary election day, to-wit: The fourth Saturday in July or the fourth Saturday in August, of any year; (d) Hold any primary convention in any precinct on the Saturday preceding a legal primary election day; (e) By the chairman of a county committee, or otherwise, certify to the County Clerk of Fort Bend County, Texas, or to the County Judge thereof, or to any official committee or other representative of the Democratic or Republican party, any nominations or indorsements made by the Association; (f) Have, or cause to be, printed in a separate column headed by the Association name any nominations on any official ballot used, or for use in, a primary or general election held on a legal primary election day or general election day; (nor does the name, Jaybird Democratic Association of Fort Bend County, Texas, or any part or indication thereof, appear on any ballot in any election other than the primaries, or other special voting occasions, held by the Association itself and alone); (g) Make, or cause to be made, a written application to the County Judge for such printing, signed and sworn to by 3% of the entire vote cast in Fort Bend County at the last preceding general election.

. . . . . .

"No officer nor Committee of such Association certifies the result of the Association membership vote, nor any nominations of the Association, to the County Clerk of Fort Bend County, Texas, nor to the Democratic Party Executive Committee nor to the Committee or official of any party with a statewide organization.

. . . . . .

"In the last few years some of the members of the Negro race have offered to vote in the Democratic Party primaries and no member of the Negro race who had qualified under the laws of the State of Texas to vote has been refused the right to vote. Some of the members of the Negro race have offered to vote in a general election in Fort Bend County, Texas, and no member of the Negro race qualified to vote has been refused a vote.

. . . . .

"The Jaybird Democratic Association of Fort Bend County, Texas, is not, and does not have, a state organization, but limits its May and June Association primaries to only the county and precinct offices, except that the membership of the Association does vote its preference for the office of District Clerk in Fort Bend County.

"The persons seeking the indorsement of the Jaybird Democratic Association of Fort Bend County, Texas, at its May or June Primaries are not required by the Association to file any expense account and do not file expense accounts with any State or local official, Committee or Board."

These stipulations from the record show the complete absence of any compliance with the state law or practice, or cooperation by or with the State. Even if it be said to be a political organization, the Jaybird Association avails itself of no state law open to political organizations, such as Art. 3163.

However, its action is not forbidden by the law of the State of Texas. Does such failure of the State to act to prevent individuals from doing what they have the right as individuals to do amount to state action? I venture the opinion it does not.

MR. JUSTICE CLARK'S opinion agrees with District Judge Kennerly that this Jaybird Democratic Association is a political party whose activities fall within the Fifteenth Amendment's self-executing ban. In the same paragraph, he admits that not all meetings for political action come under the constitutional ban. Surely white or colored members of any political faith or economic belief may hold caucuses. It is only when the State by action of its legislative bodies or action of some of its officials in their official capacity cooperates with such political party or gives it direction in its activities that the Federal Constitution may come into play. A political organization not using state machinery or depending upon state law to authorize what it does could not be within the ban of the Fifteenth Amendment. As the stipulation quoted shows, the Jaybird Association did not attempt to conform or in any way to comply with the statutes of Texas covering primaries. No action of any legislative or quasi-legislative body or of any state official or agency ever in any manner denied the vote to Negroes, even in the Jaybird primaries.

So it seems to me clear there is no state action, and the Jaybird Democratic Association is in no sense a part of the Democratic Party. If it is a political organization, it has made no attempt to use the State, or the State to use it, to carry on its poll.

Rice v. *Elmore,* 165 F. 2d 387, is cited as authority for the position of the petitioners. In that case, South Carolina had repealed all its laws relating to the conduct of primaries. The only primary conducted was by the Democratic Party of South Carolina in accordance with rules adopted by the Party. It was stipulated on the trial of that case that the Democratic Party "conducts nominating primaries and thereafter prints its ballots for use in the General Elections with the names of its nominees

thereon which ballots are distributed by party officials and placed at the General Election precincts in South Carolina for use by any electors who choose to use such ballot in voting in any such General Election in South Carolina." The District Court specifically found in Finding 19: "There is no General Election ballot in South Carolina. The only printed ballots available in General Elections in South Carolina are ballots prepared by the political parties giving only the names of their respective candidates." Finding 14 stated: "During the past 25 years the Democratic Party of South Carolina has been the only political party in South Carolina which has held state-wide primaries for nomination of candidates for Federal and State offices."

Thus it will be seen that there the Democratic Party furnished not only the candidate in the general election, but it also furnished the only ballot one could vote in that election. So the State in the general election accepted the ballot of the Democratic Party as its official ballot, and on that ballot no Negro had been permitted to vote. Clearly, the State adopted the Democratic Party's procedure as its action. The State and the Democratic Party effectively cooperated to carry on this two-step election procedure.

No such action is taken by the Jaybird Association. It neither files, certifies, nor supplies anything for the primary or election. The winner of the poll in the Jaybird Association contest files in the Democratic primary, where he may and sometimes has received opposition, and successful opposition, in precinct contests for County Commissioner, Justice of the Peace and Constable. There is no rule of the Jaybird Association that requires the successful party in its poll to file in the Democratic primary or elsewhere. It is all individual, voluntary action. Neither the State nor the Democratic Party

avails itself of the action of or cooperates in any manner with the Jaybird Association.

Smith v. *Allwright,* 321 U. S. 649, is in no manner controlling. In that case, the State had set up the machinery for the Democratic Party to conduct its primary. The State of Texas made the Democratic Party its agent for the conducting of a Democratic primary. Of course, the Democratic Party could not run that primary, set up under the auspices of the State, in a manner to exclude citizens of Texas therefrom because of their race. That such is the basis of the Court's opinion in *Smith* v. *Allwright, supra,* is apparent from the following quotation taken from that case:

> "Primary elections are conducted by the party under state statutory authority. The county executive committee selects precinct election officials and the county, district or state executive committees, respectively, canvass the returns. These party committees or the state convention certify the party's candidates to the appropriate officers for inclusion on the official ballot for the general election. No name which has not been so certified may appear upon the ballot for the general election as a candidate of a political party. . . .
>
> . . . . . .
>
> "We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party *which is required* to follow these legislative directions an agency of the State in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party." 321 U. S. 649, 663. (Emphasis supplied.)

This case does not hold that a group of Democrats, white, black, male, female, native-born or foreign, economic royalists or workingmen, may not caucus or conduct a straw vote. What the Jaybird Association did here was to conduct as individuals, separate and apart from the Democratic Party or the State, a straw vote as to who should receive the Association's endorsement for county and precinct offices. It has been successful in seeing that those who receive its endorsement are nominated and elected. That is true of concerted action by any group. In numbers there is strength. In organization there is effectiveness. Often a small minority of stockholders control a corporation. Indeed, it is almost an axiom of corporate management that a small, cohesive group may control, especially in the larger corporations where the holdings are widely diffused.

I do not understand that concerted action of individuals which is successful somehow becomes state action. However, the candidates endorsed by the Jaybird Association have several times been defeated in primaries and elections. Usually but not always since 1938, only the Jaybird-endorsed candidate has been on the Democratic official ballot in the County.

In the instant case, the State of Texas has provided for elections and primaries. This is separate and apart and wholly unrelated to the Jaybird Association's activities. Its activities are confined to one County where a group of citizens have appointed themselves the censors of those who would run for public offices. Apparently so far they have succeeded in convincing the voters of this County in most instances that their supported candidates should win. This seems to differ very little from situations common in many other places far north of the Mason-Dixon line, such as areas where a candidate must obtain the approval of a religious group. In other localities, candidates are carefully selected by both parties to

give proper weight to Jew, Protestant and Catholic, and certain posts are considered the sole possession of certain ethnic groups. The propriety of these practices is something the courts sensibly have left to the good or bad judgment of the electorate. It must be recognized that elections and other public business are influenced by all sorts of pressures from carefully organized groups. We have pressure from labor unions, from the National Association of Manufacturers, from the Silver Shirts, from the National Association for the Advancement of Colored People, from the Ku Klux Klan and others. Far from the activities of these groups being properly labeled as state action, under either the Fourteenth or the Fifteenth Amendment, they are to be considered as attempts to influence or obtain state action.

The courts do not normally pass upon these pressure groups, whether their causes are good or bad, highly successful or only so-so. It is difficult for me to see how this Jaybird Association is anything but such a pressure group. Apparently it is believed in by enough people in Fort Bend County to obtain a majority of the votes for its approved candidates. This differs little from the situation in many parts of the "Bible Belt" where a church stamp of approval or that of the Anti-Saloon League must be put on any candidate who does not want to lose the election.

The State of Texas in its elections and primaries takes no cognizance of this Jaybird Association. The State treats its decisions apparently with the same disdain as it would the approval or condemnation of judicial candidates by a bar association poll of its members.

In this case the majority have found that this pressure group's work does constitute state action. The basis of this conclusion is rather difficult to ascertain. Apparently it derives mainly from a dislike of the goals of the Jaybird Association. I share that dislike. I fail to see how it makes state action. I would affirm.

ESSO STANDARD OIL CO. *v.* EVANS, COMMISSIONER OF FINANCE AND TAXATION, ET AL.

NO. 330. APPEAL FROM THE SUPREME COURT OF TENNESSEE.*

Argued March 10, 1953.—Decided May 4, 1953.

Appellant, a private corporation, entered into a contract with the Federal Government, under which, for a fee, appellant stored government-owned gasoline in tanks in Tennessee owned by appellant or leased by appellant from another private corporation. The Government agreed to assume liability for all state taxes. Tennessee levied on appellant a "special privilege tax" of six cents per gallon "for engaging in and carrying on such business" in the State. *Held:* Sovereign immunity does not prohibit this tax. Pp. 496–501.

(a) *United States* v. *Allegheny County*, 322 U. S. 174, distinguished. Pp. 498–499.

(b) The Constitution does not extend sovereign exemption from state taxation to corporations or individuals, contracting with the United States, merely because their activities are useful to the Government or because the tax would burden the Government financially. P. 500.

(c) Tennessee has not discriminated against the Federal Government by denying immunity in this case after recognizing the immunity of a public body from the same tax in *Tennessee Oil Co.* v. *McCanless*, 178 Tenn. 683, 157 S. W. 2d 267, where the facts were different. Pp. 500–501.

194 Tenn. 377, 250 S. W. 2d 659, affirmed.

The Supreme Court of Tennessee sustained the validity of a tax levied on appellant under 2 Williams Tenn. Code §§ 1126–1147, for the privilege of storing government-owned gasoline in the State for the Government. 194 Tenn. 377, 250 S. W. 2d 659. On appeal to this Court, *affirmed*, p. 501.

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*Together with No. 378, *United States* v. *Evans, Commissioner of Finance and Taxation, et al.*, also on appeal from the same court.

William Waller argued the cause and filed a brief for appellant in No. 330.

Oscar H. Davis argued the cause for the United States, appellant in No. 378. With him on the brief were *Solicitor General Cummings, Assistant Attorney General Holland, Ellis N. Slack, Lee A. Jackson* and *Berryman Green. Robert L. Stern,* then Acting Solicitor General, was on the Statement as to Jurisdiction.

K. Harlan Dodson, Jr. argued the causes and filed briefs for appellees.

Mr. Justice Reed delivered the opinion of the Court.

These are appeals from the Supreme Court of Tennessee, affirming a Chancery Court judgment for some $196,000 in favor of the State Commissioner of Finance and Taxation, against Esso Standard Oil Co., the party of record in No. 330. Ultimately liable, the United States intervened in that litigation and brought a separate appeal here, No. 378. It contended that the state tax involved is barred by principles of sovereign immunity. This is a test case. We are told that if the tax is sustained, a liability for upwards of $4,000,000 will result.

The facts are these. During World War II the Government was actively engaged in the production and procurement of high octane aviation fuel. All such gasoline produced was purchased before it left the refinery and, by formal passage of title, became immediately the property of the Defense Supplies Corporation, a corporation wholly owned by the Reconstruction Finance Corporation, 6 Fed. Reg. 2972, as amended 6 Fed. Reg. 3363, and specifically exempt from state storage and use taxes, 55 Stat. 248. Release from storage by the producing companies occurred only on notification by the Petroleum Administration for War, in accordance with allocation of specific lots of fuel to various official consumers, including

the Services and the Allies. The Air Force, in particular, then arranged for transportation of its various allotments—sometimes by government carrier—from the refineries to the nearest consuming point.

We are concerned with certain lots of Air Force fuel produced in the South at various plants and shipped through Memphis, Tennessee. It appears that in 1943 a shortage of storage facilities developed in the area, forcing resort to privately owned tanks. Appellant Esso and the Lion Oil Company were able to provide such service through tanks at various points near Memphis. As a result, the Government entered into extensive contracts with Esso which in turn rented the Lion tanks, providing that the Company would "render services . . . in receiving, storing, handling and loading Government-owned fuel." The Company's service charge ranged from 18/100 of a cent to 6 3/10 cents per gallon. The United States agreed to assume liability for all state taxes. Pursuant thereto, allotments of gasoline were moved by barge from refineries to these private tanks, stored there pending need, and later reshipped by truck to consuming airfields on order of the Air Force. The operations continued from 1943 through 1946 under several contracts of similar import.

August 2, 1949, the State, after investigation, demanded that Esso pay taxes in connection with these operations under the Tennessee gasoline tax, 2 Williams Tenn. Code §§ 1126–1147. This statute, in material part, provided:

> "Every distributor when engaged in such business in this state, shall pay to the state comptroller, through commissioner of finance and taxation, for the exclusive use of the state, a special privilege tax, in addition to all other taxes, for engaging in and carrying on such business in this state, in an amount equal to six cents for each gallon of gasoline, and six

> cents for each gallon of distillate refined, manufactured, produced, or compounded by such distributor and sold, stored or distributed by him in this state, or shipped, transported or imported by such distributor into, and distributed, stored or sold by him within this state, during such year; . . . ." § 1127.

And § 1126 defines distribution as

> "every person who engages in the business in the state of refining, manufacturing, producing, or compounding gasoline or distillate, and selling or storing the same in this state; and also every person who engages in the business in this state of transporting, importing, or causing to be imported, gasoline or distillate into this state, and distributing, storing, or making original sales of the same in this state, for any purpose whatsoever."

Esso paid the required tax for the privilege of storing gasoline measured by the amount stored during the month of January 1944—the statute of limitations having run in regard to 1943 operations—and sued to recover. The Government intervened in the trial court and entered its plea, echoed by Esso, that the tax was barred by the constitutional doctrine of intergovernmental immunity; that to construe the Tennessee statute as applicable to storage of gasoline owned by the United States makes it repugnant to the Constitution and void. Both the Chancery Court and the Court of Appeals rejected the claimed immunity and held the statute valid as applied. 194 Tenn. 377, 250 S. W. 2d 659. We noted our probable jurisdiction on appeal. 28 U. S. C. § 1257 (2).

The appellants take a firm stand on *United States* v. *Allegheny County,* 322 U. S. 174, which they contend is an analogous case that compels reversal of this decision. They say, in effect, that the tax here is no less "on" the

property of the Federal Government than it was in that case, and in support of this claimed similarity they point to the following factors: that the statute grew out of the State's effort to tax sales to the final consumer, that the tax is paid but once, and this by the first producer or importer, and that refunds when the fuel is subsequently exported are provided. Thus the "true character" of the tax, as one "on the property of the United States," it is claimed, is precisely the same as that in *Allegheny County*.

Allegheny County, however, was quite different. The United States had leased certain machinery to the Mesta Machine Company. In imposing the state ad valorem property tax, Pennsylvania included in the Mesta assessment both the privately owned land and buildings, and the government machinery. *Id.,* at 179–180, 186. So the value of the federal property was, in part, the measure of the tax. We held the substance of this procedure was "to lay an ad valorem general property tax on property owned by the United States," *id.,* at 185, and therefore invalid. Our holding was not "dependent upon the ultimate resting place of the economic burden of the tax." *Id.,* at 189.

This tax was imposed because Esso stored gasoline. It is not, as the *Allegheny County* tax was, based on the worth of the government property. Instead, the amount collected is graduated in accordance with the exercise of Esso's privilege to engage in such operations; so it is not "on" the federal property as was Pennsylvania's. Federal ownership of the fuel will not immunize such a private contractor from the tax on storage. It may generally, as it did here, burden the United States financially. But since *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 151, this has been no fatal flaw. We must look further, and find either a stated immunity created by Congress in

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the exercise of a constitutional power,[1] or one arising by implication from our constitutional system of dual government.[2]

Neither condition applies to the kind of governmental operations here involved. There is no claim of a stated immunity. And we find none implied. The United States, today, is engaged in vast and complicated operations in business fields, and important purchasing, financial, and contract transactions with private enterprise. The Constitution does not extend sovereign exemption from state taxation to corporations or individuals, contracting with the United States, merely because their activities are useful to the Government. We hold, therefore, that sovereign immunity does not prohibit this tax.

Appellants press a further point, that the Tennessee courts have discriminated against the Federal Government by the result in this case. They point to the fact that heretofore, specifically in *Tennessee Oil Co.* v. *McCanless,* 178 Tenn. 683, 157 S. W. 2d 267, a claim of immunity by a public body was sustained where the public body had leased the tanks from the private dealer. Apparently, appellants feel that the distinction between that case and this is so fine as to require similar results from any fair-minded court. We do not agree. Had the United States similarly rented the tanks from Esso, and thus stood firmly in its shoes as the organization exercising the privilege of storage, it would have fallen within the *McCanless* precedent. It did not do so, but instead paid Esso to receive, store, handle and load the fuel. The

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[1] *Pittman* v. *Home Owners' Loan Corporation,* 308 U. S. 21; *Carson* v. *Roane-Anderson Co.,* 342 U. S. 232; *Dameron* v. *Brodhead,* 345 U. S. 322.

[2] *Mayo* v. *United States,* 319 U. S. 441, 447; *United States* v. *Allegheny County, supra.*

different results in the two cases thus accord with our conception of the operation of the Tennessee statute as a privilege tax.

Affirmed.

THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE JACKSON dissent.

MR. JUSTICE FRANKFURTER, not having heard the argument, took no part in the consideration or decision of this case.

UNITED STATES *v.* INTERNATIONAL BUILDING CO.

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

No. 508. Argued April 8, 1953.—Decided May 4, 1953.

In 1942 the Commissioner of Internal Revenue assessed deficiencies against respondent for the taxable years 1933, 1938 and 1939, determining that the proper basis for depreciation of respondent's leasehold was $385,000, not $860,000 as claimed by respondent. Respondent petitioned the Tax Court for review. Thereafter, pursuant to a stipulation filed by respondent and the Commissioner, and without a hearing, the Tax Court entered formal decisions that there were no deficiencies for the taxable years in question. In 1948 the Commissioner assessed deficiencies against respondent for the years 1943, 1944 and 1945, again challenging respondent's claimed basis for depreciation. *Held:* Upon this record, the decisions of the Tax Court for the years 1933, 1938 and 1939 were not *res judicata* of the fact that the basis for depreciation was $860,000. Pp. 503–506.

(a) In a subsequent action between the same parties on a different claim, a judgment is conclusive only as to the point or question actually litigated and determined in the original action, not as to what might have been litigated and determined. Pp. 504–505.

(b) The decisions entered by the Tax Court for the years 1933, 1938 and 1939 were only *pro forma* acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed. P. 505.

199 F. 2d 12, reversed.

In a suit by respondent to recover alleged overpayment of federal income taxes, the District Court held against respondent. 97 F. Supp. 595. The Court of Appeals reversed. 199 F. 2d 12. This Court granted certiorari. 344 U. S. 927. *Reversed,* p. 506.

Philip Elman argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, Lee A. Jackson* and *Cecelia H. Goetz.*

Malcolm I. Frank argued the cause for respondent. With him on the brief was *Irl B. Rosenblum.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent, a Missouri corporation, owns a leasehold of a plot of ground together with an office building erected on it. In 1942 the Commissioner assessed deficiencies against respondent for the taxable years 1933, 1938, and 1939, determining that it had claimed an excessive value as its basis for depreciating the property. These deficiencies were predicated on a basis of $385,000 amortized over the life of the lease. Respondent, who claimed a base of $860,000 amortized over a shorter period, filed petitions for review with the Tax Court. Meanwhile respondent filed a petition under ch. X of the Bankruptcy Act which ended in a confirmed plan of reorganization. Although the Collector filed proof of claim for the deficiencies in those proceedings, he later withdrew the claim under a stipulation that the withdrawal was "without prejudice" and did not constitute a determination of or prejudice the rights of the United States to any taxes with respect to any year other than those involved in the claim. Shortly thereafter respondent and the Commissioner filed stipulations in the pending Tax Court proceedings stating that "there is no deficiency in Federal income tax due" from respondent for the taxable years in question, that the tax liability for each of the years was nil, and that the jeopardy assess-

ment was abated.* The Tax Court, pursuant to the stipulation, entered formal decisions that there were no deficiencies for the taxable years in question. The Tax Court, however, held no hearing; no stipulations of fact were entered into; no briefs were filed or argument had. The issue as to the correctness of the basis of depreciation used by respondent was, however, the basis of its appeal to the Tax Court. And so, when the Commissioner in 1948 assessed deficiencies for the years 1943, 1944, and 1945, challenging once more the correctness of the basis of depreciation, respondent paid the deficiencies and brought this suit to recover, alleging *inter alia* that the decisions of the Tax Court for the years 1933, 1938, and 1939 were *res judicata* of the fact that the basis for depreciation was $860,000. The District Court held against respondent. 97 F. Supp. 595. The Court of Appeals reversed. 199 F. 2d 12. Because of a conflict between that decision and *Trapp* v. *United States,* 177 F. 2d 1, decided by the Court of Appeals for the Tenth Circuit, we granted certiorari. 344 U. S. 927.

The governing principle is stated in *Cromwell* v. *County of Sac,* 94 U. S. 351, 352–353. A judgment is an absolute bar to a subsequent action on the same claim.

> "But where the second action between the same parties is upon a different claim or demand, the

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*The stipulation for the year 1933, which is typical, reads as follows:

"It is hereby stipulated that there is no deficiency in Federal income tax due from the petitioner for the taxable year 1933 and that the following statement shows the petitioner's Federal income tax liability for the taxable year 1933:

"Tax liability	None
"Assessment (Jeopardy):	
"January 23, 1942 (not paid)	$2,188.12
"Assessment to be abated	$2,188.12"

> judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

And see *Tait* v. *Western Md. R. Co.,* 289 U. S. 620, 623; *Mercoid Corp.* v. *Mid-Continent Co.,* 320 U. S. 661, 671; *Commissioner* v. *Sunnen,* 333 U. S. 591, 597–598. Estoppel by judgment, or collateral estoppel as it is often called, is applicable in the federal income tax field. *Tait* v. *Western Md. R. Co., supra,* at 624; *Commissioner* v. *Sunnen, supra,* at 598.

We conclude that the decisions entered by the Tax Court for the years 1933, 1938, and 1939 were only a *pro forma* acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed. There is no showing either in the record or by extrinsic evidence (see *Russell* v. *Place,* 94 U. S. 606, 608) that the issues raised by the pleadings were submitted to the Tax Court for determination or determined by that court. They may or may not have been agreed upon by the parties. Perhaps, as the Court of Appeals inferred, the parties did agree on the basis for depreciation. Perhaps the settlement was made for a different reason, for some exigency arising out of the bankruptcy proceeding. As the case reaches us, we are unable to tell whether the agreement of the parties was based on the merits or on some collateral consideration.

Certainly the judgments entered are *res judicata* of the tax claims for the years 1933, 1938 and 1939, whether or not the basis of the agreements on which they rest reached the merits. But unless we can say that they were an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits. Estoppel by judgment includes matters in a second proceeding which were actually presented and determined in an earlier suit. See *Commissioner* v. *Sunnen, supra,* at 598. A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties.

Reversed.

Syllabus.

CALLANAN ROAD IMPROVEMENT CO. *v.* UNITED STATES ET AL.

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

No. 488. Argued April 8, 1953.—Decided May 4, 1953.

A certificate of convenience and necessity to operate as a common carrier by water, issued by the Interstate Commerce Commission under § 309 of Part III of the Interstate Commerce Act, was subsequently amended by an order of the Commission restricting the carrier's operations to freightage as distinguished from towage, and the amended certificate was accepted by the carrier. Appellant sought and obtained Commission approval of a transfer of the amended certificate to appellant. Thereafter appellant claimed the right under the certificate to engage in towage operations. The Commission denied the right, and appellant sued to set aside its order. *Held:*

1. Appellant had no standing to raise, in this collateral proceeding, the question of the power of the Commission to modify the original certificate. Pp. 508–512.

2. Having invoked the power of the Commission to approve the transfer of the amended certificate, appellant was estopped to deny the Commission's power to issue the certificate in the form in which it was when appellant sought its transfer. P. 513.

107 F. Supp. 184, affirmed.

In a suit to set aside an order of the Interstate Commerce Commission, 285 I. C. C. 75, a three-judge District Court held against appellant. 107 F. Supp. 184. On direct appeal to this Court, *affirmed*, p. 513.

William A. Roberts argued the cause for appellant. With him on the brief was *James E. Wilson.*

William J. Hickey argued the cause for the United States and the Interstate Commerce Commission, appellees. With him on the brief were *Acting Solicitor General Stern, Acting Assistant Attorney General Hodges,*

Ralph S. Spritzer, Daniel M. Friedman and *Edward M. Reidy.*

R. Granville Curry argued the cause for the Cornell Steamboat Company, appellee. With him on the brief was *Frederick M. Dolan.*

MR. JUSTICE MINTON delivered the opinion of the Court.

In 1941, one Joseph R. Hutton applied to the Interstate Commerce Commission for a permit to operate as a contract carrier by water between points on Long Island Sound, New York Harbor, the Hudson River, the New York State Barge Canal System, the Niagara River, and contiguous ports. In the alternative, he prayed a certificate of convenience and necessity if he be found to be a common carrier. The application was a "grandfather" clause proceeding under § 309 of Part III, Water Carriers, of the Interstate Commerce Act, 54 Stat. 941, 49 U. S. C. (1946 ed.) § 909.

The Commission, after hearing and investigation, made findings of fact and conclusions of law thereon to the effect that for 37 years Hutton had been in operation; that "[h]e owns and manages 1 steam power boat of about 240 horsepower, and 4 barges, all of which are operated as a unit. The power boat is used to tow the barges but also carries about 150 gross tons of freight. On occasion other barges are rented or chartered for operation in applicant's fleet." It was further found that during and since 1939 and 1940, "applicant's operation has been that of a common carrier of commodities generally between points on New York Harbor, the Hudson River below its junction with the New York State Barge Canal, the New York State Barge Canal between the Hudson River and the Niagara River including the Oswego branch, and the Niagara River." The Commission further found that the applicant was in operation January 1, 1940, the crit-

ical date provided in § 309 for "grandfather" proceedings, and by reason of his long, continuous operation, public convenience and necessity would be served by continuance of such operation, and specifically found:

> "We find that applicant is a common carrier by water; that public convenience and necessity require operation by applicant as a common carrier in interstate or foreign commerce, of commodities generally, between points on New York Harbor as determined in Ex Parte No. 140, points on the Hudson River below its junction with the New York State Barge Canal, the New York State Barge Canal between the Hudson River and the Niagara River including the Oswego branch, and the Niagara River; that applicant is fit, willing and able properly to perform said transportation; and that applicant is entitled to a certificate authorizing such operation, subject, however, to general conditions which are necessary to carry out, with respect to such operation, the requirements of Part III of the act and the orders, rules, and regulations of the Commission thereunder."

The Commission entered an order on July 17, 1942, effective October 5, 1942, granting the certificate of convenience and necessity to Hutton. This order recited the fact of the above findings and incorporated them by reference. 250 I. C. C. 804.

Thus it will be seen that the Commission found the operations of Hutton to be those of a common carrier by water of commodities generally in self-propelled vessels which he owned and which he also used to tow barges he owned, rented, or chartered. There is no finding that his operations included the towing of barges which he did not own, rent, or charter. The certificate was accepted by Hutton, and, as far as appears on this

record, he operated under it until March 7, 1944, in the same manner as he had before.

On March 7, 1944, the Commission of its own motion opened the record in Hutton's original application and, after reconsidering its former findings, specified the type of vessels to be used in the exercise of its authority theretofore granted. 260 I. C. C. 804. The Commission's order of March 7, 1944, in pertinent part reads as follows:

> "That public convenience and necessity require the continuance of operation by applicant as a common carrier by water, by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels in interstate or foreign commerce, in the transportation of commodities generally between points in the area defined by the order of the Commission . . . ."

This amended certificate, which limited Hutton to the identical operations he had long carried on and upon which his § 309 rights were authorized, was accepted by him without question, and he continued to operate under it until his death several months later.

The Callanan Road Improvement Company, the appellant here, sought to purchase the amended certificate from Hutton's administratrix for operations limited to the Hudson River and New York Harbor. By § 312 of the Interstate Commerce Act, 54 Stat. 944, 49 U. S. C. (1946 ed.) § 912, the Interstate Commerce Commission's authorization is required for such a transfer. An application for approval was filed before the Commission by the appellant and the administratrix. After hearing, the Commission by order dated August 18, 1947 (265 I. C. C. 813), authorized the transfer of the amended certificate to the appellant in the following words:

> "It is further ordered, That, following consummation of the sale to the transferee of the operating

rights covered by said amended certificate, said transferee may perform to the extent above described, the water-carrier service heretofore authorized under said amended certificate dated March 7, 1944, in No. W–103."

On February 5, 1948, the Commission issued an amended certificate to the appellant, pursuant to its order of August 18, 1947. Thus, the appellant sought and received a transfer of the amended certificate of March 7, 1944, limited by consent as to waters to be operated upon.

On January 5, 1951, the appellant filed a petition with the Commission for interpretation of the amended certificate it had purchased from Hutton's administratrix. Cornell Steamboat Company, engaged only in towing on the waters in question, appeared and offered evidence against the appellant. In this proceeding, the appellant claimed the right under its certificate to engage in towing service as distinguished from freighting service. It is and was the contention of the appellant that under the original certificate issued to Hutton in 1942, the latter was a common carrier of goods generally, and that the limitations or modification of this certificate by the order of the Commission of March 7, 1944, which denied Hutton the right to engage in towing services was unauthorized, and, as transferee, the appellant was entitled to engage in towing service and to promulgate and file tariffs therefor. The Commission after hearing held the appellant was not entitled to engage in the service of towing and cancelled the tariffs filed by the appellant covering towing services. 285 I. C. C. 75.

The appellant filed a complaint in the District Court of the United States for the Northern District of New York to set aside that order. A statutory three-judge court refused to set it aside, 107 F. Supp. 184, and this appeal followed.

We need not go into the differences between towage and freightage. It is admitted for the purposes of this case that the limitations placed by the order of March 7, 1944, upon the original certificate issued Hutton in 1942, had the effect of restricting his operations to freightage and denied him the right to engage in towage. The appellant cannot now raise the question of the power of the Commission to modify the original certificate of July 17, 1942, by the limitations contained in the order of March 7, 1944. Whether the Commission's action in reopening the 1942 proceedings and placing the limitations on the certificate theretofore issued was right or wrong, the jurisdiction of the Commission was not destroyed thereby. A direct attack in such circumstances was the remedy.

Hutton not only did not object. He accepted the modified certificate and operated under it, just as he had always operated. His operation was not cut down by the limitations placed upon the certificate. The appellant, as transferee of that modified certificate, stands in no better position than Hutton stood. Cf. *Gregg Cartage & Storage Co.* v. *United States,* 316 U. S. 74, 82–83. Indeed, in the 1947 transfer proceedings before the Commission when the appellant sought to acquire Hutton's amended certificate of March 7, 1944, the appellant objected that the protestant there could not raise the question of the Commission's power to modify the certificate, as this would be a collateral attack on the Commission's order. That is exactly what the appellant seeks to do here. It cannot in this collateral proceeding attack the validity of the Commission's order of March 7, 1944. *Securities & Exchange Comm'n* v. *Central-Illinois Sec. Corp.,* 338 U. S. 96, 143; *Stanley* v. *Supervisors,* 121 U. S. 535, 550; *Reconstruction Finance Corp.* v. *Lightsey,* 185 F. 2d 167; *City of Tulsa* v. *Midland Valley R. Co.,* 168 F. 2d 252, 254; *Brown Co.* v. *Atlantic Pipe Line,* 91 F. 2d 394, 398. The appellant must take the certificate as it stood at the

time it sought and received the Commission's approval for its transfer.

Furthermore, the appellant, having invoked the power of the Commission to approve the transfer of the amended certificate to it, is now estopped to deny the Commission's power to issue the certificate in its present form and as it existed prior to the time the appellant sought its transfer. *United Fuel Gas Co.* v. *Railroad Comm'n,* 278 U. S. 300, 307–308; *St. Louis Malleable Casting Co.* v. *Prendergast Construction Co.,* 260 U. S. 469. This is especially true in view of the appellant's contention at the 1947 transfer hearing that the protestant in that hearing could not raise the question there which the appellant seeks to raise here, as it would constitute a collateral attack on the order of the Commission. The appellant cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval. If the appellant then had taken the position it seeks now, the Commission might conceivably have refused its approval of the transfer. The appellant accepted the transfer with the limitations contained in the certificate. The appellant now will not be heard to say it is entitled to receive more than its transferor had or the certificate transferred gave.

The judgment of the District Court is

Affirmed.

Mr. Justice Black concurs in the result.

Mr. Justice Douglas dissents.

WELLS, ADMINISTRATRIX, *v.* SIMONDS ABRASIVE CO.

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

No. 394. Argued January 7, 1953.—Decided May 18, 1953.

Petitioner's decedent was killed in Alabama by the bursting of a grinding wheel manufactured by respondent, a corporation with its principal place of business in Pennsylvania. More than one year but less than two years later, petitioner sued for damages in a federal court in Pennsylvania, basing jurisdiction on diversity of citizenship. The Alabama wrongful-death statute permitted suit within two years, but the Pennsylvania statute outlawed such suits after one year. Holding that the Pennsylvania rule governing conflicts of laws required application of the Pennsylvania limitation, the court granted summary judgment for respondent. *Held:* The Pennsylvania rule governing conflicts of laws does not violate the Full Faith and Credit Clause of the Constitution; and the judgment is sustained. Pp. 515–519.

(a) Applying the statute of limitations of the forum to a foreign substantive right does not deny full faith and credit. P. 516.

(b) A different result is not required merely because a different statute of limitations is included in a foreign statute creating a substantive right unknown to the common law. Pp. 517–518.

(c) *Engel* v. *Davenport,* 271 U. S. 33; *Hughes* v. *Fetter,* 341 U. S. 609; and *First Nat. Bank* v. *United Air Lines,* 342 U. S. 396, distinguished. Pp. 518–519.

195 F. 2d 814, affirmed.

In petitioner's suit for wrongful death, a federal district court granted summary judgment for respondent. 102 F. Supp. 519. The Court of Appeals affirmed. 195 F. 2d 814. This Court granted certiorari. 344 U. S. 815. *Affirmed,* p. 519.

Charles J. Biddle argued the cause for petitioner. With him on the brief were *Henry S. Drinker* and *Francis Hopkinson.*

Philip Price argued the cause and filed a brief for respondent.

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

Cheek Wells was killed in Alabama when a grinding wheel with which he was working burst. The wheel had been manufactured by the respondent, a corporation with its principal place of business in Pennsylvania. The administratrix of the estate of Cheek Wells brought an action for damages in the federal court for the Eastern District of Pennsylvania after one year, but within two years, after the death. Jurisdiction was based upon diversity of citizenship.

The section of the Alabama Code [1] upon which petitioner predicated her action for wrongful death provided that action ". . . must be brought within two years from and after the death . . . ." The respondent moved for summary judgment on the ground the Pennsylvania

[1] "A personal representative may maintain an action, and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate." Ala. Code, 1940, Tit. 7, § 123.

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wrongful death statute required suit to be commenced within one year.[2] In an opinion [3] on that motion, the district judge found that the Pennsylvania statute, which was analogous to the Alabama statute, had a one-year limitation. He further found that the Pennsylvania conflict of laws rule called for the application of its own limitation rather than that of the place of the accident. Deeming himself bound by the Pennsylvania conflicts rule, he ordered summary judgment for the respondent. The Court of Appeals for the Third Circuit affirmed.[4]

We granted certiorari [5] limited to the question whether this Pennsylvania conflicts rule violates the Full Faith and Credit Clause [6] of the Federal Constitution.

The states are free to adopt such rules of conflict of laws as they choose, *Kryger* v. *Wilson,* 242 U. S. 171 (1916), subject to the Full Faith and Credit Clause and other constitutional restrictions. The Full Faith and Credit Clause does not compel a state to adopt any particular set of rules of conflict of laws; it merely sets certain minimum requirements which each state must observe when asked to apply the law of a sister state.

Long ago, we held that applying the statute of limitations of the forum to a foreign substantive right did not deny full faith and credit, *McElmoyle* v. *Cohen,* 13 Pet. 312 (1839); *Townsend* v. *Jemison,* 9 How. 407 (1850); *Bacon* v. *Howard,* 20 How. 22 (1857). Recently we referred to ". . . the well-established principle of conflict

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[2] Purdon's Pa. Stat. Ann., 1931, Tit. 12, § 1603.

[3] 102 F. Supp. 519 (1951).

[4] 195 F. 2d 814 (1952). See also *Quinn* v. *Simonds Abrasive Co.,* 199 F. 2d 416 (1952).

[5] 344 U. S. 815 (1952).

[6] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U. S. Const., Art. IV, § 1, cl. 1.

of laws that 'If action is barred by the statute of limitations of the forum, no action can be maintained though action is not barred in the state where the cause of action arose.' Restatement, Conflict of Laws § 603 (1934)." *Order of United Commercial Travelers* v. *Wolfe,* 331 U. S. 586, 607 (1947).[7]

The rule that the limitations of the forum apply (which this Court has said meets the requirements of full faith and credit) is the usual conflicts rule of the states.[8] However, there have been divergent views when a foreign statutory right unknown to the common law has a period of limitation included in the section creating the right. The Alabama statute here involved creates such a right and contains a built-in limitation. The view is held in some jurisdictions that such a limitation is so intimately connected with the right that it must be enforced in the forum state along with the substantive right.[9]

We are not concerned with the reasons which have led some states for their own purposes to adopt the foreign limitation, instead of their own, in such a situation. The question here is whether the Full Faith and Credit Clause compels them to do so. Our prevailing rule is that the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state.

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[7] Cf. dissenting opinion by Mr. Justice Black, *Order of United Commercial Travelers* v. *Wolfe,* 331 U. S. 625 (1947).

[8] Restatement, Conflict of Laws, § 603 (1934).

[9] *Cristilly* v. *Warner,* 87 Conn. 461, 88 A. 711 (1913), overruled on another ground, *Daury* v. *Ferraro,* 108 Conn. 386, 143 A. 630 (1928); *Louisville & Nashville R. Co.* v. *Burkhart,* 154 Ky. 92, 157 S. W. 18 (1913) (dictum); *Negaubauer* v. *Great Northern R. Co.,* 92 Minn. 184, 99 N. W. 620 (1904). Contra: *White* v. *Govatos,* 40 Del. 349, 10 A. 2d 524 (1939); *Tieffenbrun* v. *Flannery,* 198 N. C. 397, 151 S. E. 857 (1930); *Rosenzweig* v. *Heller,* 302 Pa. 279, 153 A. 346 (1931). See also Restatement, Conflict of Laws, § 397, Comment b, and § 605 (1934).

We see no reason in the present situation to graft an exception onto it. Differences based upon whether the foreign right was known to the common law or upon the arrangement of the code of the foreign state are too unsubstantial to form the basis for constitutional distinctions under the Full Faith and Credit Clause.

We agree with the respondent that *Engel* v. *Davenport,* 271 U. S. 33 (1926), has no application here. It presented an entirely different problem. Congress had given a statutory cause of action to seamen for certain personal injuries, placing concurrent jurisdiction in the state and federal courts. In *Engel, supra,* the two-year federal limitation rather than the one-year California limitation for similar actions was held controlling in an action brought in the California courts. Once it was decided that the intention of Congress was that the two-year limitation was meant to apply in both federal and state courts under our Federal Constitution, that was the supreme law of the land.[10]

Our decisions in *Hughes* v. *Fetter,* 341 U. S. 609 (1951), and *First National Bank* v. *United Air Lines,* 342 U. S. 396 (1952), do not call for a change in the well-established rule that the forum state is permitted to apply its own period of limitation. The crucial factor in those two cases was that the forum laid an uneven hand on causes of action arising within and without the forum state. Causes of action arising in sister states were dis-

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[10] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Const., Art. VI, cl. 2.

criminated against. Here Pennsylvania applies her one-year limitation to all wrongful death actions wherever they may arise. The judgment is

Affirmed.

MR. JUSTICE CLARK, not having heard oral argument, took no part in the consideration or decision of this case.

MR. JUSTICE JACKSON, with whom MR. JUSTICE BLACK and MR. JUSTICE MINTON join, dissenting.

We are unable to accept the results or follow the reasoning of the Court. Petitioner's decedent, a resident of Alabama, was killed in that State by a bursting emery wheel alleged to have been defective. It was manufactured by respondent, a Pennsylvania corporation. Finding it impossible to serve process on the defendant in Alabama, petitioner brought an action in the United States Court for the Eastern District of Pennsylvania. Her action was based on a statute of Alabama which conferred a right of action for wrongfully causing death and required that the action be brought within two years from the death. This she did, but her complaint was dismissed on the ground that, since the federal court was sitting in Pennsylvania, it was bound by the Pennsylvania statute of limitations of one year and, hence, that her action was barred. I believe the United States District Court, though sitting in Pennsylvania, should apply the law of Alabama, both as to liability and as to limitation.

The respondent relies upon the line of cases that began with *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. A careful reading of the *Erie* decision will show that, so far as it applies at all, it is authority for the plaintiff's and not the defendant's position. The *Erie* injury occurred in Pennsylvania, but the action was brought in a United States District Court in New York. Although the trial court

sat in New York, this Court held that it must decide liability by Pennsylvania law, that is, by the law of the state of injury, not that of the forum state, which holding, if applied here, would require that this case be adjudged by the law of Alabama even though it is brought in a federal court sitting in another state. That opinion, by Mr. Justice Brandeis, will be searched in vain for any hint that this result depended on the New York law of conflicts, which is not even paid the respect of mention. *Erie R. Co.* v. *Tompkins* held that there is no federal common law of torts and that federal courts must not improvise one of their own but must follow that state's law *which is applicable to the case.*

That the applicable state law was that of Pennsylvania, instead of that of the forum, was assumed without discussion of the reason because it was pursuant to what is probably the best-settled rule of conflicts in tort cases. It was stated by Mr. Justice Holmes, as follows: ". . . [I]t is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery." *Western Union Telegraph Co.* v. *Brown,* 234 U. S. 542, 547. See also *Slater* v. *Mexican National R. Co.,* 194 U. S. 120, 126; Cardozo, J. in *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99, 120 N. E. 198. The existence and justice of this principle is recognized by its adoption as the policy of federal law. The Federal Tort Claims Act makes the basic test of the Government's liability whether a private person "would be liable to the claimant . . . in accordance with the law of the place where the act or omission occurred." 60 Stat. 812, 843.

Klaxon Co. v. *Stentor Co.,* 313 U. S. 487, also cited by respondent, contains language that would seem to make

all conflict questions depend on the law of the forum. But that was an action on contract in which conflict considerations prevail that are not present in tort cases. It is but *dictum* so far as it touches this statutory tort case.

Most of these decisions are actuated by a laudable but undiscriminating yen for uniformity within the forum state. Thus, "Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side." *Klaxon Co.* v. *Stentor Co., supra,* at 496, citing the *Erie* case; and the Court's opinion here refers to it as a "crucial factor" that "the forum laid an uneven hand on causes of action arising within and without the forum state."

But the essence of the Full Faith and Credit Clause of the Constitution is that uniformities other than just those within the state are to be observed in a federal system. The whole purpose and the only need for requiring full faith and credit to foreign law is that it does differ from that of the forum. But that disparity does not cause the type of evil aimed at in *Erie R. Co.* v. *Tompkins, supra,* namely, that the same event may be judged by two different laws, depending upon whether a state court or a federal forum within that state is available. Application of the Full Faith and Credit Clause prevents this disparity by requiring that the law where the cause of action arose will follow the cause of action in whatever forum it is pursued.

The Court's decision, in contrast with our position, would enable shopping for favorable forums. Suppose this plaintiff might have obtained service of process in several different states—an assumption not extravagant in the case of many national corporations. Under the Court's holding, she could choose from as many varieties of law as of forums. Under our theory, wherever she elected to sue (if she had a choice), she would take Ala-

bama law with her. Suppose even now she can get service in a state with no statute of limitations or a long one; can she thereby revive a cause of action that has expired under Alabama law? The Court's logic would so indicate. The life of her cause of action is then determined by the fortuitous circumstances that enable her to make service of process in a certain state or states.

Another very practical consideration indicates the unworkability of a doctrine for federal courts that the place of trial is the sole factor which determines the law of the case. 28 U. S. C. § 1404 (a) authorizes certain transfers of any civil action from state to state for the convenience of witnesses or of parties, or in the interests of justice. The purpose was to adopt for federal courts the principles of *forum non conveniens*. *Ex parte Collett,* 337 U. S. 55. These are broad and imprecise and involve such considerations as the state of the court's docket. *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501. Are we then to understand that parties may get a change of law as a bonus for a change of venue? If the law of the forum in which the case is tried is to be the sole test of substantive law, burden of proof, contributory negligence, measure of damages, limitations, admission of evidence, conflict of laws and other doctrines, see *Guaranty Trust Co.* v. *York,* 326 U. S. 99, at 109, then shopping for a favorable law via the *forum non conveniens* route opens up possibilities of conflict, confusion and injustice greater than anything *Swift* v. *Tyson,* 16 Pet. 1, ever held.

This case is in United States Court, not by grace of Pennsylvania, but by authority of Congress, and what I said in *First National Bank of Chicago* v. *United Air Lines,* 342 U. S. 396, 398, seems to me applicable here. I had supposed, before *Hughes* v. *Fetter,* 341 U. S. 609, that the Commonwealth of Pennsylvania could close its courts to trial of this case. But no one would have questioned, I should think, that if the cause were entertained it must

be tried in accordance with the law of the place of the wrong. Neither *Guaranty Trust Co.* v. *York,* 326 U. S. 99, nor *Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U. S. 530, indicate to the contrary or have pertinence here, for in both cases the cause of action arose under the laws of the state of the forum and no conflict, or need to resort to foreign law, was present. They were issues between federal improvised law and settled state law.

Whether the principle of full faith and credit and of the law of conflicts will carry a general statute of limitations into the state of the forum along with the right is a more difficult question in the light of our precedents. *McElmoyle* v. *Cohen,* 13 Pet. 312.

Early cases drew sharp distinction between rules of substantive law and rules of procedure. They classified statutes of limitations as procedural and hence excluded from the operation of the Full Faith and Credit Clause. This is not difficult to understand in the atmosphere of those times. Many state legislatures adopted comprehensive statutes of limitations applicable to equitable, common-law, and statutory cases. Following the example of the early Field Code, the law of limitations not infrequently was incorporated into codes of procedure and thus was classified as procedural by the legislatures. In those days, federal courts were required to conform to local rules of procedure, although often independent of local substantive law under *Swift* v. *Tyson, supra.* Today that relationship is completely inverted. Federal procedure is not subservient to state law; substantive law is.

But, in *Guaranty Trust Co.* v. *York, supra,* this Court riddled the distinction between "substantive" and "procedural," on which *McElmoyle* v. *Cohen, supra,* rests. Even as to general statutes of limitations recent decisions have bound the right and the limitation into a single bundle to be taken by the federal court as a whole.

"Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. . . . It accrues and comes to an end when local law so declares. . . ." *Ragan* v. *Merchants Transfer & Warehouse Co., supra,* at 533. We have also required that under some circumstances a forum must apply a foreign statute of limitations to a contract case. *Order of United Commercial Travelers of America* v. *Wolfe,* 331 U. S. 586.

But whatever may be the argument concerning general statutes of limitations as applied to common-law causes, this Court long ago recognized a distinction as to limitations on the action created by statutes in the pattern of the Lord Campbell Act. This Court early held such an action in federal court to be barred by the limitation contained in the applicable state statute. The reasoning of Mr. Chief Justice Waite is just as valid when it leads to a contrary result. For a unanimous Court, he wrote: ". . . The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. . . . Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right. . . ." *The Harrisburg,* 119 U. S. 199, 214.

Subsequently, Mr. Justice Holmes twice wrote for the Court to the same effect. In *Davis* v. *Mills,* 194 U. S. 451, at 454, he said:

> ". . . But, as the source of the obligation is the foreign law, the defendant, generally speaking, is en-

titled to the benefit of whatever conditions and limitations the foreign law creates. *Slater* v. *Mexican National Railroad,* 194 U. S. 120. It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure and as belonging to the *lex fori,* as affecting the remedy only and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. . . ."

And in *Atlantic Coast Line R. Co.* v. *Burnette,* 239 U. S. 199, at 201, he wrote:

". . . But irrespective of the fact that the act of Congress is paramount, when a law that is relied on as a source of an obligation in tort, sets a limit to the existence of what it creates, other jurisdictions naturally have been disinclined to press the obligation farther. . . ."

In all three of these cases the benefit of this doctrine that the remedy is inseparable from the right accrued to defendants. But the validity of a doctrine does not depend on whose ox it gores. In *Engel* v. *Davenport,* 271 U. S. 33, 38, this Court employed the same premise as to the unity of the right and the limitation to hold a plaintiff entitled to the longer period prescribed in federal legislation instead of the short statutory period of the forum state, saying of the limitation, "This provision is one of substantive right, setting a limit to the existence

of the obligation which the Act creates. . . . And it necessarily implies that the action may be maintained, as a substantive right, if commenced within the two years."

The Supreme Court of Alabama has held the same doctrine applicable to the very statute in question, saying, "This is not a statute of limitations, but of the essence of the cause of action, to be disclosed by averment and proof." *Parker* v. *Fies & Sons,* 243 Ala. 348, 350, 10 So. 2d 13, 15. The doctrine is well recognized in the literature of the law of conflicts.*

The Court of Appeals for the District of Columbia in a well-considered and documented opinion held that a federal court in the District trying an action brought under the Wrongful Death Act of Nebraska must apply the two-year limitation of the Nebraska Act and not the one-year limitation of the law of the forum. Judge Proctor, admitting "considerable authority" to the contrary, said: "However, there is a line of opposing authority which takes the view that as to rights of action of a purely statutory nature, such as the so-called wrongful death statutes, the time thereby prescribed for filing suit operates as a limitation of the liability itself as created by the statute, and not of the remedy alone. It is deemed to be a condition attached to the right to sue. As such, time has been made of the essence of the right, which is lost if the time is disregarded. The liability and the remedy being created by the same statute, limitation of the remedy must be treated as limitation of the right." *Lewis* v. *Reconstruction Finance Corporation,* 85 U. S. App. D. C. 339, 340, 177 F. 2d 654, 655. Cf. *Young* v.

*See Goodrich, Conflict of Laws (3d ed.), § 86, for discussion and citations; Blume and George, Limitations and the Federal Courts, 49 Mich. L. Rev. 937.

United States, 87 U. S. App. D. C. 145, 184 F. 2d 587. See also *Wilson* v. *Massengill,* 124 F. 2d 666, cert. denied 316 U. S. 686; *Maki* v. *Cooke Co.,* 124 F. 2d 663, cert. denied 316 U. S. 686.

We think that the better view of the case before us would be that it is Alabama law which giveth and only Alabama law that taketh away.

MAY *v.* ANDERSON.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 244. Argued January 6, 1953.—Decided May 18, 1953.

In a habeas corpus proceeding attacking the right of a mother to retain possession of her minor children, an Ohio court is not bound by the Full Faith and Credit Clause of the Federal Constitution to give effect to a Wisconsin decree awarding custody of the children to their father, when that decree was obtained by the father in an *ex parte* divorce action in a Wisconsin court that had no personal jurisdiction over the mother. Pp. 528–535.

157 Ohio St. 436, 105 N. E. 2d 648, reversed.

In a habeas corpus proceeding to test the right as between a father and mother to immediate possession of their minor children, the Ohio trial court ordered the children discharged from further restraint by the mother. The State Court of Appeals affirmed. 91 Ohio App. 557, 107 N. E. 2d 358. The State Supreme Court dismissed an appeal. 157 Ohio St. 436, 105 N. E. 2d 648. On appeal to this Court, the appeal is treated as a petition for a writ of certiorari, certiorari is granted, and the judgment is *reversed and remanded,* p. 535.

Ralph Atkinson and *F. W. Springer* argued the cause and filed a brief for appellant.

I. Engle argued the cause and filed a brief for appellee.

MR. JUSTICE BURTON delivered the opinion of the Court.

The question presented is whether, in a habeas corpus proceeding attacking the right of a mother to retain possession of her minor children, an Ohio court must give full faith and credit to a Wisconsin decree awarding custody of the children to their father when that decree is obtained by the father in an *ex parte* divorce action in

a Wisconsin court which had no personal jurisdiction over the mother. For the reasons hereafter stated, our answer is no.

This proceeding began July 5, 1951, when Owen Anderson, here called the appellee, filed a petition for a writ of habeas corpus in the Probate Court of Columbiana County, Ohio. He alleged that his former wife, Leona Anderson May, here called the appellant, was illegally restraining the liberty of their children, Ronald, Sandra and James, aged, respectively, 12, 8 and 5, by refusing to deliver them to him in response to a decree issued by the County Court of Waukesha County, Wisconsin, February 5, 1947. With both parties and their children before it, the Probate Court ordered that, until this matter be finally determined, the children remain with their mother subject to their father's right to visit them at reasonable times.

After a hearing "on the petition, the stipulation of counsel for the parties as to the agreed statement of facts, and the testimony," the Probate Court decided that it was obliged by the Full Faith and Credit Clause of the Constitution of the United States [1] to accept the Wisconsin decree as binding upon the mother. Accordingly, proceeding to the merits of the case upon the issues presented by the stipulations of counsel, it ordered the children discharged from further restraint by her. That order has been held in abeyance and the children are still with her. The Court of Appeals for Columbiana County, Ohio, affirmed. 91 Ohio App. 557, 107 N. E. 2d 358. The Supreme Court of Ohio, without opinion, denied a motion directing the Court of Appeals to certify

[1] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Art. IV, § 1.

its record for review, and dismissed an appeal on the ground that no debatable constitutional question was involved. 157 Ohio St. 436, 105 N. E. 2d 648, 25 Ohio Bar 199.

On appeal to this Court, we noted probable jurisdiction. Inasmuch, however, as neither the Court of Appeals nor the Supreme Court of Ohio relied upon the Ohio statute alleged to be the basis of the appeal, we have treated the appeal as a petition for a writ of certiorari, granted pursuant to 28 U. S. C. (Supp. V) § 2103, while continuing, for convenience, to refer to the parties as appellant and appellee.[2]

The parties were married in Wisconsin and, until 1947, both were domiciled there. After marital troubles developed, they agreed in December, 1946, that appellant should take their children to Lisbon, Columbiana County, Ohio, and there think over her future course. By New Year's Day, she had decided not to return to Wisconsin and, by telephone, she informed her husband of that decision.

Within a few days he filed suit in Wisconsin, seeking both an absolute divorce and custody of the children. The only service of process upon appellant consisted of the delivery to her personally, in Ohio, of a copy of the Wisconsin summons and petition. Such service is au-

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[2] The state statute alleged to have been drawn in question by appellant as repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States was § 7996 of the Ohio General Code of 1910 providing that "The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto." The Probate Court was said to have upheld that section as establishing the legal domicile of the children with their father and, on that basis, to have upheld the Wisconsin decree as validly depriving their mother of her custody over her children, although the Wisconsin court never obtained personal jurisdiction over her.

thorized by a Wisconsin statute for use in an action for a divorce but that statute makes no mention of its availability in a proceeding for the custody of children.[3] Appellant entered no appearance and took no part in this Wisconsin proceeding which produced not only a decree divorcing the parties from the bonds of matrimony but a decree purporting to award the custody of the children to their father, subject to a right of their mother to visit them at reasonable times. Appellant contests only the validity of the decree as to custody. See *Estin* v. *Estin*, 334 U. S. 541, and *Kreiger* v. *Kreiger*, 334 U. S. 555, recognizing the divisibility of decrees of divorce from those for payment of alimony.

Armed with a copy of the decree and accompanied by a local police officer, appellee, in Lisbon, Ohio, demanded and obtained the children from their mother. The record does not disclose what took place between 1947 and 1951, except that the children remained with their father in Wisconsin until July 1, 1951. He then brought them

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[3] "262.12 *Publication or service outside state, when permitted.* When the summons cannot with due diligence be served within the state, the service of the summons may be made without the state or by publication upon a defendant when it appears from the verified complaint that he is a necessary or proper party to an action or special proceeding as provided in Rule 262.13, in any of the following cases:

. . . . . .

"(5) When the action is for a divorce or for annulment of marriage.

. . . . . .

"262.13 *Publication or service outside state; . . . mode of service.*

. . . . . .

"(4) In the cases specified in Rule 262.12 the plaintiff may, at his option and in lieu of service by publication, cause to be delivered to any defendant personally without the state a copy of the summons and verified complaint or notice of object of action as the case may require, which delivery shall have the same effect as a completed publication and mailing. . . ." Wis. Stat., 1949.

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back to Lisbon and permitted them to visit their mother. This time, when he demanded their return, she refused to surrender them.

Relying upon the Wisconsin decree, he promptly filed in the Probate Court of Columbiana County, Ohio, the petition for a writ of habeas corpus now before us. Under Ohio procedure that writ tests only the immediate right to possession of the children. It does not open the door for the modification of any prior award of custody on a showing of changed circumstances. Nor is it available as a procedure for settling the future custody of children in the first instance.

> "It is well settled that *habeas corpus* is not the proper or appropriate action to determine, as between parents, who is entitled to the custody of their minor children.
>
> "The agreed statement of facts disclosed to the Court of Appeals that the children were in the custody of their mother. There being no evidence that the appellant had a superior right to their custody, that court was fully warranted in concluding that the children were not illegally restrained of their liberty." *In re Corey,* 145 Ohio St. 413, 418, 61 N. E. 2d 892, 894–895.[4]

The narrow issue thus presented was noted but not decided in *Halvey* v. *Halvey,* 330 U. S. 610, 615–616. There a mother instituted a suit for divorce in Florida. She obtained service on her absent husband by publica-

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[4] This limitation contrasts with the procedure in states where a court, upon securing the presence before it of the parents and children in response to a writ of habeas corpus, may proceed to determine the future custody of the children. See *e. g., Halvey* v. *Halvey,* 330 U. S. 610 (New York procedure); *Boor* v. *Boor,* 241 Iowa 973, 43 N. W. 2d 155; *Helton* v. *Crawley,* 241 Iowa 296, 41 N. W. 2d 60.

tion and he entered no appearance. The Florida court granted her a divorce and also awarded her the custody of their child. There was, therefore, inherent in that decree the question "whether in absence of personal service the Florida decree of custody had any binding effect on the husband; . . . ." *Id.*, at 615. We were not compelled to answer it there and a decision on it was expressly reserved.

Separated as our issue is from that of the future interests of the children, we have before us the elemental question whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam*. Rights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody.

> "[I]t is now too well settled to be open to further dispute that the 'full faith and credit' clause and the act of Congress passed pursuant to it [5] do not entitle a judgment *in personam* to extra-territorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound." *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 401, and see 403; *Thompson* v. *Whitman*, 18 Wall. 457; *D'Arcy* v. *Ketchum*, 11 How. 165.

In *Estin* v. *Estin, supra,* and *Kreiger* v. *Kreiger, supra,* this Court upheld the validity of a Nevada divorce obtained *ex parte* by a husband, resident in Nevada, insofar as it dissolved the bonds of matrimony. At the same time, we held Nevada powerless to cut off, in that proceeding, a spouse's right to financial support under the

[5] See 28 U. S. C. (Supp. V) § 1738, as developed from the Act of May 26, 1790, 1 Stat. 122.

prior decree of another state.[6] In the instant case, we recognize that a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony.

In the instant case, the Ohio courts gave weight to appellee's contention that the Wisconsin award of custody binds appellant because, at the time it was issued, her children had a technical domicile in Wisconsin, although they were neither resident nor present there.[7] We find it unnecessary to determine the children's legal domicile because, even if it be with their father, that does not give Wisconsin, certainly as against Ohio, the personal jurisdiction that it must have in order to deprive their mother of her personal right to their immediate possession.[8]

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[6] ". . . The fact that the requirements of full faith and credit, so far as judgments are concerned, are exacting, if not inexorable (*Sherrer* v. *Sherrer, supra* [334 U. S. 343]), does not mean, however, that the State of the domicile of one spouse may, through the use of constructive service, enter a decree that changes every legal incidence of the marriage relationship.

. . . . . .

"The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony." 334 U. S., at 546, 549.

[7] By stipulation, the parties recognized her domicile in Ohio. See also, *Estin* v. *Estin, supra; Kreiger* v. *Kreiger, supra; Williams* v. *North Carolina,* 317 U. S. 287.

For the general rule that in cases of the separation of parents, apart from any award of custody of the children, the domicile of the children is that of the parent with whom they live and that only the state of that domicile may award their custody, see Restatement, Conflict of Laws (1934), §§ 32 and 146, Illustrations 1 and 2.

[8] ". . . the weight of authority is in favor of confining the jurisdiction of the court in an action for divorce, where the defendant is a non-resident and does not appear, and process upon the defendant is by substituted service only, to a determination of the *status* of the parties. . . . This rule of law extends to children who are

The judgment of the Supreme Court of Ohio, accordingly, is reversed and the cause is remanded to it for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE CLARK, not having heard oral argument, took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, concurring.

The views expressed by my brother JACKSON make it important that I state, in joining the Court's opinion, what I understand the Court to be deciding and what it is not deciding in this case.

What is decided—the only thing the Court decides—is that the Full Faith and Credit Clause does not require Ohio, in disposing of the custody of children in Ohio, to accept, in the circumstances before us, the disposition made by Wisconsin. The Ohio Supreme Court felt itself so bound. This Court does not decide that Ohio would be precluded from recognizing, as a matter of local law, the disposition made by the Wisconsin court. For Ohio to give respect to the Wisconsin decree would not offend

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not within the jurisdiction of the court when the decree is rendered, where the defendant is not a resident of the state of the seat of the court, and has neither been personally served with process nor appeared to the action. . . . [Citing cases.]

"By the authority of the cases *supra,* a decree of the custody of a minor child under the circumstances stated is void." *Weber* v. *Redding,* 200 Ind. 448, 454–455, 163 N. E. 269, 271. See also, *Sanders* v. *Sanders,* 223 Mo. App. 834, 837–838, 14 S. W. 2d 458, 459–460; *Carter* v. *Carter,* 201 Ga. 850, 41 S. E. 2d 532.

The instant case does not present the special considerations that arise where a parent, with or without minor children, leaves a jurisdiction for the purpose of escaping process or otherwise evading jurisdiction, and we do not have here the considerations that arise when children are unlawfully or surreptitiously taken by one parent from the other.

the Due Process Clause. Ohio is no more precluded from doing so than a court of Ontario or Manitoba would be, were the mother to bring the children into one of these provinces.

Property, personal claims, and even the marriage status (see, *e. g., Sherrer* v. *Sherrer,* 334 U. S. 343), generally give rise to interests different from those relevant to the discharge of a State's continuing responsibility to children within her borders. Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children. There are, of course, adjudications other than those pertaining to children, as for instance decrees of alimony, which may not be definitive even in the decreeing State, let alone binding under the Full Faith and Credit Clause. Interests of a State other than its duty towards children may also prevail over the interest of national unity that underlies the Full Faith and Credit Clause. But the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time. Reliance on opinions regarding out-of-State adjudications of property rights, personal claims or the marital status is bound to confuse analysis when a claim to the custody of children before the courts of one State is based on an award previously made by another State. Whatever light may be had from such opinions, they cannot give conclusive answers.

MR. JUSTICE JACKSON, whom MR. JUSTICE REED joins, dissenting.

The Court apparently is holding that the Federal Constitution prohibits Ohio from recognizing the validity of

this Wisconsin divorce decree insofar as it settles custody of the couple's children. In the light of settled and unchallenged precedents of this Court, such a decision can only rest upon the proposition that Wisconsin's courts had no jurisdiction to make such a decree binding upon appellant. *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 401; *Esenwein* v. *Commonwealth,* 325 U. S. 279, 281.

A conclusion that a state must not recognize a judgment of a sister commonwealth involves very different considerations than a conclusion that it must do so. If Wisconsin has rendered a valid judgment, the Constitution not only requires every state to give it full faith and credit, but 28 U. S. C. § 1738, referring to such judicial proceedings, commands that they "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." [1] The only escape from obedience lies in a holding that the judgment rendered in Wisconsin, at least as to custody, is void and entitled to no standing even in Wisconsin. It is void only if it denies due process of law.

The Ohio courts reasoned that although personal jurisdiction over the wife was lacking, domicile of the children in Wisconsin was a sufficient jurisdictional basis to enable Wisconsin to bind all parties interested in their custody. This determination that the children were domiciled in Wisconsin has not been contested either at our bar or below. Therefore, under our precedents, it is conclusive. *Williams* v. *North Carolina,* 317 U. S. 287, 302. The husband, plaintiff in the case, was at all times domiciled in Wisconsin; the defendant-wife was a Wisconsin native,

[1] None of the cases involving exceptions to this rule are in point here. See, *e. g., Fall* v. *Eastin,* 215 U. S. 1.

was married there and both were domiciled in that State until her move in December 1946, when the parties stipulate that she acquired an Ohio domicile. The children were born in Wisconsin, were always domiciled there, and were physically resident in Wisconsin at all times until December 1946, when their mother took them to Ohio with her. But the Ohio court specifically found that she brought the children to Ohio with the understanding that if she decided not to go back to Wisconsin the children were to be returned to that State. In spite of the fact that she did decide not to return, she kept the children in Ohio. It was under these circumstances that the Wisconsin decree was rendered in February 1947, less than two months after the wife had given up her physical residence in Wisconsin and held the children out of the State in breach of her agreement.

The husband subsequently went to Ohio, retrieved the children and took them back to Wisconsin, where they remained with him for four years. Then he voluntarily brought them to Ohio for a visit with their mother, whereupon she refused to surrender them, and he sought habeas corpus in the Ohio courts. In this situation Wisconsin was no meddler reaching out to draw to its courts controversies that arose in and concerned other legal communities. If ever domicile of the children plus that of one spouse is sufficient to support a custody decree binding all interested parties, it should be in this case.[2] Cf. *Yarborough* v. *Yarborough,* 290 U. S. 202, 210.

I am quite aware that in recent times this Court has been chipping away at the concept of domicile as a connecting factor between the state and the individual to

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[2] American Law Institute, Restatement, Conflict of Laws (1934), §§ 117, 144–147.

determine rights and obligations.[3] We are a mobile people, historically on the move, and perhaps the rigid concept of domicile derived by common law from feudal attachment to the land is too rigid for a society so restless as ours. But if our federal system is to maintain separate legal communities, as the Full Faith and Credit Clause evidently contemplates, there must be some test for determining to which of these a person belongs. If, for this purpose, there is a better concept than domicile, we have not yet hit upon it. Abandonment of this ancient doctrine would leave partial vacuums in many branches of the law. It seems to be abandoned here.

The Court's decision holds that the state in which a child and one parent are domiciled and which is primarily concerned about his welfare cannot constitutionally adjudicate controversies as to his guardianship. The state's power here is defeated by the absence of the other parent for a period of two months. The convenience of a leave-taking parent is placed above the welfare of the child, but neither party is greatly aided in obtaining a decision. The Wisconsin courts cannot bind the mother, and the Ohio courts cannot bind the father. A state of the law such as this, where possession apparently is not merely nine points of the law but all of them and self-help the ultimate authority, has little to commend it in legal logic or as a principle of order in a federal system.

Nor can I agree on principle with the Court's treatment of the question of personal jurisdiction of the wife. I agree with its conclusion and that of the Ohio courts that Wisconsin never obtained jurisdiction of the person of the appellant in this action and therefore the jurisdic-

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[3] Cf. *Curry* v. *McCanless*, 307 U. S. 357; *State Tax Commission* v. *Aldrich*, 316 U. S. 174; the *Dorrance* litigation, 298 U. S. 678, 115 N. J. Eq. 268, 170 A. 601, 309 Pa. 151, 163 A. 303.

tion must be rested on domicile of the husband and children. Cf. *Milliken* v. *Meyer,* 311 U. S. 457. And I have heretofore expressed the view that such personal jurisdiction is necessary in cases where the domicile is obviously a contrived one or the claim of it a sham. *Williams* v. *North Carolina, supra,* at 311; *Rice* v. *Rice,* 336 U. S. 674, 676. But here the Court requires personal service upon a spouse who decamps before the State of good-faith domicile can make provision for custody and support of the children still legally domiciled within it. Wisconsin had a far more real concern with the transactions here litigated than have many of the divorce-mill forums whose judgments we have commanded their sister states to recognize.

In spite of the fact that judges and law writers long have recognized the similarity between the jurisdictional requirements for divorce and for custody,[4] this decision appears to equate the jurisdictional requirements for a custody decree to those for an *in personam* money judgment. One reads the opinion in vain to discover reasons for this choice, unless it is found in the remark that for the wife "rights far more precious . . . than property will be cut off" in the custody proceeding. The force of this cardiac consideration is self-evident, but it seems to me to reflect a misapprehension as to the nature of a custody proceeding or a revision of the views that have heretofore prevailed. When courts deal with inanimate property by the conventional *in rem* proceeding, their principal concern is the distribution of rights in that property, rather than with the welfare of the property apart from its ownership claims. But even where dealing solely with property rights, where concern with the *"res"* is minimal and concern with the claimants is paramount,

[4] See Goodrich, Custody of Children in Divorce Suits, 7 Corn. L. Q. 1.

courts may exercise jurisdiction *in rem* over the property without having personal jurisdiction over all of the claimants.[5] Only when they seek to render a party liable to some personal performance must they acquire personal jurisdiction.[6]

The difference between a proceeding involving the status, custody and support of children and one involving adjudication of property rights is too apparent to require elaboration. In the former, courts are no longer concerned primarily with the proprietary claims of the contestants for the *"res"* before the court, but with the welfare of the *"res"* itself. Custody is viewed not with the idea of adjudicating rights *in* the children, as if they were chattels, but rather with the idea of making the best disposition possible for the welfare of the children. To speak of a court's "cutting off" a mother's right to custody of her children, as if it raised problems similar to those involved in "cutting off" her rights in a plot of ground, is to obliterate these obvious distinctions. Personal jurisdiction of all parties to be affected by a proceeding is highly desirable, to make certain that they have had valid notice and opportunity to be heard. But the assumption that it overrides all other considerations and in its absence a state is constitutionally impotent to resolve questions of custody flies in the face of our own cases. The wife's marital ties may be dissolved without personal jurisdiction over her by a state where the husband has a genuine domicile because the concern of that state with the welfare and marital status of its domiciliary is felt to be sufficiently urgent. Certainly the claim of the domiciled parent to relief for himself from the leave-taking parent does not exhaust the power of the state. The claim of

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[5] *Harris* v. *Balk*, 198 U. S. 215; *Thompson* v. *Whitman*, 18 Wall. 457.

[6] *Pennoyer* v. *Neff*, 95 U. S. 714.

children as well as the home-keeping parent to have their status determined with reasonable certainty, and to be free from an incessant tug of war between squabbling parents, is equally urgent.

The mother in this case would in all probability not be permanently precluded from attempting to redetermine the custody of the children. If the Wisconsin courts would allow modification of the decree upon a showing of changed circumstances, such modification could be accomplished by another state which acquired jurisdiction over the parties. *Halvey* v. *Halvey,* 330 U. S. 610; cf. *Lynde* v. *Lynde,* 181 U. S. 183. And, of course, no judgment settling custody rights as between the parents would itself prevent any state which may find itself responsible for the welfare of the children from taking action adverse to either parent. No such case is before us.

I fear this decision will author new confusions. The interpretative concurrence, if it be a true interpretation, seems to reduce the law of custody to a rule of seize-and-run. I would affirm the decision of the Ohio courts that they should respect the judgment of the Wisconsin court, until it or some other court with equal or better claims to jurisdiction shall modify it.

MR. JUSTICE MINTON, dissenting.

The opinion of the Court and the dissent of MR. JUSTICE JACKSON deal with a jurisdictional question not raised on the record.

As I understand the law of Ohio, "parents are the legal and natural custodians of their minor children and each parent has an equal right to their custody in the absence of an order, judgment, or decree of a court of competent jurisdiction fixing their custody. Section 8032, General Code. It is well settled that *habeas corpus* is not the proper or appropriate action to determine, as between parents, who is entitled to the custody of their minor

children." *In re Corey,* 145 Ohio St. 413, 418, 61 N. E. 2d 892, 894–895.

The instant case was a proceeding in Ohio by habeas corpus brought by the father against the mother for the possession of the minor children. The father could not succeed in this habeas corpus action unless he could show that he had an order of a court of competent jurisdiction awarding him the custody of the children. He produced an authenticated copy of a decree of the County Court of Waukesha County, Wisconsin, valid on its face and unappealed from, which awarded him the custody of the children. It is not contended that this decree is void upon its face, nor did appellant, the mother, challenge its validity in Ohio by any responsive pleading to the petition for habeas corpus.

The only question before the Ohio court was whether that court should give full faith and credit to the Wisconsin decree. That unappealed decree was valid on its face, and its validity was not attacked by any pleading. The validity of the decree is not affected by any admission in this case, on or off the record. As far as this record is concerned, the decree of the Wisconsin court was what it purported to be on its face. Since appellant failed to challenge its validity by any pleading, the decree was entitled to full faith and credit in Ohio under Art. IV, § 1 of the United States Constitution. The Ohio court properly accorded the decree full faith and credit, and it was evidence, together with parenthood, which proved the father's right to possession of the children and entitled him to succeed in the proceeding.

I would therefore affirm.

WATSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 290. Argued February 2, 1953.—Decided May 18, 1953.

For several years, a taxpayer held an undivided interest in an orange grove and engaged in the business of growing and selling the oranges it produced. In the midst of the 1944 growing season, she sold her interest in the grove, including an unmatured crop then on the trees. *Held:* For federal income tax purposes, under § 117 (j) of the Internal Revenue Code, as in effect in 1944, she must treat that part of her profit from the sale which is attributable to the unmatured crop as ordinary income—not as a capital gain. Pp. 545–553.

(a) It is immaterial that, under the law of the state where the land is situated, an unmatured, unharvested crop is treated as real property for many purposes. P. 551.

(b) In the circumstances of this case, the proceeds of the sale fairly attributable to the crop were derived from property "held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business," within the meaning of § 117 (j), as it existed in 1944. Pp. 551–552.

197 F. 2d 56, affirmed.

The Tax Court sustained a deficiency assessed by the Commissioner of Internal Revenue against petitioners, but reduced the amount. 15 T. C. 800. The Court of Appeals affirmed. 197 F. 2d 56. This Court granted certiorari. 344 U. S. 895. *Affirmed,* p. 553.

Arthur McGregor argued the cause for petitioners. With him on the brief was *A. Calder Mackay.*

Ellis N. Slack argued the cause for respondent. With him on the brief were *Solicitor General Cummings, Assistant Attorney General Lyon* and *Hilbert P. Zarky.*

Chester H. Ferguson and *George W. Ericksen* filed a brief for Edwards et al., as *amici curiae,* supporting petitioners.

MR. JUSTICE BURTON delivered the opinion of the Court.

This case relates to a taxpayer who, for several years, held an undivided interest in an orange grove and engaged in the business of growing and selling the oranges it produced. In the midst of the 1944 growing season, she sold her interest in the grove, including an unmatured crop then on the trees. The question before us is whether, for federal income tax purposes, she must treat that part of her profit from the sale which is attributable to the unmatured crop as ordinary income or as a capital gain. For the reasons hereafter stated, she must treat it as ordinary income.

In 1944, Mrs. M. Gladys Watson, one of the petitioners here, and her two brothers, each owned an undivided one-third interest in a 110-acre navel orange grove near Exeter, Tulare County, California. Its management had been supervised by her brothers since 1912 and, since 1942, she and her brothers had operated it as a partnership. It was the oldest and one of the best groves in the locality. Its production per acre was about twice the average of such production in the county. In each of the last five years the value of its crop had increased over that of the year before. In 1943 it produced 79,851 loose boxes of oranges, yielding a gross income of $136,808.71. After deducting all expenses of cultivation, operation, picking and hauling, a net income of $92,153.05 was left.[1] Anticipating a heavy frost after November,

[1] In 1942 it yielded 54,939 boxes with a gross income of $82,521.17 and a net of $49,790.10. Its average annual yield from 1934 to 1943 was 55,097 boxes with a gross income of $46,512.68 and a net of $22,141.42.

1944, one of the brothers advocated selling the grove before then. Accordingly, in May or June, it was offered for $197,100, complete, including land, trees, unmatured crop, improvements, equipment and a five-acre peach orchard. At about that time the 1944 orange crop was in bloom.

By July the smaller fruit had dropped from the trees and the crop was "set," but not assured. A purchaser became interested but delayed his decision so as to determine more accurately the probable crop and to cause the sellers to bear more of the expense of its care. He examined past production records and, by early August, received estimates that the 1944 crop might be from 70,000 to 80,000 boxes, which, at current prices, would bring him $120,000 for the crop above expenses. One of Mrs. Watson's brothers also estimated the 1944 crop at 70,000 boxes if it matured. August 10, the sales price of $197,100 was agreed upon, payable $10,000 in cash and the balance September 1. No allocation of the price between the crop and the rest of the property was specified but the seller bore the expense of caring for the crop up to September 1, amounting to $16,020.54. The sale was carried through and there was no serious frost. The crop filled 74,268 boxes. The purchaser sold them for $146,000, yielding him a net return of $126,000.

Mrs. Watson filed a joint return with her husband, taking full deductions for her one-third share of all of the business expenses incurred in the cultivation of the crop, but treating her gain from the sale of the grove, including the unmatured crop, as a long-term capital gain. On that basis, her net gain from the sale of the grove was shown as $48,819.82, but, treating it as a long-term capital gain, only 50% of it, or $24,409.91, was included in her taxable income.[2]

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[2] § 117 (b) and (c)(2), I. R. C., as amended by § 150 (c) of the Revenue Act of 1942, c. 619, 56 Stat. 843–844, 26 U. S. C. (1940 ed., Supp. V) § 117 (b) and (c)(2).

The Commissioner of Internal Revenue assessed a deficiency against petitioners, largely based on his claim that whatever part of Mrs. Watson's income was attributable to the unmatured crop should be treated as ordinary income. He allocated $122,500, out of the $197,100 received for the grove, as attributable to the unmatured crop. On that premise, he assessed a deficiency of $24,101.35 against petitioners on their joint return. On review, the Tax Court, with two judges dissenting, sustained the Commissioner in principle but reduced to $40,000 the portion of the proceeds attributable to the crop. 15 T. C. 800. With other adjustments, not material here, the Tax Court reduced the deficiency to $6,920.35. The Court of Appeals affirmed. 197 F. 2d 56. In the meantime, the Tax Court made comparable decisions in *McCoy* v. *Commissioner,* 15 T. C. 828, and *Owen* v. *Commissioner,* P-H TC Memo, ¶ 50,300, each of which was reversed on appeal, 192 F. 2d 486 (C. A. 10th Cir.), and 192 F. 2d 1006 (C. A. 5th Cir.). Shortly before the latter decisions, the Revenue Act of 1951 amended the statute in relation to taxable years beginning after December 31, 1950, to permit proceeds from certain sales of unharvested crops to be treated as capital gains.[3] We granted certiorari in the instant case to resolve the above-indicated conflict of statutory construction still affecting many sales made before 1951. 344 U. S. 895.

The issue before us turns upon the Acts of Congress. In 1951, Congress, for the first time, dealt expressly and specifically with this subject.[4] While that action was

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[3] 65 Stat. 500–501, 26 U. S. C. (Supp. V) §§ 117 (j), 24 (f), 113 (b)(1).

[4] The Revenue Act of 1951 added to § 117 (j) of the Internal Revenue Code:

"(3) SALE OF LAND WITH UNHARVESTED CROP.—In the case of an unharvested crop on land used in the trade or business and held

prospective only, its terms throw light on the problems of prior years.[5] The adoption of that amendment emphasized the point that the question was one of federal law. Its adoption also recognized that, in order for such income to be a capital gain, an affirmative statement by Congress was needed. Finally, it not only permitted proceeds of unharvested crops to be treated as capital gains under certain circumstances, but it provided that, under those circumstances, the taxpayer could not deduct from his taxable income the expenses attributable to the production of the unharvested crop. Those expenses thereafter must be treated as capital investments added to the basis of the property to which they relate. This emphasizes the impropriety of the interpretation advocated by Mrs. Watson in the instant case. She seeks to deduct her share of the crop cultivation expenses at 100% up to the date of the sale. At the same time, she

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for more than 6 months, if the crop and the land are sold or exchanged (or compulsorily or involuntarily converted as described in paragraph (2)) at the same time and to the same person, the crop shall be considered as 'property used in the trade or business.'" 65 Stat. 500, 26 U. S. C. (Supp. V) § 117 (j)(3).

And, equally important, it added to § 24 of the Internal Revenue Code:

"(f) Sale of Land With Unharvested Crop.—Where an unharvested crop sold by the taxpayer is considered under the provisions of section 117 (j)(3) as 'property used in the trade or business,' in computing net income no deduction (whether or not for the taxable year of the sale and whether for expenses, depreciation, or otherwise) attributable to the production of such crop shall be allowed." *Id.*, at 501, 26 U. S. C. (Supp. V) § 24 (f).

[5] The purpose of Congress to make this amendment prospective, rather than retroactive, is emphasized in the very next section of the 1951 Act. That section made retroactive to 1942 another amendment to § 117 (j). It redefined capital gains so as to include the proceeds of certain sales of livestock, provided such stock be held for draft, breeding or dairy purposes. Stock so held is comparable to the orange trees rather than to the orange crop in the instant case.

claims a right to report only 50% of her gain on the sale of those crops to which the cultivation expenses relate.[6]

In the instant case, we are dependent upon § 117 (j) of the Internal Revenue Code, as in effect in 1944.[7] The

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[6] In this connection, the Senate Committee on Finance, when reporting the proposed amendment in 1951, said:

"Your committee believes that sales of land together with growing crops or fruit are not such transactions as occur in the ordinary course of business and should thus result in capital gains rather than in ordinary income. Section 323 of the bill so provides.

"Your committee recognizes, however, that when the taxpayer keeps his accounts and makes his returns on the cash receipts and disbursements basis, the expenses of growing the unharvested crop or the unripe fruit will be deducted in full from ordinary income, while the entire proceeds from the sale of the crop, as such, will be viewed as a capital gain. Actually, of course, the true gain in such cases is the difference between that part of the selling price attributable to the crop or fruit and the expenses attributable to its production. Therefore, your committee's bill provides that no deduction shall be allowed which is attributable to the production of such crops or fruit, but that the deductions so disallowed shall be included in the basis of the property for the purpose of computing the capital gain.

"The provisions of this section are applicable to sales or other dispositions occurring in taxable years beginning after December 31, 1950.

"The revenue loss under this provision is expected to be about $3 million annually." S. Rep. No. 781, 82d Cong., 1st Sess. 47–48.

[7] Internal Revenue Code, as amended, 56 Stat. 846:

"SEC. 117. CAPITAL GAINS AND LOSSES.

. . . . . .

"(j) GAINS AND LOSSES . . . FROM THE SALE OR EXCHANGE OF CERTAIN PROPERTY USED IN THE TRADE OR BUSINESS.—

"(1) DEFINITION OF PROPERTY USED IN THE TRADE OR BUSINESS.—*"For the purposes of this subsection, the term 'property used in the trade or business' means property* used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, *which is not* (A) property of a kind which would properly be in-

controlling language in that subsection then required that, in order for gains from the sale of property to be treated as capital gains, the property sold must be "used in the trade or business" of the taxpayer, "held for more than 6 months," and *not* "held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." In the instant case, the Commissioner contends that, while the land and trees met these and all other tests of the subsection, the unmatured, unharvested crop of oranges met none of the above three.

Each day brought the annual crop closer to its availability for sale in the ordinary course of that business. While the uncertainty of its condition at maturity discounted its current value, nevertheless, its presence contributed substantially to the value of the grove. The Commissioner allocated to the unmatured crop, as of September 1, a value of $122,500 out of the $197,100. The Tax Court reduced this to $40,000. We accept the latter amount now confirmed by the Court of Appeals. It is obvious that the parties to this sale did in fact attribute substantial value to the unmatured crop. If, at any moment, the crop had been stripped from the trees or destroyed by frost, there would have resulted at once a substantial reduction in the sales value of the grove.

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cludible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) *property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.*

"(2) GENERAL RULE.—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business . . . exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. . . ." (Italics supplied.) See 26 U. S. C. § 117 (j).

Assuming $40,000 to be the value fairly attributable to the presence of the crop in August and September, 1944, it remains for the taxpayer to demonstrate that § 117 (j) has authorized that value, in addition to the value of the land, trees, improvements and equipment, to be treated as a capital gain.

Mrs. Watson and the Courts of Appeals for the Fifth and Tenth Circuits have placed emphasis upon a claim that, under the law of the state where the land is situated, an unmatured, unharvested crop, for many purposes, is treated as real property. We regard that as immaterial. Whether or not the crop be real property, the federal income tax upon the gain resulting from its sale is, in its nature, a subject of federal law.

The Commissioner urges two grounds in support of his position that § 117 (j) does not authorize the taxpayer's treatment of the proceeds of the unmatured crop as a capital gain. The first is that the proceeds fairly attributable to the crop are derived from property held by the taxpayer primarily for sale to customers in the ordinary course of the taxpayer's trade or business. We agree with that contention. Although the property was not severable at the date of its sale, there is nothing in the Act requiring it to be severable. While, in previous years, like crops were held for a sale that occurred after maturity, in 1944 the date of that sale came September 1. There is nothing in the Act that distinguishes between the taxable character of a gain derived from a present sale discounting the hazards of the future, and one derived from a later sale when the hazards are past. After the transfer of title to the grove, the crop on the trees retained its character and continued to be held for sale to customers of the grove owner in the ordinary course of the owner's trade or business.

The Commissioner's treatment of the proceeds of sales of unmatured crops as ordinary income in the absence of

a statutory requirement to the contrary is consistent with the policy evidenced in *Williams* v. *McGowan,* 152 F. 2d 570, 572, which established in the Second Circuit, in 1945, the doctrine that "upon the sale of a going business it [the sales price] is to be comminuted into its fragments, and these are to be separately matched against the definition in § 117 (a)(1) . . . ." It is consistent also with the policy of the Bureau of Internal Revenue and the Tax Court, dating, at least, from the statement made by the Bureau in 1946, that, under circumstances comparable to those before us, "regardless of their stage of development, any gain realized from the sale of growing crops is ordinary income." [8]

We do not have here the situation which arises from the sale of land, including coal or other mineral wealth not separated from its natural state and not in the course of annual growth leading to a seasonal separation. See *Butler Consolidated Coal Co.* v. *Commissioner,* 6 T. C. 183. The instant case also is distinguishable from that of growing timber which is not in itself an annual or short-term product. See *Carroll* v. *Commissioner,* 70 F. 2d

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[8] "The production of fruit from orchards or groves constitutes a business, and section 117 (j) of the Code, supra, is applicable to the sale of an orchard or grove. The crops are produced with the primary purpose of selling the fruit to customers in the ordinary course of the business. Therefore, regardless of their stage of development, any gain realized from the sale of growing crops is ordinary income.

"In view of the foregoing, it is held that, for Federal income tax purposes, where citrus groves are sold with fruit on the trees, a portion of the selling price must be allocated to the fruit and the balance to the land and trees. Gain from the sale of the fruit will constitute ordinary income. Gain from the sale of the land and trees may be treated as capital gain under section 117 (j) of the Internal Revenue Code, provided the recognized gains from all transactions coming within the purview of that section exceed the recognized losses thereunder." 1946-2 Cum. Bull. 31.

806; *Camp Manufacturing Co.* v. *Commissioner,* 3 T. C. 467.

Having reached this conclusion, we find it unnecessary to pass upon the Commissioner's second contention that, because the crop did not come into existence before it was "set" in July, or at least before it was in bloom in May or June, it had not been held by Mrs. Watson for more than six months at the time of its sale.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE MINTON, with whom MR. JUSTICE REED and MR. JUSTICE DOUGLAS join, dissenting from the Court's opinion and judgment.

The question is: Should the sale and conveyance of this land for a lump sum be treated wholly as a sale of real estate taxable as a long-term capital gain, or should the crop of immature oranges be segregated and its value taxed as ordinary income?

The pertinent provisions of the statute are set forth in the margin.[1] Mrs. Watson does not contend that the growing oranges were capital assets as defined in § 117 (a), but instead she claims that they were "property used in the trade or business" as defined in § 117 (j) and that she is entitled to capital gains treatment under that sec-

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[1] "SEC. 117. CAPITAL GAINS AND LOSSES.

"(a) DEFINITIONS.—As used in this chapter—

"(1) CAPITAL ASSETS.—The term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l) . . . or real property

tion. Her claim rests on her contention that the growing oranges were: (1) real property; (2) used in her trade or business; and (3) held for more than 6 months; and that they were neither (4) properly includible in inventory; nor (5) held primarily for sale to customers in the ordinary course of her business.

First. The immature oranges were real property when the orange grove was sold. Mrs. Watson and her brothers sold the green oranges as part of the land, without severance, constructive or otherwise. How this transaction should be treated under California law does not necessarily control its treatment taxwise under the federal statute. *Burnet* v. *Harmel,* 287 U. S. 103, 110. However, real property is not defined in the Revenue Act,

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used in the trade or business of the taxpayer . . . ." 53 Stat. 50, as amended, 26 U. S. C. § 117 (a)(1).

. . . . . .

"(j) GAINS AND LOSSES FROM INVOLUNTARY CONVERSION AND FROM THE SALE OR EXCHANGE OF CERTAIN PROPERTY USED IN THE TRADE OR BUSINESS.—

"(1) DEFINITION OF PROPERTY USED IN THE TRADE OR BUSINESS.—

"For the purposes of this subsection, the term 'property used in the trade or business' means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

"(2) GENERAL RULE.—

"If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business . . . exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. . . ." 56 Stat. 846, 26 U. S. C. § 117 (j).

and in the absence of such definition we must look to the law of California to determine what is real property. Under that law, this crop of oranges passed as real estate. *Wilson* v. *White,* 161 Cal. 453, 460, 119 P. 895, 898; *Young* v. *Bank of California,* 88 Cal. App. 2d 184, 187–188, 198 P. 2d 543, 545–546. The immature fruit, from the falling of the blossoms until the harvesting, is a part of the realty, as its very existence and growth are wholly dependent upon the ground from which it takes its life and gains its sustenance. Actually severed from the ground before maturity, the fruit is worthless. Its life, and hence its value, lies in the soil of which it is a part.

Second. The Commissioner urges that, unlike the trees, the oranges are the ultimate product of the enterprise, and as such are not "used" in the business. We do not interpret the word "used" so narrowly. We believe that the phrase "used in the trade or business" is simply designed to differentiate business assets from the taxpayer's personal assets and his nonbusiness, income-producing property. It is not disputed that Mrs. Watson's business was raising and selling oranges nor that the land and orange trees were used in her business. At the time the orange grove was sold, the oranges were as much a part of the trees as the leaves and the bark. Therefore, the oranges were "property used in [Mrs. Watson's] trade or business."

Third. Were the oranges "held for more than 6 months" before the sale? It is clear that the land and trees had been held since January 1, 1942, over two and one-half years prior to the sale. As we have just said, the oranges were real property, an integral part of the trees on which they grew. Therefore, the holding period for the oranges is the same as for the trees, and the oranges were "held for more than 6 months" within the meaning of § 117 (j).

Fourth. The Bureau itself has said that the growing oranges were not "properly . . . includible in [Mrs.

Watson's] inventory." The Bureau's ruling provides in pertinent part:

> "While farmers may report their gross income upon the accrual basis (in which an inventory to determine profits is used), they are not permitted to inventory growing crops for the reason that the amount and value of such crops on hand at the beginning and end of the taxable year can not be accurately determined. . . ." [2]

Fifth. We believe that the growing oranges were not "held . . . primarily for sale to customers in the ordinary course of [Mrs. Watson's] trade or business." What was the business of the taxpayer? She was in the business of raising and selling matured fruit. She was not in the business of selling land and trees and green fruit growing upon the trees. She was going out of the business in which she had long been engaged. She sold everything for one lump sum, without any allocation to land, trees or green fruit. It was not an ordinary business transaction. It was an extraordinary transaction. It was not a sale in the ordinary course of business. It was a sale out of the course of business for the purpose of going out of business. It was not a sale to an ordinary customer, who bought ripe fruit in quantities less than the whole crop, as Mrs. Watson had been accustomed to sell them. It was a sale of land and green fruit to one not a customer. Mrs. Watson did not split the sale up into land, trees, and green fruit. She sold all as one, and at the same time. It is the Commissioner who breaks up her sale into parts and makes something out of it different from what it was, and then proceeds to tax the transaction as he remade it. I have always understood that tax laws deal with realities. It is unrealistic to treat an

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[2] I–1 Cum. Bull. 72.

extraordinary sale for one consideration of real property, part of which is immature green fruit, which sale will put the seller completely out of business, as an ordinary sale in the course of trade or business, when the business being closed out had been one that dealt only in the sale of matured fruit. The Commissioner is not free to remake the transaction as he sees fit.

The Tenth Circuit and the Fifth Circuit have reached a different conclusion from that of the Tax Court and the Ninth Circuit in the instant case. In *McCoy* v. *Commissioner,* 192 F. 2d 486 (C. A. 10th Cir.), the court was dealing with the sale of land with a growing crop of wheat upon it. In *Owen* v. *Commissioner,* 192 F. 2d 1006 (C. A. 5th Cir.), as in the instant case, the court was dealing with the sale of an orange grove. Moreover, two District Courts have held that the seller of an orange grove is entitled to capital gains treatment of the value of the immature oranges. *Cole* v. *Smyth,* 96 F. Supp. 745; *Irrgang* v. *Fahs,* 94 F. Supp. 206. I agree with these courts that the oranges in the instant case were "property used in [Mrs. Watson's] trade or business" as defined by the Revenue Act. The sale of the orange grove was not to be broken up to enable the Commissioner to tax as personalty that which was real property. The immature crop of green oranges was not property held primarily for sale to customers in the ordinary course of trade or business.

In amending the Revenue Act of 1951, Congress took cognizance of the construction placed on § 117 (j)(1) by the Commissioner and the Tax Court, and amended the section to make it abundantly clear that unharvested crops were a part of the realty upon which they were growing and were to be given capital gains treatment. 65 Stat. 500, 26 U. S. C. (Supp. V) § 117 (j)(3).

After discussing the conflict that had arisen over the Commissioner's interpretation of the statute as to grow-

ing immature crops, the Senate Committee Report on this Amendment states:

> "Your committee believes that sales of land together with growing crops or fruit are not such transactions as occur in the ordinary course of business and should thus result in capital gains rather than in ordinary income. . . ." [3]

Congress was correcting a misinterpretation of the Revenue Act by the Commissioner and the Tax Court. It was making clear what the Commissioner and the Tax Court had obfuscated. I see no reason why we should strain to uphold a tax which Congress has by recent legislation determined to be incorrect.

I would reverse the judgment.

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[3] S. Rep. No. 781, 82d Cong., 1st Sess. 47.

AVERY *v.* GEORGIA.

CERTIORARI TO THE SUPREME COURT OF GEORGIA.

No. 648. Argued April 30, 1953.—Decided May 25, 1953.

Notwithstanding a timely challenge, on the ground of racial discrimination contrary to the Equal Protection Clause of the Fourteenth Amendment, of the array of petit jurors selected to try his case in a state court, petitioner, a Negro, was convicted of rape. After the names of prospective jurors had been selected by jury commissioners, the names of white persons were printed on white tickets and the names of Negroes on yellow tickets, which were placed together in a jury box. A judge then drew a number of tickets from the box; and he testified, without contradiction, that he had not discriminated in the drawing. The tickets drawn were handed to a sheriff, who entrusted them to a clerk, whose duty it was to "arrange" the tickets and to type in final form the list of persons to be called to serve on the panel. About 60 persons were on the panel from which the jury was selected and none of them was a Negro, although many Negroes were available for service. *Held:* The conviction is reversed. Pp. 560–563.

(a) On the record in this case, petitioner made a prima facie showing of discrimination in the organization of this particular jury panel. Pp. 561–562.

(b) Petitioner having proved a prima facie case of discrimination in the selection of the jury, the burden was upon the State to overcome this prima facie case, and it failed to do so. Pp. 562–563.

209 Ga. 116, 70 S. E. 2d 716, reversed.

In a Georgia trial court, petitioner was convicted of rape and sentenced to death. The Supreme Court of Georgia affirmed. 209 Ga. 116, 70 S. E. 2d 716. This Court granted certiorari. 345 U. S. 903. *Reversed,* p. 563.

Frank M. Gleason argued the cause and filed a brief for petitioner.

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 *Paul Webb.*

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

Petitioner was tried for rape in the Superior Court of Fulton County, Georgia. He was convicted and sentenced to death. The Supreme Court of Georgia affirmed after overruling petitioner's contention that the jury which convicted him had been selected by a means repugnant to the Equal Protection Clause of the Fourteenth Amendment.[1] We granted certiorari to review this claim. 345 U. S. 903.

The indictment, upon which petitioner was tried, was returned by a grand jury in Walker County, Georgia. A change of venue was granted and the cause removed to Fulton County. By proper pleadings petitioner, a Negro, challenged the array of petit jurors selected to try his case; he charged that discrimination had been practiced against members of his race. Testimony was then taken, and thereafter the trial court overruled the challenge.

The salient facts, developed in this hearing, are undisputed. Under Georgia law the task of organizing panels of petit jurors for criminal cases falls upon a county Board of Jury Commissioners. In discharging this responsibility the Commissioners, at stated intervals, select prospective jurors from the county tax returns. Their list is then printed; the names of white persons on this list are printed on white tickets; the names of Negroes are printed on yellow tickets. These tickets—white and yellow—are placed in a jury box. A judge of the Su-

[1] *Avery* v. *State,* 209 Ga. 116, 70 S. E. 2d 716 (1952).

perior Court then draws a number of tickets from the box. The tickets are handed to a sheriff who in turn entrusts them to a clerk. It is the clerk's duty to "arrange" the tickets and to type up, in final form, the list of persons to be called to serve on the panel.

Approximately sixty persons were selected to make up the panel from which the jury in this particular case was drawn. The judge who picked out the tickets—bearing the names of persons composing the panel—testified that he did not, nor had he ever, practiced discrimination in any way, in the discharge of that duty. There is no contradictory evidence. Yet the fact remains that there was not a single Negro in that panel. The State concedes that Negroes are available for jury service in Fulton County, and we are told that Negroes generally do serve on juries in the courts of that county. The question we must decide, based upon our independent analysis of the record,[2] is whether petitioner has made a sufficient showing of discrimination in the organization of this particular panel. We think he has.

The Jury Commissioners, and the other officials responsible for the selection of this panel, were under a constitutional duty to follow a procedure—"a course of conduct"—which would not "operate to discriminate in the selection of jurors on racial grounds." *Hill* v. *Texas,* 316 U. S. 400, 404 (1942). If they failed in that duty, then this conviction must be reversed—no matter how strong the evidence of petitioner's guilt. That is the law established by decisions of this Court spanning more than seventy years of interpretation of the meaning of "equal protection." [3]

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[2] *Norris* v. *Alabama,* 294 U. S. 587 (1935).

[3] *E. g., Neal* v. *Delaware,* 103 U. S. 370 (1881); *Rogers* v. *Alabama,* 192 U. S. 226 (1904); *Norris* v. *Alabama, supra; Pierre* v. *Louisiana,* 306 U. S. 354 (1939); *Cassell* v. *Texas,* 339 U. S. 282 (1950).

Petitioner's charge of discrimination in the jury selection in this case springs from the Jury Commissioners' use of white and yellow tickets. Obviously that practice makes it easier for those to discriminate who are of a mind to discriminate. Further, the practice has no authorization in the Georgia statutes—which simply enjoin the Commissioners to select "upright and intelligent men to serve as jurors . . . ." [4] It is important to note that the Supreme Court of Georgia, in this case, specifically disapproved of the use of separately colored tickets in Fulton County, saying that it constituted "prima facie evidence of discrimination."

We agree. Even if the white and yellow tickets were drawn from the jury box without discrimination, opportunity was available to resort to it at other stages in the selection process. And, in view of the case before us, where not a single Negro was selected to serve on a panel of sixty—though many were available—we think that petitioner has certainly established a prima facie case of discrimination.

The court below affirmed, however, because petitioner had failed to prove some particular act of discrimination by some particular officer responsible for the selection of the jury; and the State now argues that it is petitioner's burden to fill this "factual vacuum." We cannot agree. If there is a "vacuum" it is one which the State must fill, by moving in with sufficient evidence to dispel the prima facie case of discrimination. We have held before,[5] and the Georgia Supreme Court, itself, recently followed these

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[4] Ga. Code Ann. § 59–106. See *Crumb* v. *State*, 205 Ga. 547, 54 S. E. 2d 639 (1949).

[5] *Norris* v. *Alabama*, *supra*, 294 U. S., at 594–595, 598; *Hill* v. *Texas*, 316 U. S. 400, 405–406 (1942); *Patton* v. *Mississippi*, 332 U. S. 463 (1947).

decisions,[6] that when a prima facie case of discrimination is presented, the burden falls, forthwith, upon the State to overcome it. The State failed to meet this test.

Reversed.

MR. JUSTICE BLACK concurs in the result.

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

MR. JUSTICE REED, concurring.

I concur in the reversal. My concurrence is based on the undisputed facts presented by the record. The facts that make a prima facie case of discrimination in the selection of petitioner's jury are as follows. The population of Fulton County is 691,797. Negroes comprise 25% or 165,814. The tax receiver's digest from which the jury list is selected has 105,035 white citizens and 17,736 Negroes—14%. The jury list for the year in question had 20,509 white and 1,115 Negroes—5%. From that list a number, 150 to 200, were drawn for service on each of the divisions of the court. Evidently these were for a week or a term's service. The venire from which the trial jury for Avery was selected numbered 60. All were white.

These facts establish a prima facie case of discrimination which the record does not rebut.

MR. JUSTICE FRANKFURTER, concurring.

It is undisputed that the drawings here were made from a box containing white and colored slips differentiated according to racial lines, white for white veniremen and yellow for colored. The slips were indiscriminately

[6] *Crumb* v. *State, supra.*

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placed in the box and were drawn from the box by a county court judge. There was testimony from a recent member of the county Board of Jury Commissioners that the use of these white and yellow slips was designed for purposes of racial discrimination, and it has not been shown that they could serve any other purpose. So far as the particular facts of this case are concerned, we may accept the testimony of the judge who drew the slips from the box as to the honesty of his purpose; that testimony does not refute the fact that there were opportunities to discriminate, as experience tells us there will inevitably be when such differentiating slips are used. In this case the opportunities are obvious, partly because the aperture in the box was sufficiently wide to make open to view the color of the slips and partly because of the subsequent use or abuse that could be made of the slips however fairly drawn. However that may be, opportunity for working of a discriminatory system exists whenever the mechanism for jury selection has a component part, such as the slips here, that differentiates between white and colored; such a mechanism certainly cannot be countenanced when a discriminatory result is reached. The stark resulting phenomenon here was that somehow or other, despite the fact that over 5% of the slips were yellow, no Negro got onto the panel of 60 jurors from which Avery's jury was selected. The mind of justice, not merely its eyes, would have to be blind to attribute such an occurrence to mere fortuity.

Accordingly, I concur in the judgment.

TINDER *v.* UNITED STATES.

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

No. 113. Argued April 9–10, 1953.—Decided May 25, 1953.

As it existed in 1950, 18 U. S. C. § 1708 made it an offense to steal from a mailbox any mail, letter, or "any article or thing contained therein." It provided that an offender shall be fined not more than $2,000 or imprisoned not more than five years, or both; and provided further that if the value of "any such article or thing" does not exceed $100, the offender shall be fined not more than $1,000 or imprisoned not more than one year, or both. *Held:* A defendant convicted in 1950 of theft from a mailbox of a letter not shown to have had a value of more than $100 was improperly sentenced to imprisonment for more than one year. Pp. 566–570.

(a) The words "article or thing" in the concluding proviso included letters; the Section does not distinguish between theft of mail and theft of an article or thing contained in a piece of mail. Pp. 567–569.

(b) The elimination of the concluding provision of § 1708 by the Act of July 1, 1952, 66 Stat. 314, is inapplicable to a prior conviction under that Section. P. 569.

193 F. 2d 720, reversed.

Petitioner was convicted of mail theft in violation of 18 U. S. C. § 1708, and subsequently moved to vacate or correct the sentence. The District Court denied petitioner's motion. The Court of Appeals affirmed. 193 F. 2d 720. This Court granted certiorari. 343 U. S. 976. *Reversed and remanded to the District Court for correction of sentence,* p. 570.

William W. Koontz, acting under appointment by the Court, argued the cause and filed a brief for petitioner.

Murry Lee Randall argued the cause for the United States. With him on the brief were *Acting Solicitor*

General Stern and *Beatrice Rosenberg*. *Philip B. Perlman,* then Solicitor General, filed a memorandum suggesting that the writ of certiorari be dismissed.

Mr. Justice Reed delivered the opinion of the Court.

On September 13, 1950, petitioner pleaded guilty to a six-count indictment charging the theft of six separate letters from the mailboxes of the six addressees in violation of 18 U. S. C. § 1708. Petitioner was sentenced to three years' imprisonment on each count, the sentences to run concurrently. 193 F. 2d 720. After serving almost a year of his term, petitioner, on August 3, 1951, filed a motion under 28 U. S. C. § 2255 to vacate or correct sentence on the ground that the indictment did not allege that any of the letters stolen from the mailboxes had a value of more than $100, hence that the indictment charged misdemeanors under § 1708, the maximum penalty for each of which was one year, instead of felonies for which the maximum penalty was five years. The District Court denied petitioner's motion and the Court of Appeals for the Fourth Circuit affirmed. Both of the courts below held that the misdemeanor provision of § 1708 applies only to thefts of "any article or thing" which in turn had been taken from a letter or package, and not to thefts of intact units of mail. As this result was in direct conflict with the position taken by the Court of Appeals for the Ninth Circuit in *Armstrong* v. *United States,* 187 F. 2d 954, we granted certiorari to resolve that conflict. 343 U. S. 976. The statute in question appears in the margin.[1]

[1] "Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts

According to the view of the Government and that adopted by the courts below, the lesser penalty is limited to thefts from mail as opposed to thefts of mail for which the maximum punishment may be imposed. Under the Government's construction, the phrase "article or thing" does not refer to mail or letters. Thus the one-year maximum sentence becomes appropriate only when mail is received in a manner not prohibited by the statute, and the contents thereof then illegally removed. We do not agree with this distinction.

As early as 1810 Congress prohibited and punished mail theft (2 Stat. 598). That statute provided a maximum of seven years' imprisonment for the theft of letters containing "any article of value," and a maximum punishment of a fine of $500 for the theft of letters "not containing any article of value or evidence thereof." In 1825 the statute was amended to provide for increased penalties for the two offenses and the value distinction

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or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

"Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

"Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—

"Shall be fined not more than $2,000 or imprisoned not more than five years, or both; but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

was retained (4 Stat. 109). Under an 1872 revision, however, the punishment distinction as to the value or the nature of the mail stolen was eliminated (17 Stat. 318). Under this revision the maximum sentence which could be imposed for mail theft was five years. This over-all maximum of five years was carried over in the 1909 Act (35 Stat. 1125) and in 18 U. S. C. § 317, the antecedent provision of 18 U. S. C. § 1708, enacted in 1948. In 1948 the entire federal criminal code received comprehensive revision. Among other changes not here pertinent, the 1948 revision added the phrase "but if the value or face value of any such article or thing does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both." The Reviser's Note on this addition which accompanied the bill and explained the changes to Congress states that "[t]he smaller penalty for an offense involving $100 or less was added." (18 U. S. C. § 1708.) This note also called attention to similar adjustments of penalties in §§ 641 and 645, which relate to illegal abstractions of government records, vouchers and other things of value. Nothing was said of the distinction to which the Government would now have us accede.[2]

As was pointed out in the *Armstrong* decision, "It would have been a simple matter for the reviser, or Con-

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[2] The Chief Reviser explained the purpose of such changes to the House Committee on Revision of the Laws as follows:

"CHANGES IN PUNISHMENT

"Our work revealed many inconsistencies in punishments. Some appeared too lenient and others too harsh when compared with crimes of similar gravity. Our problem was twofold.

"First, we found that in spite of our exact definition of felonies and misdemeanors, 29 punishments were inaccurately labeled, resulting in conflicting court opinions. We solved this problem by omitting from each of the 29 punishments any description of the offense as a

gress, to have made clear, had such been the intent, that stealing 'an article or thing' from an item of mail, leaving the item of mail otherwise intact, is to be regarded as a less serious offense than stealing the item of mail itself. A highly technical distinction of this sort, which could easily have been spelled out, cannot be imposed on the general words 'any such article or thing' in the concluding proviso of Sec. 1708. Those words must be deemed to include any article or thing previously mentioned in Sec. 1708, whether it is described specifically as a 'letter' or generally as 'an article or thing.'" 187 F. 2d 954, 956.

Following the *Armstrong* decision, the Postmaster General and the Attorney General asked Congress to eliminate the misdemeanor provision from § 1708 because the crime of theft of mail had been divided into "felonies and misdemeanors, with the value of the matter stolen as the determining factor." S. Rep. No. 980, 82d Cong., 1st Sess., pp. 3–4; H. R. Rep. No. 1674, 82d Cong., 2d Sess., pp. 3–5. Subsequent to our granting certiorari, June 9, 1952, the proposal to eliminate the misdemeanor provision was approved, July 1, 1952. 66 Stat. 314. Although Congress thus eliminated the conflict which led us to grant certiorari, the change in the statute can have no effect on a prior conviction such as petitioner's. In our view, under the then wording of § 1708, and its purpose as shown by the Reviser's Notes, petitioner was improperly convicted of a felony.

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felony or misdemeanor, leaving the test as to the kind of crime, to our definitive section.

"Second, we discovered serious disparities in punishments when we considered the nature of various crimes. Before attempting to eliminate these differences we prepared a master table showing the nature of each offense and its punishment. In this way we eliminated many inequalities and brought uniformity out of the conflicts which time had developed." Hearings on H. R. 5450, 78th Cong., 2d Sess., p. 6.

This Court has power to do justice as the case requires.[3] 28 U. S. C. § 2106. The judgment of the Court of Appeals is reversed and the cause is remanded to the District Court to correct the sentence.

It is so ordered.

MR. JUSTICE BURTON, MR. JUSTICE CLARK, and MR. JUSTICE MINTON, dissenting, would affirm the judgment of the Court of Appeals for the Fourth Circuit for the reasons stated in the opinion of that court, 193 F. 2d 720.

THE CHIEF JUSTICE, not having heard all of the oral argument, took no part in the consideration or decision of this case.

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[3] *Patterson* v. *Alabama*, 294 U. S. 600, 607; *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 555; *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671, 676.

Syllabus.

LAURITZEN *v.* LARSEN.

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

No. 226. Argued January 6, 1953.—Decided May 25, 1953.

1. In this suit *in personam* under the Jones Act, 46 U. S. C. § 688, in a federal district court in New York, by a foreign seaman against a foreign shipowner for an injury sustained in a foreign port, process was served on defendant in New York and defendant appeared generally and answered. *Held:* The court had jurisdiction to determine whether the asserted cause of action was well founded. Pp. 574–575.
2. While temporarily in New York, a Danish seaman joined the crew of a ship of Danish flag and registry owned by a Danish citizen. The seaman signed ship's articles providing that the rights of crew members would be governed by Danish law and by the employer's contract with the Danish Seamen's Union, of which the seaman was a member. He was negligently injured aboard the ship, in the course of his employment, while in Havana harbor. He sued the ship's owner in a federal district court in New York for damages under the Jones Act. *Held:* The Jones Act was inapplicable. Pp. 573–593.

   (a) Allowance of an additional remedy under the Jones Act would conflict sharply with the policy and letter of Danish law. Pp. 575–576.

   (b) By usage as old as the Nation, shipping laws of the United States written in all-inclusive general terms have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law. Pp. 576–579.

   (c) The locality test affords no support for the application of American law in this case, since the injury occurred on a Danish ship in Cuban waters. Pp. 583–584.

   (d) It is settled American doctrine that the law of the flag governs all matters of discipline on a ship and all things done on board which affect only the ship and those belonging to her, and which do not involve the peace and dignity of the country or the tranquillity of the port. Pp. 584–586.

   (e) The seaman's presence in New York was transitory and created no such national interest in, or duty toward, him as to justify application of the Jones Act. Pp. 586–587.

(f) The utmost liberality in disregarding the formality of a ship's registration in a country other than that of the allegiance of its owner does not support application of American law in this case. Pp. 587–588.

(g) That the contract of employment was made in New York does not require a different result, since the place of contract is not a substantial influence in the choice between competing laws to govern a maritime tort, and the contract itself validly provided for application of Danish law. Pp. 588–589.

(h) Justice does not require adjudication of this case under American law to save this seaman expense and loss of time in returning to a foreign forum. Pp. 589–590.

(i) That an American forum has perfected its jurisdiction over the parties and that the defendant does frequent and regular business in the forum state does not justify application of the law of the forum in this case. Pp. 590–593.

196 F. 2d 220, reversed.

A federal district court awarded respondent a judgment against petitioner for damages under the Jones Act, 46 U. S. C. § 688. The Court of Appeals affirmed. 196 F. 2d 220. This Court granted certiorari. 344 U. S. 810. *Reversed and remanded,* p. 593.

James M. Estabrook argued the cause for petitioner. With him on the brief was *David P. H. Watson.*

George Halpern and *Richard M. Cantor* argued the cause and filed a brief for respondent.

Briefs of *amici curiae* supporting petitioner were filed by *John Lord O'Brian* for the Royal Danish Government; and *James S. Hemingway* for Skibsfartens Arbeidsgiverforening.

Briefs of *amici curiae* urging affirmance were filed by *Harry D. Graham* for Pedersen et al.; *Mr. Cantor* and *Mr. Halpern* for the Seafarers International Union of North America et al.; *Silas Blake Axtell* for the Friends of Andrew Furuseth Legislative Association; and *Jacob Rassner* for the Seamen's Union of Panama.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The key issue in this case is whether statutes of the United States should be applied to this claim of maritime tort. Larsen, a Danish seaman, while temporarily in New York joined the crew of the *Randa,* a ship of Danish flag and registry, owned by petitioner, a Danish citizen. Larsen signed ship's articles, written in Danish, providing that the rights of crew members would be governed by Danish law and by the employer's contract with the Danish Seamen's Union, of which Larsen was a member. He was negligently injured aboard the *Randa* in the course of employment, while in Havana harbor.

Respondent brought suit under the Jones Act [1] on the law side of the District Court for the Southern District of New York and demanded a jury. Petitioner contended that Danish law was applicable and that, under it, respondent had received all of the compensation to which he was entitled. He also contested the court's jurisdiction. Entertaining the cause, the court ruled that American rather than Danish law applied, and the jury rendered a verdict of $4,267.50. The Court of Appeals, Second Circuit, affirmed.[2] Its decision, at least superficially, is at variance with its own earlier ones [3] and

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[1] "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . ." 46 U. S. C. § 688.

[2] 196 F. 2d 220.

[3] In *The Paula,* 91 F. 2d 1001, the then Circuit Court of Appeals, Second Circuit, held the Jones Act inapplicable to a suit by an alien seaman against this same petitioner, and expressly refused to follow dicta by the Fifth Circuit Court of Appeals in *Arthur* v. *Compagnie Generale Transatlantique,* 72 F. 2d 662, to the effect that the Act

conflicts with one by the New York Court of Appeals.[4] We granted certiorari.[5]

The question of jurisdiction is shortly answered. A suit to recover damages under the Jones Act is *in personam* against the ship's owner and not one *in rem* against the ship itself.[6] The defendant appeared generally, answered and tendered no objection to jurisdiction of

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gave a right of action to "all seamen regardless of nationality." The *Paula* decision is generally consistent with prior decisions of the court rendering it. See *The Hanna Nielsen,* 273 F. 171; *The Pinar Del Rio,* 16 F. 2d 984, aff'd 277 U. S. 151. A few years later, in *Gambera* v. *Bergoty,* 132 F. 2d 414, that same court granted relief under the Jones Act to a plaintiff who was a long-time resident, though not a citizen, of this country, and who suffered injury in American territorial waters while serving on a Greek ship. In *Kyriakos* v. *Goulandris,* 151 F. 2d 132, the court (over the dissent of Judge Learned Hand) held that the Act applied to injuries sustained while ashore in the United States by a Greek seaman employed by a Greek shipowner. In *O'Neill* v. *Cunard White Star,* 160 F. 2d 446, that court held that a British seaman injured on a British vessel on the high seas could not sue under the Jones Act. In *Taylor* v. *Atlantic Maritime Co.,* 179 F. 2d 597, it reversed a district court judgment dismissing a Jones Act suit by a Panamanian citizen, allegedly residing in New York, against a ship of Panamanian registry for injuries apparently received on the high seas. Judge Learned Hand, writing for the court, indicated that a majority of the panel thought that the Jones Act was not applicable to alien seamen, but that "in spite of what we should hold, were we free" they were bound by the decision in *Kyriakos.* In the case now before us the court affirmed *per curiam* on the authority of *Kyriakos* and *Taylor.* No two of these cases present exactly the same basis for application of American law and their contrary results do not necessarily mean inconsistency. But they illustrate different considerations which influence choice of law in maritime tort cases.

[4] *Sonnesen* v. *Panama Transport Co.,* 298 N. Y. 262, 82 N. E. 2d 569. Such a conflict can arise because Jones Act suits may be brought in state as well as federal courts. *Engel* v. *Davenport,* 271 U. S. 33.

[5] 344 U. S. 810.

[6] See *Plamals* v. *Pinar Del Rio,* 277 U. S. 151.

his person. As frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction of subject matter. A cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact. Cf. *Montana-Dakota Co.* v. *Public Service Co.,* 341 U. S. 246, 249.

Denmark has enacted a comprehensive code to govern the relations of her shipowners to her seagoing labor which by its terms and intentions controls this claim. Though it is not for us to decide, it is plausibly contended that all obligations of the owner growing out of Danish law have been performed or tendered to this seaman. The shipowner, supported here by the Danish Government, asserts that the Danish law supplies the full measure of his obligation and that maritime usage and international law as accepted by the United States exclude the application of our incompatible statute.

That allowance of an additional remedy under our Jones Act would sharply conflict with the policy and letter of Danish law is plain from a general comparison of the two systems of dealing with shipboard accidents. Both assure the ill or injured seafaring worker the conventional maintenance and cure at the shipowner's cost, regardless of fault or negligence on the part of anyone. But, while we limit this to the period within which maximum possible cure can be effected, *Farrell* v. *United States,* 336 U. S. 511, the Danish law limits it to a fixed period of twelve weeks, and the monetary measurement is different. The two systems are in sharpest conflict as to treatment of claims for disability, partial or complete, which are permanent, or which outlast the liability for maintenance and cure, to which class this claim belongs. Such injuries Danish law relieves under a state-operated plan similar to our workmen's compensa-

tion systems. Claims for such disability are not made against the owner but against the state's Directorate of Insurance Against the Consequences of Accidents. They may be presented directly or through any Danish Consulate. They are allowed by administrative action, not by litigation, and depend not upon fault or negligence but only on the fact of injury and the extent of disability. Our own law, apart from indemnity for injury caused by the ship's unseaworthiness, makes no such compensation for such disability in the absence of fault or negligence. But, when such fault or negligence is established by litigation, it allows recovery for elements such as pain and suffering not compensated under Danish law and lets the damages be fixed by jury. In this case, since negligence was found, United States law permits a larger recovery than Danish law. If the same injury were sustained but negligence was absent or not provable, the Danish law would appear to provide compensation where ours would not.

Respondent does not deny that Danish law is applicable to his case. The contention as stated in his brief is rather that "A claimant may select whatever forum he desires and receive the benefits resulting from such choice" and "A ship owner is liable under the laws of the forum where he does business as well as in his own country." This contention that the Jones Act provides an optional cumulative remedy is not based on any explicit terms of the Act, which makes no provision for cases in which remedies have been obtained or are obtainable under foreign law. Rather he relies upon the literal catholicity of its terminology. If read literally, Congress has conferred an American right of action which requires nothing more than that plaintiff be "any seaman who shall suffer personal injury in the course of his employment." It makes no explicit requirement that either

the seaman, the employment or the injury have the slightest connection with the United States. Unless some relationship of one or more of these to our national interest is implied, Congress has extended our law and opened our courts to all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation—a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal wording.

But Congress in 1920 wrote these all-comprehending words, not on a clean slate, but as a postscript to a long series of enactments governing shipping. All were enacted with regard to a seasoned body of maritime law developed by the experience of American courts long accustomed to dealing with admiralty problems in reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations.

The shipping laws of the United States, set forth in Title 46 of the United States Code, comprise a patchwork of separate enactments, some tracing far back in our history and many designed for particular emergencies. While some have been specific in application to foreign shipping and others in being confined to American shipping, many give no evidence that Congress addressed itself to their foreign application and are in general terms which leave their application to be judicially determined from context and circumstance. By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law. Thus, in *United States* v. *Palmer,* 3 Wheat. 610, this Court was called upon to interpret a statute of 1790 (1 Stat. 115) punishing certain acts when committed on the high seas by "any person or persons," terms which, as Mr. Chief Justice Marshall observed, are

"broad enough to comprehend every human being." But the Court determined that the literal universality of the prohibition "must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them" (p. 631) and therefore would not reach a person performing the proscribed acts aboard the ship of a foreign state on the high seas.

This doctrine of construction is in accord with the long-heeded admonition of Mr. Chief Justice Marshall that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ." *The Charming Betsy,* 2 Cranch 64, 118. See *The Nereide,* 9 Cranch 388, 423; *MacLeod* v. *United States,* 229 U. S. 416, 434; *Sandberg* v. *McDonald,* 248 U. S. 185, 195. And it has long been accepted in maritime jurisprudence that ". . . if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory." Lord Russell of Killowen in *The Queen* v. *Jameson,* [1896] 2 Q. B. 425, 430. This is not, as sometimes is implied, any impairment of our own sovereignty, or limitation of the power of Congress. "The law of the sea," we have had occasion to observe, "is in a peculiar sense an international law, but application of its specific rules depends upon acceptance by the United States." *Farrell* v. *United States,* 336 U. S. 511, 517. On the contrary, we are simply dealing with a problem of statutory construction rather commonplace in a federal system by which courts often have to decide whether "any" or "every" reaches to the limits of the enacting

authority's usual scope or is to be applied to foreign events or transactions.[7]

The history of the statute before us begins with the 1915 enactment of the comprehensive LaFollette Act, entitled, "An Act To promote the welfare of American seamen in the merchant marine of the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea." 38 Stat. 1164. Many sections of this Act were in terms or by obvious implication restricted to American ships.[8] Three

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[7] Cheatham and Reese, Choice of the Applicable Law, 52 Col. L. Rev. 959, 961, dealing with state statutes, puts the problem in this fashion:

"There is one rule or policy which, wherever applicable, takes precedence over others and, to a large extent, saves the courts from further pain of decision. That controlling policy, obvious as it may be, is that a court must follow the dictates of its own legislature to the extent that these are constitutional. But, although choice of law constitutes no exception to this fundamental rule, rarely can the principle be applied in practice. The vast run of statutes are enacted with only the intrastate situation in mind. The application of a statute to out-of-state occurrences, therefore, must generally be determined in accordance with ordinary conflict of laws rules. And this is so even if, as is frequently the case, the statute employs such sweeping terms as 'every contract' or 'every decedent.' Unless it appears that the draftsmen so intended, language of this sort is not to be taken literally to mean that the statute is applicable to every transaction wherever occurring or to every case brought in the forum. Where, on the other hand, it is clear that the legislature has actually addressed itself to the choice of law problem, the courts, subject to the limitation of constitutionality, must give effect to its intentions."

[8] Section 1, requiring lost seamen to be replaced, directed the master to report such replacement to the United States consul at the first port at which he shall arrive thereafter. Section 2 provided certain regulations affecting the duties of crew members aboard "all merchant vessels of the United States." Section 5 provided that on complaint of the officers or crew of "any vessel" in a foreign port

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sections were made specifically applicable to foreign vessels,[9] and these provoked considerable doubt and debate.[10] Others were phrased in terms which on their face might apply to the world or to anything less. In this category fell § 20, a cryptic paragraph dealing with the fellow-servant doctrine, to which this Court ascribed little, if any, of its intended effect. *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372. In 1920, Congress, under the title "An Act To provide for the promotion and maintenance of the American merchant marine . . . ." and other subjects not relevant, provided a plan to aid our mercan-

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that the vessel is unseaworthy or inadequately provisioned "the consul" may appoint someone to make inquiry. Section 6 set forth certain sanitation requirements for "merchant vessels of the United States." Section 13 required every vessel to have in its complement a minimum percentage of able-bodied seamen certified by the Secretary of Commerce. Section 19 was concerned with the procedure to be followed before American consuls abroad in certain matters involving American seamen.

[9] §§ 4, 11, and 14. Section 4 gave seamen the right to demand certain wage payments on coming into port. Its closing portion provided ". . . this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement." Section 11 re-enacted, with some changes, an 1898 statute prohibiting payment of advance wages to seamen; one subsection stated "this section shall apply as well to foreign vessels while in waters of the United States, as to vessels of the United States, and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for similar violation."

For construction of these two sections see *Patterson* v. *Bark Eudora*, 190 U. S. 169; *Sandberg* v. *McDonald*, 248 U. S. 185, and *Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 348.

Section 14 directed that certain requirements concerning lifeboats should also be applicable to foreign vessels leaving United States ports.

[10] See Report of the House Committee on Merchant Marine and Fisheries, H. R. Rep. No. 852, 63d Cong., 2d Sess., pp. 18, 20; 50 Cong. Rec. 5761–5792.

tile fleet and included the revised provision for injured seamen now before us for construction. 41 Stat. 988, 1007. It did so by reference to the Federal Employers' Liability Act, which we have held not applicable to an American citizen's injury sustained in Canada while in service of an American employer. *New York Central R. Co.* v. *Chisholm,* 268 U. S. 29. And it did not give the seaman the one really effective security for a claim against a foreign owner, a maritime lien.[11]

Congress could not have been unaware of the necessity of construction imposed upon courts by such generality of language and was well warned that in the absence of more definite directions than are contained in the Jones Act it would be applied by the courts to foreign events, foreign ships and foreign seamen only in accordance with the usual doctrine and practices of maritime law.

Respondent places great stress upon the assertion that petitioner's commerce and contacts with the ports of the United States are frequent and regular, as the basis for applying our statutes to incidents aboard his ships. But the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea. Hence, courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality.[12] It has the force of law, not

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[11] *Plamals* v. *Pinar Del Rio,* n. 6, *supra.*

[12] See the famous opinion of Mr. Justice Story in *De Lovio* v. *Boit,* Fed. Cas. No. 3,776, 2 Gall. 398; *The Sally,* 8 Cranch 382 and 2 Cranch 406; *The Scotia,* 14 Wall. 170; Dickinson, The Law of Nations as Part of the National Law of the United States, 101 U. of Pa. L. Rev. 26, 28–29, 792, 803–816.

from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.

International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own. Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority. It would not be candid to claim that our courts have arrived at satisfactory standards or apply those that they profess with perfect consistency. But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

In the case before us, two foreign nations can claim some connecting factor with this tort—Denmark, because, among other reasons, the ship and the seaman were Danish nationals; Cuba, because the tortious conduct occurred and caused injury in Cuban waters. The United States may also claim contacts because the seaman had

been hired in and was returned to the United States, which also is the state of the forum. We therefore review the several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim, particularly a maritime tort claim, and the weight and significance accorded them.

1. *Place of the Wrongful Act.*—The solution most commonly accepted as to torts in our municipal and in international law is to apply the law of the place where the acts giving rise to the liability occurred, the *lex loci delicti commissi.*[13] This rule of locality, often applied to maritime torts,[14] would indicate application of the law of Cuba, in whose domain the actionable wrong took place. The test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts, because of the varieties of legal authority over waters she may navigate. These range from ports, harbors, roadsteads, straits, rivers and canals which form part of the domain of various states, through bays and gulfs, and that band of the littoral sea known as territorial waters, over which control in a large, but not unlimited, degree is conceded to the adjacent state. It includes, of course, the high seas as to which the law was probably settled and old when Grotius wrote that it cannot be anyone's property and cannot be monopolized by virtue of discovery, occupation, papal grant, prescription or custom.[15]

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[13] See *Slater* v. *Mexican National R. Co.*, 194 U. S. 120; *New York Central R. Co.* v. *Chisholm*, 268 U. S. 29; Rheinstein, The Place of Wrong, 19 Tulane L. Rev. 4, 165; cf. *Sandberg* v. *McDonald*, 248 U. S. 185, 195.

[14] *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176; cf. *Uravic* v. *Jarka Co.*, 282 U. S. 234. See Restatement, Conflict of Laws, § 404.

[15] Grotius, De Jure Praedae, Carnegie Endowment Publication 1950, 207, 220, 222, 223, 231–233, 234, 237. See Dumbauld, Grotius on the Law of Prize, 1 J. Pub. L. 370, 372, 387.

We have sometimes uncompromisingly asserted territorial rights, as when we held that foreign ships voluntarily entering our waters become subject to our prohibition laws and other laws as well, except as we may in pursuance of our own policy forego or limit exertion of our power. *Cunard Steamship Co.* v. *Mellon,* 262 U. S. 100, 124. This doctrine would seem to indicate Cuban law for this case. But the territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by the more constant law of the flag. This would appear to be consistent with the practice of Cuba, which applies a workmen's compensation system in principle not unlike that of Denmark to all accidents occurring aboard ships of Cuban registry.[16] The locality test, for what it is worth, affords no support for the application of American law in this case and probably refers us to Danish in preference to Cuban law, though this point we need not decide, for neither party urges Cuban law as controlling.

2. *Law of the Flag.*—Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state.[17]

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[16] See Cuba Workmen's Compensation Law, Decree No. 2687, November 15, 1933, Arts. XI, XL.

[17] The leading case is *The Virginius,* seized in 1873 by the Spanish when en route to Cuba. President Grant took the position that "if the ship's papers were irregular or fraudulent, the crime was committed against the American laws and only its tribunals were

This Court has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it "is deemed to be a part of the territory of that sovereignty [whose flag it flies], and not to lose that character when in navigable waters within the territorial limits of another sovereignty." On this principle, we concede a territorial government involved only concurrent jurisdiction of offenses aboard our ships. *United States* v. *Flores,* 289 U. S. 137, 155–159, and cases cited. Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flag-state,[18] but apply the law of the flag on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her.

It is significant to us here that the weight given to the ensign overbears most other connecting events in determining applicable law. As this Court held in *United States* v. *Flores, supra,* at 158, and iterated in *Cunard Steamship Co.* v. *Mellon, supra,* at 123:

> "And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the

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competent to decide the question." The Attorney General took the same position. The ship was restored. 2 Moore's Digest 895–903. Higgins and Colombos, International Law of the Sea (2d ed.), 201.

[18] The theoretical basis used by this Court apparently prevailed in 1928 with the Permanent Court of International Justice in the case of *The Lotus,* P. C. I. J., Series A, No. 10. For criticism of it see Higgins and Colombos, International Law of the Sea (2d ed.), 193–195. We leave the controversy where we find it, for either basis leads to the same result in this case, though this might not be so with some other problems of shipping.

> tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. . . ."

This was but a repetition of settled American doctrine.[19]

These considerations are of such weight in favor of Danish and against American law in this case that it must prevail unless some heavy counterweight appears.

3. *Allegiance or Domicile of the Injured.*—Until recent times there was little occasion for conflict between the law of the flag and the law of the state of which the seafarer was a subject, for the long-standing rule, as pronounced by this Court after exhaustive review of authority, was that the nationality of the vessel for jurisdictional purposes was attributed to all her crew. *In re Ross,* 140 U. S. 453, 472.[20] Surely during service under a foreign flag some duty of allegiance is due. But, also, each nation has a legitimate interest that its nationals and permanent inhabitants be not maimed or disabled from self-support. In some later American cases, courts have been prompted to apply the Jones Act by the fact that the wrongful act or omission alleged caused injury to an American citizen or domiciliary.[21] We need not, however, weigh the seaman's nationality against that of the ship, for here the two coincide without resort to fiction. Ad-

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[19] *Wildenhus's Case,* 120 U. S. 1; *Brown* v. *Duchesne,* 19 How. 183. For application of this doctrine in tort cases see *Bonsalem* v. *Byron S. S. Co.,* 50 F. 2d 114; *Cain* v. *Alpha S. S. Corp.,* 35 F. 2d 717; *Grand Trunk R. Co.* v. *Wright,* 21 F. 2d 814; Restatement, Conflict of Laws, § 405.

[20] See also *Rainey* v. *New York & P. S. S. Co.,* 216 F. 449.

[21] See *Uravic* v. *Jarka Co., supra; Shorter* v. *Bermuda & West Indies S. S. Co.,* 57 F. 2d 313; *Gambera* v. *Bergoty,* 132 F. 2d 414. But see *The Oriskany,* 3 F. Supp. 805; *Clark* v. *Montezuma Transportation Co.,* 217 App. Div. 172, 216 N. Y. Supp. 295.

mittedly, respondent is neither citizen nor resident of the United States. While on direct examination he answered leading questions that he was living in New York when he joined the *Randa,* the articles which he signed recited, and on cross-examination he admitted, that his home was Silkeburg, Denmark. His presence in New York was transitory and created no such national interest in, or duty toward, him as to justify intervention of the law of one state on the shipboard of another.

4. *Allegiance of the Defendant Shipowner.*—A state "is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed." *Skiriotes* v. *Florida,* 313 U. S. 69, 73. *Steele* v. *Bulova Watch Co.,* 344 U. S. 280, 282. Until recent times this factor was not a frequent occasion of conflict, for the nationality of the ship was that of its owners.[22] But it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries.[23] Confronted with such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them.[24] But here again the

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[22] Many nations (including both the United States and Denmark) still allow only those ships wholly or predominantly owned by its nationals to register under its flag. See 46 U. S. C. §§ 11, 808; Denmark, Maritime Law of May 7, 1937, § 1.

[23] McFee, The Law of the Sea, 152–154. See Merchant Marine Study and Investigation (Transfer of American Ships to Foreign Registry), Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 81st Cong., 1st Sess.

[24] See *Gerradin* v. *United Fruit Co.,* 60 F. 2d 927; cf. *Central Vermont Co.* v. *Durning,* 294 U. S. 33.

utmost liberality in disregard of formality does not support the application of American law in this case, for it appears beyond doubt that this owner is a Dane by nationality and domicile.

5. *Place of Contract.*—Place of contract, which was New York, is the factor on which respondent chiefly relies to invoke American law. It is one which often has significance in choice of law in a contract action. But a Jones Act suit is for tort, in which respect it differs from one to enforce liability for maintenance and cure. As we have said of the latter, "In the United States this obligation has been recognized consistently as an implied provision in contracts of marine employment. Created thus with the contract of employment, the liability, unlike that for indemnity or that later created by the Jones Act, in no sense is predicated on the fault or negligence of the shipowner." *Aguilar* v. *Standard Oil Co.,* 318 U. S. 724, 730. *De Zon* v. *American President Lines,* 318 U. S. 660, 667; *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, 527. But this action does not seek to recover anything due under the contract or damages for its breach.

The place of contracting in this instance, as is usual to such contracts, was fortuitous. A seaman takes his employment, like his fun, where he finds it; a ship takes on crew in any port where it needs them. The practical effect of making the *lex loci contractus* govern all tort claims during the service would be to subject a ship to a multitude of systems of law, to put some of the crew in a more advantageous position than others, and not unlikely in the long run to diminish hirings in ports of countries that take best care of their seamen.

But if contract law is nonetheless to be considered, we face the fact that this contract was explicit that the Danish law and the contract with the Danish union were to control. Except as forbidden by some public policy,

the tendency of the law is to apply in contract matters the law which the parties intended to apply.[25] We are aware of no public policy that would prevent the parties to this contract, which contemplates performance in a multitude of territorial jurisdictions and on the high seas, from so settling upon the law of the flag-state as their governing code. This arrangement is so natural and compatible with the policy of the law that even in the absence of an express provision it would probably have been implied. *The Belgenland,* 114 U. S. 355, 367; *The Hanna Nielsen,* 273 F. 171. We think a quite different result would follow if the contract attempted to avoid applicable law, for example, so as to apply foreign law to an American ship.

However, at the same time that he is relying on the place of the contract, respondent attacks the whole contract as void because the articles do not describe the voyage with sufficient definiteness within the rule applied in *The Quoque,* 261 F. 414, aff'd 266 F. 696. This case dealt with an American ship and its holding was founded upon a statute originally enacted in 1873 and held by those courts that have dealt with the problem applicable only to American ships. *The Montapedia,* 14 F. 427; *The Elswick Tower,* 241 F. 706. The contention is without merit.

We do not think the place of contract is a substantial influence in the choice between competing laws to govern a maritime tort.

6. *Inaccessibility of Foreign Forum.*—It is argued, and particularly stressed by an *amicus* brief, that justice requires adjudication under American law to save seamen expense and loss of time in returning to a foreign forum. This might be a persuasive argument for exercising a dis-

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[25] See Yntema, "Autonomy" in Choice of Law, 1 Am. J. Comp. L. 341.

cretionary jurisdiction to adjudge a controversy; but it is not persuasive as to the law by which it shall be judged. It is pointed out, however, that the statutes of at least one maritime country (Panama) allow suit under its law by injured seamen only in its own courts. The effect of such a provision is doubtful in view of our holding that such venue restrictions by one of the states of the Union will not preclude action in a sister state, *Tennessee Coal, Iron & R. Co.* v. *George,* 233 U. S. 354.

Confining ourselves to the case in hand, we do not find this seaman disadvantaged in obtaining his remedy under Danish law from being in New York instead of Denmark. The Danish compensation system does not necessitate delayed, prolonged, expensive and uncertain litigation. It is stipulated in this case that claims may be made through the Danish Consulate. There is not the slightest showing that to obtain any relief to which he is entitled under Danish law would require his presence in Denmark or necessitate his leaving New York. And, even if it were so, the record indicates that he was offered and declined free transportation to Denmark by petitioner.

7. *The Law of the Forum.*—It is urged that, since an American forum has perfected its jurisdiction over the parties and defendant does more or less frequent and regular business within the forum state, it should apply its own law to the controversy between them. The "doing business" which is enough to warrant service of process may fall quite short of the considerations necessary to bring extraterritorial torts to judgment under our law. Under respondent's contention, all that is necessary to bring a foreign transaction between foreigners in foreign ports under American law is to be able to serve American process on the defendant. We have held it a denial of due process of law when a state of the Union attempts to draw into control of its law otherwise foreign controversies, on slight connections, because it is a forum

state. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143; *Home Insurance Co.* v. *Dick*, 281 U. S. 397. The purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum. Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable.

It is pointed out that our statute on limitation of shipowner's liability which formerly applied in terms to "any vessel" was applied by our courts to foreign causes.[26] Hence, it is argued by analogy that "any seaman" should be construed so to apply. But the situation is inverted. The limitation-of-liability statute was construed to thus apply only against those who had chosen to sue in our courts on foreign transactions.[27] Because a

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[26] *The Scotland*, 105 U. S. 24; *The Titanic*, 233 U. S. 718. At the time these cases were decided the statute purported to apply to "any vessel." In 1936 it was amended so as expressly to apply to foreign, as well as domestic, vessels. 49 Stat. 1479.

[27] "It is true that the act of Congress does not control or profess to control the conduct of a British ship on the high seas. See *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356. It is true that the foundation for a recovery upon a British tort is an obligation created by British law. But it also is true that the laws of the forum may decline altogether to enforce that obligation on the ground that it is contrary to the domestic policy, or may decline to enforce it except within such limits as it may impose. *Cuba Railroad Co.* v. *Crosby*, 222 U. S. 473, 478, 480. Dicey, Conflict of Laws, 2d ed., 647. It is competent therefore for Congress to enact that in certain matters belonging to admiralty jurisdiction parties resorting to our courts shall recover only to such extent or in such way as it may mark out. *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527. The question is not whether the owner of the Titanic by this proceeding can require all claimants to come in and can cut down

law of the forum is applied to plaintiffs who voluntarily submit themselves to it is no argument for imposing the law of the forum upon those who do not. Furthermore, this application of the limitation on liability brought our practice into harmony with that of all other maritime nations,[28] while the application of the Jones Act here advocated would bring us into conflict with the maritime world.

This review of the connecting factors which either maritime law or our municipal law of conflicts regards as significant in determining the law applicable to a claim of actionable wrong shows an overwhelming preponderance in favor of Danish law. The parties are both Danish subjects, the events took place on a Danish ship, not within our territorial waters. Against these considerations is only the fact that the defendant was served here with process and that the plaintiff signed on in New York, where the defendant was engaged in our foreign commerce. The latter event is offset by provision of his contract that the law of Denmark should govern. We do not question the power of Congress to condition access to our ports by foreign-owned vessels upon submission to any liabilities it may consider good American policy to

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rights vested under English law, as against, for instance, Englishmen living in England who do not appear. It is only whether those who do see fit to sue in this country are limited in their recovery irrespective of the English law. That they are so limited results in our opinion from the decisions of this court. For on what ground was the limitation of liability allowed in *The Scotland* or *La Bourgogne?* . . . . The essential point was that the limitation might be applied to foreign ships if sued in this country although they were not subject to our substantive law." *The Titanic, supra,* at 732–733 (per Holmes, J.).

[28] Limitation of liability has been an essential part of the maritime law of every maritime nation since the *Grand Ordonnance* of Louis XIV in 1681. See discussion in the opinion of Mr. Justice Brown in *The Main* v. *Williams,* 152 U. S. 122.

exact. But we can find no justification for interpreting the Jones Act to intervene between foreigners and their own law because of acts on a foreign ship not in our waters.

In apparent recognition of the weakness of the legal argument, a candid and brash appeal is made by respondent and by *amicus* briefs to extend the law to this situation as a means of benefiting seamen and enhancing the costs of foreign ship operation for the competitive advantage of our own. We are not sure that the interest of this foreign seaman, who is able to prove negligence, is the interest of all seamen or that his interest is that of the United States. Nor do we stop to inquire which law does whom the greater or the lesser good. The argument is misaddressed. It would be within the proprieties if addressed to Congress. Counsel familiar with the traditional attitude of this Court in maritime matters could not have intended it for us.[29]

The judgment below is reversed and the cause remanded to District Court for proceedings consistent herewith.

Reversed and remanded.

MR. JUSTICE BLACK agrees with the Court of Appeals and would affirm its judgment.

MR. JUSTICE CLARK, not having heard oral argument, took no part in the consideration or decision of this case.

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[29] Cf. *The Peterhoff*, 5 Wall. 28, 57: "In cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country."

TIMES-PICAYUNE PUBLISHING CO. ET AL. *v.* UNITED STATES.

NO. 374. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.*

Argued March 11, 1953.—Decided May 25, 1953.

A publishing company owns and publishes in New Orleans a morning and an evening newspaper. Its sole competitor in the daily newspaper field is an independent evening newspaper. Classified and general display advertisers in the company's publications may purchase only combined insertions appearing in both its morning and evening papers, not in either separately. The United States brought a civil suit against the company under the Sherman Act, challenging the use of these "unit" contracts as an unreasonable restraint of trade in violation of § 1, and as an attempt to monopolize trade in violation of § 2. *Held:* The record in this case does not establish the charged violations of § 1 and § 2 of the Sherman Act. Pp. 596–628.

(a) The challenged activities of the company constitute interstate commerce within the meaning of the Sherman Act. P. 602, n. 11.

(b) A "tying" arrangement violates § 1 of the Sherman Act when a seller enjoys a monopolistic position in the market for the "tying" product *and* a substantial volume of commerce in the "tied" product is restrained. *International Salt Co.* v. *United States,* 332 U. S. 392. Pp. 608–609.

(c) Since the charge against the company was not of tying sales to its readers but only to buyers of general and classified space in its papers, dominance in the New Orleans newspaper advertising market, not in the readership, is the decisive factor in determining the legality of the company's unit plan. P. 610.

(d) Section 2 of the Sherman Act outlaws monopolization of any "appreciable part" of interstate commerce, and § 1 bans unreasonable restraints irrespective of the amount of commerce involved. P. 611.

(e) The essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position

*Together with No. 375, *United States* v. *Times-Picayune Publishing Co. et al.,* also on appeal from the same court.

in one market to expand into another. Solely for testing the strength of that lever, the whole and not part of a relevant market must be assigned controlling weight. P. 611.

(f) The company's morning newspaper did not enjoy in the newspaper advertising market in New Orleans that position of "dominance" which, together with a "not insubstantial" volume of trade in the "tied" product, would result in a Sherman Act offense under the rule of *International Salt Co.* v. *United States,* 332 U. S. 392. Pp. 608–613.

(g) The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant "tying" product, resulting in economic harm to competition in the "tied" market. Pp. 613–614.

(h) In the absence of evidence demonstrating two distinct commodities sold by the publishing company, neither the rationale nor the doctrines of the "tying" cases can dispose of the company's advertising contracts challenged here. They must therefore be tested under the Sherman Act's general prohibition on unreasonable restraints of trade. Pp. 613–615.

(i) The inquiry to determine reasonableness under § 1 in this case must focus on the percentage of business controlled, the strength of the competition, and whether the challenged activity springs from business requirements or from purpose to monopolize. P. 615.

(j) The factual data in the record in this case do not demonstrate that the company's advertising contracts unduly handicapped the existing competing newspaper. Pp. 615–622.

(k) The Government has proved in this case neither actual unlawful effects nor facts which radiate a potential for future harm. P. 622.

(l) While even otherwise reasonable trade arrangements must fall if conceived to achieve forbidden ends, the company's adoption of the unit plan in this case was predominantly motivated by legitimate business aims. P. 622.

(m) Although emulation of a competitor's illegal plan does not justify an unlawful trade practice, that factor is relevant in determining intent, particularly when planned injury to that competitor is the crux of the charge of Sherman Act violation. P. 623.

(n) Although long-tolerated trade arrangements acquire no vested immunity under the Sherman Act, that consideration is relevant when monopolistic purpose rather than effect is to be gauged. Pp. 623–624.

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(o) The record in this case shows neither unlawful effects nor aims. Pp. 615–624.

(p) The company's refusal to sell advertising space except *en bloc*, viewed alone, in the circumstances of this case, does not constitute a violation of the Sherman Act. Pp. 624–626.

(q) A specific intent to destroy competition or to build monopoly is essential to guilt of an attempt to monopolize in violation of § 2 of the Sherman Act, and such intent is not established by the record in this case. Pp. 626–627.

105 F. Supp. 670, reversed.

Ashton Phelps argued the cause for appellants in No. 374 and appellees in No. 375. With him on the brief were *Charles E. Dunbar, Jr., Henry N. Ess* and *James C. Wilson.*

By special leave of Court, *John T. Cahill* argued the cause for the Birmingham News et al., as *amici curiae,* urging reversal. With him on the brief were *Thurlow M. Gordon, Neil C. Head, Wilson W. Wyatt* and *Hubert Hickam.*

Acting Solicitor General Stern argued the cause for the United States. With him on the brief were *Walter J. Cummings, Jr.,* then Solicitor General, *Acting Assistant Attorney General Hodges, Charles H. Weston, Victor H. Kramer* and *Baddia J. Rashid.*

By special leave of Court, *Edward O. Proctor* argued the cause and filed a brief for the Post Publishing Company of Boston, as *amicus curiae,* supporting the Government.

Mr. Justice Clark delivered the opinion of the Court.

At issue is the legality under the Sherman Act of the Times-Picayune Publishing Company's contracts for the sale of newspaper classified and general display advertising space. The Company in New Orleans owns and publishes the morning Times-Picayune and the evening States. Buyers of space for general display and classified

advertising in its publications may purchase only combined insertions appearing in both the morning and evening papers, and not in either separately.[1] The United States filed a civil suit under the Sherman Act, challenging these "unit" or "forced combination" contracts as unreasonable restraints of interstate trade, banned by § 1, and as tools in an attempt to monopolize a segment of interstate commerce, in violation of § 2.[2] After intensive trial of the facts, the District Court found violations of

[1] On Sundays the Times-Picayune Publishing Company also distributes the Times-Picayune-States. Under the existing unit plan, general display advertisers alternatively may insert in a combination of either daily paper with the Sunday paper. Additionally, the Company's unit plan for classified advertising excludes some advertising, known as "over-the-river" classified, placed from a small local area. As neither the parties nor the District Court attached any significance to these exceptions to the challenged unit rates for general display and classified advertising space in the Publishing Company's daily papers, we mention them solely for completeness.

[2] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . . ." 15 U. S. C. § 1.

"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, or with foreign nations, shall be deemed guilty of a misdemeanor, ..." 15 U. S. C. § 2.

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of [this Act]; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. . . ." 15 U. S. C. § 4.

The complaint named as defendants the Times-Picayune Publishing Company and four of its officers. Two of these individuals remain as parties in these appeals, one died after the appeals were filed, and the District Court dismissed the complaint as to another. For convenience we refer to the former parties defendant as the "Times-Picayune Publishing Company" or "Publishing Company."

both sections of the law and entered a decree enjoining the Publishing Company's use of these unit contracts and related arrangements for the marketing of advertising space.[3] In No. 374, the Publishing Company appeals the merits of the District Court's holding under the Sherman Act; the Government, in No. 375, seeks relief broader than the District Court's decree. Both appeals come directly here under the Expediting Act.[4]

Testimony in a voluminous record retraces a history of over twenty-five years.[5] Prior to 1933, four daily newspapers served New Orleans. The Item Company, Ltd., published the Morning Tribune and the evening Item. The morning Times-Picayune was published by its present owners, and the Daily States Publishing Company, Ltd., an independent organization, distributed the evening States. In 1933, the Times-Picayune Publishing Company purchased the name, good will, circulation, and advertising contracts of the States, and continued to publish it evenings. The Morning Tribune of the Item Co., Ltd., suspended publication in 1941. Today the Times-Picayune, Item, and States remain the sole significant newspaper media for the dissemination of news and advertising to the residents of New Orleans.

The Times-Picayune Publishing Company distributes the leading newspaper in the area, the Times-Picayune. The 1933 acquisition of the States did not include its plant and other physical assets; since the States' absorption the Publishing Company has utilized facilities at a single plant for printing and distributing the Times-Picayune and the States. Unified financial, purchasing, and sales administration, in addition to a substantial

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[3] 105 F. Supp. 670 (D. C. E. D. La. 1952).

[4] 15 U. S. C. (Supp. V) § 29. Probable jurisdiction was noted on November 10, 1952.

[5] The printed record here comprises 1,644 pages of testimony and exhibits of various degrees of pertinence to the issues.

segment of personnel servicing both publications, results in further joint operation. Although both publications adhere to a single general editorial policy, distinct features and format differentiate the morning Times-Picayune from the evening States. 1950 data reveal a daily average circulation of 188,402 for the Times-Picayune, 114,660 for the Item, and 105,235 for the States. The Times-Picayune thus sold nearly as many copies as the circulation of the Item and States together.

Each of these New Orleans publications sells advertising in various forms. Three principal classes of advertising space are sold: classified, general, and local display. Classified advertising, known as "want ads," includes individual insertions under various headings; general, also called national, advertising typically comprises displays by national manufacturers or wholesale distributors of brand-name goods; local, or retail, display generally publicizes bargains by local merchants selling directly to the public. From 1924 until the Morning Tribune's demise in 1941, the Item Company sold classified advertising space solely on the unit plan by which advertisers paid a single rate for identical insertions appearing in both the morning and evening papers and could not purchase space in either alone. After the Times-Picayune Publishing Company acquired the States in 1933, it offered general advertisers an optional plan by which space combined in both publications could be bought for less than the sum of the separate rates for each. Two years later it adopted the unit plan of its competitor, the Item Co., Ltd., in selling space for classified ads. General advertisers in the Publishing Company's newspapers were also availed volume discounts since 1940, but had to combine insertions in both publications in order to qualify for the substantial discounts on purchases of more than 10,000 lines per year. Local display ads as early as 1935 were marketed under a still effective volume

discount system which for determining the discount bracket in the States permitted cumulation of linage placed in the Times-Picayune as well. In 1950, however, the Publishing Company eliminated all optional plans for general advertisers, and instituted the unit plan theretofore applied solely to classified ads. As a result, since 1950 general and classified advertisers cannot buy space in either the Times-Picayune or the States alone, but must insert identical copy in both or none. Against that practice the Government levels its attack grounded on §§ 1 and 2 of the Sherman Act.

After the District Court at the outset denied the Government's motion for partial summary judgment holding the unit contracts *per se* violations of § 1, the case went to trial and eventuated in comprehensive and detailed findings of fact: [6] The Times-Picayune and the States, though published by a single publisher, were two distinct newspapers with individual format, news and feature content, reaching separate reader groups in New Orleans. The Times-Picayune, the sole local morning daily which for twenty years outdistanced the States and Item in circulation, published pages, and advertising linage, was the "dominant" newspaper in New Orleans; insertions in that paper were deemed essential by advertisers desiring to cover the local market. Although the local publishing field permits entry by additional competitors, the Item today is the sole effective daily competition which the Times-Picayune Publishing Company's two newspapers must meet. On the other hand, their quest for advertising linage encounters the competition of other media, such as radio, television, and magazines. Nevertheless, the District Court determined, the adoption of unit selling caused a substantial rise in classified and general advertising linage placed in the States,

[6] See R. 1252–1261.

enabling it to enhance its comparative position toward the Item. The District Court found, moreover, that the defendants had instituted the unit system, economically enforceable against buyers solely because of the Times-Picayune's "dominant" or "monopoly position," in order to "restrain general and classified advertisers from making an untrammeled choice between the States and the Item in purchasing advertising space, and also to substantially diminish the competitive vigor of the Item." [7]

On the basis of these findings, the District Judge held the unit contracts in violation of the Sherman Act. The contracts were viewed as tying arrangements which the Publishing Company because of the Times-Picayune's "monopoly position" could force upon advertisers.[8] Postulating that contracts foreclosing competitors from a substantial part of the market restrain trade within the meaning of § 1 of the Act, and that effect on competition tests the reasonableness of a restraint, the court deemed a substantial percentage of advertising accounts in the New Orleans papers unlawfully "restrained." [9] Further, a violation of § 2 was found: defendants by use of the unit plan "attempted to monopolize that segment of the afternoon newspaper general and classified advertising field which was represented by those advertisers who also required morning newspaper space and who could not because of budgetary limitations or financial inability purchase space in both afternoon newspapers." [10]

Injunctive relief was accordingly decreed. The District Court enjoined the Times-Picayune Publishing Company from (A) selling advertising space in any newspaper published by it "upon the condition, expressed or implied, that the purchaser of such space will contract for

[7] Fdg. 31; cf. 105 F. Supp., at 678.

[8] *Ibid.*

[9] *Id.*, at 678–679.

[10] *Id.*, at 681.

or purchase advertising space in any other newspaper published by it"; (B) refusing to sell advertising space separately in each newspaper which it publishes; (C) using its "dominant position" in the morning field "to sell any newspaper advertising at rates lower than those approximating either (1) the cost of producing and selling such advertising or (2) comparable newspaper advertising rates in New Orleans." Hence these appeals.[11]

The daily newspaper, though essential to the effective functioning of our political system, has in recent years suffered drastic economic decline. A vigorous and dauntless press is a chief source feeding the flow of democratic expression and controversy which maintains the institutions of a free society. *Associated Press* v. *United States,* 326 U. S. 1, 20 (1945); cf. *Wieman* v. *Updegraff,* 344 U. S. 183, 191 (1952); *Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 501 (1952). By interpreting to the citizen the policies of his government and vigilantly scrutinizing the official conduct of those who administer the state, an independent press stimulates free discussion and focuses public opinion on issues and officials as a potent check on arbitrary action or abuse. Cf. *Grosjean* v. *American Press Co.,* 297 U. S. 233, 250 (1936); *Near* v. *Minnesota,* 283 U. S. 697, 716–718 (1931). The press, in fact, "serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with

[11] In the light of this Court's broad interpretations of those relevant concepts, it is now beyond dispute that the activities challenged in this case are sufficiently "trade or commerce" relating to the interstate economy to fall under the wide sweep of the Sherman Act. Cf., *e. g., Lorain Journal* v. *United States,* 342 U. S. 143 (1951); *United States* v. *National Assn. of Real Estate Boards,* 339 U. S. 485 (1950); *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219 (1948); *United States* v. *Frankfort Distilleries,* 324 U. S. 293 (1945); *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533 (1944); *Wickard* v. *Filburn,* 317 U. S. 111 (1942); *Indiana Farmer's Guide Pub. Co.* v. *Prairie Farmer Pub. Co.,* 293 U. S. 268 (1934).

as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." [12] Yet today, despite the vital task that in our society the press performs, the number of daily newspapers in the United States is at its lowest point since the century's turn: in 1951, 1,773 daily newspapers served 1,443 American cities, compared with 2,600 dailies published in 1,207 cities in the year 1909.[13] Moreover, while 598 new dailies braved the field between 1929 and 1950, 373 of these suspended publication during that period—less than half of the new entrants survived.[14] Concurrently, daily newspaper competition within individual cities has grown nearly extinct: in 1951, 81% of all daily newspaper cities had only one daily paper; 11% more had two or more publications, but a single publisher controlled both or all.[15] In that year, therefore, only 8% of daily newspaper cities enjoyed the clash of opinion which competition among publishers of their daily press could provide.

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[12] Learned Hand, J., in *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (D. C. S. D. N. Y. 1943), aff'd, 326 U. S. 1 (1945).

[13] Editor & Publisher 1952 International Yearbook Number, p. 17; Comment, Local Monopoly in the Daily Newspaper Industry, 61 Yale L. J. 948, 949 (1952), a comprehensive industry study. See also Ray, Economic Forces as Factors in Daily Newspaper Concentration, 29 Journ. Q. 31 (1952); Ray, Competition in the Newspaper Industry, 15 J. Marketing 444 (1951); Nixon, Concentration and Absenteeism in Daily Newspaper Ownership, 22 Journ. Q. 97 (1945).

[14] American Newspaper Publishers Association, Newspaper Mortality Since 1929 (Bulletin No. 5203, July 27, 1950). Demise of individual newspapers occurred mainly through merger with other publications or outright suspension of publication.

[15] 61 Yale L. J., at 950.

Advertising is the economic mainstay of the newspaper business. Generally, more than two-thirds of a newspaper's total revenues flow from the sale of advertising space. Local display advertising brings in about 44% of revenues; general—14%; classified—13%; circulation, almost the rest.[16] Obviously, newspapers must sell advertising to survive. And while newspapers in 1929 garnered 79% of total national advertising expenditures, by 1951 other mass media had cut newspapers' share down to 34.7%.[17] When the Times-Picayune Publishing Company in 1949 announced its forthcoming institution of unit selling to general advertisers, about 180 other publishers of morning-evening newspapers had previously adopted the unit plan.[18] Of the 598 daily newspapers which broke into publication between 1929 and 1950, 38% still published when that period closed. Forty-six of these entering dailies, however, encountered the competition of established dailies which utilized unit rates; significantly, by 1950, of these 46, 41 had collapsed.[19] Thus a newcomer in the daily newspaper business could calculate his chances of survival as 11% in cities where unit plans had taken hold. Viewed against the background of rapidly declining competition in the daily newspaper business, such a trade practice becomes suspect under the Sherman Act.

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[16] *Id.*, at 977. Some small dailies also derive income from miscellaneous sources such as job printing. In this case the District Court found that advertising and circulation accounted for approximately 98% of New Orleans newspapers' total revenues. Fdg. 27.

[17] Mass Communications (Schramm ed. 1949), 549; Printers' Ink, August 8, 1952, p. 35. And see Borden, Taylor and Hovde, National Advertising in Newspapers, 33 *et seq.* (1946).

[18] Fdg. 26.

[19] Comparison between Bulletin, note 14, *supra*, at tables 2 and 3, and Editor & Publisher International Yearbook Numbers 1929 to 1953.

Tying arrangements, we may readily agree, flout the Sherman Act's policy that competition rule the marts of trade. Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take. Yet "[t]ying agreements serve hardly any purpose beyond the suppression of competition." *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 305 (1949).[20] By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the "tied" product's merits and insulates it from the competitive stresses of the open market. But any intrinsic superiority of the "tied" product would convince freely choosing buyers to select it over others, anyway. Thus "[i]n the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one." *Id.*, at 306. Conversely, the effect on competing sellers attempting to rival the "tied" product is drastic: to the extent the enforcer of the tying arrangement enjoys market control, other existing or potential sellers are foreclosed from offering up their goods to a free competitive judgment; they are effectively excluded from the marketplace.

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[20] See Miller, Unfair Competition, 199 *et seq.* (1941); Lockhart and Sacks, The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act, 65 Harv. L. Rev. 913, 942 *et seq.* (1952); Note, 49 Col. L. Rev. 241, 246 (1949); cf. Edwards, Maintaining Competition, 175–178 (1949); Watkins, Public Regulation of Competitive Practices in Business Enterprise, 220 *et seq.* (1940).

For that reason, tying agreements fare harshly under the laws forbidding restraints of trade. *Federal Trade Commission* v. *Gratz,* 253 U. S. 421 (1920), decided that a complaint which charged a seller with conditioning his sale of steel ties on purchases of jute bagging did not, because it failed to allege his monopolistic purpose or market control, state an actionable "unfair method of competition" within the meaning of § 5 of the Federal Trade Commission Act.[21] *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451 (1922),[22] held, however, that a seller occupying a "dominant position" in the shoe machinery industry, without more, violated § 3 of the Clayton Act by contracts tying to the lease of his machines the purchase of other types of machinery and incidental supplies.[23] Potential lessening of competition, requisite to illegality under § 3, was automatically inferred from the seller's "dominating position." *Id.,* at

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[21] "Unfair methods of competition in commerce . . . are hereby declared unlawful." 15 U. S. C. § 45. In the *Gratz* case, decided on a point of pleading, the Court observed that the "complaint contains no intimation that Warren, Jones & Gratz did not properly obtain their ties and bagging as merchants usually do; the amount controlled by them is not stated; nor is it alleged that they held a monopoly of either ties or bagging or had ability, purpose or intent to acquire one." 253 U. S., at 428. "All question of monopoly or combination," therefore, was "out of the way." *Ibid.*

[22] *United States* v. *United Shoe Machinery Co.,* 247 U. S. 32 (1918), is not relied on by the parties.

[23] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor

457–458. *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463 (1923), extended the principles of *Gratz* to the Clayton Act; purchases of gasoline were tied to the lease of pumps at nominal rates, but neither monopolistic purpose or power nor potential harm to competition was shown. And, in any event, the "tie" was voluntary since buyers could take the gasoline without taking the pumps. *Id.*, at 474–475. Indeed, the arrangement merely prevented lessees from dispensing other types of gasoline through the lessor's brand pumps and was thus viewed as a means of protecting the goodwill of the lessor's branded gas. See also *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3 (1936).[24] The bounds of that doctrine were drawn by *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936). When competing sellers could meet the specifications of the "tied" product, in that case tabulating cards hitched by contract to the sale of computing machines, § 3 of the Clayton Act outlawed the tying arrangement because the "substantial" amount of commerce in the "tied" product

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or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U. S. C. § 14.

That section relates to simple exclusive dealing arrangements, cf., *e. g.*, *Standard Oil Co. of California* v. *United States*, 337 U. S. 293 (1949), not involved in this case, as well as to tying sales. For purposes of the Clayton Act, the requisite condition not to deal in the goods of another may be inferred from the practical effects of the tying arrangement. *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 135 (1936); *Thomson Mfg. Co.* v. *Federal Trade Commission*, 150 F. 2d 952, 956 (1945); *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 132 F. 2d 48, 52 (1942); *Lord* v. *Radio Corp. of America*, 24 F. 2d 565, 568 (1928). Cf. *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 473–474 (1923).

[24] Affirming, per curiam, 80 F. 2d 641 (1935).

indicated potential lessening of competition as a result. *Id.*, at 136, 139.[25]

With its decision in *International Salt Co.* v. *United States,* 332 U. S. 392 (1947), this Court wove the strands of past cases into the law's present pattern. There leases of patented machines for dispensing industrial salt were conditioned on the lessees' purchase of the lessor's salt. A unanimous Court affirmed summary judgment adjudicating the arrangement unlawful under § 3 of the Clayton Act and § 1 of the Sherman Act as well. The patents on their face conferred monopolistic, albeit lawful, market control, and the volume of salt affected by the tying practice was not "insignificant or insubstantial." *Id.*, at 396. Clayton Act violation followed as a matter of course from the doctrines evolved in prior "tying" cases. See also *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 304–306, 305, nn. 7–8. And since the Court deemed it "unreasonable, *per se,* to foreclose competitors from any substantial market," neither could the tying arrangement survive § 1 of the Sherman Act. 332 U. S., at 396. That principle underpinned the decisions in the *Movie* cases, holding unlawful the "block-booking" of copyrighted films by lessors, *United States* v. *Paramount Pictures,* 334 U. S. 131, 156–159 (1948), as well as a buyer's wielding of lawful monopoly power in one market to coerce concessions that handicapped competition facing him in another. *United States* v. *Griffith,* 334 U. S. 100, 106–108 (1948). From the "tying" cases a perceptible pattern of illegality emerges: When the seller enjoys a monopolistic position in the market for the "tying" product, *or* if a substantial volume of commerce in the "tied" product is restrained, a tying arrangement violates the narrower standards expressed in § 3 of

[25] See also *Signode Steel Strapping Co.* v. *Federal Trade Commission,* 132 F. 2d 48, 54 (1942); *Thomson Mfg. Co.* v. *Federal Trade Commission,* 150 F. 2d 952, 958 (1945).

the Clayton Act because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is "unreasonable, *per se,* to foreclose competitors from any substantial market," a tying arrangement is banned by § 1 of the Sherman Act whenever *both* conditions are met.[26] In either case, the arrangement transgresses § 5 of the Federal Trade Commission Act, since minimally that section registers violations of the Clayton and Sherman Acts. *Federal Trade Commission* v. *Motion Picture Advertising Service Co.,* 344 U. S. 392, 395 (1953); *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683, 690–694 (1948); *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457, 463 (1941).

In this case, the rule of *International Salt* can apply only if both its ingredients are met. The Government at the outset elected to proceed not under the Clayton but the Sherman Act.[27] While the Clayton Act's more specific standards illuminate the public policy which the Sherman Act was designed to subserve, *e. g., United States*

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[26] Dealing with a monopolization offense under Sherman Act § 2, a charge not raised or considered here, the Court in *United States* v. *Griffith,* 334 U. S. 100, 106–108 (1948), pointedly observed: "Anyone who owns and operates the single theatre in a town, or who acquires the exclusive right to exhibit a film, has a monopoly in the popular sense. But he usually does not violate § 2 of the Sherman Act unless he has acquired or maintained his strategic position, or sought to expand his monopoly, or expanded it by means of those restraints of trade which are cognizable under § 1. . . . [T]he use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful. . . . If monopoly power can be used to beget monopoly, the Act becomes a feeble instrument indeed." See also Levi, A Two Level Anti-Monopoly Law, 47 Northwestern U. L. Rev. 567, 580–585 (1952).

[27] On oral argument here, the Government explanatorily referred to an early informal Federal Trade Commission opinion to the effect that advertising space was not a "commodity" within the meaning

v. *Columbia Steel Co.,* 334 U. S. 495, 507, n. 7 (1948); *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457, 463 (1941), the Government here must measure up to the criteria of the more stringent law. See *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 297, 311–314 (1949); *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451, 459–460 (1922).

Once granted that the volume of commerce affected was not "insignificant or insubstantial," [28] the Times-Picayune's market position becomes critical to the case. The District Court found that the Times-Picayune occupied a "dominant position" in New Orleans; the sole morning daily in the area, it led its competitors in circulation, number of pages and advertising linage. But every newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space. This case concerns solely one of these markets. The Publishing Company stands accused not of tying sales to its readers but only to buyers of general and classified space in its papers. For this reason, dominance in the advertising market, not in readership, must be decisive in gauging the legality of the Company's unit plan. Cf. *Lorain Journal* v. *United States,* 342 U. S. 143, 149–150, 152–153 (1951); *United*

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of § 2 of the Clayton Act (cf. note 23, *supra*). 81 Cong. Rec. App. 2336-2337. Cf. *Fleetway, Inc.* v. *Public Service Interstate Transp. Co.,* 72 F. 2d 761 (1934); *United States* v. *Investors Diversified Services,* 102 F. Supp. 645 (1951). We express no views on that statutory interpretation. Compare note 11, *supra.*

[28] The District Court in this case did not find the volume of commerce affected by the restraint, but determined solely that a substantial percentage of advertising accounts in New Orleans papers was restrained by the Publishing Company's unit plan. Fdg. 30; cf. Fdg. 22. In view of our disposition of this case we may assume, though not deciding, that the Sherman Act's substantiality test was met.

States v. *Paramount Pictures, supra,* at 166–167; *Indiana Farmer's Guide Pub. Co.* v. *Prairie Farmer Pub. Co.,* 293 U. S. 268, 278–279 (1934).

The "market," as most concepts in law or economics, cannot be measured by metes and bounds. Nor does the substance of Sherman Act violations typically depend on so flexible a guide. Section 2 outlaws monopolization of any "appreciable part" of interstate commerce, and by § 1 unreasonable restraints are banned irrespective of the amount of commerce involved. *Lorain Journal* v. *United States, supra,* at 151, n. 6; *United States* v. *Paramount Pictures, supra,* at 173; *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 225–226 (1947).[29] But the essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next. Solely for testing the strength of that lever, the whole and not part of a relevant market must be assigned controlling weight. Cf. *United States* v. *Columbia Steel Co., supra,* at 524.

We do not think that the Times-Picayune occupied a "dominant" position in the newspaper advertising market in New Orleans. Unlike other "tying" cases where patents or copyrights supplied the requisite market control, any equivalent market "dominance" in this case must rest on comparative marketing data.[30] Excluding ad-

[29] See also *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 224, n. 59 (1940); *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.,* 194 F. 2d 484 (1952); *White Bear Theatre Corp.* v. *State Theatre Corp.,* 129 F. 2d 600 (1942).

[30] "A patent, . . . although in fact there may be many competing substitutes for the patented article, is at least *prima facie* evidence of [market] control." *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 307 (1949). Cf. *id.,* at 303; *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.,* 83 F. 2d 764, 766 (1936); Miller, Unfair Competition (1941), 199; Lockhart and Sacks, note 20, *supra,* at 943–944; Note, 49 Col. L. Rev. 241, 243 (1949).

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vertising placed through other communications media and including general and classified linage inserted in all New Orleans dailies, as we must since the record contains no evidence which could circumscribe a broader or narrower "market" defined by buyers' habits or mobility of demand,[31] the Times-Picayune's sales of both general and classified linage over the years hovered around 40%.[32] Obviously no magic inheres in numbers; "the relative effect of percentage command of a market varies with the setting in which that factor is placed." *United States* v. *Columbia Steel Co., supra,* at 528; cf. *United States* v. *National Lead Co.,* 332 U. S. 319, 352–353 (1947). If each of the New Orleans publications shared equally in the total volume of linage, the Times-Picayune would have sold 33⅓%; in the absence of patent or copyright control, the small existing increment in the circumstances here disclosed[33] cannot confer that market

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[31] For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose "cross-elasticities of demand" are small. Useful to that determination is, among other things, the trade's own characterization of the products involved. The advertising industry and its customers, for example, markedly differentiate between advertising in newspapers and in other mass media. See, *e. g.,* Frey, Advertising (2d ed. 1953), cc. 12, 15; Duffy, Advertising Media and Markets (2d ed. 1951), cc. 3, 4; Hepner, Effective Advertising, c. 20 (1949); Borden, Taylor and Hovde, National Advertising in Newspapers, *passim* (1946); Sandage, Advertising Theory and Practice (3d ed. 1948), cc. XX, XXI.

[32] See tables, notes 37 and 39, *infra.*

[33] Cf., *e. g.,* situations where several competitors together controlling a large share of the market acting individually or in concert adopt an identical trade practice. See *Federal Trade Commission* v. *Motion Picture Advertising Service Co.,* 344 U. S. 392 (1953); *Signode Steel Strapping Co.* v. *Federal Trade Commission,* 132 F. 2d 48, 54 (1942). And, obviously, if a producer controlling an even

"dominance" which, in conjunction with a "not insubstantial" volume of trade in the "tied" product, would result in a Sherman Act offense under the rule of *International Salt*.

Yet another consideration vitiates the applicability of *International Salt*. The District Court determined that the Times-Picayune and the States were separate and distinct newspapers, though published under single ownership and control. But that readers consciously distinguished between these two publications does not necessarily imply that advertisers bought separate and distinct products when insertions were placed in the Times-Picayune and the States. So to conclude here would involve speculation that advertisers bought space motivated by considerations other than customer coverage; that their media selections, in effect, rested on generic qualities differentiating morning from evening readers in New Orleans. Although advertising space in the Times-Picayune, as the sole morning daily, was doubtless essential to blanket coverage of the local newspaper readership, nothing in the record suggests that advertisers viewed the city's newspaper readers, morning or evening, as other than fungible customer potential.[34] We must assume, therefore, that the readership "bought" by advertisers in the Times-Picayune was the selfsame "product" sold by the States and, for that matter, the Item.

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lesser share than here is ringed by numerous smaller satellites together accounting for the rest, his mastery of the market is greater than were he facing fierce rivalry of other large sellers. Cf. *United States* v. *National Lead Co.*, 332 U. S. 319, 346–348, 352–353 (1947); *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 527–528 (1948). Fewness of sellers, on the other hand, may facilitate concerted action. See Fellner, Competition Among the Few (1949), *passim;* Stigler, The Theory of Price, 228 *et seq.* (Rev. ed. 1952).

[34] In fact, a survey (R. 1484) in 1940 disclosed that 27.6% of States home carrier subscribers subscribed to the Times-Picayune by home carrier as well.

The factual departure from the "tying" cases then becomes manifest. The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant "tying" product, resulting in economic harm to competition in the "tied" market. Here, however, two newspapers under single ownership at the same place, time, and terms sell indistinguishable products to advertisers; no dominant "tying" product exists (in fact, since space in neither the Times-Picayune nor the States can be bought alone, one may be viewed as "tying" as the other); no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same. Cf. *Standard Oil Co. (Indiana)* v. *United States,* 283 U. S. 163, 176–178 (1931); *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 424 (1945); compare *Indiana Farmer's Guide Pub. Co.* v. *Prairie Farmer Pub. Co.,* 293 U. S. 268, 278–280 (1934). In short, neither the rationale nor the doctrines evolved by the "tying" cases can dispose of the Publishing Company's arrangements challenged here.

The Publishing Company's advertising contracts must thus be tested under the Sherman Act's general prohibition on unreasonable restraints of trade. For purposes of § 1, "[a] restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal *per se*." *United States* v. *Columbia Steel Co.,* 334 U. S. 495, 522 (1948). Since the requisite intent is inferred whenever unlawful effects are found, *United States* v. *Griffith,* 334 U. S. 100, 105, 108 (1948); *United States* v. *Patten,* 226 U. S. 525, 543 (1913), and the rule of *International Salt* is out of the way, the contracts may yet be banned by § 1 if unreasonable restraint was either their object or effect. Although these unit contracts do not in

express terms preclude buyers from purchasing additional space in competing newspapers, the Act deals with competitive realities, not words. *United States* v. *Masonite Corp.*, 316 U. S. 265, 280 (1942). Thus, while we "do not think this concession relieves the contract of being a restraint of trade, albeit a less harsh one" than otherwise, *International Salt Co.* v. *United States,* 332 U. S. 392, 397 (1947); see *United States* v. *Paramount Pictures,* 334 U. S. 131, 156–158 (1948),[35] the "open end" feature of the contracts here minimizes the restraint. For our inquiry to determine reasonableness under § 1 must focus on "the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize." 334 U. S., at 527; compare *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 312-313 (1949).

The record is replete with relevant statistical data. The volume discounts available to local display buyers were not held unlawful by the District Court, and the Government does not assail the practice here. That segment of advertising linage, by far the largest revenue producer of the three linage classes sold by all New Orleans newspapers,[36] is thus eliminated from consideration.

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[35] In *International Salt,* the lessor's tying arrangement permitted the lessee's purchase of the "tied" product in the open market whenever the lessor declined to match the going market price. That, this Court thought, "does not avoid the stifling effect of the agreement on competition. The [lessor] had at all times a priority on the business at equal prices." 332 U. S., at 397. And the "block-booking" found unlawful in the *Paramount* case did not, of course, impose any express restrictions on licensees desiring to acquire additional films elsewhere. In fact, by specifying that a particular amount of the "tied" product be taken and that amount covers the buyer's total requirements, a tying arrangement may achieve a result equivalent to total exclusion of other sellers without the formality of expressly saying so. See also note 23, *supra.*

[36] See 61 Yale L. J., at 977, n. 162; note 43, *infra.*

Consequently, only classified and display linage data can be scrutinized for possible forbidden effects.

Classified.—The Item Company, then publishing the Morning Tribune and the evening Item, utilized unit rates for classified advertising in its papers in the year the Times-Picayune Company absorbed the evening States. In 1933, the Item Company's classified linage totaled 2.72 million, compared with the Times-Picayune Company's total of 2.12 million.[37] Equalizing the competitive relationship, the Times-Picayune Company in 1935 countered by adopting the unit-rate system of its rival. In that year the Times-Picayune sold 2.84 million, to the Item Company's 2.35 million, lines. While thus

[37] These and the following classified advertising data are derived from the table below (R. 1448):

Classified Advertising Linage Carried by New Orleans Daily Newspapers, 1933–1950

	Times-Picayune Morning	States Evening	Item Evening	Tribune Morning
1933	1, 484, 740	633, 332	1, 369, 729	1, 349, 577
1934	1, 344, 479	642, 347	1, 185, 832	1, 142, 753
1935	1, 490, 316	1, 344, 849	1, 180, 850	1, 169, 733
1936	1, 789, 838	1, 786, 773	1, 308, 983	1, 298, 880
1937	1, 832, 728	1, 834, 845	1, 252, 840	1, 228, 357
1938	1, 761, 830	1, 759, 477	1, 113, 160	1, 113, 115
1939	1, 881, 673	1, 882, 970	1, 097, 277	1, 086, 777
1940	1, 954, 535	1, 955, 117	1, 277, 140	*1, 248, 712
1941	2, 085, 566	2, 083, 812	1, 231, 540	
1942	1, 954, 870	1, 957, 057	910, 275	
1943	2, 849, 190	2, 843, 097	1, 241, 787	
1944	3, 021, 616	3, 027, 236	1, 857, 741	
1945	3, 246, 566	3, 265, 686	1, 899, 926	
1946	3, 930, 313	4, 083, 664	2, 181, 640	
1947	4, 353, 943	4, 507, 427	2, 210, 193	
1948	4, 501, 599	4, 664, 403	2, 437, 268	
1949	4, 271, 302	4, 420, 193	2, 232, 617	
1950	4, 357, 713	4, 549, 238	2, 166, 518	

*Morning Tribune discontinued (January 1941).

evenly matched, the Times-Picayune over the years steadily increased its lead. That Company sold 3.52 million lines in 1938, and 3.76 in 1939; the Item Company totaled 2.23 and 2.18, respectively. In fact the Times-Picayune Publishing Company in every year but 1938 advanced its linage total; since 1936 the Item Company's totals declined yearly, solely excepting 1940.

At the end of that year the Item Company's Morning Tribune suspended publication; [38] a new local competitive structure took form. In that first year the Item, as sole competitor of the Times-Picayune Company's two dailies, sold 1.23 million lines of classified linage, compared with 2.09 million for the Times-Picayune and 2.08 for the States; the Item's share thus accounted for roughly 23% of the total. Ten years later the Item's share had declined to approximately 20%: in 1950 it sold 2.17 million lines, compared with the Times-Picayune Publishing Company's total linage of 8.91 million, comprising 4.36 million for the Times-Picayune and 4.55 for the States. Measured against the evening States alone, the Item's percentage attrition is comparable. In 1941 it sold 37% of the two evening papers' total linage; by 1950 that share had declined to 32%. Thus, over a period of ten years' competition while facing its morning-evening rival's compulsory unit rate the New Orleans Item's share of the New Orleans classified linage market declined 3%; viewed solely in relation to its evening competitor, its percentage loss amounted to 5%.

General Display.—Because the unit rate applicable to general display linage was instituted to become effective 1950, only one year's comparative data are in the record. In 1949, general display linage in all New Orleans dailies

[38] This record contains no evidence explaining the Morning Tribune's demise. We must therefore assume that the Times-Picayune Publishing Company's challenged trade practices are in no way linked to the suspension of that competing daily newspaper.

totaled 6.84 million, comprising 3.04 million lines in the Times-Picayune, 1.93 million in the States, and 1.87 million in the Item; the Publishing Company ran 73% of the total.[39] One year's experience with the unit rate for

[39] All general display advertising data are derived from the table below (R. 1450):

General Display Advertising Linage Carried by New Orleans Daily Newspapers, 1949–1950

	Times-Picayune Morning	States Evening	Item Evening
1949—Monthly Totals			
Jan	190, 708	130, 761	110, 940
Feb	231, 656	158, 252	154, 008
March	305, 782	205, 740	183, 383
April	295, 603	179, 186	164, 288
May	282, 080	171, 509	177, 725
June	275, 249	162, 481	165, 681
July	227, 896	136, 380	133, 669
Aug	180, 019	118, 031	124, 768
Sept	248, 078	154, 362	151, 187
Oct	291, 072	200, 552	181, 548
Nov	281, 356	173, 898	157, 516
Dec	228, 701	143, 780	165, 741
Total	3, 038, 200	1, 934, 932	1, 870, 454
1950—Monthly Totals			
Jan	237, 517	171, 564	176, 184
Feb*	229, 367	166, 536	167, 309
March	283, 568	210, 413	164, 734
April	262, 997	199, 803	162, 523
May	276, 036	229, 662	154, 058
June	260, 248	222, 657	170, 420
July	213, 550	194, 800	121, 387
Aug	181, 522	176, 400	115, 256
Sept	241, 167	221, 574	147, 051
Oct	300, 757	293, 723	158, 052
Nov	265, 956	266, 869	168, 339
Dec	211, 735	196, 794	148, 630
Total	2, 964, 420	2, 550, 795	1, 853, 943

*Unit rate became effective on Feb. 1, 1950.

general display advertising showed a New Orleans total volume of 7.37 million lines, roughly apportioned as 2.96 million in the Times-Picayune, 2.55 million in the States, and 1.85 million in the Item; the Publishing Company's share had risen to 75%. Compared with the States alone, the Item in 1949 accounted for 49% of the two evening papers' total; in 1950, that had declined to 42%.

In that year, a reallocation of advertising accounts also took place.[40] In 1949, 23.7% of general display advertisers utilized the Times-Picayune Publishing Company's publications exclusively; one year later that percentage had risen to 41%. Concurrently, however, accounts advertising solely in the Times-Picayune declined from 22.7% to 5.8%, and sole advertisers in the States dropped from 2% to .4%. On the other hand, in 1950 10.6%, compared with 9.6% the year before, of general display accounts inserted solely in the Item; and the segment of advertising accounts inserting in all three publications rose from 30.4% in 1949 to 39% in the following year. In fact, while in 1949 only 51.6% of general display accounts utilized the Item either exclusively or in conjunction with other New Orleans dailies, one year later 52.8% of the accounts so patronized the Item.

The record's factual data, in sum, do not demonstrate that the Publishing Company's advertising contracts unduly handicapped its extant competitor, the Item. In the early years when four-cornered newspaper competition for classified linage prevailed in New Orleans, the ascendancy of the Publishing Company's papers over their morning-evening competitor soon became manifest. With unit plan pitted on even terms against unit plan, over the years the local market pattern steadily evolved

[40] Data are derived from tables and graphs at R. 1453–1456.

from the Times-Picayune Company's rise and the Item Company's decline. With the Morning Tribune's demise in 1940, the market shrank but the pattern remained. The Item continued its gradually declining share of the market, though in fact the Times-Picayune's unit rate for "classified" between 1940 and 1950 coincided with a reversal of the trend marking the Item's absolute volume decline. Even less competitive hurt is discernible from the Publishing Company's unit rate for general display linage. True, in the single recorded year of its existence the combination plan did diminish by 7% the Item's share of linage if measured solely against the States. Versus the linage sold by the Publishing Company in its two newspapers, however, the Item's share of the total market declined but 2%. That apparent incongruity is simply explained: Compared with 1949 monthly volume data, the unit rate in each of the 11 months of its operation in 1950 drew linage away from the Times-Picayune and toward the States.[41] In effect, the Publishing Company's unit plan merely reallocated the linage sold by its two constituent papers. And not only did the unit plan take from the Times-Picayune and give to the States. Apparently it also led more advertisers to insert in the Item, which sold general display space to a proportionately greater number of accounts in 1950 than in 1949.

Meanwhile the Item flourishes. The ten years preceding this trial marked its more than 75% growth in classified linage. Between 1946 and 1950 its general display volume increased almost 25%. The Item's local display linage is twice the equivalent linage in the States.[42] And 1950, the Item's peak year for total linage comprising all three classes of advertising, marked its greatest

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[41] See table at note 39, *supra*.

[42] Media Records, 11 (1950).

circulation in history as well. In fact, since in newspapers of the Item's circulation bracket general display and classified linage typically provide no more than 32% of total revenues, the demonstrated diminution of its New Orleans market shares in these advertising classes might well not have resulted in revenue losses exceeding 1%.[43] Moreover, between 1943 and 1949 the Item earned over $1.4 million net before taxes, enabling its then publisher in the latter year to transfer his equity at a net profit of $600,000. The Item, the alleged victim of the Times-Picayune Company's challenged trade practices, appeared, in short, to be doing well.

The record in this case thus does not disclose evidence from which demonstrably deleterious effects on competition may be inferred. To be sure, economic statistics are easily susceptible to legerdemain, and only the organized context of all relevant factors can validly translate raw data into logical cause and effect. But we must take the record as we find it, and hack through the jungle as best we can. It may well be that any enhancement of the Times-Picayune's market position during the period of the assailed arrangements resulted from better

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[43] For the average daily newspaper of greater than 100,000 circulation, a 1951 industry survey revealed the following typical percentage sources of total revenues (Editor & Publisher, April 12, 1952, p. 74):

Local display	37.24%
General display	16.98%
Classified advertising	14.60%
Circulation	29.47%

A 3% decline in classified advertising, accounting for 14.6% of total revenues, and a 2% loss in general display, responsible for 16.98% of revenues, would amount to a total revenue loss of .78%. Compare *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (1948), where the composition of a buyer's inventory necessitated protection against competitive harm in the purchasing of even a fractional part of his stock in trade. *Id.*, at 49.

service or lower prices, or was due to superior planning initiative or managerial skills; [44] conversely, it is equally possible that but for the adoption of the unit contracts its market position might have turned for the worse. Nor can we be certain that the challenged practice, though not destructive of existing competition, did not abort yet unborn competitors equally within the concern of the Sherman Act. See *United States* v. *Griffith,* 334 U. S. 100, 107 (1948); *American Tobacco Co.* v. *United States,* 328 U. S. 781, 814 (1946); *Associated Press* v. *United States,* 326 U. S. 1, 13 (1945). But this suit was not brought to adjudicate a trade practice as banned by specific statutory prohibitions which by a clearly defined public policy dispense with difficult standards of economic proof. Compare *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 311–313 (1949). And the case has not met the *per se* criteria of Sherman Act § 1 from which proscribed effect automatically must be inferred. Cf. *International Salt Co.* v. *United States,* 332 U. S. 392 (1947). Under the broad general policy directed by § 1 against unreasonable trade restraints, guilt cannot rest on speculation; the Government here has proved neither actual unlawful effects nor facts which radiate a potential for future harm.

While even otherwise reasonable trade arrangements must fall if conceived to achieve forbidden ends, legitimate business aims predominantly motivated the Publishing Company's adoption of the unit plan. Because the antitrust laws strike equally at nascent and accom-

[44] The record does, in fact, contain evidence demonstrating that the Times-Picayune Publishing Company's milline rates (cost to advertisers of one agate line per million circulation) ranged roughly from $2.14 to $1.96, compared to the Item's corresponding rates from $2.96 to $2.58. R. 296, 1115. Moreover, though no inference necessarily flows from that fact, the Item changed ownership at least twice in the past twenty years.

plished restraints of trade, monopolistic designs as well as results are reached by the prohibitions of the Sherman Act. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 224, n. 59 (1940); *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 402 (1927). The unit rate for classified advertising, however, was adopted in 1935 obviously to counteract the competition of the Item and Morning Tribune which confronted the Times-Picayune Publishing Company with an established unit rate. To be sure, an unlawful trade practice may not be justified as an emulation of another's illegal plan. Cf. *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746, 753–754 (1945). But that factor is certainly relevant to illuminate ambiguous intent, particularly when planned injury to that other competitor is the crux of the charge. In any event, uncontradicted testimony suggests that unit insertions of classified ads substantially reduce the publisher's overhead costs.[45] Approximately thirty separate operations are necessary to translate an advertiser's order into a published line of print. A reasonable price for a classified ad is necessarily low. And the Publishing Company processed about 2,300 classified ads for publication each day. Certainly a publisher's steps to rationalize that operation do not bespeak a purposive quest for monopoly or restraint of trade.

Similarly, competitive business considerations apparently actuated the adoption of the unit rate for general display linage in 1950. At that time about 180 other publishers, the vast majority of morning-evening owners, had previously instituted similar unit plans. Doubtless, long-tolerated trade arrangements acquire no vested immunity under the Sherman Act; no prescriptive rights

[45] R. 1127–1129. Cf. Borden, Taylor and Hovde, National Advertising in Newspapers, 461–462 (1946). Obviously, equivalent economies flow from voluntary unit insertions.

accrue by the prosecutor's delay. Cf. *United States* v. *Socony-Vacuum Oil Co., supra,* at 225–228. That consideration, however, is not wholly irrelevant when monopolistic purpose rather than effect remains to be gauged. *Ibid.* By adopting the unit plan for general display linage at the time it did, the Publishing Company devised not a novel restrictive scheme but aligned itself with the industry's guide, legal or illegal in particular cases that is found to be. Moreover, the unit rate was viewed as a competitive weapon in the rivalry for national advertising accounts. Lower milline rates visualized as a consequence of unit insertions might attract national linage from advertisers utilizing newspapers in other cities, as well as counteract a national advertisers' trend away from newspapers toward other mass communications media.[46] In summary, neither unlawful effects nor aims are shown by the record.[47]

Consequently, no Sherman Act violation has occurred unless the Publishing Company's refusal to sell advertis-

[46] But cf. *id.,* at 461–464; Nixon, Concentration and Absenteeism in Daily Newspaper Ownership, 22 Journ. Q. 97, 110–113 (1945), for advertisers' reactions to unit rates.

[47] The Government places much emphasis on a memorandum prepared by the Publishing Company's advertising representatives, referring to the Company's adoption of the unit plan as one way "to eliminate to a great extent the deleterious selling on the part of our evening contemporary which in the long run is not to the best interests of the manufacturer." As pointed out by the District Court, however, the author of the memorandum explained that "in a number of cases . . . the advertising agencies favored the compulsory or unit rate, because once an agency had made its selection or its recommendation of media to the advertiser, the agency could resist any pressure brought to make a change in media by pointing to the unit rate as making such change impossible." 105 F. Supp., at 675–676. That explanation accords with prevailing agency practices and attitudes. See Borden, Taylor and Hovde, National Advertising in Newspapers, 207–212 (1946).

ing space except *en bloc,* viewed alone, constitutes a violation of the Act. Refusals to sell, without more, do not violate the law.[48] Though group boycotts, or concerted refusals to deal, clearly run afoul of § 1, *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S. 211, 214 (1951); *Associated Press* v. *United States,* 326 U. S. 1 (1945); see *United States* v. *Columbia Steel Co.,* 334 U. S. 495, 522 (1948), different criteria have long applied to qualify the rights of an individual seller. Beginning with *United States* v. *Colgate & Co.,* 250 U. S. 300 (1919), this Court's decisions have recognized individual refusals to sell as a general right, though "neither absolute nor exempt from regulation." *Lorain Journal* v. *United States,* 342 U. S. 143, 155 (1951). If accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control, even individual sellers' refusals to deal have transgressed the Act. *Lorain Journal* v. *United States, supra; United States* v. *Bausch & Lomb Optical Co.,* 321 U. S. 707, 721–723 (1944); *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U. S. 359, 375 (1927); *United States* v. *Schrader's Son, Inc.,* 252 U. S. 85, 99 (1920); cf. *American Tobacco Co.* v. *United States,* 328 U. S. 781, 808 (1946); *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441, 453–455 (1922).[49]

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[48] See, generally, Comment, Refusals to Sell and Public Control of Competition, 58 Yale L. J. 1121 (1949).

[49] And see *United States* v. *Klearflax Linen Looms,* 63 F. Supp. 32 (1945). "[I]f all the newspapers in a city, in order to monopolize the dissemination of news and advertising by eliminating a competing radio station, conspired to accept no advertisements from anyone who advertised over that station, they would violate §§ 1 and 2 of the Sherman Act. [Citing cases.] It is consistent with that result to hold here that a single newspaper, already enjoying a substantial monopoly in its area, violates the 'attempt to monopolize' clause of § 2 when it uses its monopoly to destroy threatened competition." *Lorain Journal* v. *United States,* 342 U. S. 143, 154 (1951).

Still, although much hedged about by later cases, *Colgate's* principle protects the Times-Picayune Publishing Company's simple refusal to sell advertising space in the Times-Picayune or States separately unless other factors destroy the limited dispensation which that case confers.

In our view, however, no additional circumstances bring this case within § 1. Though operating two constituent newspapers, the Times-Picayune is a single corporation, and the Government in the District Court abandoned a charge of unlawful concert among the corporate officers.[50] With the advertising contracts in this proceeding viewed as in themselves lawful and no further elements of combination apparent in the case, § 2 criteria must become dispositive here.

An insufficient showing of specific intent vitiates this part of the Government's case. While the completed offense of monopolization under § 2 demands only a general intent to do the act, "for no monopolist monopolizes unconscious of what he is doing," a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt now charged. *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 431–432 (1945); *United States* v. *Griffith,* 334 U. S. 100, 105 (1948); *American Tobacco Co.* v. *United States,* 328 U. S. 781, 814 (1946); *Swift & Co.* v. *United States,* 196 U. S. 375, 396 (1905). This case does not demonstrate an attempt by a monopolist established in one area to nose into a second market, so that past monopolistic success both enhances the probability of future harm and supplies a motivation for further forays. Cf. *United States* v. *Griffith, supra; Swift & Co.* v. *United States, supra.*

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[50] Compare *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 598, 606 (1951); *Nelson Radio & Supply Co.* v. *Motorola,* 200 F. 2d 911, 914 (1952); *United States* v. *Lorain Journal,* 92 F. Supp. 794, 799–800 (1950).

And unlike *Lorain Journal* v. *United States,* 342 U. S. 143 (1951), where a single newspaper's refusal to sell space to advertisers unless they forewent advertising over a competing local radio station manifested "bold, relentless, and predatory commercial behavior," *id.,* at 149, no remotely comparable charge is borne out here. This branch of the Government's case comprised allegations that the Publishing Company's acquisition of the States in 1933 was one element in a cool and calculated quest for monopoly control; that the Company deliberately operated the evening States at a financial loss to the detriment of the competing Item; and that it interfered with the Item's distribution on the streets of New Orleans. The District Court, and much evidence supports its conclusions, determined that the 1933 purchase of the States then seemed a legitimate means of business expansion; assumed that the Company's cost and revenue allocations between its two publications were mere bookkeeping transactions without economic significance; and concluded that the Company rather than obstruct street sales of the Item merely sought to assure equal treatment by news vendors of the Item and States.[51] Because these pillars of the Government's § 2 case thus collapsed in the District Court, only the adoption of the unit rates remains to support the alleged violation of § 2 of the Sherman Act. Since we have viewed that step as predominantly motivated by legitimate business aims, this record cannot bear out the specific intent essential to sustain an attempt to monopolize under § 2.

We conclude, therefore, that this record does not establish the charged violations of § 1 and § 2 of the Sherman Act. We do not determine that unit advertising arrangements are lawful in other circumstances or in other proceedings. Our decision adjudicates solely

[51] 105 F. Supp., at 676–677, 680.

that this record cannot substantiate the Government's view of this case. Accordingly, the District Court's judgment must be

Reversed.

MR. JUSTICE BURTON, with whom MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MINTON join, dissenting.

The majority opinion seeks to avoid the effect of *United States* v. *Griffith,* 334 U. S. 100, and of *International Salt Co.* v. *United States,* 332 U. S. 392, by taking the position that the Times-Picayune does not enjoy a "dominant position" in the general newspaper advertising market of New Orleans, including all three papers, as a single market. The complaint, however, is not and need not be dependent upon the relation of the Times-Picayune to that entire market.

The complaint is that the Times-Picayune enjoys a distinct, conceded and complete monopoly of access to the morning newspaper readers in the New Orleans area and that it uses that monopoly to restrain unreasonably the competition between its evening newspaper, the New Orleans States, and the independent New Orleans Item, in the competitive field of evening newspaper advertising. Insistence by the Times-Picayune upon acceptance of its compulsory combination advertising contracts makes payment for, and publication of, classified and general advertising in its own evening paper an inescapable part of the price of access to the all-important columns of the single morning paper. I agree with the District Court that such conduct violates the Sherman Act under the circumstances here presented. See also, Fed. Rules Civ. Proc., 52 (a), "Findings of fact shall not be set aside unless clearly erroneous . . ." and *Lorain Journal Co.* v. *United States,* 342 U. S. 143. In view of the disposition made of this case by the majority, it is not necessary to discuss the terms of the decree.

UNITED STATES *v.* W. T. GRANT CO. ET AL.

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

No. 532. Argued April 9, 1953.—Decided May 25, 1953.

Under § 15 of the Clayton Act, the United States sued in a federal district court to enjoin an individual and six corporations from violating § 8 through the holding by the individual of interlocking directorates in three pairs of competing corporations. Thereafter, the individual resigned his directorship in one out of each pair of corporations and filed affidavits disclaiming any intention of resuming such directorates. On motion of the defendants, the court then granted summary judgment dismissing the suit. *Held:*

1. The power of the Federal Trade Commission under § 11 to enforce § 8 is not exclusive, and the court had jurisdiction under § 15 to entertain the suit. Pp. 631–632.

2. The termination of the interlocking directorates did not render the case moot. Pp. 632–633.

3. The court did not abuse its discretion by refusing to grant injunctive relief. Pp. 633–636.

112 F. Supp. 336, affirmed.

The District Court dismissed the Government's suit to enjoin violations of § 8 of the Clayton Act, 15 U. S. C. § 19. 112 F. Supp. 336. On direct appeal to this Court under 15 U. S. C. § 29, *affirmed,* p. 636.

Victor H. Kramer argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Acting Assistant Attorney General Hodges* and *Daniel M. Friedman.*

Eustace Seligman argued the cause for Hancock et al., appellees. With him on the brief was *Howard T. Milman.*

Abe Fortas argued the cause for the Kroger Company, appellee. With him on the brief was *Norman Diamond.*

Samuel J. Silverman was on the Statement Opposing Jurisdiction and Motion to Dismiss or Affirm.

Harry H. Wiggins and *Harman Hawkins* submitted on brief for S. H. Kress & Co., appellee.

MR. JUSTICE CLARK delivered the opinion of the Court.

For the first time since the enactment of the Clayton Act in 1914 the Court is called upon to consider § 8's prohibitions against interlocking corporate directorates.[1] The Government appeals from judgments dismissing civil actions brought against Hancock and three pairs of corporations which he served as a director, W. T. Grant Co. and S. H. Kress & Co., Sears Roebuck & Co. and Bond Stores, Inc., and Kroger Co. and Jewel Tea Co., Inc. Alleging that the size and competitive relationship of each set of companies brought the interlocks within the reach of § 8, the complaints asked the court to order the particular interlocks terminated and to enjoin future violations of § 8 by the individual and corporate defendants. Soon after the complaints were filed, Hancock resigned from the boards of Kress, Kroger and Bond. Disclosing the resignations by affidavit, all of the defendants then moved to dismiss the actions as moot. Treated as motions for summary judgment,[2] they were granted by the District Judge. He concluded that there is not "the

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[1] "SEC. 8. . . .

"No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. . . ." 38 Stat. 730, 15 U. S. C. § 19.

[2] Fed. Rules Civ. Proc. 12 (b) (6), 56.

slightest threat that the defendants will attempt any future activity in violation of Section 8 [if they have violated it already] . . . ." 112 F. Supp. 336, 338. The Government brought this direct appeal under § 2 of the Expediting Act, 32 Stat. 823, as amended, 62 Stat. 989, 15 U. S. C. (Supp. V) § 29, contending that the cases were not rendered moot by Hancock's resignations and that it was an abuse of discretion for the trial court to refuse any injunctive relief.

Appellees suggest, without arguing the point *in extenso,* that the judgment should be affirmed because § 11 of the Clayton Act vests exclusive § 8 enforcement powers in the Federal Trade Commission.[3] Section 11 does authorize the Commission to enforce § 8. But any inference that administrative jurisdiction was intended to be exclusive falls before the plain words of § 15: "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this

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[3] "SEC. 11. That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested . . . in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

"Whenever the Commission . . . shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of hearing . . . . If upon such hearing the Commission . . . shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order. . . ." 64 Stat. 1126, 15 U. S. C., Supp. V, § 21.

Act . . . ." 38 Stat. 736, 15 U. S. C. § 25. And the cases have spoken of Congress' design to provide a scheme of dual enforcement for the Clayton Act. *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196, 208 (1945); *Standard Oil Co.* v. *United States,* 337 U. S. 293, 310, note 13 (1949). Appellees' failure to press the point denotes its merits. The District Court properly entertained the suits.

Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i. e.,* does not make the case moot. *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290 (1897); *Walling* v. *Helmerich & Payne, Inc.,* 323 U. S. 37 (1944); *Hecht Co.* v. *Bowles,* 321 U. S. 321 (1944). A controversy may remain to be settled in such circumstances, *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 448 (1945), *e. g.,* a dispute over the legality of the challenged practices. *Walling* v. *Helmerich & Payne, Inc., supra; Carpenters Union* v. *Labor Board,* 341 U. S. 707, 715 (1951). The defendant is free to return to his old ways.[4] This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. *United States* v. *Trans-Missouri Freight Assn., supra,* at 309, 310. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right, *Labor Board* v. *General Motors Corp.,* 179 F. 2d 221 (1950). The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.[5]

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[4] Cf. *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft,* 239 U. S. 466 (1916).

[5] "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. . . . It is the duty of the courts to beware of efforts to defeat

The case may nevertheless be moot if the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated." [6] The burden is a heavy one. Here the defendants told the court that the interlocks no longer existed and disclaimed any intention to revive them. Such a profession does not suffice to make a case moot although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts.

Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct. *Hecht Co.* v. *Bowles, supra; Goshen Mfg. Co.* v. *Myers Mfg. Co.,* 242 U. S. 202 (1916). The purpose of an injunction is to prevent future violations, *Swift & Co.* v. *United States,* 276 U. S. 311, 326 (1928), and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations.

The facts relied on by the Government to show an abuse of discretion in this case are these: Hancock's three interlocking directorates viewed as three distinct violations, his failure to terminate them until after suit was

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injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States* v. *Oregon State Medical Society,* 343 U. S. 326, 333 (1952).

[6] *United States* v. *Aluminum Co. of America, supra,* at p. 448.

filed despite five years of administrative attempts to persuade him of their illegality, his express refusal to concede that the interlocks in question were illegal under the statute and his failure to promise not to commit similar violations in the future.

Were we sitting as a trial court, this showing might be persuasive. But the Government must demonstrate that there was no reasonable basis for the District Judge's decision.[7] In this we think it fails. An individual proclivity to violate the statute need not be inferred from the fact that three violations were charged, particularly since it is only recently that the Government has attempted systematic enforcement of § 8.[8] The District Court was not dealing with a defendant who follows one adjudicated violation with others. The only material before the District Judge on the supposed five years of administrative persuasion could easily support an inference that during that time the defendant and the Department of Justice were each trying to determine the legality of his directorships. The Government's remedy under the statute was plain. Postponement of suit indicates doubt on the prosecutor's part as much as intransigence on the defendant's. How much contrition should be expected of a defendant is hard for us to say. This surely is a question better addressed to the discretion of the trial court. The same can be said of the limited disclaimer of future intent.

Assuming with the Government that the corporations were properly joined as defendants,[9] the conclusion that there was no abuse of discretion in refusing injunctive relief against Hancock applies *a fortiori* in their case.

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[7] Cf. *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 89 (1950), on review of particular antitrust decree provisions.

[8] See Kramer, Interlocking Directorships and the Clayton Act After 35 Years, 59 Yale L. J. 1266.

[9] We should not be understood as deciding whether corporations can violate § 8 or, for other reasons, be enjoined under the statute.

None of the corporations appeared to have engaged in more than one alleged violation. And affidavits filed with the motions to dismiss indicated that these defendants were ignorant of the Government's interest in the interlocks until the suits were filed. Indeed the emphasis on this branch of the case is placed on the refusal of relief against Hancock. The failure to point to circumstances compelling further relief against the corporations speaks for itself.

Essentially, the Government's claim is that it was deprived of a trial on the relief issue. But at no time was objection raised to the procedure by which the case was handled. Of course summary judgment procedure could not have been employed were there a "genuine issue as to any material fact." Fed. Rules Civ. Proc. 56. However, after the defendants had moved to dismiss, the Government elected not to file any countervailing affidavits or amend its complaint and stated on oral argument that the truth of the defendants' affidavits was not questioned. To frame a factual dispute, that left the complaint, the only relevant paragraph of which reads: "16. The defendants have threatened to continue and will continue *the aforesaid violation* of Section 8 of the Clayton Act unless the relief prayed for herein is granted." (Emphasis added.) "The aforesaid violation[s]," the specific interlocks, had been voluntarily terminated and intention to resume them had been negatived under oath. As to the prayer that the defendants be enjoined from any future violations of § 8, the complaint alleged no threatened violations other than those specifically charged. In these circumstances, the District Judge could decide that there was no significant threat of future violation and that there was no factual dispute about the existence of such a threat.

We conclude that, although the actions were not moot, no abuse of discretion has been demonstrated in the trial

court's refusal to award injunctive relief. Moreover, the court stated its dismissals "would not be a bar to a new suit in case possible violations arise in the future." The judgments are

Affirmed.

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

Monopoly and restraints of trade are sometimes the products of practices and devices as ingenious as the minds of men. Sometimes they follow a blunt and direct course as is involved in the acquisition of the assets of a competitor—a way of growth of monopoly power to which the decisions of the Court have given a powerful impetus and encouragement. See especially *United States* v. *Columbia Steel Co.*, 334 U. S. 495. More subtle are interlocking arrangements between directorates. This can accomplish disastrous consequences, as Mr. Justice Brandeis pointed out forty years ago. Interlocking directorates between companies which compete stifle the competition. Or to use the words of Mr. Justice Brandeis, the practice substitutes "the pull of privilege for the push of manhood." [1] Moreover, those entwined relations are the stuff out of which concentration of financial power over American industry was built and is maintained. Mr. Justice Brandeis gave one example: [2]

> "They, the bankers, control the railroads, and controlling the railroads, they were able to control the issue and sale of securities. Being bankers, they bought those securities at a price which they had a

[1] See Brandeis, The Endless Chain, Harper's Weekly, Dec. 6, 1913, p. 13, quoted in Lief, The Brandeis Guide to the Modern World, p. 111.

[2] See his testimony in Hearings, H. R. Committee on the Judiciary, 63d Cong., 2d Sess., on Trust Legislation, vol. 2, p. 922, quoted in Lief, *op. cit., supra,* note 1, p. 113.

> part in fixing or could have a part in fixing. They sold those securities, as bankers, to insurance companies in which they were able to exercise some control as directors. They got the money with which to buy those securities from railroads through their control of the great banking institutions, and then, in their capacity of having control of the railroads, they utilized that money to purchase from great corporations, like the Steel Corporation, what the railroads needed, and in their capacity as controlling other corporations they bought from the Steel Corporation again, and so on until we had the endless chain."

The web that is woven may tie many industries, insurance companies, and financial houses together into a vast and friendly alliance that takes the edge off competition.

That condition is aggravated here. The interlocking control in the present case is not indirect. Mr. Hancock served as a director for each of three sets of companies which, on the state of the pleadings before us, we must assume to have been competitive. The fact that he resigned under the pressure of these proceedings should not dispose of the case. We are dealing here with professionals whose technique for controlling enterprises and building empires was fully developed and well known long before Mr. Justice Brandeis was crying out against the evils of "the money trust." Mr. Hancock is and has been for some years a partner in the investment banking firm of Lehman Bros. In 1940 he testified that when Lehman Bros. did financing for a company it was their "traditional practice" to ask for representation on the board of directors.[3]

It therefore seems to me that a District Judge, faced with violations such as were involved here, would want

[3] Hearings, Temporary National Economic Committee, 76th Cong., 3d Sess., Pt. 24, p. 12400.

to know *first,* how investment bankers built their empires; *second,* how this particular firm built its own empire; *third,* the effect of these banker empires on competition between the companies which are tied to them.

The fact that the Lehman partner resigned to avoid a decision on the merits has little, if any, relevancy to the issue in the case, for we are here concerned with the *proclivity* of the house to indulge in the practice.

The relevant issues have never been weighed in this case. The District Court's ruling would be entitled to a presumption of validity if those various factors had been considered. But the District Court made no such considered judgment. It disposed of the case on the basis of mootness, a ruling now conceded to be erroneous. The case should go back for a consideration of the nature and extent of the web which this investment banking house has woven over industry and its effect on the "elimination of competition" within the meaning of § 8 of the Clayton Act.[4] Unless we know that much, we are in no position to judge the service an injunction against future violations may do. Unless we know that much, we are in no position to carry out Woodrow Wilson's policy expressed in § 8 of the Clayton Act that those interlocking directorates should be prevented which make "those who affect to compete in fact partners and masters of some whole field of business." Message, Joint Session of the Houses of Congress, Jan. 20, 1914.

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[4] In *United States* v. *Sears, Roebuck & Co.,* 111 F. Supp. 614, 616, decided April 28, 1953, the court ruled that Congress intended by § 8 "to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates."

CENTRAL BANK *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 521. Argued April 29, 1953.—Decided June 1, 1953.

Pursuant to the Assignment of Claims Act of 1940, a government contractor in 1945 assigned to a bank the proceeds of its contract with the Navy. As authorized by the Act, the contract provided that payments to the assignee should not be subject to setoff for any indebtedness of the contractor arising independently of the contract. The contractor failed to pay over federal income and social security taxes withheld by it from the wages of its employees performing work under the contract. *Held:* Within the meaning of the Act, the contractor's tax indebtedness arose "independently of" the contract and could not be set off against money owed by the Government on the contract to the assignee. Pp. 640–647.

(a) The contractor's tax indebtedness was imposed by §§ 1401 and 1622 of the Internal Revenue Code. It was thus an indebtedness "arising independently of" the contract within the meaning of the Assignment of Claims Act of 1940. Pp. 645–646.

(b) To permit the Government to set off the tax indebtedness against the amount due under the contract in the circumstances of this case would defeat the purpose of the Assignment of Claims Act of 1940 to encourage the private financing of government contracts. Pp. 646–647.

123 Ct. Cl. 237, 105 F. Supp. 992, reversed.

The Court of Claims denied a claim by a bank as assignee of the proceeds of a Navy contract, on the ground that the Government was entitled to set off the contractor's tax indebtedness against the amount due under the contract. 123 Ct. Cl. 237, 105 F. Supp. 992. This Court granted certiorari. 345 U. S. 903. *Reversed,* p. 647.

George H. Koster argued the cause for petitioner. With him on the brief was *Llewellyn A. Luce.*

Lester S. Jayson argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Burger* and *Samuel D. Slade.*

MR. JUSTICE REED delivered the opinion of the Court.

This grant of certiorari requires us to construe the provision of the Assignment of Claims Act of 1940, 54 Stat. 1029, 31 U. S. C. § 203, which provides:

> "Any contract entered into by the War Department or the Navy Department may provide that payments to an assignee of any claim arising under such contract shall not be subject to reduction or set-off, and if it is so provided in such contract, such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract." [1]

The facts of the case are not in dispute. The Graham Ship Repair Company, a California partnership, entered into a contract for ship repair work with the Navy Department on December 30, 1944. As permitted by the Assignment of Claims Act of 1940, the contract authorized the Graham Company to assign the proceeds of the contract to a bank and payments to the assignee bank were not to be "subject to reduction or set-off for any indebtedness of the Contractor to the Government arising independently of this contract."

After the contract had been made, the Graham Company arranged with petitioner, a California banking corporation, for the financing of the ship repair work. As security for the funds to be advanced, Graham assigned the proceeds payable under the contract to petitioner. This assignment was made on January 31, 1945. The Contracting Officer, Bureau of Ships, Navy Department, the Disbursing Officer and the General Accounting Office were duly notified of the assignment as required by the Act.

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[1] Amended so as to include the Department of the Air Force by the Act of July 26, 1947, 61 Stat. 501, 508, 31 U. S. C. (Supp. III) § 203.

Pursuant to the assignment, the Graham Company received substantial sums of money from petitioner for use in performing the contract. During the course of performance Graham failed to remit to the Collector of Internal Revenue $453,469.55 in withholding taxes, and $11,462.91 in federal unemployment taxes, which it had withheld, pursuant to §§ 1401 and 1622 of the Internal Revenue Code, from the salaries and wages of its employees who were engaged in work called for by the Navy contract. Instead of remitting these sums to the Collector, Graham had converted them to its own use. Because of this dereliction the contract was terminated by the Navy on March 31, 1946, and the individuals of the Graham partnership pleaded guilty to an indictment for willful attempt to evade the payment of the withheld taxes.

At the time the contract was terminated, Graham's obligation to the Government for the unpaid withholding taxes, with interest and penalties, aggregated $616,750.95. At that time the sum of $110,966.08 was due Graham from the Government for work performed under the contract. Also at that time Graham was indebted to petitioner in an amount in excess of $110,966.08 for advances made by petitioner pursuant to the assignment.

Petitioner, as assignee, filed a claim for the balance due from the Government under the contract. The Commissioner of Internal Revenue also claimed that amount. The Comptroller General ruled that the $110,966.08 was a proper set-off against Graham's tax indebtedness and accordingly reduced such indebtedness to $415,018.17.

Thereafter petitioner brought this suit in the Court of Claims. That court held that the set-off made by the Comptroller General was proper because the tax deductions withheld were "not entirely independent of such contract," *Central Bank* v. *United States,* 123 Ct. Cl. 237,

105 F. Supp. 992, 994, and that petitioner was therefore not entitled to recover under the assignment.

Prior to 1940, an assignment such as Graham made to petitioner would have been of no effect as against the United States. Under the Anti-Assignment Statutes (R. S. §§ 3477 and 3737), while the assignment might in some circumstances have been good as between the assignor and assignee (*Martin* v. *National Surety Co.*, 300 U. S. 588), it could not operate to the detriment of rights of the United States. Any set-off which the United States had against an assignor would have been effective against the assignee.

The Assignment of Claims Act of 1940, amending the Anti-Assignment Statutes,[2] validated the assignment of moneys due or to become due under any government contract if the assignment were made to a financing in-

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[2] The issue before us has been prospectively settled for others by the 1951 Assignment of Claims Act (65 Stat. 41, 31 U. S. C. (Supp. V) § 203). That Act amended the Assignment of Claims Act of 1940 by rephrasing subsection 4 so as to bar by specific words the United States from setting off "any liability of the assignor on account of (1) renegotiation . . . (2) fines, (3) penalties . . ., or (4) taxes, social security contributions, or the withholding or non-withholding of taxes or social security contributions, whether arising from or independently of such contract.

"Except as herein otherwise provided, nothing in this Act, as amended, shall be deemed to affect or impair rights or obligations heretofore accrued." 65 Stat. 41, 42.

This amendment was caused by uneasiness among lenders because of rulings of the Comptroller General:

"In an opinion dated May 17, 1949, the Comptroller General held that, in the event of a price revision under a Government contract, any amount in excess of the contract price as so revised may either be withheld from payment to the assignee 'or recovered directly from the assignee if already paid.' Generally, when any payment is received by an assignee bank, it is immediately applied to the contractor's loan, and the excess is released to the borrower. In several instances, long after full payment of a bank's loan to a contractor,

stitution. The Act authorized the War and Navy Departments to limit the Government's previous rights of set-off. See R. S. §§ 3477, 3737, as amended. It provided, see 31 U. S. C. § 203, p. 640, *supra,* "that payments to an assignee of any claim arising under such contract shall not be subject to reduction or set-off."

The Assignment of Claims Act of 1940 was evidently designed to assist in the national defense program through facilitating the financing of defense contracts by limiting the Government's power to reduce properly assigned payments.[3] Borrowers were not to be penalized in security because one contracting party was the Government. Contractors might well have obligations to the United States not imposed by the contract from which the payments flowed, as for example the contractor's income tax for prior earnings under the contract. The taxes here involved are another good illustration of the dangers to lenders.

The clause in question which prohibits set-offs for "any indebtedness of the assignor to the United States arising independently of such contract," was embodied in an

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the Comptroller General has made claims for recovery of payments previously made to the bank assignee.

"It had also been the understanding of banks that the statute protected them against set-off by the Government on account of any claims by the Government against the contractor arising outside of the terms of the assigned contract. However, in an opinion dated May 15, 1950, the Comptroller General ruled that claims by the Government against a contractor on account of unpaid social-security contributions and withheld income taxes were claims which did not arise independently of the assigned contract." S. Rep. No. 217, 82d Cong., 1st Sess., p. 2.

[3] Hearings before the Senate Committee on Banking and Currency on S. 4340, 76th Cong., 3d Sess., p. 2 *et seq.;* 86 Cong. Rec. 12803; H. R. Rep. No. 2925, 76th Cong., 3d Sess., p. 2; S. Rep. No. 2136, 76th Cong., 3d Sess., p. 2.

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amendment introduced by Senator Barkley during debate on the Act.[4] In proposing the amendment, the Senator stated:

> "Mr. President, the amendment merely provides that when a contractor, in order to obtain money so that he may perform his contract with the Government under the defense program, assigns his contract to a bank or trust company in order to get money with which to proceed with the work, it shall not be permissible to offset against the claim or contract later an indebtedness which the contractor may owe the Government on account of some other contract or some other situation. . . ."

Otherwise,

> ". . . the Government could come in and assert a claim against the contractor on account of something else which had no relationship whatever to the contract and the defense program."

In the decision below the court said:

> "The assignee knew that the contractor would be required to withhold and pay taxes to the defendant. The obligation of the contractor for the taxes in question arose before the partners converted such taxes to their own use and such obligation was therefore directly associated with the contract.
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> . . . . . .
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> "In order to be independent, as we think that term was used and intended by the Assignment of Claims Act, the indebtedness must arise irrespective of, exclusive of, and separate from the contract, and must have no direct relation with such contract." [5]

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[4] 86 Cong. Rec. 12803.

[5] *Central Bank* v. *United States,* 123 Ct. Cl. 237, 244, 245, 105 F. Supp. 992, 994.

To support its position, the words of *United States* v. *Munsey Trust Co.* were relied upon:

> "[One] is not compelled to lessen his own chance of recovering what is due him by setting up a fund undiminished by his claim, so that others may share it with him." 332 U. S. 234, 240.

The *Munsey* case is inapplicable. It turns on the ability of the Government to reimburse itself ahead of a surety for sums expended to pay laborers out of funds withheld by the United States from the surety's principal. No problem of assignment was involved and we held the Government could set off its independent claim against the surety.

The requirement that Graham withhold taxes from the "payment of wages" to its employees and pay the same over to the United States did not arise from the contract. The requirement is squarely imposed by §§ 1401 and 1622 of the Internal Revenue Code.[6] Without a government

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[6] "§ 1400. Rate of tax.

"In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages . . . .

"§ 1401. Deduction of tax from wages—(a) Requirement.

"The tax imposed by section 1400 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

"(b) Indemnification of employer.

"Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

. . . . . .

"§ 1622. Income tax collected at source—(a) Requirement of withholding.

"Every employer making payment of wages shall deduct and withhold upon such wages a tax equal to the sum of the following: . . . ."

contract Graham would owe the statutory duty to pay over the taxes due, just as it would to pay its income tax on profits earned. Graham's embezzlement lay neither in execution nor in breach of the contract. It arose from the conversion of the withheld taxes which Graham held as trustee for the United States pursuant to § 3661 of the Code.[7] Assignor Graham's indebtedness to the United States arose, we think, "independently" of the contract.

Finally it is urged that the Act should be construed so as to protect the United States. The short answer to this is that the Act should be construed so as to carry out the purpose of Congress to encourage the private financing of government contracts.[8] To grant the Gov-

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[7] "§ 3661. Enforcement of liability for taxes collected.

"Whenever any person is required to collect or withhold any internal-revenue tax from any other person and to pay such tax over to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose."

[8] *United States* v. *Guaranty Trust Co.*, 280 U. S. 478, 483. In the *Guaranty Trust* case the United States sought priority under R. S. § 3466 for its debts from embarrassed railroads. Transportation Act of 1920, Tit. II, §§ 207, 209, 210, 41 Stat. 456, 457–469. Although there was no specific waiver of § 3466, similar to the waiver of the right of set-off or reduction here claimed, this Court held:

"To have given priority to debts due the United States pursuant to Title II, would have defeated the purpose of Congress. It not only would have prevented the reëstablishment of railroad credit among bankers and investors, but it would even have seriously impaired the market value of outstanding railroad securities. It would have deprived the carriers of the credit commonly enjoyed from supplymen and others; would have seriously embarrassed the carriers in their daily operations; and would have made necessary a great enlargement of their working capital. The provision for loans under § 210 would have been frustrated. For, carriers could ill

ernment its sought-for rights of set-off under the circumstances of this case, would be to defeat the purpose of Congress. It would require the assignee to police the assignor's accounting and payment system. It would increase the risk to the assignee, the difficulty of the assignor in financing the performance, and the ultimate cost to the Government.

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE BURTON and MR. JUSTICE CLARK dissent.

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

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afford voluntarily to contract new debts thereunder which would displace, *pro tanto*, their existing bonded indebtedness. The entire spirit of the Act makes clear the purpose that the rule leading to such consequences should not be applied." 280 U. S., at 485.

LEVINSON ET AL. *v.* DEUPREE, ANCILLARY ADMINISTRATOR.

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

No. 439. Argued February 5–6, 1953.—Decided June 1, 1953.

A New York girl was killed in a collision between two motorboats on the Ohio River in Kentucky. Respondent obtained a defective appointment as ancillary administrator of her estate and filed a timely libel *in personam* in a Federal District Court in Kentucky against the owners and operators of the motorboats for damages under the Kentucky wrongful death statute, which prescribed a one-year statute of limitations. Respondent later obtained an undoubtedly valid appointment and, more than a year after the death, moved to amend his libel to allege his new appointment. This was not permitted under Kentucky law, because a new suit would have been barred by the statute of limitations. *Held:* The suit being in admiralty, federal practice controls. The administrator, holding an effective appointment under Kentucky law, should be permitted to amend his libel so as to allege that appointment, even though the applicable statute of limitations would bar a new suit. Pp. 649–652.

199 F. 2d 760, affirmed.

A Federal District Court dismissed an administrator's libel to recover for a wrongful death occurring on a navigable river. The Court of Appeals reversed. 186 F. 2d 297. This Court denied certiorari. 341 U. S. 915. On remand, the District Court awarded a decree to the administrator. The Court of Appeals affirmed. 199 F. 2d 760. This Court granted certiorari. 344 U. S. 903. *Affirmed,* p. 652.

Charles E. Lester, Jr. argued the cause for petitioners. With him on the brief was *Stephens L. Blakely.*

Robert S. Marx argued the cause for respondent. With him on the brief was *Harry M. Hoffheimer.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Katherine Wing of New York was killed in a collision between two motorboats on the Ohio River within Campbell County, Kentucky, on June 19, 1948. On December 7, 1948, Deupree was appointed ancillary administrator of Katherine Wing's estate by the County Court of Kenton County, Kentucky, and on the same day he filed in the United States District Court for the Eastern District of Kentucky a libel seeking to recover damages for her death from petitioners Levinson and Hall, the owners and operators of the boats which had collided. The libel alleged Deupree's appointment as administrator. On March 3, 1949, petitioners answered with a general denial. On July 7, 1949, petitioners having moved for an order requiring the administrator to provide security for costs, Deupree filed an "affidavit for leave to sue *in forma pauperis*." This affidavit stated that "decedent was possessed of no estate out of which costs or expenses herein can be paid or from which security therefor can be given." On the same day petitioners filed a special demurrer putting in issue Deupree's capacity to sue, on the ground that the appointment of an administrator in a county where there is no estate is void. *Jewel Tea Co.* v. *Walker's Administrator,* 290 Ky. 328, 331, 161 S. W. 2d 66, 68. Deupree thereupon obtained another appointment as ancillary administrator, this time from the County Court of Campbell County, where the cause of action for wrongful death, itself an estate, had its *locus.* On July 29, 1949, Deupree filed a motion to amend his libel by alleging this new appointment. To the amended libel, petitioners, on September 9, 1949, entered a general demurrer.

The District Court sustained both the general and special demurrers. It held that the Kenton County appointment of Deupree as administrator was void and that

the amended libel alleging the Campbell County appointment "cannot relate back to the inception of the libel proceeding." The claim as set out in the amended libel, the court held, was therefore barred by the Kentucky one-year statute of limitations, and the libel had to be dismissed.

The Court of Appeals agreed that under Kentucky law the Kenton County appointment was defective, although it held that the existence of a cause of action alone is sufficient, in Kentucky, to support the appointment of an administrator, and hence that the Campbell County appointment was valid. The court agreed also that under the Kentucky law the amended libel was barred. But, the Court of Appeals held, as to this matter, Kentucky law was not controlling. And it reversed and remanded for trial. 186 F. 2d 297. We denied a petition for certiorari to review this judgment, 341 U. S. 915, but, after a decree had been awarded to the administrator and the Court of Appeals had affirmed, 199 F. 2d 760, we granted the present petition. 344 U. S. 903. Although the issue, embedded as it is in peculiarities of Kentucky law, is now seen to be a narrow one, it appeared to us at first that there was involved a broader and more important question of the binding force of local law in federal admiralty courts administering remedies created by that law.

The maritime law does not allow recovery for wrongful death. *The Harrisburg,* 119 U. S. 199; *Butler* v. *Boston & Savannah Steamship Co.,* 130 U. S. 527, 555. In 1920, Congress adopted a Lord Campbell's Act restricted to deaths on the high seas, 41 Stat. 537 *et seq.,* 46 U. S. C. § 761 *et seq.* In further alleviation of the maritime law, we have held that "where death . . . results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a

libel *in personam* for the damages sustained by those to whom such right is given." *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 242. Like the *Garcia* suit, the present libel was brought under a State wrongful death statute. Ky. Rev. Stat., 1946, § 411.130. As we held in *Garcia,* a time limitation deemed attached to the right of action created by the State is binding in the federal forum. *The Harrisburg, supra,* 119 U. S., at 214. Similarly, when the statute, as it does in this case, vests the right of action in "the personal representative of the decedent," it is not for the forum provided by another jurisdiction to vest the right elsewhere; such a forum must look to the local law to determine the meaning of the phrase "personal representative." But the narrow question here is whether such a forum, accepting and enforcing the limited scope given to the right by the local law which created it, must also be bound by the dubious and perhaps conflicting intimations on *elegantia juris* to be found in local decisions, whether, that is, a federal court is imprisoned by procedural niceties relating to amendments of pleadings.

The United States District Court for the Eastern District of Kentucky heard this suit sitting in admiralty. Its jurisdiction did not derive from diversity of citizenship; indeed there was no such diversity. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, is irrelevant. The court in this case was not "in effect, only another court of the State," *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 108. The reasons why the court heard the suit and why it deemed itself controlled by the Kentucky statute of limitations and by the Kentucky definition of "personal representative" are quite different. The District Court adopted and enforced the *obligatio* created by the State of Kentucky not because it sits in Kentucky and responds to the desirability of uniformity in the administration of justice within that State. In the absence of congressional action, the court adopted

and enforced the *obligatio* created by Kentucky as it would one originating in any foreign jurisdiction. *La Bourgogne,* 210 U. S. 95, 138; *The Hamilton,* 207 U. S. 398, 405. And it was bound to enforce it as it found it, but not bound beyond that to strive for uniformity of results in procedural niceties with the courts of the jurisdiction which originated the *obligatio.* Even in diversity cases, when "a right is enforceable in a federal as well as in a State court," and the federal court sits as "another court of the State," we have recognized that "the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic." *Guaranty Trust Co.* v. *York, supra,* 326 U. S., at 108. Whether, if this were a diversity case, we would consider that we are here dealing with "forms and modes" or with matters more seriously affecting the enforcement of the right, it is clear that we are not dealing with an integral part of the right created by Kentucky.

We hold that federal practice controls the question whether the administrator, holding an effective appointment under Kentucky law, should be permitted to amend his libel so as to allege that appointment, at a time when the applicable statute of limitations would bar a new suit. And we hold that the administrator should be permitted to do so. Rule 23, Rules of Practice in Admiralty and Maritime Cases; cf. *New York Central R. Co.* v. *Kinney,* 260 U. S. 340, 346.

Affirmed.

Syllabus.

TRANSCONTINENTAL & WESTERN AIR, INC. *v.* KOPPAL.

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

No. 509. Argued April 8–9, 1953.—Decided June 1, 1953.

A discharged employee of a carrier that was subject to the Railway Labor Act, claiming diversity of citizenship and the requisite jurisdictional amount, brought in a federal district court in Missouri an action under Missouri law for wrongful discharge. He failed to show that he had exhausted the administrative remedies prescribed by his employment contract. The employment contract was a Missouri contract and the administrative remedies prescribed therein were consistent with the Railway Labor Act. *Held:* The District Court properly dismissed the complaint. Pp. 654–662.

(a) A discharged employee of a carrier that is subject to the Railway Labor Act is not precluded by that Act from resorting to a state-recognized cause of action for wrongful discharge. Pp. 660–662.

(b) In an action under state law for wrongful discharge, brought by a discharged employee of a carrier that is subject to the Railway Labor Act, the employee must show that he has exhausted his administrative remedies under his contract of employment, if the applicable state law so requires. Pp. 654–657, 660–662.

(c) Under the law of Missouri, a discharged employee who brings an action against his employer for wrongful discharge must show exhaustion of administrative remedies under his employment contract in order to sustain his cause of action. Pp. 657–660.

199 F. 2d 117, reversed.

In an action brought by respondent against petitioner, based on diversity of citizenship, the District Court set aside a verdict for respondent and dismissed the complaint. The Court of Appeals reversed and remanded the case for further proceedings. 199 F. 2d 117. This Court granted a limited certiorari. 344 U. S. 933. *Reversed and remanded,* p. 662.

Horace G. Hitchcock argued the cause for petitioner. With him on the brief were *Gerald B. Brophy, Ruby D. Garrett, Harold L. Warner, Jr.* and *Francis E. Koch.*

Fred J. Freel and *Ray D. Jones, Jr.* argued the cause for respondent. With them on the brief was *John R. Baty.*

MR. JUSTICE BURTON delivered the opinion of the Court.

This case presents two questions: (1) whether a discharged employee of a carrier that is subject to the Railway Labor Act is precluded by that Act from resorting to a state-recognized cause of action for wrongful discharge and, if not, (2) whether, in such action, he must show that he has exhausted his administrative remedies, under his contract of employment. For the reasons hereafter stated, our answer to the first question is no and to the second, yes, provided the applicable state law so requires. After stating the case, we shall discuss the second question first.

Respondent Koppal is a citizen of Kansas who, in 1949, was employed as a master mechanic in Kansas City, Missouri, by petitioner, Transcontinental & Western Air, Inc., a Delaware corporation. At all times material to this case, petitioner has been a carrier by air, engaged in interstate commerce and subject to Title II of the Railway Labor Act.[1] The terms of respondent's employment contract were stated in a written agreement between petitioner and the International Association of Machinists. That association was a union which, for collective-bargaining purposes, represented respondent and the other mechanics in the employ of petitioner, although respondent was not a member of the union.

[1] 49 Stat. 1189 *et seq.*, 45 U. S. C. §§ 181–188.

November 8, 1949, respondent reported to his employer by telephone that he was not well and would not be able to work that day. Before noon, a representative from petitioner's Industrial Relations Department made an unexpected call at respondent's home. He found respondent there with two of petitioner's employees, one of whom also had taken sick leave. While the testimony is conflicting, there is substantial evidence to support a conclusion that respondent was not sufficiently ill to justify his staying at home and that, by prearrangement, he met there with two other employees while preparing to take an examination to qualify as a flight engineer. On respondent's return to work the next day, he was suspended from employment on a charge of abuse of the sick-leave provisions of his contract and notified that a hearing would be held on that charge November 11, pursuant to the grievance procedure in his contract. He attended the hearing, which was held before a representative of petitioner other than the one bringing the complaint. At its conclusion, the hearing officer stated that there had been a severe abuse of the sick-pay policy and that respondent would be discharged. In view of respondent's past favorable record, the hearing officer asked him whether he would prefer to resign and advised him that he could appeal even if he resigned.

Respondent resigned, stating that he did so "under protest." He took no appeal under his employment contract but, June 30, 1950, instituted the present proceeding in the United States District Court for the Western District of Missouri, claiming diversity of citizenship and seeking $7,500 compensatory and $15,000 punitive damages.

During the trial, which was before a jury, petitioner (then defendant) moved for a directed verdict in its favor and made a similar motion at the close of evidence. Both motions were denied and the jury returned a verdict

of $7,500 for respondent. The court set aside the verdict and dismissed the complaint on the ground that respondent had failed to appeal the original decision of the hearing officer and had otherwise failed to exhaust the remedies prescribed in his employment contract. The Court of Appeals, with one judge dissenting, reversed that judgment and remanded the case for further proceedings. 199 F. 2d 117. Because of differing opinions expressed as to the effect of our decisions in *Moore* v. *Illinois Central R. Co.,* 312 U. S. 630, and *Slocum* v. *Delaware, L. & W. R. Co.,* 339 U. S. 239, and due to the importance of the case in relation to the Railway Labor Act, we granted certiorari. 344 U. S. 933.[2]

The jurisdiction of the District Court rested upon diversity of citizenship and an adequate amount in controversy. The complaint sought judgment for damages resulting from the alleged unlawful discharge of respondent in violation of a contract of employment made in Missouri, to be performed in Missouri and agreed by the parties to be a "Missouri contract." Accordingly, if the Railway Labor Act were not involved, there would be no question but that the substantive law of Missouri should determine the requirements of the cause of action, the interpretation of the contract and the measure of damages

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[2] The grant was limited to questions 1 and 2 presented by the petition for the writ, *viz.:*

"1. Whether in a diversity action for wrongful discharge by an employee against a carrier subject to the provisions of the Railway Labor Act, the Act precludes the application by the District Court of state law, otherwise controlling, governing the right to bring the action.

"2. Whether the decisions of this Court in *Moore* v. *Illinois Central R. Co.,* 312 U. S. 630, and *Slocum* v. *Delaware, L. & W. R. Co.,* 339 U. S. 239, bar the application of state law requiring an employee to attempt to adjust his dispute with his employer before he may seek redress in state courts for alleged breach of a collective bargaining agreement made pursuant to the Railway Labor Act."

to be applied. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487.

No decision of the Supreme Court of Missouri has been cited on the point but the law of Missouri has been shown, by the following cases, to be that an employee must exhaust the administrative remedies under his contract of employment in order to sustain his cause of action in such a case.

The United States Court of Appeals for the Eighth Circuit, in 1934, affirmed a decision of the United States District Court for the Eastern District of Missouri to that effect. *Harrison* v. *Pullman Co.,* 68 F. 2d 826. That was a diversity case, removed from a Missouri state court, in which a discharged porter sued his employer, the Pullman Company, for damages for his alleged unlawful discharge in November, 1926. The terms of his employment were stated in a printed agreement which contained a complete code for the adjustment of such disputes. The code called for an initial appeal by the employee to a district official of the company, a subsequent appeal to the highest local officer of the company designated to handle such matters, then an appeal to the Zone General Committee and finally to the Bureau of Industrial Relations. The porter made no substantial attempt to follow this procedure beyond the district official and none whatever to reach the Zone General Committee. Instead, about five years later, he brought suit and, in that litigation, the United States Court of Appeals, in affirming a directed verdict for the employer, said:

> "Appellant in terms sues because of an alleged breach of this contract, and, to prevail, he must show that he has brought himself within its terms and has been unable to secure a satisfactory adjustment by the means therein expressly provided. This he has

failed to do, and for this reason he is unable to present his case in court as a justiciable controversy." *Id.*, at 827.

Similarly, in 1936, the St. Louis Court of Appeals, Missouri, in *Reed* v. *St. Louis S. W. R. Co.*, 95 S. W. 2d 887 (not published in State Reports), took a like position. There a discharged conductor sued his employer, the St. Louis Southwestern Railroad Company, for damages for his alleged unlawful discharge in 1928. The terms of his employment were stated in a written contract between the Order of Railway Conductors and the railroad. This prescribed a complete code for the hearing and review of discharges. The conductor was charged with intoxication and attended a prescribed hearing, which was held on that charge, before an assistant superintendent of the company. This resulted in the conductor's discharge but he resorted to none of the administrative appeals prescribed in the code. Instead, he sued his employer in a state court and won a verdict and judgment for damages due to his discharge. The St. Louis Court of Appeals reversed that judgment because the trial court had failed to sustain the employer's demurrer which was based on the ground that the conductor had failed to exhaust the remedies prescribed in his contract.[3]

[3] ". . . This assignment of error is based upon the rule that where a contract of employment provides, as in the instant case, that a discharged employee may seek redress by appealing to certain designated officers, boards, or tribunals, such an employee is required to pursue and exhaust his contract remedy and cannot properly complain to a court for redress until he has exhausted the remedies accorded him by his contract. The point is well taken." *Id.*, at 888–889.

". . . It is well settled that, where contracting parties either agree or are required by law to resort to a designated tribunal for the adjustment of controversies, they must exhaust such remedy before resorting to the courts for redress." *Glass* v. *Hoblitzelle*, 83 S. W. 2d 796, 802 (Tex. Civ. App.). See also, *Bell* v. *Western R. Co.*, 228 Ala. 328, 153 So. 434. This quotation and citation are relied on in the *Reed* case, at 889.

Respondent's contract, in the instant case, consisted simply of his employment by petitioner pursuant to the terms of a written agreement between petitioner and the mechanics and related employees in its service, as represented by the International Association of Machinists. That agreement was entered into "in accordance with the provisions of Title II of the Railway Labor Act, as amended . . . ." It contained detailed provisions as to grievance procedure and sick leave. It included provisions that no employee in respondent's status shall be discharged—

> "without a fair hearing before a designated representative of the Company other than the one bringing complaint against the employee. . . . At a reasonable time prior to the hearing, such employee and his duly authorized representative will be apprised, in writing, of the precise charge and given a reasonable opportunity to secure the presence of necessary witnesses. . . . A written decision will be issued within five (5) work days after the close of such hearing. If the decision is not satisfactory, then appeal may be made in accordance with the procedure prescribed in Step 3."

Step 3 provided for an appeal to the chief operating officer of the company. Notice of intent to appeal must be in writing and made within ten work days after the above-mentioned decision which is part of Step 2. If the decision in Step 3 is not satisfactory to the union, the matter then may be referred by the system general chairman, acting for the union, to the system board of adjustment or, by mutual agreement, to arbitration. This procedure is comparable to that described in the Railway Labor Act, which provides that disputes between an employee and a carrier "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes," then by appropriate ad-

justment boards and finally by the National Air Transport Adjustment Board. 49 Stat. 1189–1190, 45 U. S. C. §§ 184, 185.

Under the law of Missouri, as shown above, respondent was required to show exhaustion of administrative remedies under his employment contract in order to sustain his cause of action. As he did not do so, the District Court's dismissal of his complaint was justified, unless the fact that petitioner was a carrier subject to the Railway Labor Act or the fact that the employment contract was drafted pursuant to that Act should make a difference.

The important point is that while the employment contract conforms to the policy of the Railway Labor Act and the Act provides a procedure for handling grievances so as to avoid litigation and interruptions of service, the Act does not deprive an employee of his right to sue his employer for an unlawful discharge if the employee chooses to do so.

> "[W]e find nothing in that [Railway Labor] Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. . . . The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge." *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 634, 636.

We amplified the foregoing statement in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 244, as follows:

> "Moore [in 312 U. S. 630] was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement

> and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

The result is that, whereas, under the Railway Labor Act, the Adjustment Board has exclusive jurisdiction to adjust grievances and jurisdictional disputes of the type involved in the *Slocum* case, that Board does not have like exclusive jurisdiction over the claim of an employee that he has been unlawfully discharged. Such employee may proceed either in accordance with the administrative procedures prescribed in his employment contract or he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim. Where the applicable law permits his recovery of damages without showing his prior exhaustion of his administrative remedies, he may so recover, as he did in the *Moore* litigation, *supra,* under Mississippi law.[4]

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[4] Moore received a judgment for $4,183.20, as damages for his wrongful discharge, without establishing his exhaustion of his administrative remedies under his employment contract. For related proceedings, see *Moore* v. *Yazoo & M. V. R. Co.,* 176 Miss. 65, 166 So. 395; *Moore* v. *Illinois Central R. Co.,* 180 Miss. 276, 176 So. 593; 24 F. Supp. 731; 112 F. 2d 959; 136 F. 2d 412. See also, *Texas & N. O. R. Co.* v. *McCombs,* 143 Tex. 257, 183 S. W. 2d 716.

On the other hand, if the applicable local law, as in Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so. Here respondent was employed by a carrier, subject to Title II of the Railway Labor Act, and his employment contract contained many administrative steps for his relief, all of which were consistent with that Act. Accordingly, while he was free to resort to the courts for relief, he was there required by the law of Missouri to show that he had exhausted the very administrative procedure contemplated by the Railway Labor Act. In the instant case, he was not able to do so and his complaint was properly dismissed.

The judgment of the Court of Appeals, therefore, is reversed. The judgment of the District Court is affirmed and the cause is remanded to it.

Reversed and remanded.

Mr. Justice Douglas dissents.

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

POLIZZI *v.* COWLES MAGAZINES, INC.

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

No. 287. Argued March 10, 1953.—Decided June 1, 1953.

Respondent, an Iowa corporation which publishes a national magazine, maintains no offices in Florida, but sells the magazine to two independent wholesale companies which distribute it to retailers in Florida. Petitioner, a resident of Florida, sued respondent in a Florida state court for allegedly libelous matter published in the magazine. Respondent removed the action to the federal district court for the district in which the state court was located. The district court dismissed the action for want of jurisdiction under 28 U. S. C. § 1391 (c). *Held:* The district court improperly dismissed the action for want of jurisdiction. The cause is remanded to that court to take jurisdiction of the action and determine whether it acquired jurisdiction of respondent by proper service. Pp. 664–667.

(a) 28 U. S. C. § 1391 (c) is inapplicable to an action which has been removed from a state court to a federal district court, and the question whether respondent was "doing business" in Florida, within the meaning of that section, is irrelevant. Pp. 665–666.

(b) The venue of removed actions is governed by 28 U. S. C. § 1441 (a). Under that section venue in this case was properly laid. Pp. 665–666.

197 F. 2d 74, reversed.

In a suit brought by petitioner in a state court, and removed by respondent to a federal district court, the district court dismissed the complaint for want of jurisdiction. The Court of Appeals affirmed. 197 F. 2d 74. This Court granted certiorari. 344 U. S. 853. *Reversed and remanded to the district court,* p. 667.

A. C. Dressler argued the cause for petitioner. With him on the brief was *John D. Marsh.*

Manuel Lee Robbins argued the cause for respondent. With him on the brief was *John F. Harding*. *Robert H. Anderson* entered an appearance for respondent.

MR. JUSTICE MINTON delivered the opinion of the Court.

Respondent, an Iowa corporation which publishes *Look* magazine, maintains no offices in Florida, but sells its magazines to two independent wholesale companies which distribute them to retailers in Florida. Respondent does employ two "circulation road men" whose job is to check retail outlets in a multi-state area which includes Florida. These two road men cover separate and mutually exclusive districts, and neither exercises any supervision over the other. Petitioner, a resident of Florida, brought suit against Respondent in the Circuit Court of Dade County, Florida, for allegedly libelous matter printed in *Look* magazine. Respondent moved to dismiss or in lieu thereof to quash the return of service, made on an agent of one of the distributing wholesalers. Before the state court acted on this motion, Respondent removed the action to the United States District Court for the Southern District of Florida. See 28 U. S. C. (Supp. V) §§ 1332, 1441, 1446, 1447 (b). That court issued an additional summons which was served on Briardy, one of Respondent's road men, "as a managing agent of [Respondent] transacting business for it in the State of Florida . . . ." See 28 U. S. C. (Supp. V) § 1448; Fed. Rules Civ. Proc., 4 (d)(3), (7); Fla. Stat. Ann., 1943, § 47.17 (5). On Petitioner's motion, the original state court service was quashed. Respondent then moved the court "to dismiss this action or in lieu thereof to quash the return of purported or attempted service of the additional summons . . . ." The District Court, without passing upon the motion to quash the return of service, dismissed the action on the ground that it did "not have jurisdiction

under Section 1391, sub-section C, New Title 28, United States Code" because Respondent "was not, at the time of the service of the summons, doing business in [the Southern District of Florida]." The Court of Appeals for the Fifth Circuit affirmed on the same ground, 197 F. 2d 74, and we granted certiorari. 344 U. S. 853.

The only question in this case on the record before us is whether the District Court correctly dismissed the action for want of jurisdiction.

Both courts below held that the District Court lacked jurisdiction, but they reached that conclusion by deciding that Respondent was not "doing business" in Florida within the meaning of 28 U. S. C. (Supp. V) § 1391 (c). Section 1391 is a general venue statute. In a case where it applies, if its requirements are not satisfied, the District Court is not deprived of jurisdiction, although dismissal of the case might be justified if a timely objection to the venue were interposed. 28 U. S. C. (Supp. V) § 1406. But even on the question of venue, § 1391 has no application to this case because this is a removed action. The venue of removed actions is governed by 28 U. S. C. (Supp. V) § 1441 (a), and under that section venue was properly laid in the Southern District of Florida. *Lee* v. *Chesapeake & O. R. Co.*, 260 U. S. 653; *General Investment Co.* v. *Lake Shore & M. S. R. Co.*, 260 U. S. 261, 270–279; *Moss* v. *Atlantic Coast Line R. Co.*, 157 F. 2d 1005.[1] The pertinent provisions of the two statutes are set forth in the margin.[2] Section 1391 (a) limits the district in which an action may be "brought." Section 1391 (c)

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[1] See also 1 Barron and Holtzoff, Federal Practice and Procedure, § 101; Charles W. Bunn, Jurisdiction and Practice of the Courts of the United States (5th ed., Charles Bunn, 1949), 146–148; Moore, Commentary on the United States Judicial Code, 199.

[2] "§ 1391. Venue generally.

"(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be *brought*

similarly limits the district in which a corporation may be "sued." This action was not "brought" in the District Court, nor was Respondent "sued" there; the action was *brought* in a state court and *removed* to the District Court. Section 1441 (a) expressly provides that the proper venue of a removed action is "the district court of the United States for the district and division embracing the place where such action is pending." The Southern District of Florida is the district embracing Dade County, the place where this action was pending. 28 U. S. C. (Supp. V) § 89.

Therefore, the question whether Respondent was "doing business" in Florida within the meaning of § 1391 (c) is irrelevant, and the discussion of that question is beside the point. The District Court based its holding that it lacked jurisdiction on a statute which has no application to the case, and the Court of Appeals affirmed on the same reasoning.

We express no opinion whether Respondent was "doing business" in Florida within the meaning of the due process requirements set out in *International Shoe Co.* v. *Washington,* 326 U. S. 310, because Respondent has not

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only in the judicial district where all plaintiffs or all defendants reside.

. . . . . .

"(c) A corporation may be *sued* in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." (Emphasis supplied.)

"§ 1441. Actions removable generally.

"(a) Except as otherwise expressly provided by Act of Congress, any civil action *brought* in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, *to the district court of the United States for the district and division embracing the place where such action is pending.*" (Emphasis supplied.)

contended that the *International Shoe* test is not met.[3] Nor do we decide whether the District Court acquired jurisdiction of the person of Respondent by proper service, because the lower courts did not pass on the question of service. Therefore, the judgment of the Court of Appeals is reversed, and the cause is remanded to the District Court to take jurisdiction of the action and determine whether the District Court acquired jurisdiction of Respondent by proper service.

Reversed.

MR. JUSTICE FRANKFURTER, not having heard the argument, took no part in the consideration and disposition of this case.

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

MR. JUSTICE BLACK, with whom MR. JUSTICE JACKSON joins, concurring in part and dissenting in part.

Polizzi lives in Coral Gables, Florida. He has been in the construction business there for some years. Cowles Magazines, Inc., an Iowa corporation, publishes *Look,* a magazine circulating nationally. May 23, 1950, *Look* carried an article branding Polizzi as one of the ringleaders of a national gang of murderous, blackmailing prostitute-pandering criminals. Nearly 50,000 copies covered Florida. Many were displayed and distributed in Polizzi's home town. He at once wrote the publisher that the charges against him were false, demanding both retraction and apology. It did nothing. Polizzi then

[3] "In the case now before the Court no question of due process is involved." Brief for Respondent in Opposition to Writ of Certiorari, p. 9. "All this has nothing to do with due process . . . ." Brief for Respondent, p. 17.

brought this libel suit in the state circuit court of his home county. Appearing "specially" in the local United States District Court, the Cowles corporation obtained an order for removal of the case from state to federal court. It asked the District Court to dismiss the case without giving Polizzi a chance to have it tried on the merits. The reasons urged were that Cowles was an Iowa corporation, was not and had not been "doing business" in Florida and consequently could not be sued in the Florida court unless it consented to be sued there. The effect of this contention was that while Polizzi could bring his libel suit in a federal district court in the corporation's home state of Iowa, no such suit could be maintained in a federal court in the state where Polizzi lived and where the criminal charges were likely to do him the most harm. Agreeing with Cowles, the District Court dismissed Polizzi's suit without giving him a chance to try the case on its merits. The Court of Appeals affirmed. For many reasons I think the dismissal was wrong and therefore concur in this Court's reversal of that dismissal. From this point on, however, I part company with the Court.

This Court reverses solely because both the District Court and the Court of Appeals in dismissing referred to and relied on the "doing business" provisions of 28 U. S. C. § 1391 (c), a venue statute not applicable to removal cases like this but to suits originally filed against corporations in United States District Courts. For this reason, not suggested by Cowles or Polizzi, the Court refuses to pass on the "doing business" contention which Cowles did make and which both courts below decided.[1]

[1] The record makes clear that the "doing business" question was the ground on which Cowles made the motion to dismiss, the ground on which the District Court dismissed the lawsuit, the ground on which the Court of Appeals affirmed, and a ground on which Cowles asked us to affirm the dismissal. The corporation's motion to dismiss

This means the case goes back for reconsideration of the same old "doing business" question that has been hanging fire for three years. It took three years for Polizzi to get here and have the Court by-pass the "doing business" question this time. If he is lucky enough to get that question back here and decided for him in three more years, he may then look forward to the possibility of having a jury try his case sometime along about 1957.

I think this Court should here and now reject Cowles' dilatory contentions. There may have been some reason for snarling up lawsuits against foreign corporations a hundred years ago because of newly expanding activities of migratory businesses. But there is no such excuse now. A large part of the business in each and every state is done today by corporations created under the laws of other states. To adjust the practical administration of law to this situation the Court in recent years has refused

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asserted that "The defendant is a corporation organized under the laws of Iowa and was not doing or carrying on business in Florida at the time of such purported or attempted service and is not doing and has never done business within the State of Florida so as to be present in Florida . . . ." Evidence of a number of witnesses was heard on this "doing business" question. The District Court dismissed by finding "as a matter of fact that defendant was not, at the time of the service of the summons, doing business in this district . . ." and then related the dismissal to 28 U. S. C. § 1391 (c). The Court of Appeals affirmed on the same ground, saying that the company could not "be said to be doing business in the state so as to be subject to suit there." It reached this conclusion because it thought the company's activities were not within "the meaning of doing business" as "discussed in the authorities" to which it referred, namely, *International Shoe Company* v. *Washington,* 326 U. S. 310, and a number of other cases of this Court cited in footnote 2, 197 F. 2d 74, 76. And in this Court the corporation argued specifically that ". . . the conclusion is inevitable that the courts below in holding that respondent was not transacting business in the State of Florida fairly followed the principles laid down in the *International Shoe Co.* case."

to be bound by old rigid concepts[2] about "doing business." Whether cases are to be tried in one locality or another is now to be tested by basic principles of fairness,[3] unless, as seems possible, this case represents a throwback to what I consider less enlightened practices.

Under any of the concepts, old or new, I think Cowles was doing business in Florida. It had a regular agent there, paid by the month, whose sole job was to carry on activities for Cowles in order to increase *Look's* circulation in that state. On this agent, who managed for the publishing corporation all the business it carried on in Florida, process was served. These facts, together with others which I need not labor, show the frivolous nature of the "doing business" question. They show also the lack of merit in the question the Court tells the district judge to pass on: Should the 1950 notice by service on the corporation's regular Florida representative be held sufficient to require it to defend, or should the District Court now after three years' litigation quash that service and require that new notice of the suit the corporation is here defending be served on some other company employee? I venture to suggest that if this question were raised anywhere except in a court, it would be dismissed as ludicrous.

But aside from what has been said, there is a new statute which gives an anachronistic flavor, a sort of irrelevance to all of Cowles' dilatory motions and arguments. I refer to 28 U. S. C. § 1404 (a), which has codified the doctrine of *forum non conveniens*. That statute

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[2] Cf. von Jhering, In the Heaven of Legal Concepts, translated in Cohen and Cohen, Readings in Jurisprudence and Legal Philosophy, 678–689.

[3] See on this point *International Shoe Co.* v. *Washington*, 326 U. S. 310; *Travelers Health Assn.* v. *Virginia*, 339 U. S. 643; *United States* v. *Scophony Corp. of America*, 333 U. S. 795.

gives district judges broad powers to transfer civil actions from one district to another "in the interest of justice." [4] And the heart of Cowles' contention is that it would be unfair, inconvenient and unjust to subject it to a suit in the District Court of Florida. But the Iowa corporation has not denied at all that it could be subjected to this libel suit in the federal district court in Iowa or in some other district where the corporation is "doing business." Therefore, the question Cowles has been raising from the beginning is: In what federal district court does the fair administration of justice require that this lawsuit be tried? This poses precisely the problem which the rule of *forum non conveniens* is designed to meet and solve. In light of that rule I think we should reject Cowles' old dilatory motions and direct the District Court in Florida to try this case at once, unless Cowles can show that court that it would be in the interest of justice to try the case in another district. But the Court refuses to discard old outdated concepts for the new rule of convenience and fairness. Instead Polizzi is sent back to the District Court not to try his case on the merits but to listen a few more years to a debate over whether Cowles has had adequate notice of this suit and whether the corporation is "doing business" in Florida. In the meantime, Polizzi stands convicted in the eyes of his community on the basis of an unproved story. At least since Magna Charta some

[4] 28 U. S. C. § 1404 (a) provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

A companion statute, 28 U. S. C. § 1406 (a), provides:

"The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

people have thought that to delay justice may be to deny justice. I would order that Polizzi be given the trial he seeks.[5]

MR. JUSTICE BURTON, concurring in part and dissenting in part.

I agree that the District Court and the Court of Appeals erroneously referred to the wrong venue statute in deciding the question of "doing business." Like MR. JUSTICE BLACK I think it unfortunate that this case must be prolonged by a remand to consider again the same "doing business" question under another statute. Unlike MR. JUSTICE BLACK, however, I find nothing in the majority opinion to suggest that the enlightened rationale of our more recent cases such as *International Shoe Co.* v. *Washington,* 326 U. S. 310, has been abandoned or impaired. Nor do I find any hint in the majority opinion that anything in the Constitution or other federal law prohibits the trial of this case in a United States District Court in Florida. My objection is that the majority have not ruled on this question at all.

[5] 28 U. S. C. § 2106 provides that this Court in reversing judgments may direct the District Court to enter such orders as are "just under the circumstances."

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 672 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.

The opinions delivered on June 8 and June 15, 1953, during the October Term, 1952, and the decisions in the *Rosenberg* case at the Special Terms of June 15 and June 18, 1953, will be reported in 346 U. S.

DECISIONS PER CURIAM AND ORDERS FROM MARCH 9, 1953, THROUGH JUNE 15, 1953.

MARCH 9, 1953.

Per Curiam Decision.

No. 451. ALLEN *v.* MISSISSIPPI. On appeal from, and petition for writ of certiorari to, the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed for the want of jurisdiction. 28 U. S. C. § 1257 (2). The petition for writ of certiorari is denied. *Forrest B. Jackson* for appellant-petitioner. Reported below: 56 So. 2d 61.

Miscellaneous Orders.

No. 203. CITY OF NEW YORK *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO., 344 U. S. 293. The motion to modify the judgment is denied.

No. 338, Misc. LOPER *v.* COURT OF CRIMINAL APPEALS OF TEXAS. Motion for leave to file petition for writ of mandamus denied.

No. 340, Misc. CONNOR *v.* MAYO, CUSTODIAN OF FLORIDA STATE PRISON; and

No. 350, Misc. WATKINS *v.* DOWD, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

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Certiorari Granted.

No. 371. GAYNOR NEWS CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari granted. *Harry S. Bandler* and *Julius Kass* for petitioner. *Acting Solicitor General Stern, George J. Bott, David P. Findling, Mozart G. Ratner* and *Frederick U. Reel* for respondent. Reported below: 197 F. 2d 719.

No. 498. MARYLAND CASUALTY CO. ET AL. *v.* CUSHING ET AL. C. A. 5th Cir. Certiorari granted. *Eberhard P. Deutsch* for petitioners. *James J. Morrison* for respondents. 198 F. 2d 536, 1021.

No. 517. BARROWS ET AL. *v.* JACKSON. District Court of Appeal of California, Second Appellate District. Certiorari granted. *Charles Leland Bagley* for petitioners. *Loren Miller* and *Franklin H. Williams* for respondent. Briefs of *amici curiae* urging that the petition be granted were filed by *G. L. Seegers* for the Marcus Avenue Improvement Association et al.; and by *John W. Preston* for Affiliated Neighbors et al. Reported below: 112 Cal. App. 2d 534, 247 P. 2d 99.

No. 567. FEDERAL COMMUNICATIONS COMMISSION *v.* RCA COMMUNICATIONS, INC.; and

No. 568. MACKAY RADIO & TELEGRAPH CO., INC. *v.* RCA COMMUNICATIONS, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Cummings* and *Benedict P. Cottone* for petitioner in No. 567. *John W. Davis, James A. Kennedy, John F. Gibbons, Burton K. Wheeler, Ralph M. Carson* and *Robert G. Seats* for petitioner in No. 568. *John T. Cahill* and *Howard R. Hawkins* for respondent. Reported below: 91 U. S. App. D. C. 289, 201 F. 2d 694.

No. 512. SECURITIES & EXCHANGE COMMISSION *v.* RALSTON PURINA CO. C. A. 8th Cir. Certiorari granted. *Solicitor General Cummings* and *Roger S. Foster* for petitioner. *Thomas S. McPheeters* for respondent. Reported below: 200 F. 2d 85.

No. 521. CENTRAL BANK *v.* UNITED STATES. Court of Claims. Certiorari granted. *Llewellyn A. Luce* and *George H. Koster* for petitioner. *Solicitor General Cummings, Assistant Attorney General Holland, Ellis N. Slack* and *John R. Benney* for the United States. Reported below: 123 Ct. Cl. 237, 105 F. Supp. 992.

No. 525. NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. *v.* NOTHNAGLE ET AL. Supreme Court of Errors of Connecticut. Certiorari granted. *H. L. Filer* for petitioner. *John A. Danaher* for Nothnagle, respondent. Reported below: 139 Conn. 278, 93 A. 2d 165.

No. 566. HARRISON, COLLECTOR OF INTERNAL REVENUE, *v.* BOHNEN, EXECUTOR, ET AL. C. A. 7th Cir. Certiorari granted. *Solicitor General Cummings* for petitioner. *George S. Stansell* for respondents. Reported below: 199 F. 2d 492.

No. 533. IRVINE *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari granted. *Morris Lavine* for petitioner. Reported below: 113 Cal. App. 2d 460, 248 P. 2d 502.

No. 102, Misc. AVERY *v.* GEORGIA. Supreme Court of Georgia. Certiorari granted. *Frank M. Gleason* for petitioner. *Eugene Cook,* Attorney General of Georgia, *M. H. Blackshear, Jr.,* Deputy Assistant Attorney General, and *Lamar W. Sizemore,* Assistant Attorney General, for respondent. Reported below: 209 Ga. 116, 70 S. E. 2d 716.

No. 548. BRIDGES ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted, limited to questions 1 and 2 presented by the petition for the writ, *viz.:*

"(1) Whether, in view of prior adjudications (including the determination of this Court in *Bridges* v. *Wixon,* 326 U. S. 135), this proceeding is barred, in whole or in part, by the principles of *res judicata,* or estoppel, or the due process clause of the Fifth Amendment.

"(2) Whether this proceeding is barred by the statute of limitations."

Motions for leave to file briefs of International Longshoremen's & Warehousemen's Union and Local 8, International Longshoremen's & Warehousemen's Union, and others, as *amici curiae,* are denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

Telford Taylor and *Norman Leonard* for petitioners. *Solicitor General Cummings, John F. Davis, Beatrice Rosenberg, Carl H. Imlay* and *John R. Wilkins* filed a memorandum for the United States. Reported below: 199 F. 2d 811.

Certiorari Denied. (See also No. 451, supra.)

No. 264. BALDI, SUPERINTENDENT, PHILADELPHIA COUNTY PRISON, ET AL. *v.* UNITED STATES EX REL. ALMEIDA. C. A. 3d Cir. Certiorari denied. *Robert E. Woodside,* Attorney General of Pennsylvania, *Randolph C. Ryder* and *Francis J. Gafford,* Deputy Attorneys General, and *Frank P. Lawley, Jr.,* Assistant Deputy Attorney General, for petitioners. *Thomas D. McBride* for respondent. Reported below: 195 F. 2d 815.

No. 427. WILLIAMS *v.* VIRGINIA MILITARY INSTITUTE ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Austin F. Canfield, Clarence E. Martin* and *Clarence E. Martin, Jr.* for

petitioner. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, and *Frederick T. Gray*, Assistant Attorney General, for the Virginia Military Institute, respondent. Reported below: 91 U. S. App. D. C. 206, 198 F. 2d 980.

No. 445. BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA *v.* JOSLYN ET AL.; and

No. 501. NEW JERSEY EQUITIES CO. ET AL. *v.* JOSLYN ET AL. C. A. 7th Cir. Certiorari denied. *John S. Miller, Gerald G. Barry* and *Horace A. Young* for petitioners. *Alvin Glen Hubbard* for Joslyn; *Edward J. Metzdorf* for Fetzer et al.; and *Karl Edwin Seyfarth* for Hillmer, respondents. Reported below: 198 F. 2d 673.

No. 471. HALL *v.* UNITED STATES; and

No. 522. UNITED STATES *v.* HALL. C. A. 2d Cir. Certiorari denied. *Harry Sacher* for Hall. *Solicitor General Cummings, Assistant Attorney General Murray, Beatrice Rosenberg* and *Edward S. Szukelewicz* in No. 471, and *Mr. Cummings* in No. 522, for the United States. Reported below: 198 F. 2d 726.

No. 476. JOHNSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Kyle Hayes* for petitioners. *Solicitor General Cummings, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 199 F. 2d 231.

No. 515. BONWIT TELLER, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Sidney Orenstein* and *Mortimer Horowitz* for petitioner. *Solicitor General Cummings, George J. Bott, David P. Findling* and *Bernard Dunau* for respondent. Reported below: 197 F. 2d 640.

No. 500. UNITED STATES *v.* ONE 1948 PLYMOUTH SEDAN. C. A. 3d Cir. Certiorari denied. *Solicitor General Cummings* for the United States. Reported below: 198 F. 2d 399.

No. 518. DEENA ARTWARE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *James G. Wheeler* for petitioner. *Solicitor General Cummings, George J. Bott, David P. Findling, Bernard Dunau* and *Samuel M. Singer* for respondent. Reported below: 198 F. 2d 645.

No. 524. PENNSYLVANIA THRESHERMEN & FARMERS' MUTUAL CASUALTY INSURANCE CO. *v.* V. L. PHILLIPS & CO., INC. ET AL. C. A. 4th Cir. Certiorari denied. *Walter E. Hoffman, Robert Lewis Young* and *H. A. Toulmin, Jr.* for petitioner. Reported below: 199 F. 2d 244.

No. 528. DUKE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *John G. Jackson, Jr.* for petitioner. *Solicitor General Cummings, Assistant Attorney General Lyon, Ellis N. Slack* and *Joseph F. Goetten* for respondent. Reported below: 200 F. 2d 82.

No. 529. SAULSBURY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *James A. Dixon* and *John G. Rauch* for petitioner. *Solicitor General Cummings, Assistant Attorney General Holland, Ellis N. Slack* and *Cecelia H. Goetz* for the United States. *Edwin K. Steers,* Attorney General, and *Robert Hollowell,* Chief Counsel, filed a brief for the State of Indiana, as *amicus curiae,* supporting petitioner. Reported below: 199 F. 2d 578.

No. 534. CEFARATTI *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *B. Dabney Fox* and *William Beasley Harris* for petitioner. *Solicitor General Cummings* filed a memorandum suggesting that the petition for a writ of certiorari was filed out of time. Reported below: 91 U. S. App. D. C. 297, 202 F. 2d 13.

No. 539. BYERS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *James J. Waters* and *Leo B. Parker* for petitioners. *Solicitor General Cummings, Assistant Attorney General Holland, Ellis N. Slack* and *Louise Foster* for respondent. Reported below: 199 F. 2d 273.

No. 543. GRIFFIN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *R. Palmer Ingram* for petitioner. *Edward D. E. Rollins,* Attorney General of Maryland, and *Kenneth C. Proctor* and *Ambrose T. Hartman,* Assistant Attorneys General, for respondent. Reported below: —— Md. ——, 92 A. 2d 743.

No. 545. LEWIS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William F. White* for petitioners. *Solicitor General Cummings, Assistant Attorney General McInerney* and *Roger P. Marquis* for the United States. Reported below: 200 F. 2d 183.

No. 546. CALDWELL FURNITURE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. *Whiteford S. Blakeney* for petitioner. *Solicitor General Cummings, George J. Bott, David P. Findling, Dominick L. Manoli, Marcel Mallet-Prevost* and *Margaret M. Farmer* for respondent. Reported below: 199 F. 2d 267.

No. 547. REDDITT ET AL. *v.* HALE ET AL. C. A. 8th Cir. Certiorari denied. *Edward P. Russell* for petitioners. *Joe C. Barrett* for respondents. Reported below: 199 F. 2d 386.

No. 550. UNITED STATES *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CO. ET AL. C. A. 7th Cir. Certiorari denied. *Solicitor General Cummings* and *Robert L. Stern,* then Acting Solicitor General, for the United States. *Eldon Martin* and *Andrew C. Scott* for the Chicago, Burlington & Quincy Railroad Co.; and *Edmund Burke* for the Gulf, Mobile & Ohio Railroad Co., respondents. Reported below: 199 F. 2d 223.

No. 552. MID-STATES FREIGHT LINES, INC. ET AL. *v.* BATES ET AL. Court of Appeals of New York. Certiorari denied. *Hyman N. Glickstein* for petitioners. *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *John C. Crary, Jr.* and *Robert W. Bush,* Assistant Attorneys General, for respondents. Reported below: 304 N. Y. 700, 788, 107 N. E. 2d 603, 109 N. E. 2d 82.

No. 553. SMITH ET AL. *v.* THE MORMACDALE ET AL. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* and *Charles Lakatos* for petitioners. *Mark D. Alspach* and *T. E. Byrne, Jr.* for respondents. Reported below: 198 F. 2d 849.

No. 554. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN *v.* CENTRAL OF GEORGIA RAILWAY CO. ET AL. C. A. 5th Cir. Certiorari denied. *Harold C. Heiss* and *Russell B. Day* for petitioner. *A. R. Lawton* and *James N. Frazer* for the Central of Georgia Railway Co.; and *Clarence E. Weisell* and *W. Colquitt Carter* for the Grand International Brotherhood of Locomotive Engineers et al., respondents. Reported below: 199 F. 2d 384.

No. 557. Pan American Petroleum & Transport Co. *v.* Seaboard Air Line Railroad Co. C. A. 5th Cir. Certiorari denied. *T. M. Cunningham* and *A. R. Lawton* for petitioner. *E. Ormonde Hunter* for respondent. Reported below: 199 F. 2d 761.

No. 560. Love Tractor, Inc. *v.* Continental Farm Equipment Co., Inc. C. A. 8th Cir. Certiorari denied. *Eugene C. Knoblock* for petitioner. *I. Joseph Farley* for respondent. Reported below: 199 F. 2d 202.

No. 561. Rupert *v.* Empire District Electric Co. C. A. 8th Cir. Certiorari denied. *William G. Boatright* for petitioner. *Wilbur H. Hecht* for respondent. Reported below: 199 F. 2d 941.

No. 562. Spring Packing Corp. *v.* National Waste Co., Inc. C. A. 7th Cir. Certiorari denied. *Stephen A. Mitchell, Charles J. Merriam* and *William I. Conway* for petitioner. *Bartholomew A. Diggins* and *Jack I. Levy* for respondent. Reported below: 200 F. 2d 14.

No. 564. Milwaukee Towne Corp. *v.* Loew's Inc. et al. C. A. 7th Cir. Certiorari denied. *Thomas C. McConnell* and *Hubert Van Hook* for petitioner. *Miles G. Seeley* for Loew's Incorporated, *Edward R. Johnston* for Paramount Pictures, Inc., *Francis E. Matthews* for Twentieth Century-Fox Film Corporation, and *Vincent O'Brien* for Warner Bros. Pictures Distributing Corporation et al., respondents. Reported below: 200 F. 2d 17.

No. 569. Miles Shoes Inc. *v.* R. H. Macy & Co., Inc. C. A. 2d Cir. Certiorari denied. *Eugene Eisenmann* for petitioner. *Francis C. Browne, William E. Schuyler, Jr.* and *Andrew B. Beveridge* for respondent. Reported below: 199 F. 2d 602.

No. 571. MATTSON ET AL. *v.* BIRKETT ET AL. C. A. 7th Cir. Certiorari denied. *James E. Markham, James W. Faulkner* and *Thomas P. Faulkner* for petitioners. *Hubert L. Will* for respondents. Reported below: 200 F. 2d 351.

No. 579. BACOM *v.* SULLIVAN, SHERIFF. C. A. 5th Cir. Certiorari denied. *Robert H. Givens, Jr.* for petitioner. *Richard W. Ervin,* Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for respondent. Reported below: 200 F. 2d 70.

No. 601. RANDOLPH LABORATORIES, INC. *v.* SPECIALTIES DEVELOPMENT CORP. C. A. 3d Cir. Certiorari denied. *Ralph M. Snyder* and *W. Brown Morton* for petitioner. *Floyd H. Crews* for respondent. Reported below: 199 F. 2d 680.

No. 487. HEAD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *J. B. Tietz* for petitioner. *Solicitor General Cummings* and *Beatrice Rosenberg* for the United States. Reported below: 199 F. 2d 337.

No. 526. UNITED STATES *v.* UNITED STATES CARTRIDGE CO. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Solicitor General Cummings* for the United States. *Robert H. McRoberts* for respondent. Reported below: 198 F. 2d 456.

No. 536. TYRRELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Victor E. Cappa* for petitioner. *Solicitor General Cummings, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 200 F. 2d 8.

No. 541. McGranery, Attorney General, Successor to the Alien Property Custodian, *v.* Vort et al., Trustees; and

No. 542. Vort et al., Trustees, *v.* McGranery, Attorney General. United States Court of Appeals for the District of Columbia Circuit. Brownell, present Attorney General, substituted for McGranery. Certiorari denied. Mr. Justice Clark took no part in the consideration or decision of these applications. *Solicitor General Cummings* in No. 541, and *Mr. Cummings, Assistant Attorney General Kirks, James D. Hill* and *George B. Searls* in No. 542, for the Attorney General. *Raoul Berger* for petitioners in No. 542 and respondents in No. 541. Reported below: 199 F. 2d 782.

No. 563. Joint Anti-Fascist Refugee Committee et al. *v.* McGranery, Attorney General, et al. United States Court of Appeals for the District of Columbia Circuit. Brownell, present Attorney General, substituted for McGranery. Certiorari denied. Mr. Justice Clark took no part in the consideration or decision of these applications. *Benedict Wolf, David Rein* and *Joseph Forer* for petitioners. *Solicitor General Cummings, Assistant Attorney General Burger, Samuel D. Slade* and *Benjamin Forman* for respondents.

No. 239, Misc. Alexander *v.* United States. United States District Court for the District of Kansas. Certiorari denied.

No. 245, Misc. Bishop *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cummings, Assistant Attorney General Murray, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 290, Misc. FOUQUETTE *v.* BERNARD, WARDEN. C. A. 9th Cir. Certiorari denied. *Ray L. Jenkins* for petitioner. *W. T. Mathews,* Attorney General of Nevada, *Geo. P. Annand, William N. Dunseath* and *John W. Barrett,* Deputy Attorneys General, and *Alan Bible* for respondent. Reported below: 198 F. 2d 860.

No. 291, Misc. LYNN *v.* LYNN. Supreme Court of Nevada and Second Judicial District Court of Nevada, Washoe County. Certiorari denied. *Samuel Gottlieb* for petitioner. *Herman A. Benjamin* and *Samuel Platt* for respondent.

No. 319, Misc. LEE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cummings, Beatrice Rosenberg* and *Robert Maysack* for the United States. Reported below: 91 U. S. App. D. C. 284, 200 F. 2d 134.

No. 327, Misc. GAWRON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 334, Misc. MAUGHS *v.* ROYSTER, SUPERINTENDENT OF STATE PRISON FARM. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 337, Misc. DARCY *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 339, Misc. CARPENTER *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 342, Misc. GILMORE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 343, Misc. HUMES *v.* MAINE. Supreme Judicial Court of Maine. Certiorari denied.

No. 344, Misc. STELLOH *v.* WISCONSIN. Supreme Court of Wisconsin. Certiorari denied.

No. 348, Misc. BRENNAN *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 351, Misc. CANNADY *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 365, Misc. BROWN *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *William H. Maness* and *T. E. Byrne, Jr.* for petitioner. Reported below: 61 So. 2d 640.

Rehearing Denied.

No. 35. EASTERN MOTOR EXPRESS, INC. ET AL. *v.* UNITED STATES ET AL., 344 U. S. 298; and

No. 37. LLOYD A. FRY ROOFING CO. *v.* WOOD ET AL., MEMBERS OF THE ARKANSAS PUBLIC SERVICE COMMISSION, 344 U. S. 157. Petitions for rehearing denied.

No. 60. PENNSYLVANIA RAILROAD CO. *v.* O'ROURKE, 344 U. S. 334. The motion for leave to file brief of Order of Railway Conductors, Pennsylvania Railroad Lines East et al., as *amici curiae,* is denied. Rehearing denied.

No. 204, Misc. FRANKFELD ET AL. *v.* UNITED STATES, 344 U. S. 922. Motion for leave to file brief of Sam Houston Allen, and others, as *amici curiae,* denied. Rehearing denied.

No. 294, Misc. CAMPBELL *v.* PENNSYLVANIA ET AL., 344 U. S. 926; and

No. 328, Misc. WALLACE *v.* HECK, AS ASSEMBLYMAN AND SPEAKER OF THE STATE ASSEMBLY OF NEW YORK, 344 U. S. 931. Petitions for rehearing denied.

No. 75. FEDERAL TRADE COMMISSION *v.* MOTION PICTURE ADVERTISING SERVICE CO., INC., 344 U. S. 392;

No. 102. BRATBURD ET AL. *v.* MARYLAND, 344 U. S. 908;

No. 320. STONE *v.* NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO., 344 U. S. 407;

No. 365. DRAGNA *v.* CALIFORNIA, 344 U. S. 921;

No. 425. HOLMES PROJECTOR CO. *v.* UNITED STATES, 344 U. S. 912;

No. 465. AIR TRANSPORT ASSOCIATES, INC. *v.* CIVIL AERONAUTICS BOARD, 344 U. S. 922;

No. 481. CLAWSON *v.* UNITED STATES, 344 U. S. 929;

No. 485. PENN *v.* COMMISSIONER OF INTERNAL REVENUE, 344 U. S. 927;

No. 491. HOXSEY CANCER CLINIC ET AL. *v.* UNITED STATES, 344 U. S. 928;

No. 503. HERRIN TRANSPORTATION CO., INC. ET AL. *v.* UNITED STATES ET AL., 344 U. S. 925;

No. 505. MALONE FREIGHT LINES, INC. *v.* UNITED STATES, 344 U. S. 925; and

No. 507. WEISS *v.* UNITED STATES, 344 U. S. 934. Petitions for rehearing denied.

No. 80, Misc., October Term, 1950. GIBBS *v.* BUSHONG, SUPERINTENDENT, 340 U. S. 804. Motion for leave to file petition for rehearing denied.

MARCH 16, 1953.

Miscellaneous Orders.

No. 10, Original. ARIZONA *v.* CALIFORNIA ET AL. The motion of Sidney Kartus et al. for leave to intervene is denied. *Samuel Langerman* was on the motion to intervene. *Ross F. Jones,* Attorney General of Arizona, *John Hanley Eversole,* Chief Assistant Attorney General, *John H. Moeur, Burr Sutter* and *Perry M. Ling* were on a brief for complainant in opposition to the motion to intervene.

No. 367, Misc. BYERS *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied.

No. 384, Misc. BYERS *v.* CURTIS. Application for injunction denied.

No. 389, Misc. PULLINS *v.* OHIO ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 406, Misc. EX PARTE INTERNATIONAL WORKERS ORDER, INC. ET AL. Motion for leave to file petition for writ of mandamus denied. *Royal W. France* for the International Workers Order, Inc. et al., petitioners. *John P. McGrath* and *Martin D. Jacobs* for the New York City Housing Authority et al., respondents.

Certiorari Granted.

No. 540. UNITED STATES *v.* NUGENT; and

No. 573. UNITED STATES *v.* PACKER. C. A. 2d Cir. Certiorari granted. *Solicitor General Cummings* for the United States. *Herman Adlerstein* and *Hayden C. Covington* for respondents. Reported below: 200 F. 2d 46, 540.

Certiorari Denied. (*See also No. 367, Misc., supra.*)

No. 336. JOHNSON ET AL., DOING BUSINESS AS THE BRAMHALL COMPANY, *v.* DURKIN, SECRETARY OF LABOR. C. A. 8th Cir. Certiorari denied. *Dupuy G. Warrick* for petitioners. *Acting Solicitor General Stern, William S. Tyson* and *Bessie Margolin* filed a memorandum stating that respondent does not oppose issuance of a writ of certiorari in this case. Reported below: 198 F. 2d 130.

No. 380. PENNINGTON-WINTER CONSTRUCTION CO. *v.* DURKIN, SECRETARY OF LABOR. C. A. 10th Cir. Certio-

rari denied. *Sylvanus G. Felix* for petitioner. *Acting Solicitor General Stern, William S. Tyson* and *Bessie Margolin* filed a memorandum stating that respondent does not oppose the petition for certiorari. Reported below: 198 F. 2d 334.

No. 474. BLOOM ET AL. *v.* WILLIS ET AL. Supreme Court of Louisiana. Certiorari denied. *W. T. Saye* for petitioners. *Geo. Gunby, M. C. Thompson, W. D. Cotton* and *Wm. H. Bronson* for respondents. Reported below: 221 La. 803, 60 So. 2d 415.

No. 497. SEATRAIN LINES, INC. *v.* PENNSYLVANIA RAILROAD CO. ET AL. C. A. 3d Cir. Certiorari denied. *Carl E. Newton* and *Theodore S. Hope, Jr.* for petitioner. *John B. Prizer, Hugh B. Cox* and *Joseph F. Eshelman* for the Pennsylvania Railroad Co., *Charles Cook Howell, Francis M. Shea* and *U. B. Ellis* for the Atlantic Coast Line Railroad Co., *Sidney S. Alderman, Henry L. Walker, Waldron M. Ward, Mr. Shea* and *Warner W. Gardner* for the Southern Railway Co., *Mr. Cox* and *L. James Huegel* for the Baltimore & Ohio Railroad Co., *Harold J. Gallagher, James B. McDonough, Jr., W. R. C. Cocke* and *Chas. T. Abeles* for the Seaboard Air Line Railroad Co., *W. T. Pierson* and *Duane E. Minard* for the Erie Railroad Co., *J. Carter Fort, Thomas L. Preston, Mr. Ward* and *Gerald D. Finney* for the Association of American Railroads; and *Robert Carey* and *H. T. Lively* for the Louisville & Nashville Railroad Co., respondents.

No. 502. ATLANTIC COAST LINE RAILROAD CO. *v.* SOUTH CAROLINA EX REL. PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA ET AL. Supreme Court of South Carolina. Certiorari denied. *Douglas McKay, Wm. P. Baskin, C. C. Howell* and *R. B. Gwathmey* for petitioner. *T. C. Callison,* Attorney General of South Carolina, *Irvine*

F. Belser, Assistant Attorney General, and *R. McC. Figg, Jr.* for respondents. *Edward M. Reidy* filed a brief for the Interstate Commerce Commission, as *amicus curiae.* Reported below: —— S. C. ——, 72 S. E. 2d 438.

No. 544. Park & Tilford Distillers Corp. *v.* United States. Court of Claims. Certiorari denied. *Roswell Magill* for petitioner. *Solicitor General Cummings, Assistant Attorney General Holland* and *Ellis N. Slack* for the United States. Reported below: 123 Ct. Cl. 509, 107 F. Supp. 941.

No. 551. United States *v.* Martell. C. A. 3d Cir. Certiorari denied. *Solicitor General Cummings* for the United States. Reported below: 199 F. 2d 670.

No. 565. Turini *v.* Allens Manufacturing Co., Inc. C. A. 1st Cir. Certiorari denied. *Floyd H. Crews* for petitioner. Reported below: 198 F. 2d 491.

No. 572. Padua Alarm Systems, Inc. *v.* General Time Corp. et al. C. A. 2d Cir. Certiorari denied. *Herbert W. Kenway* for petitioner. *Charles P. Bauer* for respondents. Reported below: 199 F. 2d 351.

No. 582. New York, New Haven & Hartford Railroad Co. *v.* Zermani, Administratrix. C. A. 1st Cir. Certiorari denied. *Paul F. Perkins* for petitioner. *Thomas J. O'Neill* and *John V. Higgins* for respondent. Reported below: 200 F. 2d 240.

No. 585. J. I. Case Co. *v.* National Labor Relations Board. C. A. 8th Cir. Certiorari denied. *Clark M. Robertson* for petitioner. *Solicitor General Cummings, George J. Bott, David P. Findling* and *Dominick L. Manoli* for respondent. Reported below: 198 F. 2d 919.

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No. 494. MILLER *v.* GUTHRIE ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Hugh M. Alcorn* for the Town of Suffield, respondent. Reported below: 198 F. 2d 267.

No. 578. MANNERFRID *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Jack Wasserman* for petitioner. *Acting Solicitor General Stern, Beatrice Rosenberg* and *John R. Wilkins* for the United States. Reported below: 200 F. 2d 730.

No. 598. NEW YORK *v.* CARDINAL, DOING BUSINESS AS CARDINAL ENGINEERING CO. Petition for writ of certiorari to the Court of Appeals of New York denied for the reason that application therefor was not made within the time provided by law. 28 U. S. C. § 2101 (c). *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *Henry S. Manley,* Assistant Attorney General, for petitioner. *Daniel McNamara* for respondent. Reported below: 304 N. Y. 400, 107 N. E. 2d 569.

No. 259, Misc. CLARK *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petition should be granted. Petitioner *pro se*. *John G. Fox,* Attorney General of West Virginia, and *T. D. Kauffelt,* Assistant Attorney General, for respondent.

No. 331, Misc. LEYRA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petition should be granted. *Harry G. Anderson* and

Frederick W. Scholem for petitioner. *Miles F. McDonald* and *William I. Siegel* for respondent. Reported below: 304 N. Y. 468, 108 N. E. 2d 673.

No. 345, Misc. RUSHKOWSKI *v.* BURKE, WARDEN, ET AL. Petition for writ of certiorari to the Supreme Court of Pennsylvania, Eastern District, denied for the reason that application therefor was not made within the time provided by law. 28 U. S. C. § 2101 (c).

No. 349, Misc. HIRONS *v.* SWENSON, WARDEN. Court of Appeals of Maryland. Certiorari denied.

No. 353, Misc. PARSONS *v.* MOORE, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 199 F. 2d 952.

No. 354, Misc. BROWN *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 360, Misc. MATHEWS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 364, Misc. COKER *v.* CALIFORNIA. District Court of Appeal of California, Third Appellate District. Certiorari denied.

No. 377, Misc. DENNY *v.* INDIANA. Circuit Court of Clay County, Indiana. Certiorari denied.

Rehearing Denied.

No. 66. LUTWAK ET AL. *v.* UNITED STATES, 344 U. S. 604;

No. 490. WHETSTONE *v.* SAUBER, DIRECTOR OF INTERNAL REVENUE, 344 U. S. 928; and

No. 325, Misc. GADSDEN *v.* UNITED STATES, 344 U. S. 935. Petitions for rehearing denied.

APRIL 6, 1953.

Miscellaneous Orders.

It is ordered that Leland L. Tolman, of Washington, D. C., be, and he hereby is, appointed a member of the Advisory Committee, appointed by the order of June 3, 1935, 295 U. S. 774, and designated as a continuing Committee to advise the Court with respect to amendments or additions to the Rules of Civil Procedure for the District Courts of the United States, by the order of January 5, 1942, 314 U. S. 720.

No. 548. BRIDGES ET AL. *v.* UNITED STATES. Certiorari, 345 U. S. 904, to the United States Court of Appeals for the Ninth Circuit. The petition for enlargement of the scope of review is denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Telford Taylor* and *Norman Leonard* for petitioners. *Acting Solicitor General Stern* filed a memorandum for the United States in opposition. Reported below: 199 F. 2d 811.

No. 293, Misc. BURKHOLDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied. Petitioner *pro se*. *Solicitor General Cummings* for the United States.

No. 363, Misc. DEJORDY *v.* MICHIGAN ET AL. Application denied.

No. 366, Misc. IN RE JERONIS. Motion for preliminary injunction denied.

No. 409, Misc. MARSHALL *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus denied.

No. 357, Misc. MILLER *v.* EIDSON, WARDEN;

No. 362, Misc. BERGEN *v.* WARDEN, MARYLAND STATE PENITENTIARY;

No. 370, Misc. BOYDEN *v.* MCGEE, DIRECTOR, DEPARTMENT OF CORRECTIONS OF CALIFORNIA, ET AL.;

No. 371, Misc. TARVER *v.* FAY, WARDEN;

No. 376, Misc. DUNCAN *v.* WARDEN, NEBRASKA STATE PENITENTIARY;

No. 379, Misc. WHITE *v.* HIATT, WARDEN; and

No. 393, Misc. IN RE OPPEDISANO. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted.

No. 527. UNITED STATES *v.* KLINGER ET AL. C. A. 2d Cir. Certiorari granted. The motions of Stanley M. Klinger and William Cantor for leave to proceed *in forma pauperis* are granted and it is ordered that Louis Bender, Esquire, of New York City, be appointed to serve as counsel for those respondents. *Solicitor General Cummings* for the United States. *Eugene H. Nickerson* for Sandler, respondent. Reported below: 199 F. 2d 645.

No. 617. DISTRICT OF COLUMBIA *v.* JOHN R. THOMPSON CO., INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Vernon E. West, Chester H. Gray* and *Edward A. Beard* for petitioner. *Ringgold Hart, John J. Wilson* and *Jo V. Morgan, Jr.* for respondent. *Attorney General Brownell, Acting Solicitor General Stern* and *Philip Elman* filed a brief for the United States, as *amicus curiae,* in support of the petition for a writ of certiorari. Reported below: 92 U. S. App. D. C. —, 203 F. 2d 579.

Certiorari Denied. (*See also No. 293, Misc., supra.*)

No. 289. CONNELLY ET AL., DOING BUSINESS AS HARBAR DRILLING CO., *v.* JENNINGS. Supreme Court of Okla-

homa. Certiorari denied. *Peyton Ford* for petitioners. *Ernest W. McFarland* for respondent. Reported below: 207 Okla. 554, 252 P. 2d 133.

No. 446. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NUMBER 406, ET AL. *v.* POSTMA, DOING BUSINESS AS HAROLD F. POSTMA GRAVEL CO., ET AL. Supreme Court of Michigan. Certiorari denied. *David Previant* and *George S. Fitzgerald* for petitioners. *Jay W. Linsey* for respondents. Reported below: 334 Mich. 347, 54 N. W. 2d 681.

No. 555. BROWN ET AL. *v.* CONTINENTAL CASUALTY CO. C. A. 7th Cir. Certiorari denied. *Kellam Foster* for petitioners. *Albert H. Gavit* for respondent.

No. 559. UNITED STATES *v.* AMERICAN CONSTRUCTION CO. Court of Claims. Certiorari denied. *Solicitor General Cummings* for the United States. *William R. Brown* for respondent. Reported below: 123 Ct. Cl. 408, 107 F. Supp. 858.

No. 577. MCCRANIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. Alton Hosch* and *John L. Green* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Samuel D. Slade* and *Cornelius J. Peck* for the United States. Reported below: 199 F. 2d 581.

No. 580. PACIFIC ATLANTIC STEAMSHIP CO. *v.* HOLLIDAY, ADMINISTRATRIX. C. A. 3d Cir. Certiorari denied. *Thomas E. Byrne, Jr.* for petitioner. *Abraham E. Freedman* and *Henry A. Wise, Jr.* for respondent. Reported below: 197 F. 2d 610.

No. 581. VAHLBERG *v.* OKLAHOMA. Criminal Court of Appeals of Oklahoma. Certiorari denied. *John B. Ogden* for petitioner. *Mac Q. Williamson,* Attorney General of Oklahoma, and *Owen J. Watts,* Assistant Attorney General, for respondent. Reported below: —— Okla. Cr. ——, 249 P. 2d 736.

No. 583. LYONS ET AL., DOING BUSINESS AS LYONS ELECTRICAL DISTRIBUTING CO., *v.* WESTINGHOUSE ELECTRIC CORP. C. A. 2d Cir. Certiorari denied. *Copal Mintz* for petitioners. *Albert R. Connelly* for respondent. Reported below: 201 F. 2d 510.

No. 584. GLYCO PRODUCTS CO., INC. *v.* FEDERAL SECURITY ADMINISTRATOR; and

No. 610. ATLAS POWDER CO. *v.* EWING, FEDERAL SECURITY ADMINISTRATOR. C. A. 3d Cir. Certiorari denied. *Michael F. Markel* for petitioner in No. 584. *Oscar Cox, C. C. Gammons, Lloyd N. Cutler* and *Louis F. Oberdorfer* for petitioner in No. 610. *Acting Solicitor General Stern, Beatrice Rosenberg* and *William W. Goodrich* for respondent. Reported below: 201 F. 2d 347.

No. 586. KNISELY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Roy H. Lambert* and *Harry H. Peterson* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Joseph M. Howard* for the United States. Reported below: 200 F. 2d 559.

No. 587. JOHNSON *v.* HALPIN, ACTING DIRECTOR OF THE DEPARTMENT OF REVENUE OF ILLINOIS, ET AL. Supreme Court of Illinois. Certiorari denied. *Albert J. Meserow* for petitioner. *Latham Castle,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondents. Reported below: 413 Ill. 257, 108 N. E. 2d 429.

No. 588. WARNER & SWASEY CO. *v.* WAR CONTRACTS PRICE ADJUSTMENT BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Sturgis Warner, John S. Walker, Luther Day* and *Curtis C. Williams, Jr.* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Samuel D. Slade* and *Benjamin Forman* for respondents. Reported below: 91 U. S. App. D. C. 330, 201 F. 2d 201.

No. 589. MCCONKEY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Robert Ash* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, A. F. Prescott* and *Fred E. Youngman* for respondent. Reported below: 199 F. 2d 892.

No. 590. KOCMOND ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles A. Bellows* for petitioners. *Acting Solicitor General Stern, Beatrice Rosenberg* and *Murry Lee Randall* for the United States. Reported below: 200 F. 2d 370.

No. 597. MALETIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *George Black, Jr.* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, Robert N. Anderson* and *S. Dee Hanson* for the United States. Reported below: 200 F. 2d 97.

No. 605. REMELIUS ET AL. *v.* JOSEPH, COMPTROLLER OF THE CITY OF NEW YORK, ET AL. Supreme Court of New York. Certiorari denied. *Roy P. Monahan* for petitioners. *Denis M. Hurley* and *W. Bernard Richland* for respondents. Reported below: See 304 N. Y. 172, 106 N. E. 2d 593.

No. 600. CONFORTI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *William C. Wines* for petitioner. *Acting Solicitor General Stern, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 200 F. 2d 365.

No. 603. NELSON RADIO & SUPPLY CO., INC. *v.* MOTOROLA, INC. C. A. 5th Cir. Certiorari denied. *Samuel M. Johnston* for petitioner. *Thomas A. Reynolds* and *Marion R. Vickers* for respondent. Reported below: 200 F. 2d 911.

No. 604. ISTHMIAN STEAMSHIP CO. *v.* COMPANIA DE NAVEGACION CEBACO, S. A. C. A. 4th Cir. Certiorari denied. *William A. Grimes* for petitioner. *Wilbur E. Dow, Jr.* and *Frederick Fish* for respondent. Reported below: 200 F. 2d 643.

No. 606. A. B. MOTORS, INC. ET AL. *v.* FREEHILL, DIRECTOR OF PRICE STABILIZATION. United States Emergency Court of Appeals. Certiorari denied. *Dan Moody* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Burger, John R. Benney, Samuel D. Slade* and *Hubert H. Margolies* for respondent.

No. 611. STAREGO *v.* SOBOLISKI ET AL. Supreme Court of New Jersey. Certiorari denied. *Paul C. Kemeny* for petitioner. *David Goldsmith* for respondents. Reported below: 11 N. J. 29, 93 A. 2d 169.

No. 613. PANG-TSU MOW ET AL. *v.* REPUBLIC OF CHINA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William A. Roberts, Warren Woods* and *Irene Kennedy* for petitioners. *William E. Leahy* and *Wm. J. Hughes, Jr.* for respondent. Reported below: 91 U. S. App. D. C. 324, 201 F. 2d 195.

No. 615. WILSON, SECRETARY OF DEFENSE, ET AL. *v.* REYNOLDS ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Solicitor General Cummings* for the Secretary of Defense et al., petitioners. *Claude L. Dawson* for respondents. Reported below: 91 U. S. App. D. C. 276, 201 F. 2d 181.

No. 618. FRIEDMAN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *James H. Nudelman* for petitioners. *Acting Solicitor General Stern, Robert S. Erdahl* and *Murry Lee Randall* for the United States. Reported below: 200 F. 2d 690.

No. 619. MOULTHROPE *v.* MATUS. Supreme Court of Errors of Connecticut. Certiorari denied. *William S. Gordon, Jr.* for petitioner. *Joseph F. Berry* for respondent. Reported below: 139 Conn. 272, 93 A. 2d 149.

No. 620. BUCKEYE STEAMSHIP CO. *v.* MCDONOUGH, ADMINISTRATOR. C. A. 6th Cir. Certiorari denied. *Lucian Y. Ray* for petitioner. *Marvin C. Harrison* for respondent. Reported below: 200 F. 2d 558.

No. 621. HENDRICKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Robert S. Erdahl* and *J. F. Bishop* for the United States. Reported below: 200 F. 2d 137.

No. 633. JENSEN *v.* PEOPLES FINANCE CO. C. A. 7th Cir. Certiorari denied. *Hector A. Brouillet* for petitioner. *Thomas J. Downs* for respondent. Reported below: 200 F. 2d 58.

No. 638. POTLATCH OIL & REFINING CO. ET AL. *v.* OHIO OIL CO. C. A. 9th Cir. Certiorari denied. *E. J. McCabe* for petitioners. *W. H. Everett* for respondent. Reported below: 199 F. 2d 766.

No. 348. ISSERMAN *v.* ETHICS COMMITTEE OF THE ESSEX COUNTY BAR ASSOCIATION. Motion for leave to file brief of National Lawyers Guild, as *amicus curiae,* denied. Petition for writ of certiorari to the Supreme Court of New Jersey denied. Memorandum filed by MR. JUSTICE BLACK. MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *Leonard B. Boudin* for petitioner. *Frederick C. Vonhof* for respondent. Reported below: 9 N. J. 269, 316, 87 A. 2d 903, 88 A. 2d 199.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS agrees.

I would grant this certiorari. It involves an order of the New Jersey Supreme Court permanently disbarring petitioner from the practice of law in that state. The Court's order rests on petitioner's conviction of contempt in a federal district court, affirmed by this Court in *Sacher* v. *United States,* 343 U. S. 1. The record of the New Jersey proceedings before us leaves me with the belief that the state failed to afford petitioner the kind of a hearing required by the Due Process Clause of the Fourteenth Amendment. Although petitioner was allowed to appear before a local bar committee and to present a formal answer and make oral argument before the State Supreme Court, the full record persuades me that he was denied an adequate opportunity to confront witnesses against him and to offer evidence in his behalf. Instead of hearing evidence and making its own findings the state court's order was based on findings made by a federal district judge who had summarily convicted petitioner of contempt without a hearing. I believe that a lawyer is denied due process when he is expelled from his profession without ever having been afforded an opportunity to confront his accusers and present evidence to deny, explain or extenuate the charges against him. See *Ex parte Robinson,* 19 Wall. 505, 512-513, and *In re Oliver,* 333 U. S. 257.

No. 576. UNITED STATES EX REL. DOLENZ *v.* SHAUGHNESSY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Alfred Feingold* and *Aloysius C. Falussy* for petitioner. *Acting Solicitor General Stern, Beatrice Rosenberg* and *J. F. Bishop* for respondent. Reported below: 200 F. 2d 288.

No. 72, Misc. SUKOWSKI *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied. Petitioner *pro se*. *Ivan A. Elliott*, Attorney General of Illinois, and *William C. Wines*, Assistant Attorney General, for respondent.

No. 307, Misc. CRAMER *v.* ILLINOIS. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 336, Misc. JOHNSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cummings, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 347, Misc. KING *v.* CALIFORNIA. District Court of Appeal of California, First Appellate District. Certiorari denied. Reported below: 114 Cal. App. 2d 95, 249 P. 2d 563.

No. 355, Misc. NITCH *v.* SUPERINTENDENT OF NORWICH STATE HOSPITAL ET AL. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 356, Misc. BERNATOWICZ *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 413 Ill. 181, 108 N. E. 2d 479.

No. 358, Misc. BAYLESS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cummings, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 200 F. 2d 113.

No. 359, Misc. MCCUTCHEON ET AL. *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Bernard A. Golding* for petitioners. Reported below: —— Tex. Cr. R. ——, 252 S. W. 2d 175.

No. 361, Misc. BURTON ET AL. *v.* WATERS, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: —— Okla. Cr. ——, 250 P. 2d 227.

No. 368, Misc. GOODMAN ET AL. *v.* MCMILLAN, TRUSTEE, ET AL. Supreme Court of Alabama. Certiorari denied. Reported below: 258 Ala. 125, 61 So. 2d 55.

No. 369, Misc. OLSEN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 372, Misc. SEVERA *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 373, Misc. SKINNER *v.* MUNIE, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 374, Misc. O'BRIEN *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 252 S. W. 2d 357.

No. 375, Misc. WILLIAMS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 378, Misc. MINER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 380, Misc. STRZEP *v.* JACKSON, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 383, Misc. ATKINS *v.* MOORE, WARDEN, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 388, Misc. HOURIHAN *v.* NATIONAL LABOR RELATIONS BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, George J. Bott, David P. Findling, Dominick L. Manoli* and *Irving M. Herman* for respondents. Reported below: 91 U. S. App. D. C. 316, 201 F. 2d 187.

No. 391, Misc. MILLER *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *Herman L. Taylor* for petitioner. *Harry McMullan*, Attorney General of North Carolina, and *Ralph Moody*, Assistant Attorney General, for respondent. Reported below: 237 N. C. 29, 74 S. E. 2d 513.

No. 392, Misc. NICKERSON *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 395, Misc. DEVENY *v.* TEETS, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 400, Misc. BRINK *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 420, Misc. PENNSYLVANIA EX REL. CAREY *v.* KEEPER OF THE MONTGOMERY COUNTY PRISON. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Robert E. Woodside*, Attorney General of Pennsylvania, and *Randolph C. Ryder*, Deputy Attorney General, for respondent. Reported below: 202 F. 2d 267.

No. 411, Misc. SHOTKIN *v.* STANGARD-DICKERSON CORP. ET AL. C. A. 3d Cir. Certiorari denied.

Rehearing Denied.

No. 167. UNITED STATES *v.* KAHRIGER, *ante*, p. 22;

No. 278. RAMSPECK ET AL. *v.* FEDERAL TRIAL EXAMINERS CONFERENCE ET AL., *ante*, p. 128;

No. 444. ORLOFF *v.* WILLOUGHBY, COMMANDANT, *ante*, p. 83; and

No. 524. PENNSYLVANIA THRESHERMEN & FARMERS' MUTUAL CASUALTY INSURANCE CO. *v.* V. L. PHILLIPS & CO., INC. ET AL., *ante*, p. 906. Petitions for rehearing denied.

No. 218. MARTINEZ *v.* NEELLY, SUCCESSOR TO JORDAN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, 344 U. S. 916; and

No. 274. CO-ORDINATED TRANSPORT, INC. ET AL. *v.* BARRETT, SECRETARY OF STATE, ET AL., 344 U. S. 583. Petitions for rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications.

No. 252, Misc. TATE *v.* CALIFORNIA, 344 U. S. 910. Second petition for rehearing denied.

No. 299, Misc., October Term, 1951. IVA IKUKO TOGURI D'AQUINO *v.* UNITED STATES, 343 U. S. 935. Motion for leave to file a second petition for rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

APRIL 13, 1953.

Per Curiam Decisions.

No. 511. CENTRAL RAILROAD CO. OF NEW JERSEY ET AL. *v.* DEPARTMENT OF PUBLIC UTILITIES, BOARD OF PUBLIC UTILITY COMMISSIONERS, OF NEW JERSEY. Appeal from

the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Judson C. McLester, Jr.* for appellants. *Theodore D. Parsons,* Attorney General of New Jersey, and *Joseph Harrison,* Special Deputy Attorney General, for appellee. Reported below: 10 N. J. 255, 90 A. 2d 1.

No. 648, October Term, 1951. BRADLEY MINING CO. *v.* BOICE. On petition for rehearing. *Per Curiam:* The petition for rehearing is granted. The order entered May 5, 1952, denying certiorari, 343 U. S. 941, is vacated and the petition for writ of certiorari is granted. The order of the division of the Court of Appeals denying petition for rehearing *en banc* is vacated and the case is remanded to the Court of Appeals for further proceedings in the light of *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.,* 345 U. S. 247, decided April 6, 1953. *John Parks Davis, Oscar W. Worthwine* and *Arthur B. Dunne* for petitioner. *William H. Langroise* for respondent.

No. 266. WILLIAM H. BANKS WAREHOUSES, INC. ET AL. *v.* WATT ET AL. 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 order of the division of the Court of Appeals denying petition for rehearing *en banc* is vacated and the case is remanded to the Court of Appeals for further proceedings in the light of *Western Pacific Railroad Corp.* v. *Western Pacific Railroad Co.,* 345 U. S. 247, decided April 6, 1953. *L. Duncan Lloyd* for petitioners. *Clifford E. Fix* for respondents. Reported below: 196 F. 2d 1018.

Miscellaneous Orders.

It is ordered that Professor James William Moore, of Yale University, be, and he is hereby, appointed a mem-

ber of the Advisory Committee, appointed by the order of June 3, 1935, 295 U. S. 774, and designated as a continuing Committee to advise the Court with respect to amendments or additions to the Rules of Civil Procedure for the District Courts of the United States, by order of January 5, 1942, 314 U. S. 720.

No. —, Original. MISSISSIPPI *v.* LOUISIANA. A rule is ordered to issue returnable within forty days, requiring the defendant to show cause why leave to file the bill of complaint should not be granted. *J. P. Coleman,* Attorney General of Mississippi, and *G. H. Brandon* for complainant.

No. 397, Misc. ELLIOTT *v.* DOWD, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted. (See also No. 648, October Term, 1951, and No. 266, supra.)

No. 614. BANKERS LIFE & CASUALTY CO. *v.* HOLLAND, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, ET AL. The petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted limited to question 1 presented by the petition for the writ, *i. e.:*

"1. Is mandamus an appropriate remedy to vacate the order of severance and transfer as an unwarranted renunciation of jurisdiction which would compel needless duplicity of trials and appeals to enforce the right to a single trial against all defendants in a proper forum?"

Charles F. Short, Jr. and *Miller Walton* for petitioner. *Eugene Cook,* Attorney General of Georgia, *M. H. Blackshear, Jr.,* Deputy Assistant Attorney General, and *Lamar W. Sizemore,* Assistant Attorney General, for respondents. Reported below: 199 F. 2d 593.

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Certiorari Denied.

No. 291. WISCONSIN MICHIGAN POWER CO. *v.* FEDERAL POWER COMMISSION; and

No. 294. WISCONSIN ET AL. *v.* FEDERAL POWER COMMISSION. C. A. 7th Cir. Certiorari denied. *Martin R. Paulsen* and *Van B. Wake* for petitioner in No. 291. *Vernon W. Thomson,* Attorney General, and *Stewart G. Honeck,* Deputy Attorney General, for the State of Wisconsin, and *William E. Torkelson* for the Public Service Commission of Wisconsin, petitioners in No. 294. *Acting Solicitor General Stern, Assistant Attorney General Baldridge, Paul A. Sweeney, Melvin Richter, Bradford Ross* and *Howard E. Wahrenbrock* filed a memorandum for respondent. Reported below: 197 F. 2d 472.

No. 495. CALIFORNIA ELECTRIC POWER CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. *Henry W. Coil* and *Donald J. Carman* for petitioner. *Solicitor General Cummings* filed a memorandum for the United States and the Federal Power Commission, respondents. Reported below: 199 F. 2d 206.

No. 574. WISCONSIN ET AL. *v.* FEDERAL POWER COMMISSION; and

No. 575. WISCONSIN POWER & LIGHT CO. *v.* FEDERAL POWER COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Vernon W. Thomson,* Attorney General, and *Stewart G. Honeck,* Deputy Attorney General, for the State of Wisconsin, and *William E. Torkelson* for the Public Service Commission of Wisconsin, petitioners in No. 574. *William Ryan* for petitioner in No. 575. *Acting Solicitor General Stern* filed a memorandum for respondent. Reported below: 91 U. S. App. D. C. 307, 201 F. 2d 183.

No. 599. DEMKO, ADMINISTRATRIX, ET AL. *v.* LAUDERDALE-BY-THE-SEA. Supreme Court of Florida. Certiorari denied. *Alfred P. Draper* and *Joseph A. Fitzsimmons* for petitioners. Reported below: 60 So. 2d 619.

No. 608. HOWLAND *v.* STITZER. Supreme Court of North Carolina. Certiorari denied. *David L. Krooth* for petitioner. *Welch Jordan* for respondent. Reported below: 236 N. C. 230, 72 S. E. 2d 583.

No. 612. BLOCH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *William A. Patty* for petitioner. *Acting Solicitor General Stern, Ellis N. Slack, Lee A. Jackson* and *Melva M. Graney* for the United States. Reported below: 200 F. 2d 63.

No. 623. BINION *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William A. Roberts, Warren Woods* and *Nash R. Adams* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Philip Elman, Ellis N. Slack* and *Joseph M. Howard* for the United States. Reported below: 201 F. 2d 498.

No. 624. TAYLOR *v.* MARCELLE, COLLECTOR OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Walter R. Kuhn* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *I. Henry Kutz* for respondent. Reported below: 199 F. 2d 759.

No. 625. FERNANDEZ *v.* UNITED FRUIT CO. C. A. 2d Cir. Certiorari denied. *Henry Fogler* for petitioner. *Eugene Underwood* for respondent. Reported below: 200 F. 2d 414.

No. 628. SHER *v.* DEHAVEN ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Walter J. Cahill* and *Charles O. Pratt* for petitioner. *Richard H. Love* for respondents. Reported below: 91 U. S. App. D. C. 257, 199 F. 2d 777.

No. 537. CORNETT *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Eugene D. O'Sullivan* for petitioner. Reported below: 155 Neb. 766, 53 N. W. 2d 747.

No. 602. THEODORAKIS *v.* XILAS ET AL. C. A. 4th Cir. Certiorari denied. *J. L. Morewitz* for petitioner. *Harry E. McCoy, Jr.* for respondents. Reported below: 200 F. 2d 107.

No. 273, Misc. WORD *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied for the reason that application therefor was not made within the time provided by law. Rule 37 (b)(2) of the Rules of Criminal Procedure. Reported below: 199 F. 2d 625.

No. 381, Misc. LUNDBERG *v.* JACQUES, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 390, Misc. MALONE *v.* KING. Supreme Court of California. Certiorari denied.

No. 401, Misc. ON LEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Gilbert S. Rosenthal* for petitioner. *Acting Solicitor General Stern, Beatrice Rosenberg* and *Carl H. Imlay* for the United States. Reported below: 201 F. 2d 722.

No. 413, Misc. SYKES *v.* SWENSON, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: — Md. —, 93 A. 2d 549.

No. 415, Misc. ENOCHS *v.* TEETS, WARDEN. Supreme Court of California. Certiorari denied.

No. 416, Misc. WAGNER *v.* RAGEN, WARDEN. Circuit Court of Madison County, Illinois. Certiorari denied.

No. 418, Misc. WEBB *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 419, Misc. RAWLINGS *v.* MARION COUNTY CRIMINAL COURT ET AL. Marion County Criminal Court of Indiana. Certiorari denied.

Rehearing Granted. (*See No. 648, October Term, 1951, supra.*)

Rehearing Denied.

No. 325, Misc. GADSDEN *v.* UNITED STATES, 344 U. S. 935. Second petition for rehearing denied.

No. 345, Misc. RUSHKOWSKI *v.* BURKE, WARDEN, ET AL., *ante,* p. 919. Petition for rehearing denied for the reason that the application was not received within the time provided by Rule 33.

APRIL 27, 1953.

Per Curiam Decisions.

No. 662. DARBY *v.* CALIFORNIA. Appeal from the District Court of Appeal of California, Second Appellate District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Bates Booth* for appellant. *Edmund G.*

Brown, Attorney General of California, *Frank W. Richards,* Assistant Attorney General, and *Dan Kaufmann,* Deputy Attorney General, for appellee. Reported below: 114 Cal. App. 2d 412, 250 P. 2d 743.

No. 675. PETTY ET AL. *v.* IDAHO. Appeal from the Supreme Court of Idaho. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a final judgment. 28 U. S. C. § 1257. *Edward S. Franklin* for appellants. *Robert E. Smylie,* Attorney General of Idaho, and *William H. Bakes,* Assistant Attorney General, for appellee. Reported below: 73 Idaho 136, 248 P. 2d 218.

Miscellaneous Orders.

No. 283, Misc. STARNES *v.* DOWD, WARDEN;

No. 399, Misc. JERONIS *v.* JACQUES, WARDEN;

No. 407, Misc. SIMEONE *v.* WARDEN, U. S. PENITENTIARY, LEWISBURG, PA.;

No. 410, Misc. BALDWIN *v.* HIATT, WARDEN; and

No. 425, Misc. SCHRADER *v.* RAGEN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Denied.

No. 454. STONER ET AL. *v.* BELLOWS ET AL. C. A. 3d Cir. Certiorari denied. *Jacob W. Friedman* for petitioners. *Warren H. Young* for respondents. Reported below: 196 F. 2d 918.

No. 482. ROSICRUCIAN FELLOWSHIP ET AL. *v.* ROSICRUCIAN FELLOWSHIP NON-SECTARIAN CHURCH ET AL. Supreme Court of California. Certiorari denied. *Rollin L. McNitt* and *Edythe Jacobs* for petitioners. *William L. Murphey* for respondents. Reported below: 39 Cal. 2d 121, 245 P. 2d 481.

No. 531. S. Buchsbaum & Co., Inc. *v.* United States. Court of Claims. Certiorari denied. *Edwin J. McDermott* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Paul A. Sweeney* and *Hubert H. Margolies* for the United States. Reported below: 123 Ct. Cl. 262, 105 F. Supp. 821.

No. 607. Heitsch, Executor, *v.* Kavanagh, Collector of Internal Revenue. C. A. 6th Cir. Certiorari denied. *Robert Dawson Heitsch* for petitioner. *Acting Solicitor General Stern* and *Assistant Attorney General Holland* for respondent. Reported below: 200 F. 2d 178.

No. 616. Morristown Trust Co., Executor, *v.* Manning, Internal Revenue Collector. C. A. 3d Cir. Certiorari denied. *Benjamin Harrow* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, Lee A. Jackson* and *Joseph F. Goetten* for respondent. Reported below: 200 F. 2d 194.

No. 622. Commissioner of Internal Revenue *v.* Golonsky et al. C. A. 3d Cir. Certiorari denied. *Solicitor General Cummings* for petitioner. Reported below: 200 F. 2d 72.

No. 626. Wynne *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Mark H. Johnson* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, A. F. Prescott* and *Cecelia H. Goetz* for respondent. Reported below: 199 F. 2d 958.

No. 627. H. J. Lewis Oyster Co. *v.* United States et al. Court of Claims. Certiorari denied. *Curtiss*

K. Thompson and *John H. Weir* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Paul A. Sweeney* and *Hubert H. Margolies* for the United States, respondent. Reported below: 123 Ct. Cl. 358, 107 F. Supp. 570.

No. 630. SELLAS *v.* KIRK, RANGE MANAGER, BUREAU OF LAND MANAGEMENT. C. A. 9th Cir. Certiorari denied. *Clel Georgetta* for petitioner. *Acting Solicitor General Stern, Acting Assistant Attorney General Williams, Roger P. Marquis* and *John C. Harrington* for respondent. Reported below: 200 F. 2d 217.

No. 632. MIMS *v.* METROPOLITAN LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. *Crampton Harris* for petitioner. *Lucien D. Gardner, Jr.* for respondent. Reported below: 200 F. 2d 800.

No. 637. MARINE MIDLAND TRUST CO. *v.* McGIRL, TRUSTEE, ET AL. C. A. 3d Cir. Certiorari denied. *Charles Danzig* for petitioner. *Acting Solicitor General Stern* and *Roger S. Foster* for the Securities and Exchange Commission; and *Samuel M. Coombs, Jr.* for McGirl, Trustee, respondents. Reported below: 200 F. 2d 327.

No. 639. SANFORD SERVICE CO. *v.* CASWELL. C. A. 5th Cir. Certiorari denied. *Eberhard P. Deutsch* for petitioner. *J. McHenry Jones* for respondent. Reported below: 200 F. 2d 830.

No. 640. HAMMERMILL PAPER CO. *v.* CITY OF ERIE. Supreme Court of Pennsylvania. Certiorari denied. *M. E. Graham* for petitioner. *Maurice J. Coughlin* for respondent. Reported below: 372 Pa. 85, 92 A. 2d 422.

No. 642. HOOD ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *W. S. Henley, R. W. Thompson, Jr., Albert Sidney Johnston, Jr., Ben F. Cameron, W. W. Dent* and *T. J. Wills* for petitioners. *Acting Solicitor General Stern, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 200 F. 2d 639.

No. 645. MINES & METALS CORP. ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioners. *Acting Solicitor General Stern, Roger S. Foster* and *Myer Feldman* for respondent. Reported below: 200 F. 2d 317.

No. 650. ROTHSCHILD, TRADING AS GEN-O-PAK CO., *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *Samuel E. Hirsch* for petitioner. *Acting Solicitor General Stern, Acting Assistant Attorney General Hodges, Daniel M. Friedman* and *W. T. Kelley* for respondent. Reported below: 200 F. 2d 39.

No. 652. WATERMAN STEAMSHIP CORP. *v.* SHIPOWNERS & MERCHANTS TOWBOAT CO., LTD. ET AL. C. A. 9th Cir. Certiorari denied. *Clarence G. Morse* for petitioner. *Lloyd M. Tweedt* for the Shipowners & Merchants Towboat Co., Ltd., respondent. Reported below: 199 F. 2d 600.

No. 653. LONDON & LANCASHIRE INSURANCE CO., LTD. *v.* GAS SERVICE CO. C. A. 8th Cir. Certiorari denied. *Flavius B. Freeman* for petitioner. *Jerome T. Duggan* for respondent. Reported below: 200 F. 2d 783.

No. 657. ODELL ET AL. *v.* HUMBLE OIL & REFINING CO. C. A. 10th Cir. Certiorari denied. *W. D. Girand, Jr.* for

petitioners. *Hiram M. Dow, Nelson Jones* and *Rex G. Baker* for respondent. Reported below: 201 F. 2d 123.

No. 659. Fargo Glass & Paint Co. *v.* Globe American Corp. et al. C. A. 7th Cir. Certiorari denied. *Edward Atlas* and *Harry G. Fins* for petitioner. *Hubert Hickam, Alan W. Boyd* and *Ralph L. Read* for respondents. Reported below: 201 F. 2d 534.

No. 665. Lichter et ux. *v.* Commissioner of Internal Revenue. C. A. 6th Cir. Certiorari denied. *Paul W. Steer* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Alexander F. Prescott* for respondent. Reported below: 201 F. 2d 49.

No. 672. Biever Motor Car Co. *v.* Chrysler Corporation. C. A. 2d Cir. Certiorari denied. *Sterling P. Harrington* and *Frederick A. Ballard* for petitioner. *Nicholas Kelley, Raymond E. Hackett, Francis S. Bensel* and *William H. Timbers* for respondent. Reported below: 199 F. 2d 758.

No. 629. Hiss *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Reed, Mr. Justice Frankfurter, and Mr. Justice Clark took no part in the consideration or decision of this application. *Chester T. Lane* and *Robert M. Benjamin* for petitioner. *Acting Solicitor General Rankin, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 201 F. 2d 372.

No. 644. Banks & Rumbaugh *v.* Tobin, Secretary of Labor. C. A. 5th Cir. Durkin, present Secretary of Labor, substituted for Tobin. Certiorari denied. *James*

O. Marberry, Jr. for petitioner. *Acting Solicitor General Stern, Harry N. Routzohn* and *Bessie Margolin* for respondent. Reported below: 201 F. 2d 223.

No. 238, Misc. WARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 199 F. 2d 270.

No. 352, Misc. WALLACE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 199 F. 2d 282.

No. 396, Misc. MANGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 403, Misc. ELCHIBEGOFF *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Burger, Samuel D. Slade* and *Benjamin Forman* for the United States. Reported below: 123 Ct. Cl. 709.

No. 405, Misc. CURRENT *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 408, Misc. MAHLER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 412, Misc. DARMAN *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 414, Misc. OLIVER *v.* MOORE, WARDEN. Court of Criminal Appeals of Texas. Certiorari denied.

No. 423, Misc. CORVINO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 424, Misc. LAWRENCE *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 426, Misc. EPHRAIM *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 427, Misc. SIMPSON *v.* NYGAARD, WARDEN. Supreme Court of North Dakota. Certiorari denied.

No. 428, Misc. MCGUIRE *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 429, Misc. KUNKLE *v.* CLAUDY, WARDEN. Supreme Court of Pennsylvania, Western District. Certiorari denied.

No. 430, Misc. DARRIN *v.* CAPITAL TRANSIT CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se.* *Edwin A. Swingle* for respondent.

No. 442, Misc. DRAPER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *J. Paul Brennan* for petitioner.

No. 432, Misc. DE SANTIS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Frank A. Gulotta* and *Philip Huntington* for respondent. Reported below: 305 N. Y. 44, 110 N. E. 2d 549.

No. 446, Misc. FITZGERALD *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 386, Misc. WATERMAN *v.* NEW YORK. Petition for writ of certiorari to the Court of Special Sessions of the City of New York, New York, denied for the reason that application therefor was not made within the time provided by law. 28 U. S. C. § 2101 (c). Petitioner *pro se.* *George Tilzer* for respondent.

No. 387, Misc. WATERMAN *v.* SCHATTEN ET AL. Petition for writ of certiorari to the Appellate Division of the Supreme Court of New York, First Judicial Department, denied for the reason that application therefor was not made within the time provided by law. 28 U. S. C. § 2101 (c). Petitioner *pro se.* *Leo E. Berson* for respondents.

No. 398, Misc. MILLER *v.* STANDARD OIL CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petition should be granted. Petitioner *pro se.* *Stuart B. Bradley* for respondent. Reported below: 199 F. 2d 457.

No. 402, Misc. KUNZ ET AL. *v.* NEW YORK. Court of Special Sessions of the City of New York, New York, Appellate Part. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petition should be granted. *Emanuel Redfield* for petitioners.

Rehearing Denied.

No. 188, October Term, 1951. GILLETTE *v.* UNITED STATES, 342 U. S. 827. Motion for leave to file a second petition for rehearing denied.

No. 20. DANIELS ET AL. *v.* ALLEN, WARDEN, 344 U. S. 443;

No. 22. SPELLER *v.* ALLEN, WARDEN, 344 U. S. 443;

No. 32. BROWN *v.* ALLEN, WARDEN, 344 U. S. 443;

No. 129. BABB *v.* BENJAMIN, CHIEF OF THE CHICAGO AREA, SOCIAL SECURITY ADMINISTRATION, ET AL., 344 U. S. 807;

No. 264. BALDI, SUPERINTENDENT, PHILADELPHIA COUNTY PRISON, ET AL., *v.* UNITED STATES EX REL. ALMEIDA, *ante*, p. 904;

No. 426. HEIKKILA *v.* BARBER, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL., *ante*, p. 229;

No. 474. BLOOM ET AL. *v.* WILLIS ET AL., *ante*, p. 916;

No. 586. KNISELY *v.* UNITED STATES, *ante*, p. 923;

No. 364, Misc. COKER *v.* CALIFORNIA, *ante*, p. 919;

No. 372, Misc. SEVERA *v.* NEW JERSEY, *ante*, p. 929;

No. 420, Misc. PENNSYLVANIA EX REL. CAREY *v.* KEEPER OF THE MONTGOMERY COUNTY PRISON, *ante*, p. 930; and

No. 331, Misc. LEYRA *v.* NEW YORK, *ante*, p. 918. Petitions for rehearing denied.

MAY 4, 1953.

Per Curiam Decisions.

No. 566. HARRISON, COLLECTOR OF INTERNAL REVENUE, *v.* BOHNEN, EXECUTOR, ET AL. Certiorari, 345 U. S. 903, to the United States Court of Appeals for the Seventh Circuit. Argued April 29, 1953. Decided May 4, 1953. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE JACKSON took no part in the consideration or decision of this case. *Lee A. Jackson* argued the cause for petitioner. With him on the brief were *Acting Solicitor General Stern, Assistant*

Attorney General Holland, Ellis N. Slack and *Hilbert P. Zarky*. *George S. Stansell* argued the cause and filed a brief for respondents. Reported below: 199 F. 2d 492.

No. 341, Misc. CHRISTOFFEL *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the United States District Court for the District of Columbia for resentencing under 18 U. S. C. (1946 ed.) § 231. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *David Rein* and *Arthur Kinoy* for petitioner. *Solicitor General Cummings, Beatrice Rosenberg* and *Murry Lee Randall* for the United States. Reported below: 91 U. S. App. D. C. 241, 200 F. 2d 734.

Miscellaneous Orders.

No. 417, Misc. ANSELMI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Motion for leave to file a petition for writ of habeas corpus also denied.

No. 449, Misc. NUNELEY *v.* RAGEN, WARDEN. Motion for leave to file a petition for writ of prohibition denied.

No. 451, Misc. TILLMAN *v.* RANDOLPH, WARDEN. Motion for leave to file a petition for writ of certiorari denied.

No. 455, Misc. HALL *v.* SKEEN, WARDEN. Motion for leave to file a petition for writ of habeas corpus denied.

Certiorari Granted. (*See also No. 341, Misc., supra.*)

No. 609. NATIONAL LABOR RELATIONS BOARD *v.* LOCAL UNION NO. 1229, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS. United States Court of Appeals for

the District of Columbia Circuit. Certiorari granted. The motion of Jefferson Standard Broadcasting Company for leave to intervene is denied. *Solicitor General Cummings* and *George J. Bott* for petitioner. *Louis Sherman* and *Philip R. Collins* for respondent. Reported below: 91 U. S. App. D. C. 333, 202 F. 2d 186.

No. 670. St. Joe Paper Co. et al. *v.* Atlantic Coast Line Railroad Co.;

No. 702. Lynch et al. *v.* Atlantic Coast Line Railroad Co.;

No. 705. Aird et al., Trustees, *v.* Atlantic Coast Line Railroad Co.; and

No. 710. Welbon et al. *v.* Atlantic Coast Line Railroad Co. C. A. 5th Cir. Certiorari granted limited to question "I" presented by the petition for writ of certiorari in No. 670, *i. e.:*

"I. It being clear that Section 77 of the Bankruptcy Act, as enacted in 1933, did not authorize the Interstate Commerce Commission to present a plan of reorganization of a railroad involving a 'forced' merger of the debtor Railway with another railroad, the question is whether amendments to the 1933 Act, made in 1935, do authorize forced mergers.

"The Act of 1933 for railroad reorganizations in bankruptcy contained in subdivision (b) a so called consistency clause which qualified the powers of the Commission in respect of mergers, by expressly providing that a merger would have to be brought about by compliance with '*provisions*' of the Interstate Commerce Act which allowed mergers *only* if requested and agreed to by the carrier and then approved by the Commission, after notice to the Governors of the states, and after hearing communities and shippers served by the carriers. This 'consistency' provision in this legislation was repeated in

subd. (e) of the 1933 Act, where it was said that transfers of property or consolidations or mergers may be made 'to the extent contemplated by the plan *consistent with the purposes* of the Interstate Commerce Act as amended'. It will be noted that the clause in (b) used the word 'provisions' and the clause in (e) used the word 'purposes'. By amendments in 1935 these two 'consistency' clauses were consolidated and transplanted from (b) and (e) to subdivision (f).

"In the 1935 Act, subd. (f), the clause allowing transfer and mergers had the qualification 'to the extent contemplated by the plan' and 'not inconsistent with the provisions and purposes of Chapter 1 of Title 49 as on August 27, 1935 or thereafter amended.'

"The narrow question is therefore whether the mere transfer of the 'consistency' clauses from subdivisions (b) and (e) to subdivision (f) altered the meaning of the clauses and gave to the Interstate Commerce Commission a power to force mergers, which was withheld from it under the Act of 1933."

William D. Mitchell and *Edward E. Watts, Jr.* for petitioners in No. 670. With them on the petition were *Harold J. Gallagher, Walter H. Brown, Jr.* and *James B. McDonough, Jr.* for the Seaboard Air Line Railroad Co., *Clarence M. Mulholland* and *Edward J. Hickey, Jr.* for the Railway Labor Executives Association, *Sidney S. Alderman* and *Henry L. Walker* for the Southern Railway System, and *Henry P. Adair* and *Donald Russell* for the Trustees under duPont Will, also petitioners in No. 670. *J. Turner Butler, Fred N. Oliver* and *Willard P. Scott* for petitioners in No. 702. *Clifton S. Thomson* for petitioners in No. 705. *Miller Walton* for petitioners in No. 710. *Edward W. Bourne, Charles Cook Howell, Richard B. Gwathmey* and *Charles Cook Howell, Jr.* for respondent. Reported below: 201 F. 2d 325.

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No. 683. OLBERDING, DOING BUSINESS AS VESS TRANSFER CO., ET AL. *v.* ILLINOIS CENTRAL RAILROAD CO., INC. C. A. 6th Cir. Certiorari granted. *William C. Welborn* and *Milford M. Miller* for petitioners. *James G. Wheeler, Joseph H. Wright* and *Chas. A. Helsell* for respondent. Reported below: 201 F. 2d 582.

Certiorari Denied. (See also Misc. Nos. 417 and 451, supra.)

No. 651. SCHENNAULT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George F. Callaghan* for petitioner. *Acting Solicitor General Stern, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 201 F. 2d 1.

No. 655. BIGELOW ET AL. *v.* LOEW'S INCORPORATED. C. A. 7th Cir. Certiorari denied. *Thomas C. McConnell* for petitioners. *Miles G. Seeley* for respondent. Reported below: 201 F. 2d 25.

No. 664. NATIONAL FRUIT PRODUCTS CO., INC. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *John W. Riely* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Helen Goodner* for the United States. Reported below: 199 F. 2d 754.

No. 666. MARTIN WUNDERLICH CO. ET AL. *v.* SECRETARY OF WAR OF THE UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph A. Maun, Ronald S. Hazel* and *Harry D. Ruddiman* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Burger, Paul A. Sweeney* and *Benjamin Forman* for respondent.

No. 669. FIORIVANTI *v.* FIORIVANTI. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Nathan M. Lubar* for petitioner. *Alvin L. Newmyer* and *Alvin L. Newmyer, Jr.* for respondent. Reported below: 91 U. S. App. D. C. 418, 200 F. 2d 750.

No. 698. WELCH *v.* ATLANTIC GULF & WEST INDIES STEAMSHIP LINES. C. A. 2d Cir. Certiorari denied. *Arthur D. Condon* for petitioner. *Frederick F. Greenman* for respondent. Reported below: 200 F. 2d 199.

No. 538. MORRIS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Thos. H. Dent* and *W. J. Durham* for petitioner. *John Ben Shepperd,* Attorney General of Texas, and *J. Milton Richardson, Ed Reichelt* and *David B. Irons,* Assistant Attorneys General, for respondent. Reported below: —— Tex. Cr. R. ——, 251 S. W. 2d 731.

No. 646. COHEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, Joseph M. Howard* and *John R. Benney* for the United States. Reported below: 201 F. 2d 386.

No. 656. MILWAUKEE TOWNE CORP. *v.* LOEW'S INCORPORATED ET AL. C. A. 7th Cir. Motion for leave to file brief of Allied States Association of Motion Picture Exhibitors, as *amicus curiae,* denied. Certiorari denied. *Thomas C. McConnell* for petitioner. *Miles G. Seeley* for Loew's Incorporated et al., *Edward R. Johnston* for Paramount Pictures, Inc., *John F. Caskey* and *Francis E. Matthews* for Twentieth Century-Fox Film Corp., and *Vincent O'Brien* for Warner Bros. Pictures Distributing Corp. et al., respondents. Reported below: 201 F. 2d 19.

No. 591. Mallonee et al. *v.* Fahey et al.;

No. 592. Wilmington Federal Savings & Loan Association et al. *v.* Home Loan Bank Board et al.;

No. 593. Home Investment Co. *v.* Fahey et al.;

No. 594. Utley *v.* Fahey et al.;

No. 595. Wallis et al. *v.* Fahey et al.;

No. 596. Title Service Co., Trustee, *v.* Fahey et al.; and

No. 658. Willhoit *v.* Fahey et al. C. A. 9th Cir. Certiorari denied. Mr. Justice Clark took no part in the consideration or decision of these applications. *Wyckoff Westover* for Mallonee et al., and *Charles K. Chapman* for the Long Beach Federal Savings & Loan Association, petitioners in No. 591; *W. I. Gilbert, Jr.* for the Wilmington Federal Savings & Loan Association et al., petitioners in No. 592, and for petitioner in No. 594; *F. Henry NeCasek* for petitioner in No. 593; *Raymond Tremaine* for Wallis, and *Mr. NeCasek* for Turner, petitioners in No. 595; *Frederic A. Shaffer* and *Lyman B. Sutter* for petitioner in No. 596; and *Emmett E. Doherty* for petitioner in No. 658. *Acting Solicitor General Stern, Assistant Attorney General Burger, Samuel D. Slade* and *Herman Marcuse* for Fahey et al.; and *Sylvester Hoffmann* for the Federal Home Loan Bank of San Francisco, respondents. Reported below: 196 F. 2d 336; 200 F. 2d 420.

No. 422, Misc. Weldon *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 435, Misc. Hilderbrand *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 436, Misc. Lutz *v.* Illinois. Supreme Court of Illinois. Certiorari denied.

No. 431, Misc. SANDRO *v.* GRABER, CHIEF JUSTICE OF THE CRIMINAL COURT OF COOK COUNTY, ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 437, Misc. NORECROSS *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 438, Misc. HODGES *v.* HEINZE, WARDEN. District Court of Appeal of California, Third Appellate District. Certiorari denied.

No. 439, Misc. JOHNSON *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 444, Misc. HARMAN *v.* BURKE, WARDEN. Supreme Court of Pennsylvania, Middle District. Certiorari denied.

No. 447, Misc. SPEARS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 460, Misc. BRYANT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 481, Misc. DEWOLF *v.* WATERS, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. *C. A. Summers* for petitioner. Reported below: —— Okla. Cr. ——, 256 P. 2d 191.

No. 394, Misc. GRAZIANO *v.* CRIMINAL COURT OF COOK COUNTY, ILLINOIS. Petition for writ of certiorari to the Supreme Court of Illinois denied for the reason that application therefor was not made within the time provided by law. 28 U. S. C. § 2101 (c).

MAY 18, 1953.

Per Curiam Decision.

No. 723. WALES, DOING BUSINESS AS WALES TRUCKING CO., ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Texas. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *United States* v. *Tucker Truck Lines,* 344 U. S. 33; *United States* v. *Detroit Navigation Co.,* 326 U. S. 236, 241. *T. S. Christopher* for appellants. *Solicitor General Cummings* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; *R. E. Kidwell* for the Newsom Truck Line et al.; *Reagan Sayers* for Tex-O-Kan Transportation Co.; and *Ewell H. Muse, Jr.* for E. L. Farmer & Co. et al., appellees. Reported below: 108 F. Supp. 928.

Miscellaneous Orders.

No. —, Original. ARKANSAS *v.* TEXAS ET AL. A rule is ordered to issue, returnable within 40 days, requiring the defendants to show cause why leave to file the complaint should not be granted. *Tom Gentry,* Attorney General of Arkansas, *Kay Matthews,* Assistant Attorney General, and *E. J. Ball,* Special Assistant to the Attorney General, for complainant.

No. 454, Misc. WILLIAMS *v.* HUMPHREY, WARDEN, ET AL.;

No. 474, Misc. BANNING *v.* HUMPHREY, WARDEN; and

No. 487, Misc. BRINK *v.* CLAUDY, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (*See also No. 244, ante, p. 528.*)

No. 661. VORIS, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR, *v.* EIKEL ET AL., DOING BUSINESS AS SOUTHERN STEVEDORING & CONTRACTING CO., ET AL. C. A. 5th Cir. Certiorari granted. *Acting Solicitor General Stern* for petitioner. *John R. Brown* for respondents. Reported below: 200 F. 2d 724.

No. 691. FEDERAL POWER COMMISSION *v.* NIAGARA MOHAWK POWER CORP. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Acting Solicitor General Stern* for petitioner. *John W. Davis, Randall J. LeBoeuf, Jr., Lauman Martin* and *Taggart Whipple* for respondent. Reported below: 91 U. S. App. D. C. 395, 202 F. 2d 190.

No. 703. HOWELL CHEVROLET CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari granted. *Frederick A. Potruch* for petitioner. *Acting Solicitor General Stern* and *George J. Bott* filed a memorandum stating that respondent does not oppose the granting of a writ of certiorari. Reported below: 204 F. 2d 79.

Certiorari Denied.

No. 570. SULLIVAN ET AL. *v.* CALIFORNIA. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. *Kenyon C. Keller* for petitioners. *Edmund G. Brown,* Attorney General of California, *Frank W. Richards,* Assistant Attorney General, and *William E. James,* Deputy Attorney General, for respondent. Reported below: 113 Cal. App. 2d 510, 248 P. 2d 520.

No. 643. SCARLETT *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *R. Palmer Ingram* for

petitioner. *Edward D. E. Rollins,* Attorney General of Maryland, and *Kenneth C. Proctor,* Assistant Attorney General, for respondent. Reported below: —— Md. ——, 93 A. 2d 753.

No. 654. UNITED STATES *v.* MARR, ADMINISTRATRIX, ET AL. Court of Claims. Certiorari denied. *Acting Solicitor General Stern* for the United States. *Eugene Meacham* for Marr; and *Nicholas J. Chase* for Littlejohn, respondents. Reported below: 123 Ct. Cl. 474, 106 F. Supp. 204.

No. 671. WASHINGTON ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Frank D. Reeves, B. Dabney Fox* and *William B. Harris* for petitioners. *Acting Solicitor General Stern, Beatrice Rosenberg* and *Murry Lee Randall* for the United States. Reported below: 92 U. S. App. D. C. ——, 202 F. 2d 214.

No. 673. TERMINAL RAILROAD ASSOCIATION OF SAINT LOUIS *v.* BARNETT. C. A. 8th Cir. Certiorari denied. *Richard Wayne Ely* for petitioner. Reported below: 200 F. 2d 893.

No. 677. NEEMAN (FORMERLY CONKLIN) *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Lawrence R. Condon* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack, L. W. Post* and *John R. Benney* for respondent. Reported below: 200 F. 2d 560.

No. 678. WILLIAMS *v.* RANKIN, ARKANSAS COMMISSIONER OF STATE LANDS. Supreme Court of Arkansas. Certiorari denied. *Bruce T. Bullion* for petitioner. *Tom Gentry,* Attorney General of Arkansas, and *Lamar Wil-*

liamson, Special Assistant to the Attorney General, for respondent. Reported below: 221 Ark. —, 252 S. W. 2d 551.

No. 682. Cooper *v.* Peak et al. Supreme Court of Alabama. Certiorari denied. *Walter J. Knabe* for petitioner. *Douglas Arant* for Peak, respondent. Reported below: 258 Ala. 167, 61 So. 2d 62.

No. 686. Teamsters & Truck Drivers Local No. 164, American Federation of Labor, et al. *v.* Way Baking Co. Supreme Court of Michigan. Certiorari denied. *David Previant* and *George S. Fitzgerald* for petitioners. *Maxwell F. Badgley* and *David W. Kendall* for respondent. Reported below: 335 Mich. 478, 56 N. W. 2d 357.

No. 689. Halpert, Trustee in Bankruptcy, *v.* Engine Air Service, Inc. et al. C. A. 2d Cir. Certiorari denied. *Max Schwartz* for petitioner. *James G. Moore* for respondents. Reported below: 202 F. 2d 75.

No. 692. Allen *v.* United States. C. A. 9th Cir. Certiorari denied. *David A. Fall* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Paul A. Sweeney* and *Hubert H. Margolies* for the United States. Reported below: 201 F. 2d 263.

No. 701. Capitol Motor Courts et al. *v.* LeBlanc Corporation et al. C. A. 2d Cir. Certiorari denied. *George C. Levin, Sydney Krause* and *George J. Hirsch* for petitioners. *Robert G. Zeller* for Rosenthal, Trustee, *Carlos L. Israels* for the LeBlanc Corporation et al., and *Leonard G. Bisco* for Hailparn et al., respondents. Reported below: 201 F. 2d 356.

No. 709. FRANK ADAM ELECTRIC CO. *v.* FEDERAL ELECTRIC PRODUCTS CORP. C. A. 8th Cir. Certiorari denied. *John H. Sutherland* for petitioner. *Edwin Levisohn* and *Joseph J. Gravely* for respondent. Reported below: 200 F. 2d 210.

No. 713. MCINNIS, TRUSTEE, *v.* WEEKS ET AL. C. A. 6th Cir. Certiorari denied. *Jason L. Honigman* for petitioner. *Nelson S. Shapero* for respondents. Reported below: 200 F. 2d 611.

No. 714. RED TOP BREWING CO. *v.* MAZZOTTI ET AL. C. A. 2d Cir. Certiorari denied. *Jesse Climenko* for petitioner. *Walter B. Hall* for respondents. Reported below: 202 F. 2d 481.

No. 421, Misc. RILEY *v.* DEPARTMENT OF THE AIR FORCE ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Assistant Attorney General Burger, Paul A. Sweeney* and *Benjamin Forman* for respondents. Reported below: 91 U. S. App. D. C. 343, 201 F. 2d 203.

No. 433, Misc. MCKENNA *v.* HANN, WARDEN. Supreme Court of Nebraska. Certiorari denied.

No. 440, Misc. PICKWELL *v.* BURKE, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Reported below: 372 Pa. 450, 93 A. 2d 482.

No. 441, Misc. BURNS *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. *Tyrah Ernest Maholm* for petitioner. Reported below: 231 Ind. 563, 108 N. E. 2d 626.

No. 443, Misc. LIVINGSTON *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. *Hugo S. Sims, Jr.* for petitioner. *T. C. Callison,* Attorney General of South Carolina, *James S. Verner* and *William A. Dallis,* Assistant Attorneys General, and *Julian S. Wolfe* for respondent. Reported below: —— S. C. ——, 73 S. E. 2d 850.

No. 448, Misc. SPARKS *v.* CALIFORNIA ET AL. District Court of Appeal of California, Third Appellate District. Certiorari denied.

No. 452, Misc. VANDERWYDE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Rudolph Stand* for petitioner. *Frank S. Hogan* and *Charles W. Manning* for respondent. Reported below: 304 N. Y. 937, 110 N. E. 2d 882.

No. 453, Misc. JOHNSON *v.* PENNSYLVANIA. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. *Joseph K. Fornance* for petitioner. *C. Howard Harry, Jr.* for respondent. Reported below: 372 Pa. 266, 93 A. 2d 691.

No. 457, Misc. HARRISON *v.* EIDSON, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 459, Misc. STINGLEY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 414 Ill. 398, 111 N. E. 2d 548.

No. 461, Misc. REED *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 465, Misc. GRIFFIN *v.* ILLINOIS ET AL. Supreme Court of Illinois. Certiorari denied.

No. 472, Misc. MARRON *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 473, Misc. TUCKER *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied.

No. 476, Misc. JACKSON *v.* MORHOUS, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 477, Misc. CASCIO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 485, Misc. BRUNSTOUN ET AL. *v.* GROW ET AL. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 489, Misc. FRANEY *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 490, Misc. THOMPSON *v.* DYE, WARDEN. C. A. 3d Cir. Certiorari denied. *Louis C. Glasso* and *Zeno Fritz* for petitioner. Reported below: 203 F. 2d 429.

Rehearing Denied.

No. 98. WATWOOD *v.* STONE'S MERCANTILE AGENCY, INC., 344 U. S. 821. Motion for leave to file petition for rehearing denied.

No. 253. UNITED STATES *v.* CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, VIRGINIA, ET AL., *ante*, p. 344. Rehearing denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 138. COMMISSIONER OF INTERNAL REVENUE *v.* SMITH, *ante*, p. 278;

No. 205. UNITED STATES *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL., *ante*, p. 295;

No. 206. COUNTY OF MINERAL, NEVADA, *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL., *ante*, p. 295;

No. 446. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NUMBER 406, ET AL. *v.* POSTMA, DOING BUSINESS AS HAROLD F. POSTMA GRAVEL CO., ET AL., *ante*, p. 922;

No. 495. CALIFORNIA ELECTRIC POWER CO. *v.* FEDERAL POWER COMMISSION ET AL., *ante*, p. 934;

No. 581. VAHLBERG *v.* OKLAHOMA, *ante*, p. 923;

No. 618. FRIEDMAN ET AL. *v.* UNITED STATES, *ante*, p. 926;

No. 623. BINION *v.* UNITED STATES, *ante*, p. 935;

No. 72, Misc. SUKOWSKI *v.* RAGEN, WARDEN, *ante*, p. 928;

No. 334, Misc. MAUGHS *v.* ROYSTER, SUPERINTENDENT OF STATE PRISON FARM, *ante*, p. 912;

No. 336, Misc. JOHNSON *v.* UNITED STATES, *ante*, p. 928;

No. 368, Misc. GOODMAN ET AL. *v.* MCMILLAN, *ante*, p. 929; and

No. 388, Misc. HOURIHAN *v.* NATIONAL LABOR RELATIONS BOARD ET AL., *ante*, p. 930. Petitions for rehearing denied.

No. 345, Misc. RUSHKOWSKI *v.* BURKE, WARDEN, ET AL., *ante*, p. 919. Second petition for rehearing denied.

No. 475, Misc., October Term, 1951. AYERS *v.* PARRY ET AL., 343 U. S. 980. Rehearing denied.

MAY 25, 1953.

Per Curiam Decisions.

No. 694. GORMAN ET AL. *v.* CITY OF NEW YORK ET AL. Appeal from the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *James H. Tully* and *Truman H. Luhrman* for appellants. *Denis M. Hurley* and *W. Bernard Richland* for appellees. Reported below: 304 N. Y. 865, 109 N. E. 2d 881.

No. 711. POCKMAN *v.* LEONARD ET AL. Appeal from the Supreme Court of California. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted. *Wayne M. Collins* for appellant. Reported below: 39 Cal. 2d 676, 249 P. 2d 267.

Miscellaneous Orders.

No. 230. RADIO OFFICERS' UNION OF THE COMMERCIAL TELEGRAPHERS UNION, AFL, *v.* NATIONAL LABOR RELATIONS BOARD;

No. 301. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA ET AL.; and

No. 371. GAYNOR NEWS CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. These cases are ordered restored to the docket for reargument.

No. 482, Misc. HOLLOWAY *v.* MICHIGAN. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted.

No. 641. PARTMAR CORPORATION ET AL. *v.* PARAMOUNT PICTURES THEATRES CORP. ET AL. C. A. 9th Cir. Certiorari granted limited to the issue of dismissal of the counterclaims. *Russell Hardy, James Wallace Kemp* and *Henry Schaefer, Jr.* for petitioners. *Jackson W. Chance* for respondents. Reported below: 200 F. 2d 561.

No. 649. THEATRE ENTERPRISES, INC. *v.* PARAMOUNT FILM DISTRIBUTING CORP. ET AL. C. A. 4th Cir. Certiorari granted. *Edwin P. Rome* and *Sol C. Berenholtz* for petitioner. *J. Cookman Boyd, Jr.* for Loew's Incorporated, respondent. Reported below: 201 F. 2d 306.

No. 647. TOOLSON *v.* NEW YORK YANKEES, INC. ET AL. C. A. 9th Cir. Certiorari granted. *Gene M. Harris* for petitioner. *Norman S. Sterry* for respondents. Reported below: 200 F. 2d 198.

No. 668. KOWALSKI *v.* CHANDLER, COMMISSIONER OF BASEBALL, ET AL. C. A. 6th Cir. Certiorari granted. *Frederic A. Johnson* for petitioner. *Raymond T. Jackson, Benjamin F. Fiery* and *Louis F. Carroll* for respondents. Reported below: 202 F. 2d 413.

No. 674. CORBETT ET AL. *v.* CHANDLER, COMMISSIONER OF BASEBALL, ET AL. C. A. 6th Cir. Certiorari granted. *Frederic A. Johnson* for petitioners. *Raymond T. Jackson, Benjamin F. Fiery* and *Louis F. Carroll* for respondents. Reported below: 202 F. 2d 428.

No. 704. MADRUGA *v.* SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO. Supreme Court of California. Certiorari granted. *Thomas M. Hamilton* for petitioner. Reported below: 40 Cal. 2d 65, 251 P. 2d 1.

Certiorari Denied.

No. 496. QUINN, ADMINISTRATRIX, ET AL. *v.* SIMONDS ABRASIVE CO., SUCCESSOR TO ABRASIVE COMPANY OF PHILADELPHIA. C. A. 3d Cir. Certiorari denied. *Ernest Ray White* for petitioners. *Philip Price* for respondent. Reported below: 199 F. 2d 416.

No. 680. HARVEY ALUMINUM, INC. ET AL. *v.* AMERICAN CYANAMID CO. ET AL. C. A. 2d Cir. Certiorari denied. *Hyman I. Fischbach* for petitioners. *George S. Leisure* for the American Cyanamid Co. et al., and *Walter C. Lundgren* for the Reynolds Metals Co., respondents. Reported below: 203 F. 2d 105.

No. 690. UNITED STATES *v.* ROLLAND. C. A. 5th Cir. Certiorari denied. *Acting Solicitor General Stern* for the United States. Reported below: 200 F. 2d 678.

No. 708. FANCHON & MARCO, INC. *v.* PARAMOUNT PICTURES, INC. ET AL. C. A. 9th Cir. Certiorari denied. *Russell Hardy, James Wallace Kemp* and *Henry Schaefer, Jr.* for petitioner. *Homer I. Mitchell* for Paramount Pictures, Inc. et al., and *Gurney E. Newlin* and *Hudson B. Cox* for Twentieth Century-Fox Film Corporation et al., respondents.

No. 716. AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY, AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION NO. 1127, ET AL. *v.* SOUTHERN BUS LINES, INC. C. A. 5th Cir. Certiorari denied. *L. Barrett Jones* for petitioners. *Carl B. Callaway* for respondent. Reported below: 201 F. 2d 53.

No. 717. AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY, AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION NO. 1127, ET AL. *v.* SOUTHERN BUS

LINES, INC. C. A. 5th Cir. Certiorari denied. *L. Barrett Jones* for petitioners. *Carl B. Callaway* for respondent. Reported below: 201 F. 2d 53.

No. 719. SOBELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Howard N. Meyer* for petitioner. *Acting Solicitor General Stern, Beatrice Rosenberg* and *John R. Wilkins* for the United States. Reported below: 200 F. 2d 666.

No. 748. PATTERSON *v.* ANDERSON, ADMINISTRATRIX. Supreme Court of Appeals of Virginia. Certiorari denied. *Belford V. Lawson, Jr.* for petitioner. *Roy G. Allman* for respondent. Reported below: 194 Va. 557, 74 S. E. 2d 195.

No. 761. COMPANIA SUD-AMERICANA DE VAPORES, SUED HEREIN AS "CHILEAN LINE," ALSO KNOWN AS SUD-AMERICANA DE VAPORES OF VALPARAISO, *v.* MOLLICA. C. A. 2d Cir. Certiorari denied. *Edmund F. Lamb* for petitioner. *Jacob Rassner* for respondent. Reported below: 202 F. 2d 25.

No. 684. MARACHOWSKY *v.* UNITED STATES; and

No. 685. MARACHOWSKY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *William D. Donnelly* for petitioners. *Acting Solicitor General Stern, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 201 F. 2d 5.

No. 687. ROSENBERG ET AL. *v.* UNITED STATES. C. A. 2d Cir. Motions for leave to file briefs of National Lawyers Guild and Joseph Brainin et al., as *amici curiae,* denied. Certiorari denied. The order of the United States Court of Appeals of February 17, 1953, granting a stay of execution is vacated. MR. JUSTICE BLACK and

MR. JUSTICE FRANKFURTER referring to the positions they took when these cases were here last November, adhere to them. 344 U. S. 889. MR. JUSTICE DOUGLAS is of the opinion the petition for certiorari should be granted. *Emanuel H. Bloch* and *John F. Finerty* for petitioners. *Acting Solicitor General Stern, Beatrice Rosenberg* and *John R. Wilkins* for the United States. Reported below: 200 F. 2d 666.

No. 699. FORGIONE ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. *Paul M. Goldstein* and *Herman Moskowitz* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Burger, John R. Benney* and *Samuel D. Slade* for the United States and the United States Maritime Commission, respondents. Reported below: 202 F. 2d 249.

No. 721. SCHOLLA *v.* SCHOLLA ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Elizabeth R. Young* for petitioner. Reported below: 92 U. S. App. D. C. ——, 201 F. 2d 211.

No. 464, Misc. SCHOLLA *v.* SCHOLLA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Frederick A. Ballard* for petitioner. *Elizabeth R. Young* for respondent. Reported below: 92 U. S. App. D. C. ——, 201 F. 2d 211.

No. 450, Misc. SMITH *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 466, Misc. SNELL *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 467, Misc. PENNSYLVANIA EX REL. BAERCHUS *v.* BURKE, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 468, Misc. IN RE TINKOFF. Supreme Court of Illinois. Certiorari denied.

No. 475, Misc. LILYROTH *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 478, Misc. BYRD *v.* NEW YORK CENTRAL RAILROAD CO. ET AL. Court of Appeals of New York. Certiorari denied. *Melvel W. Snitow* and *Sydney Snitow* for petitioner. *Gerald E. Dwyer* and *C. Austin White* for the New York Central Railroad Company, respondent. Reported below: 304 N. Y. 769, 980, 109 N. E. 2d 75, 110 N. E. 2d 899.

No. 479, Misc. BERG *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 483, Misc. PETTUS *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied. Reported below: 41 Wash. 2d 567, 250 P. 2d 542.

No. 484, Misc. MOUNT OLIVE FIRE BAPTIZED HOLINESS CHURCH OF GOD OF THE AMERICAS ET AL. *v.* GROW ET AL. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 486, Misc. KOALSKA *v.* SWENSON, WARDEN. Supreme Court of Minnesota. Certiorari denied.

No. 488, Misc. HINKLE *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Reported below: 138 W. Va. ——, 75 S. E. 2d 223.

No. 491, Misc. CONWAY *v.* WATERS, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: —— Okla. Cr. ——, 256 P. 2d 189.

No. 493, Misc. HOTIANOVICH ET AL. *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 494, Misc. CROWDER *v.* BURKE, WARDEN, ET AL. Supreme Court of Wisconsin. Certiorari denied.

No. 497, Misc. HEATH *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

JUNE 1, 1953.

Per Curiam Decision.

No. 688. GORDON ET AL. *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals for consideration in the light of the Government's confession of error. *John S. Boyden* and *Allen H. Tibbals* for petitioners. *Acting Solicitor General Stern* for the United States. Reported below: 203 F. 2d 248.

Miscellaneous Orders.

No. 10, Original. ARIZONA *v.* CALIFORNIA ET AL. The answer to the bill of complaint is received and filed and leave is granted the complainant to reply thereto on or before September 1, next. The motion for leave to file brief of Colter Water Project Association, Inc., as *amicus curiae,* is denied.

No. 498. MARYLAND CASUALTY CO. ET AL. *v.* CUSHING ET AL. This case is ordered restored to the docket for reargument.

No. 513, Misc. DUNBAR *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Motion for leave to file petition for writ of certiorari denied.

Certiorari Granted. (*See also No. 688, supra.*)

No. 695. LOBER ET AL., EXECUTORS, *v.* UNITED STATES. Court of Claims. Certiorari granted. *David Stock* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Elizabeth B. Davis* for the United States. Reported below: 124 Ct. Cl. 44, 108 F. Supp. 731.

No. 715. WILKO *v.* SWAN ET AL., DOING BUSINESS AS HAYDEN STONE & CO., ET AL. C. A. 2d Cir. Certiorari granted. *Henry E. Mills* and *Richard H. Wels* for petitioner. *Leonard P. Moore* and *Francis E. Koch* for respondents. *Acting Solicitor General Stern, Roger S. Foster* and *Alexander Cohen* filed a brief for the Securities and Exchange Commission, as *amicus curiae,* urging that the petition for a writ of certiorari be granted. Reported below: 201 F. 2d 439.

Certiorari Denied. (*See also No. 513, Misc., supra.*)

No. 697. MCDOUGALL *v.* UNITED STATES CIVIL SERVICE COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Acting Solicitor General Stern, Assistant Attorney General Burger* and *Samuel D. Slade* for respondents. Reported below: 92 U. S. App. D. C. —, 202 F. 2d 361.

No. 706. MAYS *v.* BOWERS, COLLECTOR OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *John H. Lumpkin* and *John C. Bruton* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Helen Goodner* for respondent. Reported below: 201 F. 2d 401.

No. 722. JAMES *v.* SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d

Cir. Certiorari denied. *Robert Markewich* and *Herbert Monte Levy* for petitioner. *Acting Solicitor General Stern, Beatrice Rosenberg* and *Carl H. Imlay* for respondent. Reported below: 202 F. 2d 519.

No. 724. ESTEP ET UX. *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *James D. Lynch* for petitioners. Reported below: 413 Ill. 437, 109 N. E. 2d 762.

No. 727. ATWOOD ET AL. *v.* HUMBLE OIL & REFINING CO. ET AL. Supreme Court of Texas. Certiorari denied. *William C. Wines* and *Horace A. Young* for petitioners. *R. E. Seagler, Felix A. Raymer* and *Rex G. Baker* for respondents. Reported below: —— Tex. ——, 253 S. W. 2d 656.

No. 729. WILLIAMSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *John C. Bruton* and *H. Hayne Crum* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Helen Goodner* for respondent. Reported below: 201 F. 2d 564.

No. 735. ROMINE, ADMINISTRATOR, *v.* SOUTHERN PACIFIC CO. Supreme Court of Arizona. Certiorari denied. *Gerald Jones* and *Fred W. Fickett* for petitioner. *Harold C. Warnock* for respondent. Reported below: 75 Ariz. 98, 251 P. 2d 908.

No. 463, Misc. UNITED STATES EX REL. MILLS *v.* DILWORTH, DISTRICT ATTORNEY, ET AL. C. A. 3d Cir. and the United States District Court for the Eastern District of Pennsylvania. Certiorari denied. *David Levinson* and *Ralph E. Powe* for petitioner. *Richardson Dilworth, pro se,* respondent.

Rehearing Denied.

No. 303. CALMAR STEAMSHIP CORP. *v.* SCOTT ET AL., *ante*, p. 427;

No. 494. MILLER *v.* GUTHRIE ET AL., *ante*, p. 918;

No. 602. THEODORAKIS *v.* XILAS ET AL., *ante*, p. 936; and

No. 642. HOOD ET AL. *v.* UNITED STATES, *ante*, p. 941. Petitions for rehearing denied.

No. 372, Misc. SEVERA *v.* NEW JERSEY, *ante*, p. 929. Second petition for rehearing denied.

No. 386, Misc. WATERMAN *v.* NEW YORK; and

No. 387, Misc. WATERMAN *v.* SCHATTEN ET AL., *ante*, p. 945. Petition for rehearing and for other relief denied.

No. 398, Misc. MILLER *v.* STANDARD OIL CO., *ante*, p. 945; and

No. 430, Misc. DARRIN *v.* CAPITAL TRANSIT CO., *ante*, p. 944. Petitions for rehearing denied.

JUNE 8, 1953.

Per Curiam Decision.

No. 818. ROBINSON *v.* BARROW-PENN & CO., INC. Appeal from the Supreme Court of Appeals of Virginia. *Per Curiam:* The appeal is dismissed for the want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. *Thomas J. Surface* and *R. H. McNeill* for appellant. *Frank W. Rogers* for appellee. Reported below: 194 Va. 632, 74 S. E. 2d 175.

Miscellaneous Orders.

No. 8. BROWN ET AL. *v.* BOARD OF EDUCATION OF TOPEKA ET AL.;

No. 101. BRIGGS ET AL. *v.* ELLIOTT ET AL., MEMBERS OF BOARD OF TRUSTEES OF SCHOOL DISTRICT #22, ET AL.;

No. 191. DAVIS ET AL. *v.* COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY ET AL.;

No. 413. BOLLING ET AL. *v.* SHARPE ET AL.; and

No. 448. GEBHART ET AL. *v.* BELTON ET AL.

Each of these cases is ordered restored to the docket and is assigned for reargument on Monday, October 12, next. In their briefs and on oral argument counsel are requested to discuss particularly the following questions insofar as they are relevant to the respective cases:

1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?

2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment

(*a*) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or

(*b*) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

3. On the assumption that the answers to questions 2 (*a*) and (*b*) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

(*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption on which questions 4 (*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (*b*),

(*a*) should this Court formulate detailed decrees in these cases;

(*b*) if so, what specific issues should the decrees reach;

(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

The Attorney General of the United States is invited to take part in the oral argument and to file an additional brief if he so desires.

No. 523, Misc. GARTNER *v.* OVERHOLSER, SUPERINTENDENT, ST. ELIZABETHS HOSPITAL. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted.

No. 696. UNITED STATES *v.* MORGAN. C. A. 2d Cir. Certiorari granted. *Acting Solicitor General Stern* for the United States. Reported below: 202 F. 2d 67.

No. 744. AVONDALE MARINE WAYS, INC. *v.* HENDERSON, DEPUTY COMMISSIONER, ET AL. C. A. 5th Cir. Certiorari granted. *Frank A. Bull* and *Ashton Phelps* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Hubert H. Margolies* and *Paul A. Sweeney* filed a memorandum for Henderson, respondent. Reported below: 201 F. 2d 437.

Certiorari Denied. (*See also No. 818, supra.*)

No. 720. CHARLES ET AL. *v.* CITY OF CHICAGO. Supreme Court of Illinois. Certiorari denied. *LeRoy G. Charles* for petitioners. *John J. Mortimer* and *L. Louis Karton* for respondent. Reported below: 413 Ill. 428, 109 N. E. 2d 790.

No. 725. SEDLACEK *v.* HANN, WARDEN. Supreme Court of Nebraska. Certiorari denied. Reported below: 156 Neb. 340, 56 N. W. 2d 138.

No. 728. SINCLAIR *v.* UNITED STATES. Court of Claims. Certiorari denied. *Edward L. P. O'Connor* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger* and *Samuel D. Slade* for the United States. Reported below: 124 Ct. Cl. 182, 109 F. Supp. 529.

No. 734. ESTATE OF COCHRAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Eli Freed* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Fred E. Youngman* for respondent. Reported below: 201 F. 2d 365.

No. 737. TOOR ET AL. *v.* WESTOVER. C. A. 9th Cir. Certiorari denied. *Leo V. Silverstein* for petitioners. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *S. Dee Hanson* for respondent. Reported below: 200 F. 2d 713.

No. 743. UNITED STATES EX REL. SPINELLA *v.* SAVORETTI, DISTRICT DIRECTOR OF UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. *Edward J. Hayes* for petitioner. *Acting Solicitor General Stern, Beatrice Rosenberg* and *John R. Wilkins* for respondent. Reported below: 201 F. 2d 364.

No. 745. ALLEN *v.* NATIONAL TUBE CO. Supreme Court of Ohio. Certiorari denied. *Jacob Levin* for petitioner. *Frank Harrison* for respondent. Reported below: 158 Ohio St. 584, 110 N. E. 2d 488.

No. 660. VICTRYLITE CANDLE CO. *v.* BRANNAN, SECRETARY OF AGRICULTURE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Benson, present Secretary of Agriculture, substituted for Brannan. Brownell, present Attorney General, substituted for McGranery. Certiorari denied. *Edward Brodkey, Frank E. Gettleman, Arthur Gettleman* and *Albert Brick* for petitioner. *Acting Solicitor General Stern* for Benson et al., respondents. Reported below: 91 U. S. App. D. C. 386, 201 F. 2d 206.

No. 718. JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE ET AL. *v.* UNITED STATES ET AL.; and

No. 774. FEDERAL MARITIME BOARD *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. The motions in No. 718 for a stay and to advance, and for leave to file brief of A/S J. Lud-

wig Mowinckels Rederi and others, as *amici curiae,* are denied. Certiorari denied. *Herman Goldman, Elkan Turk* and *George F. Galland* for petitioners in No. 718. *Francis T. Greene* and *Joseph A. Klausner* for petitioner in No. 774. *Acting Solicitor General Stern* and *Ralph S. Spritzer* for the United States, respondent. *John J. O'Connor, Thurman Arnold, Paul A. Porter* and *William L. McGovern* for Isbrandtsen Co., Inc., respondent.

No. 732. De Vita *v.* New Jersey; and

No. 733. Grillo *v.* New Jersey. Supreme Court of New Jersey. Certiorari denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion that the petitions should be granted. *Harry Kay* for petitioner in No. 732. *George R. Sommer* for petitioner in No. 733. *Edward Gaulkin* and *C. William Caruso* for respondent. Reported below: 11 N. J. 173, 93 A. 2d 328.

No. 740. Cly *v.* United States. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Acting Solicitor General Stern, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 201 F. 2d 806.

No. 788. Lopez *v.* American-Hawaiian Steamship Co. C. A. 3d Cir. Certiorari denied. *Paul M. Goldstein* and *Herman Moskowitz* for petitioner. *Thomas E. Byrne, Jr.* for respondent. Reported below: 201 F. 2d 418.

No. 462, Misc. Tatum *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 499, Misc. Pennsylvania ex rel. Elliott *v.* Baldi, Superintendent, Philadelphia County Prison.

Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Petitioner *pro se*. *Randolph C. Ryder* for respondent. Reported below: 373 Pa. 489, 96 A. 2d 122.

No. 501, Misc. BOZELL *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 2d 711.

No. 502, Misc. MALLOW *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 504, Misc. UNITED STATES EX REL. MORGAN *v.* MARTIN, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *Herman N. Harcourt* and *Raymond B. Madden,* Assistant Attorneys General, for respondent. Reported below: 202 F. 2d 67.

No. 507, Misc. MCHARNESS *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. *Walter A. Raymond* for petitioner. Reported below: 255 S. W. 2d 826.

No. 508, Misc. LAMARR *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 509, Misc. BERNOVICH *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 512, Misc. GILBERT *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 519, Misc. STALEY *v.* MAYO, STATE PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied.

No. 522, Misc. VAN DYKE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 414 Ill. 251, 111 N. E. 2d 165.

No. 530, Misc. HERSHEY *v.* PENNSYLVANIA BOARD OF PAROLE ET AL. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

Rehearing Denied.

No. 341. POULOS *v.* NEW HAMPSHIRE, *ante*, p. 395;

No. 488. CALLANAN ROAD IMPROVEMENT CO. *v.* UNITED STATES ET AL., *ante*, p. 507; and

No. 508. UNITED STATES *v.* INTERNATIONAL BUILDING CO., *ante*, p. 502. Petitions for rehearing denied.

No. 566. HARRISON, COLLECTOR OF INTERNAL REVENUE, *v.* BOHNEN, EXECUTOR, *ante*, p. 946. Rehearing denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 591. MALLONEE ET AL. *v.* FAHEY ET AL.;

No. 592. WILMINGTON FEDERAL SAVINGS & LOAN ASSOCIATION ET AL. *v.* HOME LOAN BANK BOARD ET AL.;

No. 593. HOME INVESTMENT CO. *v.* FAHEY ET AL.;

No. 594. UTLEY, RECEIVER, *v.* FAHEY ET AL.;

No. 595. WALLIS ET AL. *v.* FAHEY ET AL.;

No. 596. TITLE SERVICE CO., TRUSTEE, *v.* FAHEY ET AL.; and

No. 658. WILLHOIT *v.* FAHEY ET AL., *ante*, p. 952. Rehearing denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application.

JUNE 15, 1953.

Per Curiam Decisions. (*See also No. 235, Misc., 346 U. S. 270.*)

No. 527. UNITED STATES *v.* KLINGER ET AL. Certiorari, 345 U. S. 921, to the United States Court of Appeals for the Second Circuit. Argued May 5, 1953. Decided June 15, 1953. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE JACKSON took no part in the consideration or decision of this case. *Beatrice Rosenberg* argued the cause for the United States. With her on the brief were *Acting Solicitor General Stern* and *Carl H. Imlay. Louis Bender,* acting under appointment by the Court, argued the cause and filed a brief for respondents. Reported below: 199 F. 2d 645.

No. 549. BRIDGES *v.* UNITED STATES. 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 reversed and the case is remanded to the District Court with directions to dismiss the proceedings. THE CHIEF JUSTICE, MR. JUSTICE REED, and MR. JUSTICE MINTON dissent for the reasons given in MR. JUSTICE REED's dissenting opinion in *Bridges* v. *United States,* 346 U. S. 209, decided this day. MR. JUSTICE JACKSON and MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Telford Taylor* and *Norman Leonard* for petitioner. *Solicitor General Cummings, Beatrice Rosenberg* and *John R. Wilkins* for the United States. Reported below: 199 F. 2d 845.

No. 750. UNITED STATES *v.* BERMAN ET AL. Appeal from the United States District Court for the Northern District of California. *Per Curiam:* Judgment reversed.

United States v. *Grainger,* 346 U. S. 235, decided this day. MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, and MR. JUSTICE DOUGLAS, adopting the reasoning in the opinion of Judge Learned Hand in *United States* v. *Klinger,* 199 F. 2d 645, would affirm the District Court in dismissing this indictment. MR. JUSTICE JACKSON took no part in the consideration or decision of this case. *Acting Solicitor General Stern* for the United States.

No. 676. SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC. ET AL. *v.* BROCK, DIRECTOR OF THE DEPARTMENT OF AGRICULTURE OF CALIFORNIA, ET AL. Appeal from the Supreme Court of California; and

No. 757. DELAY ET AL. *v.* CALIFORNIA. Appeal from the Superior Court in and for the County of Los Angeles, California. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for the want of a substantial federal question. *Edward S. Shattuck* for appellants. *Edmund G. Brown,* Attorney General of California, and *Frank J. Mackin,* Assistant Attorney General, for appellees. *John F. Hassler,* Deputy Attorney General, was also of counsel for appellees in No. 676. Reported below: No. 676, 39 Cal. 2d 813, 249 P. 2d 545.

No. 800. DART TRANSIT CO. *v.* INTERSTATE COMMERCE COMMISSION ET AL. Appeal from the United States District Court for the District of Minnesota. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion probable jurisdiction should be noted and the case set down for oral argument. *Lee Loevinger* and *David W. Louisell* for appellant. *Acting Solicitor General Stern* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission, appellees. Reported below: 110 F. Supp. 876.

Order Modifying and Supplementing Decree.

No. 5, Original. NEBRASKA *v.* WYOMING (COLORADO, IMPLEADED DEFENDANT, AND THE UNITED STATES, INTERVENOR).

The joint motion for approval of a stipulation and to modify and supplement the decree is granted and the following order is entered in compliance with the stipulation:

The parties to this cause having filed a stipulation, dated January 14, 1953, and a joint motion for approval of the stipulation and to modify and supplement the decree entered on October 8, 1945 (325 U. S. 665) and the Court being fully advised:

The stipulation dated January 14, 1953, is approved; and

IT IS ORDERED that the decree of October 8, 1945, is hereby modified and supplemented as follows:

1. In paragraph I (a) of the decree the figure "145,000" is substituted for the figure "135,000."

2. Paragraph XIII is amended by striking the first sentence and substituting for it the following:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief, except that for a period of five years from and after June 15, 1953, the State of Colorado shall not institute any proceedings for the amendment of the decree or for further relief. In the event that within said period of five years any other party applies for an amendment of the decree or for further relief, then the State of Colorado may assert any and all rights, claims or defenses available to it under the decree as amended.

3. Two new paragraphs, as follows, are added to the decree:

> XVI. Whatever claims or defenses the parties or any of them may have in respect to the application,

interpretation or construction of the Act of August 9, 1937 (50 Stat. 564–595) shall be determined without prejudice to any party arising because of any development of the Kendrick Project occurring subsequent to October 1, 1951.

XVII. When Glendo Dam and Reservoir are constructed, the following provisions shall be effective:

(a) The construction and operation of the Glendo Project shall not impose any demand on areas at or above Seminoe Reservoir which will prejudice any rights that the States of Colorado or Wyoming might have to secure a modification of the decree permitting an expansion of water uses in the natural basin of the North Platte River in Colorado or above Seminoe Reservoir in Wyoming.

(b) The construction and operation of Glendo Reservoir shall not affect the regimen of the natural flow of the North Platte River above Pathfinder Dam. The regimen of the natural flow of the North Platte River below Pathfinder Dam shall not be changed, except that not more than 40,000 acre feet of the natural flow of the North Platte River and its tributaries which cannot be stored in upstream reservoirs under the provisions of this decree may be stored in the Glendo Reservoir during any water year, in addition to evaporation losses on such storage, and, further, the amount of such storage water that may be held in storage at any one time, including carryover storage, shall never exceed 100,000 acre feet. Such storage water shall be disposed of in accordance with contracts to be hereafter executed, and it may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent

of 25,000 acre feet annually, and for the irrigation of lands in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre feet annually, provided that it shall not be used as a substitute for storage water contracted for under any existing permanent arrangements. The above limitation on storage of natural flow does not apply to flood water which may be temporarily stored in any capacity allocated for flood control in the Glendo Reservoir, nor to water originally stored in Pathfinder Reservoir which may be temporarily re-stored in Glendo Reservoir after its release from Pathfinder and before its delivery pursuant to contract; nor to water which may be impounded behind Glendo Dam, as provided in the Bureau of Reclamation Definite Plan Report for the Glendo Unit dated December 1952, for the purpose of creating a head for the development of water power.

(c) Paragraph III of the decree is amended to read as follows:

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir;
Fourth, Alcova Reservoir; and
Fifth, Glendo Reservoir;

Provided, however that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

Storage rights of Glendo Reservoir shall be subject to the provisions of this paragraph III.

(d) Paragraph IV of the decree is amended to read as follows:

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said five reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

(e) Paragraph V of the decree is amended to read as follows:

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A and the stipulation of the parties dated January 14, 1953, and filed on January 30, 1953:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Stand-

ard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Glendo and Guernsey Reservoirs.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Loss—Second Feet May	June	July	Aug.	Sept.
Alcova to Glendo Reservoir	6,740	43	61	70	61	45
Guernsey Reservoir to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Glendo Dam to head of Guernsey Reservoir (area 680 acres) because this area is less than submerged area of original river bed (940

acres) in Glendo Reservoir and is, therefore, considered as off-set.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

Clarence S. Beck, Attorney General, and *Bert L. Overcash,* Assistant Attorney General, for the State of Nebraska, *Howard B. Black,* Attorney General, for the

State of Wyoming, *Duke W. Dunbar,* Attorney General, *H. Lawrence Hinkley,* Deputy Attorney General, and *Jean S. Breitenstein* for the State of Colorado, and *Acting Solicitor General Stern* for the United States.

Miscellaneous Orders.

No. 11, Original. MISSISSIPPI *v.* LOUISIANA. The motion for leave to file a bill of complaint is granted and process is ordered to issue returnable within 60 days. *J. P. Coleman,* Attorney General of Mississippi, and *G. H. Brandon* for plaintiff. *Fred S. LeBlanc,* Attorney General of Louisiana, *W. C. Perrault,* First Assistant Attorney General, *Carroll Buck,* Second Assistant Attorney General, and *John L. Madden,* Assistant Attorney General, for defendant.

No. ——. NORBACK ET AL. *v.* GRAND CENTRAL AIRCRAFT CO. The application for a stay of the interlocutory injunction is denied. THE CHIEF JUSTICE and MR. JUSTICE BURTON are of the opinion the application should be granted. MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Acting Solicitor General Stern* for Norback et al. *Dana Latham* for respondent.

No. 287. POLIZZI *v.* COWLES MAGAZINES, INC. The petition for clarification of the opinion is denied. MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 787. MISSISSIPPI RIVER FUEL CORP. *v.* FEDERAL POWER COMMISSION. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit dismissed on motion of counsel for the petitioner. *William A. Dougherty, James Lawrence White* and *Charles E. McGee* for petitioner. Reported below: 202 F. 2d 899.

No. ——. ROSENBERG ET AL. *v.* UNITED STATES. An application for stay of execution was filed herein on June 12, 1953. It was referred to MR. JUSTICE JACKSON, the appropriate Circuit Justice. MR. JUSTICE JACKSON referred it to the Court for consideration and action, with the recommendation "that it be set for oral hearing on Monday, June 15, 1953, at which time the parties have agreed to be ready for argument."

Upon consideration of the recommendation, the Court declined to hear oral argument on the application.

MR. JUSTICE FRANKFURTER and MR. JUSTICE BURTON, agreeing with MR. JUSTICE JACKSON'S recommendation, believe that the application should be set for hearing on Monday, June 15, 1953.

Thereupon, the Court gave consideration to the application for the stay, and denies it, MR. JUSTICE BURTON joining in such denial.

MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON, believing that the application for a stay should not be acted upon without a hearing before the full Court, do not agree that the stay should be denied.

MR. JUSTICE BLACK is of the opinion that the Court should grant a rehearing and a stay pending final disposition of the case. But since a sufficient number do not vote for a rehearing, he is willing to join those who wish to hear argument on the question of a stay.

MR. JUSTICE DOUGLAS would grant a stay and hear the case on the merits, as he thinks the petition for certiorari and the petition for rehearing present substantial questions. But since the Court has decided not to take the case, there would be no end served by hearing oral argument on the motion for a stay. For the motion presents no new substantial question not presented by the petition for certiorari and by the petition for rehearing.

Emanuel H. Bloch and *John F. Finerty* for petitioners. *Acting Solicitor General Stern* for the United States.

No. 545, Misc. KADO *v.* PENNSYLVANIA ET AL. Petition for writ of certiorari to the Supreme Court of Pennsylvania, Western District, denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 458, Misc. WORK *v.* LOONEY;
No. 516, Misc. IN RE JERONIS;
No. 517, Misc. DEL'MARMOL *v.* HEINZE, WARDEN;
No. 528, Misc. EX PARTE BAUMGARTEN;
No. 531, Misc. WHITING *v.* LOONEY, WARDEN;
No. 533, Misc. SULLIVAN *v.* TEETS, WARDEN;
No. 539, Misc. SWANSON *v.* HANN, WARDEN; and
No. 544, Misc. BURKHOLDER *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

No. 548, Misc. SEVERA *v.* MCCORKLE, ACTING WARDEN. Motion for leave to file petition for writ of habeas corpus and for other relief denied.

No. 506, Misc. CROSS *v.* SUPREME COURT OF CALIFORNIA. Motion for leave to file petition for writ of mandamus denied.

No. 527, Misc. IN RE WILSON. Application denied.

Certiorari Granted. (*See also No. 549, supra, and No. 235, Misc., 346 U. S. 270.*)

No. 535. POPE & TALBOT, INC. *v.* HAWN ET AL. C. A. 3d Cir. Certiorari granted. *Mark D. Alspach* for petitioner. *Charles Lakatos* for Hawn; and *Thomas F. Mount* and *Joseph W. Henderson* for Haenn Ship Ceiling & Refitting Corporation, respondents. Reported below: 198 F. 2d 800.

No. 764. PEREIRA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *Charles L. Sylvester* and *Wil-*

liam H. Fryer for petitioners. *Acting Solicitor General Stern* and *Beatrice Rosenberg* for the United States. Reported below: 202 F. 2d 830.

No. 765. UNITED STATES *v.* DEBROW;
No. 766. UNITED STATES *v.* WILKINSON;
No. 767. UNITED STATES *v.* BRASHIER;
No. 768. UNITED STATES *v.* ROGERS; and
No. 769. UNITED STATES *v.* JACKSON. C. A. 5th Cir. Certiorari granted. *Acting Solicitor General Stern* for the United States. *W. S. Henley, R. W. Thompson, Jr., Albert Sidney Johnston, Jr., Ben F. Cameron, W. W. Dent* and *T. J. Wills* for respondents. Reported below: 203 F. 2d 699.

No. 773. GARNER ET AL., TRADING AS CENTRAL STORAGE & TRANSFER CO., *v.* TEAMSTERS, CHAUFFEURS, AND HELPERS LOCAL UNION No. 776 (A. F. L.) ET AL. Supreme Court of Pennsylvania, Middle District. Certiorari granted. *James H. Booser* for petitioners. Reported below: 373 Pa. 19, 94 A. 2d 893.

No. 777. DICKINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Hayden C. Covington* for petitioner. *Acting Solicitor General Stern, Beatrice Rosenberg* and *Carl Imlay* for the United States. Reported below: 203 F. 2d 336.

No. 784. NEVADA AND NEW YORK *v.* STACHER. Seventh Judicial District Court in and for the County of White Pine, Nevada. Certiorari granted. *William T. Matthews,* Attorney General, and *Jack Streeter* and *George M. Dickerson,* Special Assistant Attorneys General, for the State of Nevada, and *Nathaniel L. Goldstein,* Attorney General, *Wendell P. Brown,* Solicitor General,

Paul W. Williams, Special Assistant Attorney General, and *Edward L. Ryan,* Assistant Attorney General, for the State of New York, petitioners.

No. 480, Misc. WALDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted. Petitioner *pro se. Acting Solicitor General Stern* for the United States. Reported below: 201 F. 2d 715.

Certiorari Denied. (*See also No. 545, Misc., supra.*)

No. 506. ACCINANTO, LTD. ET AL. *v.* A/S J. LUDWIG MOWINCKELS REDERI ET AL. C. A. 4th Cir. Certiorari denied. *Henry N. Longley* and *George W. P. Whip* for petitioners. *Harold S. Deming, William A. Grimes* and *Wharton Poor* for respondents. Reported below: 199 F. 2d 134.

No. 631. CONTINENTAL CASUALTY CO. *v.* THE BENNY SKOU. C. A. 4th Cir. Certiorari denied. *R. Arthur Jett* for petitioner. *Thos. M. Johnston* for respondent. Reported below: 200 F. 2d 246.

No. 707. SCOTT PUBLISHING CO. ET AL. *v.* GAFFNEY. Supreme Court of Washington. Certiorari denied. *J. Kennard Cheadle* for petitioners. Reported below: 41 Wash. 2d 191, 248 P. 2d 390.

No. 738. SPIKINGS *v.* WABASH RAILROAD CO. C. A. 7th Cir. Certiorari denied. *William C. Wines* for petitioner. *Elmer W. Freytag* for respondent. Reported below: 201 F. 2d 492.

No. 741. ATLANTIC COAST LINE RAILROAD CO. *v.* BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, ET AL. C. A. 4th Cir. Certiorari denied. *Charles Cook*

Howell, M. V. Barnhill, Jr., F. S. Spruill, Donald R. Richberg and *Delmar W. Holloman* for petitioner. *Clarence M. Mulholland* and *Edward J. Hickey, Jr.* for respondents. Reported below: 201 F. 2d 36.

No. 746. SCHNEIDER *v.* GALLAGHER, SHERIFF. Supreme Court of California. Certiorari denied. *Lloyd E. McMurray* for petitioner.

No. 751. PEARCE *v.* PREVIEWS, INCORPORATED. C. A. 5th Cir. Certiorari denied. *Claude Pepper* for petitioner. *Manley P. Caldwell, Madison F. Pacetti* and *H. Elmo Robinson* for respondent. Reported below: 201 F. 2d 385.

No. 752. YGLESIAS *v.* GULFSTREAM PARK RACING ASSOCIATION, INC. C. A. 5th Cir. Certiorari denied. *Claude Pepper* and *J. M. Flowers* for petitioner. *William Gresham Ward* for respondent. Reported below: 201 F. 2d 817.

No. 753. YGLESIAS *v.* GULFSTREAM PARK RACING ASSOCIATION, INC. C. A. 5th Cir. Certiorari denied. *Claude Pepper* and *J. M. Flowers* for petitioner. *William Gresham Ward* for respondent. Reported below: 201 F. 2d 819.

No. 754. POLLOCK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Llewellyn A. Luce* and *Walter H. Maloney* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Joseph M. Howard* for the United States. Reported below: 202 F. 2d 281.

No. 755. REPORTER PUBLISHING CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *James M. Barnes* for petitioner. *Acting*

Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack and *Cecelia H. Goetz* for respondent. Reported below: 201 F. 2d 743.

No. 756. BASCOM LAUNDER CORP. ET AL. *v.* TELECOIN CORPORATION. C. A. 2d Cir. Certiorari denied. *Arnold Malkan* and *Cyrus Austin* for petitioners. *Clarence Fried* for respondent. Reported below: 204 F. 2d 331.

No. 759. SKOVGAARD *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Claude L. Dawson* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Burger, Paul A. Sweeney* and *Hubert H. Margolies* for the United States. Reported below: 92 U. S. App. D. C. —, 202 F. 2d 363.

No. 760. TRENTON CHEMICAL CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Selden S. Dickinson* and *Glenn D. Curtis* for petitioner. *Acting Solicitor General Stern, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 201 F. 2d 776.

No. 770. UNITED STATES *v.* THOMAS;

No. 771. UNITED STATES *v.* RAMSEY; and

No. 772. UNITED STATES *v.* FRAME. Court of Claims. Certiorari denied. *Acting Solicitor General Stern* for the United States. *Paul R. Harmel* for respondents in Nos. 770 and 771, and *Thomas H. King* for respondent in No. 772. Reported below: Nos. 770, 771 and 772, 124 Ct. Cl. 557, 830, 833; No. 771, 107 F. Supp. 957.

No. 775. BRIER CREEK HUNTING & FISHING CLUB, INC. *v.* SCREVEN COUNTY ET AL. C. A. 5th Cir. Certiorari denied. *Benjamin E. Pierce* and *W. Inman Curry* for petitioner. Reported below: 202 F. 2d 369.

No. 776. INGRAM, ADMINISTRATIVE OFFICER AND COUNTY JUDGE OF CRITTENDEN COUNTY, ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Joe C. Barrett* for petitioners. *Acting Solicitor General Stern, Acting Assistant Attorney General Williams* and *Roger P. Marquis* for the United States. Reported below: 203 F. 2d 91.

No. 780. SCHALLERER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Isaac I. Bender* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Hilbert P. Zarky* for respondent. Reported below: 203 F. 2d 100.

No. 781. PAINTERS DISTRICT COUNCIL No. 6, BROTHERHOOD OF PAINTERS, DECORATORS, AND PAPERHANGERS OF AMERICA, AFL, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Mortimer Riemer* and *Samuel H. Jaffee* for petitioners. *Acting Solicitor General Stern, George J. Bott, David P. Findling, Dominick L. Manoli* and *Owsley Vose* for respondent. Reported below: 202 F. 2d 957.

No. 783. RATETT *v.* KAPLAN, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari denied. *Archibald Palmer* for petitioner. *Benjamin Weintraub* and *Harris Levin* for respondent. Reported below: 201 F. 2d 889.

No. 786. JACK SMITH BEVERAGES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *J. Adrian Rosenburg* for petitioner. *Acting Solicitor General Stern, George J. Bott, David P. Findling, Dominick L. Manoli* and *Frederick U. Reel* for respondent. Reported below: 202 F. 2d 100.

No. 791. NEAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Hayden C. Covington* for petitioner. *Acting Solicitor General Stern* and *Beatrice Rosenberg* for the United States. Reported below: 203 F. 2d 111.

No. 792. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Hayden C. Covington* for petitioner. *Acting Solicitor General Stern, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 203 F. 2d 853.

No. 793. WISMILLER *v.* ESTATE OF GARRETT. Supreme Court of Pennsylvania, Eastern District. Certiorari denied. Petitioner *pro se*. *Robert E. Woodside,* Attorney General, and *Harry F. Stambaugh* for the State of Pennsylvania, opposing the petition for writ of certiorari. Reported below: 372 Pa. 438, 94 A. 2d 357.

No. 808. PATTISON ET AL. *v.* UNION CENTRAL LIFE INSURANCE CO. Supreme Court of Ohio. Certiorari denied. *Sol Goodman* for petitioners. *Frank F. Dinsmore* and *Virgil D. Parish* for respondent. Reported below: 158 Ohio St. 563, 110 N. E. 2d 487.

No. 812. GENERAL MOTORS CORP. ET AL. *v.* ACKERMANS. C. A. 4th Cir. Certiorari denied. *Duward C. Staley* and *John H. Bruninga* for petitioners. *William D. Hall* for respondent. Reported below: 202 F. 2d 642.

No. 816. CANTRALL ET AL., DOING BUSINESS AS J. R. CANTRALL CO., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Maurice J. Nicoson* for petitioners. *Acting Solicitor General Stern, George J. Bott, David P. Findling, Dominick L. Manoli* and *Frederick U. Reel* for respondent. Reported below: 201 F. 2d 853.

No. 820. U. S. A. C. TRANSPORT, INC., ALSO DOING BUSINESS AS U. S. AIRPLANE TRANSPORT, INC., *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *J. Ninian Beall* for petitioner. *Acting Solicitor General Stern* and *Daniel M. Friedman* for the United States. Reported below: 203 F. 2d 878.

No. 821. UNITED STATES EX REL. BECK *v.* NEELLY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Albert W. Dilling* and *Kirkpatrick W. Dilling* for petitioner. *Acting Solicitor General Stern, Beatrice Rosenberg* and *Felicia Dubrovsky* for respondent. Reported below: 202 F. 2d 221.

No. 825. REILLY *v.* CHICAGO & NORTH WESTERN RAILWAY CO. ET AL. C. A. 7th Cir. Certiorari denied. *Edward J. Bradley* for petitioner. *Otis Lowell Hastings* and *Drennan J. Slater* for the Chicago & North Western Railway Co.; and *Louis Johnson* and *Stephen Ailes* for the Baltimore & Ohio Chicago Terminal Railroad Company, respondents. Reported below: 201 F. 2d 473.

No. 826. GREAT WESTERN FOOD DISTRIBUTORS, INC. ET AL. *v.* BENSON (SUCCESSOR TO BRANNAN), SECRETARY OF AGRICULTURE, ET AL. C. A. 7th Cir. Certiorari denied. *George L. Siegel* and *Bernard Tomson* for petitioners. *Acting Solicitor General Stern, Ralph S. Spritzer, Karl D. Loos* and *Neil Brooks* for respondents. Reported below: 201 F. 2d 476.

No. 843. KRAUSE ET AL. *v.* BUCHER. C. A. 7th Cir. Certiorari denied. *John J. Mortimer, L. Louis Karton* and *Arthur Magid* for petitioners. *Andrew J. Dallstream* for respondent. Reported below: 200 F. 2d 576.

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No. 836. 24 DIGGER MERCHANDISING MACHINES ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Morris A. Shenker* for petitioners. *Acting Solicitor General Stern, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 202 F. 2d 647.

No. 845. FERGUSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *G. W. Horsley* for petitioner. *Acting Solicitor General Stern* for the United States. Reported below: 202 F. 2d 621.

No. 681. CAMMARATA *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Edward T. Kelley* and *Patrick J. Melillo* for petitioner. *Frank G. Millard,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara* and *Perry A. Maynard,* Assistant Attorneys General, for respondent.

No. 726. GORDON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William Strong* for petitioner. *Acting Solicitor General Stern, Assistant Attorney General Holland, Ellis N. Slack* and *Joseph M. Howard* for the United States. Reported below: 202 F. 2d 596.

No. 742. PATTERSON *v.* SAUNDERS ET AL. Supreme Court of Appeals of Virginia. Motion to defer consideration denied. Certiorari denied. Reported below: 194 Va. 607, 74 S. E. 2d 204.

No. 840. GONZALEZ-MARTINEZ *v.* LANDON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 9th Cir. Certiorari denied. *Frank Pomeranz* for petitioner. *Acting Solicitor General Stern* and *Beatrice Rosenberg* for respondents. Reported below: 203 F. 2d 196.

No. 382, Misc. NORMANDALE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern* and *Beatrice Rosenberg* for the United States. Reported below: 201 F. 2d 463.

No. 385, Misc. GRASS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *Latham Castle,* Attorney General of Illinois, for respondent.

No. 404, Misc. WHITE *v.* UNITED STATES C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Beatrice Rosenberg* and *Edward S. Szukelewicz* for the United States. Reported below: 200 F. 2d 509, 514.

No. 434, Misc. MCCANN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 445, Misc. WORK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 201 F. 2d 510.

No. 471, Misc. ELDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. B. Tietz* for petitioner. *Acting Solicitor General Stern* and *Beatrice Rosenberg* filed a memorandum for the United States. Reported below: 202 F. 2d 465.

No. 492, Misc. ROBINSON *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. *Jesse T. Edwards* for petitioner. *Eugene Cook,* Attorney General of Georgia, and *Lamar W. Sizemore,* Assistant Attorney General, for respondent. Reported below: 209 Ga. 650, 75 S. E. 2d 9.

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No. 495, Misc. THOMAS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 498, Misc. PICKING ET AL. *v.* PENNSYLVANIA RAILROAD CO. ET AL. C. A. 3d Cir. Certiorari denied. Petitioners *pro se*. *Robert E. Woodside*, Attorney General of Pennsylvania, and *H. F. Stambaugh* for James et al.; and *James A. Strite* for Kell et al., respondents.

No. 500, Misc. JORDAN *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 503, Misc. LAUGHTON *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 510, Misc. UNITED STATES EX REL. WELLS *v.* RAGEN, WARDEN. Circuit Court of Madison County, Illinois. Certiorari denied.

No. 514, Misc. COLLIE *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 515, Misc. BARNETT *v.* DOERFLER, SHERIFF. Supreme Court of Illinois. Certiorari denied.

No. 518, Misc. LUKE *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied. Reported below: 42 Wash. 2d 260, 254 P. 2d 718.

No. 520, Misc. KELLS *v.* ELLIS, GENERAL MANAGER, TEXAS PRISON SYSTEM. Court of Criminal Appeals of Texas. Certiorari denied.

No. 521, Misc. LEE *v.* KINDELAN, WARDEN. Supreme Court of Rhode Island. Certiorari denied. Reported below: —— R. I. ——, 95 A. 2d 51.

No. 524, Misc. CROSBY *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 525, Misc. BRINK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Acting Solicitor General Stern, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 202 F. 2d 4.

No. 526, Misc. WHITNEY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 529, Misc. SCHELL *v.* EIDSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 203 F. 2d 902.

No. 532, Misc. TABOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 F. 2d 948.

No. 534, Misc. SANDERS, ADMINISTRATRIX, *v.* SOUTHERN RAILWAY CO. C. A. 6th Cir. Certiorari denied. *Hughie Ragan* for petitioner. *Caruthers Ewing* for respondent. Reported below: 203 F. 2d 568.

No. 536, Misc. ALLEN *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 537, Misc. PEER *v.* SKEEN, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 542, Misc. LANDGRAVER *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 543, Misc. GAWRON *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 546, Misc. KOENIG *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 547, Misc. ESKRIDGE *v.* CRANOR, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 549, Misc. BUTLER *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 552, Misc. RUPOLI *v.* NEW YORK. Supreme Court of New York, Appellate Division, Second Judicial Department. Certiorari denied.

No. 553, Misc. WALDEN *v.* BURKE, WARDEN. Supreme Court of Pennsylvania, Eastern District. Certiorari denied.

No. 469, Misc. BOWEN *v.* COUNTY OF LOS ANGELES ET AL. Supreme Court of California. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petition should be granted. *A. L. Wirin* and *Fred Okrand* for petitioner. *Harold W. Kennedy* and *Gerald G. Kelly* for respondents. Reported below: 39 Cal. 2d 714, 249 P. 2d 285.

No. 470, Misc. PETHERBRIDGE ET AL. *v.* COUNTY OF LOS ANGELES ET AL. Supreme Court of California. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the petition should be granted. *A. L. Wirin* and *Fred Okrand* for Petherbridge; and *Ben Margolis* for Hirschman et al., petitioners. *Harold W. Kennedy* and *Gerald G. Kelly* for respondents. Reported below: 39 Cal. 2d 698, 249 P. 2d 287.

No. 505, Misc. HOUSTON *v.* MISSOURI. Petition for writ of certiorari to the Supreme Court of Missouri denied for the reason that application therefor was not made within the time provided by law. 28 U. S. C. § 2101 (d); Rule 38½ of the Rules of this Court.

No. 511, Misc. LEE *v.* TENNESSEE. Petition for writ of certiorari to the Supreme Court of Tennessee denied for the reason that application therefor was not made within the time provided by law. 28 U. S. C. § 2101 (d); Rule 38½ of the Rules of this Court. Reported below: 194 Tenn. 652, 254 S. W. 2d 747.

No. 540, Misc. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Motion to enlarge time denied. Certiorari denied. Reported below: 203 F. 2d 85.

Rehearing Denied.

No. 52. TERRY ET AL. *v.* ADAMS ET AL., *ante*, p. 461;

No. 290. WATSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 544;

No. 671. WASHINGTON ET AL. *v.* UNITED STATES, *ante*, p. 956; and

No. 719. SOBELL *v.* UNITED STATES, *ante*, p. 965. Petitions for rehearing denied.

No. 314. MCRAE *v.* WOODS, ACTING HOUSING EXPEDITER, 344 U. S. 892. Motion for leave to file a second petition for rehearing denied.

No. 687. ROSENBERG ET AL. *v.* UNITED STATES, *ante*, p. 965. Petition for rehearing denied. MR. JUSTICE FRANKFURTER deems it appropriate to state once more that the reasons that preclude publication by the Court, as a general practice, of votes on petition for certiorari guide him

in all cases, so that it has been his "unbroken practice not to note dissent from the Court's disposition of petitions for certiorari." *Chemical Bank Co.* v. *Investors*, 343 U. S. 982; *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912; *Darr* v. *Burford*, 339 U. S. 200, 227; *Agoston* v. *Pennsylvania*, 340 U. S. 844; *Bondholders, Inc.* v. *Powell*, 342 U. S. 921; *Rosenberg* v. *United States*, 344 U. S. 889, 345 U. S. 965. Partial disclosure of votes on successive stages of a certiorari proceeding does not present an accurate picture of what took place. MR. JUSTICE BLACK is of the opinion the petition for rehearing should be granted.

No. 368, Misc. GOODMAN ET AL. *v.* MCMILLAN, *ante*, p. 929. Second petition for rehearing denied.

No. 421, Misc. RILEY *v.* DEPARTMENT OF THE AIR FORCE ET AL., *ante*, p. 958;

No. 452, Misc. VANDERWYDE *v.* NEW YORK, *ante*, p. 959; and

No. 460, Misc. BRYANT *v.* UNITED STATES, *ante*, p. 953. Petitions for rehearing denied.

ORDER FIXING FEES FOR UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

ORDER.

In pursuance of § 1926 of Title 28 of the United States Code,

It is now here ordered by this Court that the following revised schedule of fees to be charged in the United States Court of Customs and Patent Appeals be, and the same is hereby, adopted and approved, *viz.:*

There shall be paid for each admission to practice, including certificate thereof, $5. For each certificate under seal, $1. For making or copying any record or other paper and certifying the same, per folio of 100 words, 20 cents. For filing and docketing each customs appeal, $15, this fee to be in full of all fees in the case: *Provided,* That when an appeal is taken by the United States, no payment of fees shall be required. For filing and docketing each patent appeal, $15, this fee to be in full of all fees in the case, except the charge for preparing and supervising the printing of the record: *Provided,* That when an appeal is taken by or on behalf of the United States, no payment of fees shall be required. For certifying a printed record, $2.

It is further ordered that the fees and costs to be allowed the marshal shall be, and hereby are, fixed the same as those allowed the marshal of the Supreme Court of the United States.

May 25, 1953.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1950, 1951, AND 1952

Terms	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
	1950	1951	1952	1950	1951	1952	1950	1951	1952	1950	1951	1952
Number of cases on dockets	13	9	11	783	827	863	539	532	563	1,335	1,368	1,437
Number disposed of during terms	5	0	0	687	714	742	524	508	544	1,216	1,222	1,286
Number remaining on dockets	8	9	11	96	113	121	15	24	19	119	146	151

	TERMS		
	1950	1951	1952
Distribution of cases disposed of during terms:			
Original cases	5	0	0
Appellate cases on merits	192	196	201
Petitions for certiorari	495	518	541
Miscellaneous docket applications	524	508	544

	TERMS		
	1950	1951	1952
Distribution of cases remaining on dockets:			
Original cases	8	9	11
Appellate cases on merits	40	57	55
Petitions for certiorari	56	56	66
Miscellaneous docket applications	15	24	19

JUNE 16, 1953.

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